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International law and the sustainable governance of shared natural resources: A principled approach

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3 | Why ‘Common Concern Of Humankind’ Should Return to the Work of the International Law Commission on the Atmosphere

ABSTRACT

In 2015, the International Law Commission (ILC) removed from its Draft Guidelines on the Protection of the Atmosphere (Draft Guidelines) the concept that the degradation of atmospheric conditions is a ‘common concern of humankind’. This decision was the result of objections by members of the Commission which included *inter alia* insufficient clarity of the concept and a lack of support in state practice for its inclusion. This article argues that atmospheric degradation is in fact a common concern of humankind and suggests reinstating the concept in the Draft Guidelines. Two main reasons support this argument. First, short-lived climate pollutants (SLCPs) such as black carbon both degrade the atmosphere and cause climate change. Since the UN Framework Convention on Climate Change recognizes climate change as an issue of common concern, atmospheric degradation necessarily also falls within this category. Second, several international instruments recognize issues of common concern as being those which affect human health and the environment and which require the concerted actions of all states to be effectively addressed. Atmospheric degradation shares these basic characteristics and is therefore a common concern of humankind. The author concludes that returning the concept to the Draft Guidelines would allow the International Law Commission the opportunity to contribute to elaborating on the meaning and scope of the rather controversial concept of common concern of humankind.

1 INTRODUCTION

In 2015, the International Law Commission (ILC) removed from its Draft Guidelines on the Protection of the Atmosphere (Draft Guidelines) the concept

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that the degradation of atmospheric conditions is a ‘common concern of humankind’.¹ Former Draft Guideline 3 stated, ‘The atmosphere is a natural resource essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems, and hence the degradation of the atmosphere is a common concern of humankind’.² Following debate on the topic at the 2015 session, the ILC deleted Draft Guideline 3 and the concept of common concern of humankind from the project. The preamble to the Draft Guidelines recognizes instead that ‘the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a pressing concern of the international community as a whole’.³ The ILC considered appropriate to ‘express the concern of the international community as a matter of a factual statement, and not as a normative statement, as such, of the gravity of the atmospheric problem’.⁴

As reported to the UN General Assembly in 2015, the reason for the removal was that ‘the legal consequences of the concept of common concern of humankind remain unclear at the present stage of development of international law relating to the atmosphere’.⁵ ILC members worried that, as of yet, common concern of humankind ‘might not be clear or established in international law and lack [sic] sufficient support in State practice’ and that ‘the link between the concept of common concern and *erga omnes* obligations needed further clarification’.⁶ It was also doubted whether ‘transboundary air pollution confined to a limited impact within the bilateral relations of states could be properly leveled as [a common concern of humankind].’⁷ Delegates to the Sixth Committee of the General Assembly expressed similar views, with some delegations objecting to the use of common concern of humankind in the Draft Guidelines because ‘the concept was vague and controversial, and [...] its content was not only difficult to define but also subject to various interpretations’.⁸

Some conceptual clarifications are necessary from the outset. Firstly, the author uses the terms “air pollution” and “atmospheric pollution” indistinctly. Secondly, the terms “atmospheric pollution” and “atmospheric degradation” have the same meaning given to such terms in the Draft Guidelines. The Draft Guidelines define atmospheric pollution as ‘the introduction or release by

1 Int’l Law Comm’n, Rep. on the Work of Its Sixty-Seventh Session, U.N. Doc. A/70/10, at 26-27 (2015).

2 Shinya Murase (Special Rapporteur), *2d Rep. on the Protection of the Atmosphere*, U.N. Doc. A/CN.4/681, at 49 (2015).

3 Int’l Law Comm’n, Protection of the Atmosphere: Texts and Titles of Draft Conclusions 1, 2 and 5, and Preambular Paragraphs Provisionally Adopted by the Drafting Committee on 13, 18, 19 and 20 May 2015, U.N. Doc. A/CN.4/L.851, at 1 (2015).

4 *Supra* note 1, at 27.

5 Int’l Law Comm’n, Rep. on the Work of Its Sixty-Seventh Session, *supra* note 1, at 26-27.

6 Murase, *supra* note 2, at 17.

7 *Id.*

8 *Id.* at 18.

humans, directly or indirectly, into the atmosphere of substances contributing to deleterious effects extending beyond the State of origin of such a nature as to endanger human life and health and the Earth's natural environment'.⁹ This definition is based on Article 1(a) of the 1979 Convention on Long-Range Transboundary Air Pollution (Air Convention), which provides that:

“‘[a]ir pollution’ means ‘the introduction by man, directly or indirectly, of substances or energy into the air resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment, and “air pollutants” shall be construed accordingly.’¹⁰

“Atmospheric pollution” in the Draft Guidelines refers to transboundary air pollution.¹¹ Additionally, the Draft Guidelines define atmospheric degradation as ‘the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to endanger human life and health and the Earth's natural environment.’¹² This definition refers to global atmospheric problems including ozone depletion and climate change.¹³ In this way, air (or atmospheric) pollution is the anthropogenic introduction into the atmosphere of substances that endanger human life and health and the environment, while atmospheric degradation is the anthropogenic change of atmospheric conditions, causing them to become progressively worse and endanger human life and health and the environment. Consequently, atmospheric pollution contributes to atmospheric degradation. Based on these conceptualizations, Part 3 focuses on one type of particles that pollute the atmosphere: pollutants that contribute to climate change, also known as short-lived climate pollutants.

In view of the removal of the concept in question from the ILC Draft Guidelines, this article argues that atmospheric degradation is in fact a common concern of humankind and suggests reinstating this concept to the Draft Guidelines. Two main reasons support this argument. First, short-lived climate pollutants (SLCPs) such as black carbon both degrade the atmosphere and cause climate change. Since the UN Framework Convention on Climate Change recognizes climate change as an issue of common concern, the degradation of the atmosphere necessarily also falls within this category. Second, several international instruments recognize issues of common concern as being those which affect human health and the environment and which need the concerted action of all states to be effectively addressed. Atmospheric degradation shares

9 Int'l Law Comm'n, Rep. on the Work of Its Sixty-Seventh Session, *supra* note 1, at 23.

10 Convention on Long-range Transboundary Air Pollution, Nov. 13, 1979, 34 U.S.T. 3043, 1302 U.N.T.S. 217.

11 Int'l Law Comm'n, Rep. on the Work of Its Sixty-Seventh Session, *supra* note 1, at 29.

12 *Id.* at 23.

13 *Id.* at 29.

these basic characteristics and is, for this reason as well, a common concern of humankind. Because atmospheric degradation *is* a common concern of humankind, and considering that the concept continues to be regarded as lacking in clarity, the author concludes that the International Law Commission could contribute to a better understanding of its meaning and scope. In the author's view, the Draft Guidelines on the Protection of the Atmosphere present a unique opportunity for the ILC, as an authoritative body, to discuss the concept of common concern of humankind and, in that process, advance its conceptual development.

This chapter argues that atmospheric degradation should be considered a common concern of humankind. It begins with a discussion of the link between air pollution and climate change to show that, because climate change is an acknowledged common concern of humankind, atmospheric degradation is also a common concern. Section 4 surveys a number of international instruments containing the concept and draws attention to the distinguishing features shared by the issues currently considered by the international community as common concerns of humankind. A summary table is provided to highlight these features. The conclusion summarizes the line of argumentation and stresses the importance of discussing atmospheric degradation as a common concern of humankind in the context of the Draft Guidelines.

2 THE CONCEPT OF COMMON CONCERN OF HUMANKIND

Since the emergence of the concept of common concern of humankind,¹⁴ scholars have tried to elucidate what an issue of "common concern of humankind" entails. Generally, they agree on several aspects. For instance, they agree that issues of common concern relate to the whole world and can only be effectively addressed through international cooperation.¹⁵ Common concern is considered to be a globalizing concept, in the sense that it applies to issues which transcend state boundaries and sovereignty, requiring collective action

14 See G.A. Res. 43/53, Protection of Global Climate for Present and Future Generations of Mankind (Dec. 6, 1988). See generally *I Meeting of the UNEP Group of Legal Experts to Examine the Implications of the "Common Concern of Mankind" Concept on Global Environmental Issues*, 13 REVISTA IIDH 247 (1991); *II Meeting of the UNEP Group of Legal Experts to Examine the Implications of the "Common Concern of Mankind" Concept on Global Environmental Issues*, 13 REVISTA IIDH 253 (1991); *United Nations Decade of International Law Symposium on Developing Countries and International Environmental Law*, 13 REVISTA IIDH 259 (1991).

15 See, e.g., Jutta Brunnée, *Common Areas, Common Heritage, and Common Concern*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 550, 553 (Daniel Bodansy et al. eds., 2008).

at the global level.¹⁶ The Second Report of the Special Rapporteur on the protection of the atmosphere is in line with these basic ideas, submitting that common concern “implies, and provides a basis for, cooperation of all states on matters of a similar importance to all nations”.¹⁷ It is generally understood that common concern highlights the need to strike a balance between the interests of the international community as a whole, and national sovereignty.¹⁸

More specifically, various authors have submitted arguments that relate to particular aspects of the notion of common concern, such as its relationship to state sovereignty or its effects on state action. Regarding sovereignty, for instance, Scholtz argues that common concern “greens” the exercising of permanent sovereignty over natural resources,¹⁹ while Bowman concludes that common concern allows the shared interests of the international community to be superimposed onto state sovereignty.²⁰ Regarding the effects of common concern on state action, French argues that common concern serves as a justification of global collective action,²¹ while Brown Weiss submits that it is also a normative basis for action at the national level.²² Cottier *et al.* go a step further in this regard, arguing that common concern also justifies unilateral action.²³ In a broader sense, Judge Cançado Trindade points out that the acknowledgement of certain issues as being common concerns of humankind is indicative of the widening scope of international law, which is no longer exclusively dedicated to the interests of states but has been expanded to include the protection of the environment and human rights.²⁴ Regarding

16 Duncan French, *Common Concern, Common Heritage and Other Global(-ising) Concepts: Rhetorical Devices, Legal Principles or a Fundamental Challenge?*, RESEARCH HANDBOOK ON BIODIVERSITY AND LAW 334 (Michael Bowman et al. eds., 2016); Werner Scholtz, *Greening Permanent Sovereignty through the Common Concern in the Climate Change Regime: Awake Custodial Sovereignty*, in 2 CLIMATE CHANGE: INTERNATIONAL LAW AND GLOBAL GOVERNANCE 201, 201 (Oliver C. Ruppel et al. eds., 2013); PATRICIA W. BIRNIE ET AL., INTERNATIONAL LAW AND THE ENVIRONMENT 129 (3d ed. 2009); Alexandre Kiss, *The Common Concern of Mankind*, 27 ENVIRONMENTAL LAW AND POLICY 244, 247 (1997).

17 Murase, *supra* note 2, at 17.

18 Michael Bowman, *Environmental Protection and the concept of common concern of mankind*, in RESEARCH HANDBOOK ON INTERNATIONAL ENVIRONMENTAL LAW 493, 501 (Malgosia Fitzmaurice et al. eds., 2010); Dinah Shelton, *Common Concern of Humanity*, 39 ENVIRONMENTAL POLICY AND LAW 83, 85 (2009); Kiss, *supra* note 16, at 247; BIRNIE ET AL., *supra* note 16, at 130.

19 Scholtz, *supra* note 16, at 202.

20 Bowman, *supra* note 18, at 511.

21 French, *supra* note 16, at 340.

22 Edith Brown Weiss, *The Coming Water Crisis: A Common Concern of Humankind*, 1 TRANSNATIONAL ENVIRONMENTAL LAW 153, 167 (2012).

23 Thomas Cottier et al., *The Principle of Common Concern and Climate Change*, 52 ARCHIV DES VÖLKERRECHTS 293, 296 (2014).

24 Pulp Mills on the River Uruguay (Arg. v. Uru.), Separate Opinion of Judge Cançado Trindade, 2010 I.C.J. 135, at 194-95 (Apr. 20). See also A.A. Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (2013), 344-352.

the legal implications of the concept, Shelton submits that because issues of common concern no longer fall under the exclusive national jurisdiction of states, “new forms of law making, compliance techniques and enforcement” are required to regulate the international action that the issue demands.²⁵

As discussed below, four issues are currently explicitly recognized in treaty law as common concerns of humankind: climate change, biodiversity conservation, plant genetic resources and the safeguarding of intangible cultural heritage. Recent publications suggest that other issues as well should be considered as common concerns of humankind. Brown Weiss argues that the availability and use of fresh water should be recognized as such,²⁶ while Jaeckel makes the case for the conservation of plant biodiversity to be acknowledged as being of common concern.²⁷ Although the efforts to explain the concept of common concern of humankind have shed light on its content, discussions at the ILC and the Sixth Committee of the General Assembly show that the concept is still generally perceived to be insufficiently clear. Scholars also observe that the notion needs further conceptual elaboration.²⁸

3 LINKAGE BETWEEN CERTAIN AIR POLLUTANTS AND CLIMATE CHANGE SHOWS THAT ATMOSPHERIC DEGRADATION IS A COMMON CONCERN OF HUMANKIND

Long-term exposure to air pollutants causes death and health problems, such as cancer and heart failure, and has become a serious public health issue in many countries.²⁹ For instance, about 1.6 million people die each year in China because of diseases caused by air pollution, equivalent to 17% of all deaths in the country.³⁰ In addition, children living in heavily polluted cities, like New Delhi, are worryingly exposed to irreversible lung damage.³¹ It is

²⁵ Shelton, *supra* note 18, at 86.

²⁶ EDITH BROWN WEISS, *INTERNATIONAL LAW FOR A WATER-SCARCE WORLD* 70-77 (2013).

²⁷ Aline Jaeckel, *Intellectual Property Rights and the Conservation of Plant Biodiversity as a Common Concern of Humankind*, 2 *TRANSNATIONAL ENVTL LAW* 167, 167-68 (2013).

²⁸ See, e.g., TRINDADE, *supra* note 24, *International Law for Humankind*, at 352; Ben Boer, *Land Degradation as a Common Concern of Humankind*, in *INTERNATIONAL LAW FOR COMMON GOODS* 289, 90 (Frederico Lenzerini & Ana Filipa Vrdoljak eds., Hart Publ'g 2014); Brunnée, *supra* note 15, at 567; BIRNIE ET AL., *supra* note 16, at 129; Cottier *et al.*, *supra* note 23, at 323; Jaeckel, *supra* note 27, at 173; WEISS, *supra* note 26 at 70-72.

²⁹ ORG. FOR ECON. COOPERATION AND DEV. [OECD], *The Cost of Air Pollution: Health Impacts of Road Transport* (2014).

³⁰ Robert A. Rhode & Richard A. Muller, *Air Pollution in China: Mapping of Concentrations and Sources*, *PLOS ONE* 10(8), 8 (2015).

³¹ Aniruddha Ghosal & Pritha Chatterjee, *Landmark Study Lies Buried, How Delhi's Poisonous Air is Damaging its Children for Life*, *THE INDIAN EXPRESS* (2015); see also Gardiner Harris, *Holding Your Breath in India*, *N.Y. TIMES*, May 29, 2015, 2015; see also Gardiner Harris, *Holding Your Breath in India*, *N.Y. TIMES*, May 29, 2015.

thus not surprising that the World Health Organization (“WHO”) and the UN Environment Programme (“UNEP”) consider air pollution to be the worst environmental health risk in the world today.³² Air pollutants also have harmful effects on agriculture, with chronic exposure resulting in “growth and yield reductions, loss of viable seeds and decreased vitality”.³³ It even harms our cultural heritage, with the surfaces of historical buildings and monuments deteriorating because of corrosion and soiling caused by air pollutants.³⁴

Air pollution moves around in the atmosphere, crossing international borders. For example, in England in April, 2015, a cloud of smog from mainland Europe combined with the pollution produced locally to create dangerously high levels.³⁵ As a matter of fact, the above-cited Air Convention³⁶ originated in the scientific finding which established the connection between sulfur emissions in continental Europe and the acidification of Scandinavian lakes.³⁷ The Air Convention establishes a legal regime to combat transboundary air pollution that has been extended by eight protocols containing targets for emission reductions of specific pollutants. As discussed below, the recently amended 1999 Protocol to Abate Acidification, Eutrophication and Ground-level Ozone (Gothenburg Protocol) is of crucial importance for the legal recognition of the linkage between certain air pollutants and climate change.³⁸

Research shows that short-lived climate pollutants (SLCPs) cause almost half of global warming.³⁹ SLCPs have atmospheric lifetimes of days to a decade

32 U. N. Env’t Programme [UNEP], *Air Pollution: World’s Worst Envi. Health Risk*, UNEP YEAR BOOK 2014 EMERGING ISSUES UPDATE 43-47 (2014), <http://www.unep.org/yearbook/2014/PDF/chapt7.pdf>; Press Release, World Health Org., *7 Million Premature Deaths Annually Linked To Air Pollution* (Mar. 25, 2014), <http://www.who.int/mediacentre/news/releases/2014/air-pollution/en/>.

33 Mike Ashmore, *Envi. And Health Impacts of Air Pollution*, in WORLD ATLAS OF ATMOSPHERIC POLLUTION 77, 80 (Ranjeet S. Sokhi ed., 2008).

34 *Air Pollution Puts Cultural Heritage at Risk*, UN ECON. COMM’N FOR EUROPE (2015), <http://www.unece.org/info/media/news/environment/2015/air-pollution-puts-cultural-heritage-at-risk/air-pollution-puts-cultural-heritage-at-risk.html>.

35 Karl Mathisen, *Air Pollution Spike Across England Sparks Warning From Health Charities*, THE GUARDIAN (Apr. 10, 2015, 1:00:00 AM), <https://www.theguardian.com/environment/2015/apr/10/air-pollution-spike-across-england-sparks-warning-from-health-charities>.

36 *Supra* note 10.

37 See *Convention on Long Range Transboundary Air Pollution, About the Convention*, UN ECON. COMM’N FOR EUROPE, <http://www.unece.org/fileadmin/DAM/env/lrtap-new/about.html>.

38 See Protocol to the 1979 Convention on Long-range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone, *opened for signature* November 30, 1999, T.I.A.S. No. 13,073, 2319 U.N.T.S. 80 [hereinafter 1999 Protocol]. See 1999 Protocol, amend. to Annexes II-IX and Addition of New Annexes X & XI, *adopted* May 4, 2012, 2319 U.N.T.S. 80.

39 See Durwood Zaelke & Nathan Borgford-Parnell, *The Importance of Phasing Down Hydrofluorocarbons and Other Short-lived Climate Pollutants*, 5 J. ENVTL. STUD. & SCI. 169 (2015); J.A. Burney, C.F. Kennel & D.G. Victor, *Getting Serious About the New Realities of Global Climate Change*, 69 BULL. ATOMIC SCIENTISTS 49 (2013); J.K. Shoemaker ET AL., *What Role for Short-*

and a half, in contrast to the primary climate pollutant carbon dioxide, which ranges from decades to centuries, with about 20 percent of it persisting for millennia.⁴⁰ SLCPs include black carbon, methane, tropospheric ozone, and hydrofluorocarbons.⁴¹ Methane and hydrofluorocarbons are mentioned in Annex A of the Kyoto Protocol, but the efforts to mitigate the effects of climate change currently prioritize reducing carbon dioxide emissions. Although the latter is an essential task in addressing global warming, present knowledge indicates that reducing carbon dioxide emissions must be complemented by cutting SLCPs to deal effectively with the effects of climate change.⁴² This hybrid approach to climate mitigation translates into concrete health benefits for populations exposed to SLCPs.⁴³ In line with this development, the Fifth Report of the Intergovernmental Panel on Climate Change (2014) acknowledges that cutting SLCP emissions plays a role in abating climate change, although it cautiously points out that further research is still necessary to determine the actual extent of the impact of SLCPs and the proper balance between the efforts to mitigate SLCPs and CO₂.⁴⁴ The science establishing the linkage between SLCPs and climate change has prompted actions on several fronts. These include the 2012 amendments to the Gothenburg Protocol and the establishment of the UNEP-endorsed Climate and Clean Air Coalition, the objective of which is to address SLCPs.⁴⁵ These developments acknowledge the scientifically proven linkage between certain components of air pollution and climate change at the legal and political level.

At the legal level, the parties to the Air Convention amended the Gothenburg Protocol to include, for the first time in treaty law, emission reduction commitments for one of the most harmful air pollutants: fine particulate matter (PM_{2.5}).⁴⁶ Indeed, the amendments added to Article 1 on definitions the following paragraphs:

Lived Climate Pollutants in Mitigation Policy? 342 SCIENCE 1323 (2013); D. Shindell ET AL., *Simultaneously Mitigating Near-Term Climate Change and Improving Human Health and Food Security* 335 SCIENCE 183 (2012).

40 United Nations Environment Programme, *Near-term Climate Protection and Clean Air Benefits: Actions for Controlling Short-Lived Climate Forcers*, ch. 2 at 3 (2011).

41 See, e.g., Inst. for Governance & Sustainable Dev., *Primer on Short-Lived Climate Pollutants: Slowing the Rate of Global Warming over the Near Term by Cutting Short-Lived Climate Pollutants to Complement Carbon Dioxide Reductions for the Long Term* (November 2013).

42 *Supra* note 39; see also *id.*

43 *Supra* note 41, at 32-3.

44 DAVID G. VICTOR ET AL., *CLIMATE CHANGE 2014: MITIGATION OF CLIMATE CHANGE. CONTRIBUTION OF WORKING GROUP III TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE* 122 (Ottmar Edenhofer et al. eds. 2014).

45 See Climate and Clean Air Coalition to Reduce Short-Lived Climate Pollutants, *About Us*, <https://cccoalition.org/en/content/about>.

46 *Supra* note 38. In 2015, the World Health Assembly highlighted the health effects of fine particulate matter, urging member states to take action. See World Health Org. [WHO], *Health and the Environment: Addressing the Health Impact of Air Pollution*, at 1-2, A68/A/CONF./2 Rev.1 (May 26, 2015).

'11 bis. "Particulate matter" or "PM" is an air pollutant consisting of a mixture of particles suspended in the air. These particles differ in their physical properties (such as size and shape) and chemical composition. Unless otherwise stated, all references to particulate matter in the present Protocol refer to particles with an aerodynamic diameter equal to or less than 10 microns (µm) (PM₁₀), including those with an aerodynamic diameter equal to or less than 2.5 µm (PM_{2.5});

11 ter. "Black carbon" means carbonaceous particulate matter that absorbs light'⁴⁷

Fine particulate matter has a diameter of 2.5 microns or less, about 30 times smaller than the diameter of a human hair and, in cities, originates primarily from the burning of fossil fuels or biomass for domestic heating, vehicle exhaust fumes and the re-suspension of paved road dust.⁴⁸ In 2012, PM_{2.5} concentrations were responsible for about 403,000 premature deaths in the European Union, originating from long-term exposure.⁴⁹ Scientists argue that an aggressive global program of PM_{2.5} mitigation could avoid as many as 750,000 of the 3.2 million deaths per year attributable to PM_{2.5}.⁵⁰ The inclusion of the short-lived climate pollutant black carbon as a component of particulate matter in the Gothenburg Protocol is a remarkable step, which strengthens the legal recognition of the linkage between SLCPs and climate change. Black carbon is a particle formed through the incomplete combustion of fossil fuels (coal, petroleum), biofuel (ethanol, biodiesel), and biomass (wood, manure)⁵¹. Black carbon can constitute up to 10-15 percent of fine particulate matter.⁵² It warms the Earth by absorbing heat in the atmosphere, and by reducing surface albedo (the ability of the Earth to reflect radiation from the sun) when black carbon is deposited on snow and ice.⁵³ Black carbon also affects human health, agriculture, and ecosystems.⁵⁴ Determined efforts to reduce this pollutant consequently benefit not only air quality but also climate, public health, and food security. By including black carbon as a component of particulate matter, the amendments to the Gothenburg Protocol legally acknowledge the soundness of current scientific knowledge on this matter and promote the harmonization of laws and policies on air pollution and climate change, such that even though these amendments are not yet in force, the importance of

47 See 1999 Protocol, amend., *supra* note 38 at Annex B3.

48 European Env't Agency, *Air quality in Europe*, at 20, EEA Report No. 5/2014 (2014).

49 European Env't Agency, *Air quality in Europe*, at 9, EEA Report No. 5/2015 (2015).

50 Joshua S. Apte et al., *Addressing Global Mortality from Ambient PM_{2.5}*, 49 ENVTL. SCI. & TECH. 8057, 8062 (2015).

51 UNEP & World Meteorological Org., *Integrated Assessment of Black Carbon and Tropospheric Ozone*, at 3 (2011).

52 *Id.*

53 *Id.*, at 4-5.

54 *Id.*, at 116-136.

this groundbreaking development cannot be overlooked.⁵⁵ At the legal level, therefore, the amended Gothenburg Protocol supports the argument that since climate change is a common concern of humankind (UNFCCC), and since SLCPs both pollute the atmosphere and cause climate change (Gothenburg Protocol), then atmospheric degradation – the deterioration of atmospheric conditions harmful to life on Earth – is a common concern of humankind.

At the political level, the governments of Bangladesh, Canada, Ghana, Mexico, Sweden, and the United States, along with UNEP, established the Climate and Clean Air Coalition (CCAC) in 2012.⁵⁶ This initiative focuses on reducing short-lived climate pollutants, among others, by raising awareness of their impact on health and climate, improving the scientific understanding thereof, and promoting best practices.⁵⁷ Its plan of action includes mitigating SLCPs from brick production, municipal solid waste, agriculture, household cooking, and domestic heating.⁵⁸ The CCAC began with six state partners and now has 50, with the addition of the European Commission, as well as 61 non-state partners, including the WHO, the World Meteorological Organization, and the World Bank.⁵⁹ The UN Economic Commission for Europe (UNECE) joined the CCAC in September 2015.⁶⁰ This significant growth in membership shows that the international community increasingly acknowledges the linkage between SLCPs and climate change and is taking action, at both the global and the local level, to address the effects of SLCPs on air quality and climate. In the lead-up to the 21st Climate Conference of the Parties to the UNFCCC (COP21) in Paris (December 2015), the CCAC encouraged states to include SLCPs in their Intended Nationally Determined Contributions (INDCs).⁶¹ In this way, SLCPs are becoming related to climate change not only in science and law but also in concrete policies.

In sum, the inclusion of particulate matter – and black carbon as a component thereof – in the Gothenburg Protocol legally acknowledges that certain air pollutants also cause climate change. Simply stated, since SLCPs contribute to climate change, and climate change is a common concern of humankind, then the harmful deterioration of atmospheric conditions is also a common concern of humankind. The work of the CCAC is in line with the amendments

55 At the time Chapter 3 was published, the amendments were not yet in force. These entered into force on 7 October 2019. <https://www.unece.org/info/media/presscurrent-press-h/environment/2019/entry-into-force-of-amended-gothenburg-protocol-is-landmark-for-clean-air-and-climate-action/doc.html>

56 www.unep.org/ccac

57 *Id.*

58 *Id.*

59 CCAC, ANNUAL REPORT SEPTEMBER 2015 – AUGUST 2016, at 109-110 (2016).

60 Press Release, UNECE, 'UNECE Joins Climate and Clean Air Coalition' (Sept. 8, 2015), available at: <http://www.unece.org/info/media/presscurrent-press-h/climate-change/2015/unece-joins-climate-and-clean-air-coalition/unece-joins-climate-and-clean-air-coalition.html>.

61 In the INDCs, states that are party to the UNFCCC outline what post-2020 climate actions they intend to take under the Paris Agreement.

to the Gothenburg Protocol and is relevant because it brings together parties that are not signatories to the Air Convention, resulting in wider adhesion to the goal of tackling SLCPs emissions. Both efforts essentially work towards the same end, i.e., advancing awareness and action regarding the linkage between SLCPs and climate change and the consequent short-term benefits for health, climate and the environment. The International Law Commission could participate in and influence this process through the Draft Guidelines on the Protection of the Atmosphere. Should the Draft Guidelines acknowledge the link between SLCPs and climate change, thereby recognizing global atmospheric problems as being a common concern of humankind, it would not only provide benefits for life on Earth by tackling SLCPs, but would also advance the conceptual development of 'common concern of humankind', a notion still regarded as insufficiently clear and thus approached with caution.

4 ATMOSPHERIC DEGRADATION SHARES KEY CHARACTERISTICS WITH ACKNOWLEDGED ISSUES OF COMMON CONCERN OF HUMANKIND

Notwithstanding the link between certain air pollutants and climate change, the degradation of the atmosphere is an issue of common concern of humankind in its own right. This section identifies the characteristics shared by issues of common concern, and demonstrates that atmospheric degradation indeed shares such characteristics. It further examines the kinds of issues the international community values as being of common concern, the reasons why they are considered as such, the type of action required by states to address them, and the principles guiding such state actions. A study of ten international instruments containing the concept sheds light on these questions; five of these are international treaties, while the remaining five are other types of international instruments. The section also provides a table summarizing the key characteristics shared by the issues of common concern.

4.1 Common concern of humankind in international instruments

4.1.1 Issues of common concern in treaties

The concept of common concern of humankind currently appears in five international treaties, namely the UN Framework Convention on Climate Change (UNFCCC),⁶² the Paris Agreement,⁶³ the Convention on Biological

62 1992 UN Framework Convention on Climate Change, *adopted* May 9, 1992, 1771 U.N.T.S. 107 [hereinafter *UNFCCC*].

63 Paris Agreement, *adopted*, December 12, 2015, FCCC/CP/2015/10/Add.1. https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en.

Diversity (CBD),⁶⁴ the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA),⁶⁵ and the Convention for the Safeguarding of the Intangible Cultural Heritage (CICH).⁶⁶

The Parties to the UNFCCC acknowledged that “change in the Earth’s climate and its adverse effects are a common concern of humankind.”⁶⁷ Climate change is considered to be a common concern because “additional warming of the Earth’s surface and atmosphere . . . may adversely affect natural ecosystems and humankind.”⁶⁸ As a result, and because of the global nature of climate change, all states are called upon to provide the widest possible cooperation to address the issue.⁶⁹ States are guided in this effort by the principles of intergenerational equity, common but differentiated responsibilities and respective capabilities, the precautionary principle, sustainable development, and cooperation.⁷⁰ The Paris Agreement—which builds upon the UNFCCC and aims to strengthen the global response to climate change⁷¹—reiterates the acknowledgment that climate change is a common concern of humankind. It includes an additional consequence of such status: climate action should respect, promote and consider Parties’ human rights obligations.⁷² This notably establishes a link between the status of climate change as an issue of common concern and the obligation of Parties, consequential to such status, to honor their human rights obligations. This adds a new element to the discussion of the legal consequences of acknowledging an issue as being of common concern. As summarized in Part 2, legal scholars have tried to elucidate what an issue of common concern entails and, in that process, have thrown light on its content. However, it appears that further conceptual elaboration of the notion is still required, particularly in light of the debate within both the ILC and the Sixth Committee of the General Assembly. As mentioned above, the reason given by the ILC for deleting the concept of common concern of humankind from the Draft Guidelines was that its legal

64 1992 Convention on Biological Diversity, *adopted* June 5, 1992, 1760 U.N.T.S. 79 [hereinafter *CBD*].

65 International Treaty on Plant Genetic Resources for Food and Agriculture, *adopted* Nov. 3, 2001, 2400 U.N.T.S. 303 [hereinafter *ITPGRFA*].

66 Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N.T.S. 35 [hereinafter *CICH*].

67 UNFCCC, *supra* note 62, at Preamble, para. 1.

68 *Id.* para. 6.

69 *Id.*

70 *Id.* Art. 3.

71 Paris Agreement, *supra* note 63, Art. 2.

72 *Id.* Preamble, para. 11: “Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity”

consequences remained unclear.⁷³ In addition, some delegations of the Sixth Committee expressed the view that the concept was vague and controversial, and that its content was difficult to define and subject to various interpretations.⁷⁴ Paragraph 11 of the Preamble to the Paris Agreement brings about a new element which could move this debate forward.

The next international treaty containing the concept is the Convention on Biological Diversity. The Preamble to the CBD affirms that “the conservation of biological diversity is a common concern of humankind.”⁷⁵ The reasons that make conserving biodiversity a common concern are a) its intrinsic value;⁷⁶ b) its ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values;⁷⁷ and c) its importance for evolution and for maintaining life sustaining systems.⁷⁸ Consequently, the CBD calls for a broad form of international cooperation at all levels of governance, including not only states but also intergovernmental and non-governmental organizations.⁷⁹ Like in the legal regime established by the UNFCCC and the Paris Agreement, the approach of the CBD towards the conservation of biological diversity is guided by the principles of intergenerational equity, common but differentiated responsibilities, the precautionary principle, sustainable development, and cooperation.⁸⁰ The climate change and biodiversity conservation regimes are typical examples of legal regimes organized around the recognition of an issue as a common concern of humankind.

Furthermore, the ITPGRFA recognizes plant genetic resources for food and agriculture as being a common concern of humankind, because all countries depend greatly on plant genetic resources originated elsewhere.⁸¹ The contracting parties are expected to implement a global plan of action for the conservation and sustainable use of these resources through local and international action.⁸² The ITPGRFA includes the same guiding principles as those found in the UNFCCC and in the CBD.⁸³

Finally, for the parties to the Convention for the Safeguarding of the Intangible Cultural Heritage, the issue of common concern involves safeguarding the intangible cultural heritage of humanity, that is, “the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith- that communities,

73 Int’l Law Comm’n, Rep. on the Work of Its Sixty-Seventh Session, *supra* note 1, at 26-27.

74 Murase, *supra* note 2, at 18.

75 CBD *supra* note 64, at Preamble, para. 3.

76 *Id.* para. 1.

77 *Id.*

78 *Id.* para. 2.

79 *Id.*

80 *Id.* See, e.g., Preamble, Arts. 1, 5, 6.

81 ITPGRFA, *supra* note 65, Preamble, para. 3.

82 *Id.*, Art. 14.

83 *Id.* See, e.g., Preamble, Arts. 5-8.

groups and, in some cases, individuals recognize as part of their cultural heritage.”⁸⁴ This is because intangible cultural heritage plays an “invaluable role ... in bringing human beings closer together and ensuring exchange and understanding among them”⁸⁵ and is vulnerable to “deterioration, disappearance and destruction.”⁸⁶ The CICH thus acknowledges the intrinsic value of intangible cultural heritage to humankind. The parties are required to cooperate at all levels of international governance in light of the principle of sustainable development.⁸⁷ One of the purposes of the CICH is to provide for international assistance⁸⁸ that will support states in their efforts to safeguard intangible cultural heritage,⁸⁹ thus acknowledging the different capabilities of states in addressing the issue of common concern.

In sum, the UNFCCC and the Paris Agreement, the CBD, the ITPGRFA, and the CICH respectively recognize climate change, the conservation of biodiversity, plant genetic resources for food and agriculture, and the safeguarding of the intangible cultural heritage as issues of common concern of humankind. These are seen as issues of common concern either because they affect the sustenance of life on earth (climate, biodiversity) or because they are otherwise essential to humanity (plant genetic resources, intangible cultural heritage). Five principles guiding state action in addressing the common concern appear repeatedly in these treaties, that is, intergenerational equity, common but differentiated responsibilities, sustainable development, the precautionary principle, and cooperation.

4.1.2 *Issues of common concern in other international instruments*

The concept of common concern of humankind also appears in the Earth Charter,⁹⁰ the Langkawi Declaration on the Environment,⁹¹ the Hague Recommendations on International Environmental Law,⁹² the International Law Association (ILA)’s New Delhi Declaration of Principles of International Law

84 CICH *supra* note 66, Art. 2, para. 1.

85 *Id.*, para. 13.

86 *Id.*, para. 4.

87 *Id.*, Art. 19(2), Preamble and Art. 2(1).

88 *Id.*, Art. 1(d).

89 *Id.*, Art. 19(1).

90 The Earth Charter Initiative, *The Earth Charter*, pmbl. (2000) [hereinafter *Earth Charter*], http://www.earthcharterinaction.org/invent/images/uploads/earthcharter_english.pdf.

91 The Commonwealth, *Langkawi Declaration on the Environment*, ¶ 2 (1989) [hereinafter *Langkawi*], <http://www.thecommonwealth.org/sites/default/files/news-items/documents/Langkawi-declaration.pdf>.

92 International Conference on Environmental Law, *The Hague Recommendations*, I.3f, II (1991) [hereinafter *Hague Recommendations*], as reprinted in 21 *Environmental Policy and Law* 242, 276.

Relating to Sustainable Development,⁹³ and the International Union for Conservation of Nature (IUCN)'s Draft Covenant on Environment and Development.⁹⁴

According to the Earth Charter, the global environment is a common concern of all peoples because the resilience of life on Earth and the wellbeing of humanity 'depend upon preserving a healthy biosphere'.⁹⁵ Consequently, a global partnership needs to be formed 'to care for Earth and one another',⁹⁶ for which foundational principles are provided in the Charter. These principles include four of the five above-mentioned guiding principles, i.e., the precautionary principle, sustainable development, intergenerational equity, and cooperation.⁹⁷ Although not legally binding, the Earth Charter has been endorsed by over six thousand organizations, including UNESCO and the IUCN,⁹⁸ and has gained moral authority.⁹⁹ Furthermore, the 1989 Langkawi Declaration on the Environment, made by the Heads of Government of the Commonwealth, recognizes environmental deterioration as a common concern of humankind because it threatens the wellbeing of present and future generations.¹⁰⁰ It also states that in many cases environmental problems require a coordinated global effort, mentioning atmospheric pollution as one example of such problems.¹⁰¹ The Langkawi Declaration makes reference to the principles of intergenerational equity, common but differentiated responsibilities and capabilities, sustainable development, and cooperation.¹⁰²

In addition, the 1991 Hague Recommendations on International Environmental Law consider two issues to be common concerns: the preservation of the global environment, and the conservation and sustainable use of biodiversity.¹⁰³ As stated in the Recommendations, considering the preservation of the environment to be a common concern of humankind enhances environmental protection and the sustainable use of natural resources.¹⁰⁴ The con-

93 70th Conference of the International Law Association, *ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development* (2002) [hereinafter *New Delhi*], reprinted in 2 *International Environmental Agreements: Politics, Law and Economics* 211. See also NICO SCHRIJVER, *THE EVOLUTION OF SUSTAINABLE DEVELOPMENT IN INTERNATIONAL LAW: INCEPTION, MEANING AND STATUS* 162-207, app. (Martinus Nijhoff Publishers 2008).

94 Int'l Union for Conservation of Nature [IUCN], *Draft International Covenant on Environment and Development. Fifth edition: Updated Text*, at 44-46 (2015).

95 *Earth Charter*, *supra* note 90, pmbl.

96 *Id.*

97 *Id.*, pmbl. and principles 4, 6, 5, 8, 11, 14, 16.

98 See *History of the Earth Charter*, EARTH CHARTER, <http://earthcharter.org/discover/history-of-the-earth-charter/>

99 Scott Russell Sanders, *The Dawning of an Earth Ethic*, 28 *ETHICS & INT'L AFFAIRS* 317, 322 (2014).

100 *Langkawi*, *supra* note 91, pmbl.

101 *Id.* at ¶ 444

102 *Langkawi*, *supra* note 91, paras. 1, 4, 5, 6.

103 *Hague Recommendations*, *supra* note 88, at I.3f, II.

104 *Id.* at I.3 and 3.f.

servation and sustainable use of biodiversity is regarded as a common concern of humankind because biological diversity is essential for the wellbeing of present and future generations, highlighting the intrinsic value of biodiversity to humanity.¹⁰⁵ The Hague Recommendations also provide general principles of international law that should apply to enhancing environmental protection, including intergenerational equity, the principle of taking precautionary action, sustainable use of natural resources, cooperation, and common but differentiated responsibilities and respective capabilities.¹⁰⁶ Additionally, the 2002 ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development recognizes two issues of common concern: sustainable development, and 'the protection, preservation and enhancement of the natural environment.'¹⁰⁷ Sustainable development is a matter of common concern because it plays a pivotal role in addressing growing inequalities within and between states.¹⁰⁸ The New Delhi Declaration encourages states to integrate sustainable development into all relevant fields of policy and includes all five guiding principles.¹⁰⁹ Finally, the IUCN Draft Covenant on Environment and Development states that the global environment is a common concern of humankind because environmental harm resulting from human activities adversely affects all humanity.¹¹⁰ In addition, 'the interdependence of the world's ecosystems and the severity of current environmental problems call for global solutions to most environmental problems'.¹¹¹ All five guiding principles again appear in this instrument.¹¹²

To sum up, these international instruments recognize the following as issues of common concern of humankind: 1) the environment as such (Earth Charter, IUCN Draft Covenant), 2) its deterioration (Langkawi Declaration), and 3) its preservation (New Delhi Declaration, Hague Recommendations). Essentially, the reason why these issues are considered common concerns is because the life and well-being of present and future generations depend on maintaining a healthy biosphere. The New Delhi Declaration also considers sustainable development to be a common concern, because it contributes to bridging inequalities within and between states, and because life as well as social and economic development depend on the sustainable use of natural resources. Like the treaties discussed previously, these international instruments emphasize the unity of the biosphere and the interdependence of humanity and the environment. Additionally, like the treaties examined, these instruments call for global cooperation in addressing issues of common concern. Finally,

¹⁰⁵ *Id.* at II.

¹⁰⁶ *Id.* at I.3d.

¹⁰⁷ *New Delhi*, *supra* note 93, 1.3.

¹⁰⁸ *Id.* at pmbl.

¹⁰⁹ *Id.* Preamble and throughout its 7 Principles.

¹¹⁰ *IUCN Draft Covenant*, *supra* note 94, commentary to Art. 3, at 44.

¹¹¹ *Id.*, at 45.

¹¹² *Id.*, throughout the Covenant, see in particular Arts. 5, 7, 11 and 13.

the same guiding principles are found in both the treaties and these additional instruments, i.e., cooperation, intergenerational equity, common but differentiated responsibilities, sustainable development, and the precautionary principle. As a result, the concept of common concern of humankind in the treaties surveyed does not differ from that in these other international instruments.

Table: Summary of the essential characteristics shared by issues of common concern of humankind as stated in international treaties and other instruments. Abbreviations: IE: intergenerational equity; CBDR: common but differentiated responsibilities; SD: sustainable development.

| | <i>What</i> | <i>Why</i> | <i>Action</i> | <i>Principles</i> |
|----------------------|---|---|---|---|
| UNFCCC | Climate change | Adverse effects of global warming on ecosystems and humankind | Global cooperation | IE, CBDR Precaution SD Cooperation |
| Paris Agreement | Climate change | Same as UNFCCC | Same as UNFCCC *Climate action should respect human rights | Same as UNFCCC |
| CBD | Conservation of biological diversity | -Intrinsic value -Maintains life-sustaining systems | Global cooperation | IE, CBDR Precaution SD Cooperation |
| ITPGRFA | Plant genetic resources | Human dependency on such resources | Global cooperation | IE, CBDR Precaution SD Cooperation |
| CICH | Safeguarding intangible cultural heritage | -Intrinsic value -Risk of deterioration, disappearance and destruction | International cooperation | SD Cooperation |
| Earth Charter | Global environment | Life depends on a healthy biosphere | Global partnership | IE, Precaution SD Cooperation |
| Langkawi Declaration | Serious deterioration of the environment | Threat to the well-being of present and future generations | Coordinated global effort | IE, CBDR SD Cooperation |

| | | | | |
|-----------------------|--|---|--|---|
| Hague Rec. | -Preservation of global environment -Conservation and sustainable use of biodiversity | -Recognition as common concern of humankind enhances environmental protection and the sustainable use of natural resources -Intrinsic value of biodiversity | International cooperation | IE, CBDR Precaution SD Cooperation |
| New Delhi Declaration | -Sustainable development -Protection, preservation and enhancement of the natural environment | - Growing economic and social inequalities within and between states - Nature and human life as well as social and economic development depend on the sustainable use of natural resources and the protection of the environment | Global partnership | IE, CBDR Precaution SD Cooperation |
| IUCN Draft Covenant | Global environment | Harm to the environment adversely affects all humanity | Worldwide cooperation to take concerted action | IE, CBDR Precaution SD Cooperation |

4.2 Key characteristics shared by issues of common concern

The summary table illustrates in a nutshell the distinctive elements of the issues currently recognized as common concerns of humankind. Two common features extracted from it capture the essence of the concept: the interest to protect humanity and the global environment from harm, and the need for international cooperation at a global scale to address the issue successfully.

Indeed, the instruments examined show that what the international community is trying to avoid by recognizing certain issues as common concerns of humankind is harm to humanity (human health and well-being, food security, cultural heritage) and to the global environment (changes in weather patterns due to global warming, and the loss of genetic, species and ecosystem diversity). Most instruments reflect the factual interaction and interdependence of humankind and the environment, addressing them as a whole. As a matter of fact, the harmful effects dealt with in the instruments are felt regardless of states' territorial boundaries, which stresses the unity of the biosphere. It is because of this unity that the second common feature comes into play: global

cooperation. The instruments surveyed indicate that international cooperation at a global level is a must regarding issues of common concern. This call for cooperative efforts is not only true between states but extends to other members of the international community as well, such as intergovernmental and non-governmental organizations. Such global action is guided by the principles of international law which appear repeatedly in the instruments examined, namely intergenerational equity, common but differentiated responsibilities, the precautionary principle, sustainable development, and international cooperation.¹¹³

4.3 Atmospheric degradation shares the key characteristics

Atmospheric degradation is of common concern not only because of its links to an acknowledged common concern in climate change, but also because it is the type of issue that the international community values as being a common concern of humankind. Atmospheric degradation shares the characteristics of issues of common concern as extracted from the international instruments surveyed in this section.

The first shared characteristic, the interest to protect humanity and the global environment from harm, indeed applies to atmospheric degradation. The atmosphere performs functions essential for sustaining life on Earth; deteriorated atmospheric conditions (e.g., due to climate change, air pollution, or stratospheric ozone depletion) place humanity and the global environment at risk. The IPCC defines the atmosphere as 'the gaseous envelope surrounding the earth,'¹¹⁴ which is followed in the Draft Guidelines.¹¹⁵ In addition to providing life-sustaining gases, essential functions of the atmosphere include keeping the temperature over the Earth's surface within certain limits and protecting the Earth from ultraviolet solar radiation. Indeed, the natural greenhouse effect of the atmosphere keeps the Earth's average surface temperature at about 15° Celsius (33° Celsius warmer than it would be without the atmosphere), and the ozone layer protects us from harmful solar radiation

113 Of the ten instruments surveyed, seven include all five guiding principles, i.e., the UNFCCC (and the Paris Agreement), the CBD, the ITPGRFA, the Hague Recommendations, the New Delhi Declaration and the IUCN Draft Covenant. Of the remaining three instruments, two include four of these principles. The Earth Charter includes all but the CBDR principle, while the exception in the Langkawi Declaration is the precautionary principle. Finally, the CICH includes sustainable development and international cooperation.

114 IPCC, 2013: Annex III: Glossary [Planton, S. (ed.)]. In: *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Stocker, T.F., D. Qin, G.-K. Plattner, M. Tignor, S.K. Allen, J. Boschung, A. Nauels, Y. Xia, V. Bex and P.M. Midgley (eds.)] Cambridge University Press, at 1448.

115 Int'l Law Comm'n, Rep. on the Work of Its Sixty-Seventh Session, *supra* note 1, at 27.

by absorbing the ultraviolet component of the radiation.¹¹⁶ The atmosphere is also one of the primary components of the climate system.¹¹⁷ It is clear that degraded atmospheric conditions endanger humanity and the global environment. This first common feature confirms the existence of an interest common to all in preserving a healthy biosphere in which humanity and the environment can thrive. In view of the essential functions that the atmosphere performs for sustaining life on Earth, preventing its degradation is as essential to protecting humanity and the global environment as many causes already supported by the notion of common concern of humankind. Consequently, the issue of atmospheric degradation shares the first key characteristic.

The second common feature, the need for international cooperation at a global scale in order to successfully address the issue of common concern, is also shared by atmospheric degradation. This is rooted in the fact that the atmosphere surrounds the entire planet; it is a unit, a whole that is in constant movement, oblivious of states' territorial boundaries. In this regard, the fact air pollution moves around in the atmosphere and across borders is an example of the need for worldwide cooperation to be able to effectively tackle the emission of degrading substances into the atmosphere. The same holds true for other atmospheric problems such as climate change and stratospheric ozone depletion. The interests protected by the notion of common concern in the instruments surveyed encourage states to act collectively in the long-term interest of the human race. They call for engagement and commitment in providing the best possible conditions for life on Earth to flourish, giving preponderance to the interests of humanity at large, both present and future. An interest protected by the notion of common concern is therefore one that lies above and beyond the local and regional interests of states. The notion of common concern thus raises awareness of the existence of a shared problem and of a common responsibility to take action. It gives a certain level of significance to the issues examined encouraging collaboration among the members of the international community. Like the acknowledged issues of common concern, the issue of atmospheric degradation requires global co-operation in order to be successfully addressed. Therefore, atmospheric degradation also possesses the second common feature.

In sum, atmospheric degradation shares both of the key features common to all currently acknowledged issues of common concern. Atmospheric degradation is indeed harmful to humanity as a whole and to the global environment, and it is an issue that requires collective action at the global level. Concerted action by all members of the international community is necessary not only because of the very nature of the atmosphere as an indivisible unit vulnerable to degradation, but also because the importance of having a healthy

116 Ranjeet S. Sokhi, *Introduction*, in *WORLD ATLAS OF ATMOSPHERIC POLLUTION* 1, 2-3 (Ranjeet S. Sokhi ed., 2008).

117 D. Randall, *Atmosphere, Clouds, and Climate (Princeton Primers in Climate)* (2012) 4.

atmosphere is such that it deserves the broadest and highest level of commitment.

5 CONCLUSION

In response to the removal of the concept that the degradation of atmospheric conditions is a common concern of humankind from the ILC Draft Guidelines on the Protection of the Atmosphere, this article argues that the degradation of the atmosphere is in fact a common concern of humanity and suggests its reinstatement.

The line of reasoning supporting the argument began with the linkage between certain air pollutants and climate change established both in science and in law and policy. From the legal point of view, atmospheric degradation is a common concern of humankind because treaty law states that climate change is a common concern of humankind (UNFCCC), and that short-lived climate pollutants both degrade the atmosphere and cause climate change (Gothenburg Protocol). Next, it was demonstrated that atmospheric degradation shares two key features characteristic of what the international community currently values as issues of common concern from treaties and other international instruments. First, atmospheric degradation endangers both humanity and the global environment. Second, action at a global scale is indispensable to addressing the issue in a manner that can reverse the damage, prevent further deterioration, and create adequate atmospheric conditions for all. For these reasons, atmospheric degradation is a common concern of humankind.

The above conclusion that atmospheric degradation is a common concern of humankind, along with the perception that the concept lacks clarity, leads the author to suggest reinstating the concept of common concern of humankind to the Draft Guidelines. Both the International Law Commission and the Sixth Committee of the General Assembly, as well as scholarly writing, have argued that the concept of common concern is insufficiently clear, however, its reinstatement would not only acknowledge the status of atmospheric degradation as an issue of common concern, but would also reopen the opportunity for the members of the ILC to exchange views about the notion and contribute to its conceptual development. Bearing in mind the nature of the Draft Guidelines as a set of recommendations, it is questionable whether that contribution should establish a normative framework or include a concrete definition of the legal consequences of the concept of common concern. Like *l'intérêt général* within states, common concern could arguably be seen as a concept that 'does not connote specific rules and obligations, but establishes the general basis for the community concerned to act.'¹¹⁸ In any case, it is the author's

118 Kiss, *supra* note 16, at 246. See also Shelton, *supra* note 18, at 85.

view that if the Draft Guidelines acknowledge atmospheric degradation to be a common concern of humankind, discussions within the ILC on the topic could contribute to a better understanding of the meaning, scope and significance of the concept. More generally, the acknowledgement would promote awareness and recognition to what the international community values today regarding the protection of the atmosphere.