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Comments

Extraterritoriality and Common Concern

CEDRIC RYNGAERT, CLAUS ZIMMERMANN
AND KRISTA NADAKAVUKAREN SCHEFER

Discussants Professor Cedric Ryngaert, Dr Claus Zimmermann, and Professor Krista Nadakavukaren Schefer were asked to address at the workshop held on 22–23 June 2018 at the World Trade Institute, Bern, Switzerland, the implications of the notion, concept, and potentially emerging principle of Common Concern of Humankind on territoriality and extraterritorial effects and the critical issue of compliance and unilateral enforcement. Their authorized interventions are transcribed below. The comments place the doctrine in the context of current research on extraterritorial effects and efforts to balance interests at stake and define the scope of unilateral measures in international law. They discuss the implications of Common Concern of Humankind on sovereignty of states and how the doctrine supports the idea of cooperative or shared sovereignty. They discuss jurisdiction in the context of multilevel governance and the 'five-storey house' and show that extraterritorial effects are necessarily inherent. Finally, they address the duty to act and support the idea that this amounts to the most important aspect of an emerging principle of Common Concern of Humankind. The comments are encouraging and by and large support the findings of the chapters in this volume.

10.1 Cedric Ryngaert

Professor Cottier writes in his paper 'Think Globally, Act Locally' regarding common concerns, conveying that acting locally does not mean a state only regulates conduct within its borders. The state could extend its laws extraterritorially in order to protect global or even local (although foreign) concerns. At Utrecht University, I have headed a related project over the last five years, called UNIJURIS, an acronym

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which stands for unilateral jurisdiction and global values.[1] The project took a public international law perspective and was specifically focused on issues of extraterritoriality. I was the principal investigator, and seven PhD researchers were affiliated with the project.

The empirical starting point of the research was that in various fields of the law, states and the European Union (EU) have unilaterally extended the reach of their law (i.e. their 'jurisdiction') to address what looks like global governance challenges. What may immediately come to mind is the decision of the Court of Justice of the EU in *ATAA* (December 2011),[2] in which the Court validated the long arm of the amended EU Aviation Directive as compatible with international law, the territoriality principle under customary international law in particular. The Directive required all airlines whose flights departed from or landed in the EU to surrender allowances for the EU Emission Trading Scheme, in respect of all air miles, also outside EU airspace.[3] In an article which I published at the time together with Geert De Baere, we argued that the jurisdictional ground on which this decision rests is a weak version of territoriality, combined with the *nature* of the governance challenges at issue, namely the global governance challenge of climate change.[4] Because this challenge is insufficiently addressed multilaterally, states, or the EU, may act unilaterally.[5] Similar common concern-based dynamics are at play in other areas.

In this contribution, I first give a brief overview of such dynamics in the field of (1) oceans governance; (2) corporate human rights accountability and (3) cyberspace. I go on to argue that unilateral assertions to protect common concerns in these fields may be informed by parochial

[1] http://unijuris.sites.uu.nl (accessed 20 Sept. 2019).

[2] Court of Justice of the EU, Grand Chamber, Judgment of 21 Dec. 2011, ECLI:EU:C:2011:864, Case C-366/10, reference for a preliminary ruling under Art. 267 TFEU from the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), *Air Transport Association of America et al.* v. *Secretary of State for Energy and Climate Change*.

[3] Directive 2008/101/EC of the European Parliament and of the Council of 19 Nov. 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (Text with EEA relevance), OJ L 8, 13.1.2009, pp. 3–21.

[4] G. De Baere and C. Ryngaert, 'The ECJ's Judgment in *Air Transport Association of America* and the International Legal Context of the EU's Climate Change Policy', *European Foreign Affairs Review*, 18(3) (2013), 389–410.

[5] N. Dobson, *Extraterritorial Climate Protection Under International Law: A Jurisdictional Analysis of EU Unilateralism*, Utrecht University, 2018.

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considerations, but that this need not detract from its cosmopolitan purposes and consequences (4). I conclude with formulating a number of legitimating principles that may render jurisdictional unilateralism 'reasonable' (5).

10.1.1 Port State Jurisdiction

The project studied two major oceans governance challenges: overfishing and vessel-source marine pollution. The relevant question here was whether *port states* (i.e. states where ocean-going vessels call or dock) could play a role in combating illegal, unsustainable, and unreported fishing, and marine pollution activities. We concluded that port states can rely on a vessel's territorial presence to regulate that vessel's activities on the high seas (i.e. an area beyond a state's national jurisdiction), and enforce those regulations. We should bear in mind in this respect that vessels do not have the right of entry, and that entry could thus be denied to non-compliant vessels, with the attendant deterrent consequences. If these vessels do enter, their extraterritorial activities could be captured by territorial(-ized) offences, such as having prohibited fishing gear (e.g. driftnets), or having inaccurate oil book records in port. These are however just the overlying offences. The underlying offences are extra-territorial, and amount to 'common concern violations'.[6] Thus, what is happening in reality may be a form of extraterritorial jurisdiction by bystander states with a view to protecting common concerns.

10.1.2 Corporate Accountability and Human Rights

Jurisdictional questions with respect to the accountability of multi-national corporations have recently gained in prominence, as victims of human rights and environmental abuses committed by corporations (or their representatives) have brought tort cases against multinational

[6] See on port state jurisdiction, C. M. J. Ryngaert and H. Ringbom, 'Port State Jurisdiction: Challenges and Potential', *International Journal of Marine and Coastal Law*, 31(3) (2016), 379–94; N. Coelho, 'Unilateral Port State Jurisdiction: The Quest for Universality in the Prevention, Reduction and Control of Ship-Source Pollution', PhD (Utrecht University, 2019), 346–66. https://dspace.library.uu.nl/handle/1874/377339 (accessed 12 Nov. 2020); A. Honniball, 'Extraterritorial Port State Measures: The Basis and Limits of Unilateral Port State Jurisdiction to Combat Illegal, Unreported and Unregulated Fishing', PhD (Utrecht University, 2019), 338–42. https://dspace.library.uu.nl/handle/1874/375223 (accessed 12 Nov. 2020).

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corporations in their home states, and sometimes in other states, in respect of what are in essence violations of common concerns (human rights, environmental interests).[7] This triggers the question whether these states have jurisdiction to entertain these claims.[8] At first sight, these states appear to be exercising extraterritorial jurisdiction in that the relevant abuse took place outside the territory. As such, however, the exercise of jurisdiction over parent corporations is not controversial as it is based on the domicile principle under private international law.[9] The domicile principle does however not confer jurisdiction on bystander states regarding non-domiciled corporations (e.g. a parent's foreign subsidiary which may have actually committed the wrong). There is in all likelihood no such thing as universal civil jurisdiction.[10] However, there are legal techniques in private international law that could be productively relied on to extraterritorially pursue common concerns in such situations (e.g. the connected claims doctrine),[11] or the doctrine of forum of necessity which offers an exceptional bystander state forum if the claimant faces a denial of justice elsewhere.[12] Again, what may be happening here is bystander states exercising extraterritorial jurisdiction to protect common concerns.

10.1.3 Regulation of Cyberspace

The challenges described so far are characterized by a tension between the classic territoriality of state regulation and enforcement on the one hand, and the transnational character of the governance challenges at issue. How can the state, as a territorially bounded community, address problems that are essentially transboundary? This question is brought into even starker relief when we consider the challenges posed by digital

[7] For example, *A. F. Akpan* v. *Royal Dutch Shell, plc*, *E. Dooh* v. *Royal Dutch Shell, plc*, *F. A. Oguru* v. *Royal Dutch Shell plc*, Court of Appeal of The Hague (18 Dec. 2015).

[8] L. Roorda, *Jurisdiction in Business and Human Rights Cases: Towards an Effective Right to Remedy*, forthcoming Utrecht University, 2019.

[9] Arts. 4 and 63 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 Dec. 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351/1 (2012).

[10] A. G. Jain, 'Universal Civil Jurisdiction in International Law', *Indian Journal of International Law*, 55(2) (2015), 209.

[11] As relied on in the Dutch *Akpan* case, *supra* n. 7.

[12] Note that in *Naït-Liman* v. *Switzerland*, the European Court of Human Rights held that there is no international obligation to offer such a forum (Case of *Naït-Liman* v. *Switzerland*, Application No. 51357/07, Judgment of 15 Mar. 2018).

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data-gathering and cybercrime. In the digital world, it may seem that there are no territorial borders at all anymore. Data are moved instantaneously from one place to another on the globe with the click of a mouse. Confronted with such a deterritorialized phenomenon, the question arises whether states can still (unilaterally) regulate it?[13] These issues are obviously quite pertinent these days, in light of the ubiquity of the Internet and the threats to privacy posed by commercial and governmental data-gathering practices. States and the EU have not hesitated to regulate unilaterally. The EU has recently enacted a General Data Protection Regulation, which also applies to non-EU-based companies offering their (electronic) services to EU citizens.[14] The USA, for its part, has enacted legislation to enable its law-enforcement agencies to obtain, from Internet intermediaries, information stored on servers outside the USA.[15]

10.1.4 Cosmopolitanism and Parochialism

Jurisdictional assertions in some of the fields discussed above may, at first sight at least, be aimed at protecting parochial concerns rather than common concerns. This applies in particular to unilateralism in the field of cyberspace regulation. Such action protects the state's *own citizens* against privacy violations or against crime, and does not strongly relate to a global common concern. However, such parochialism may go hand in hand with a push for universality (i.e. for local concerns to become a common concern). For instance, the EU's 'territorial extension' of the EU fundamental right to data protection may in due course lead to such right being recognized as a universal human right (i.e. a common concern).[16]

[13] See generally on the role of the state in Internet governance, Uta Kohl (ed.), *The Net and the State* (Cambridge: Cambridge University Press, 2017).

[14] Art. 3 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 Apr. 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

[15] Clarifying Lawful Overseas Use of Data Act or CLOUD Act (HR 4943) (2018). See on extraterritorial enforcement jurisdiction in cyberspace, Mark Zoetekouw, 'Extraterritorial Jurisdiction on the Internet: The Criminals Have Crossed the Border – Will Law-Enforcement Follow?', Utrecht University, 2019.

[16] See also M. Taylor, *Transatlantic Jurisdictional Conflicts in Data Protection Law How the Fundamental Right to Data Protection Conditions the European Union's Exercise of Extraterritorial Jurisdiction*, Utrecht University, 2018.

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At the same time, jurisdictional assertions that are, at first sight, aimed at realizing common concerns may on closer inspection be informed by rather self-centred political and economic considerations. Regulation and enforcement is often not just aimed at 'saving the world', but also at levelling the playing field for a state's own corporations, a playing field which has been distorted as a result of lax foreign regulation (e.g. in the field of the environment, fisheries, corruption, or human rights). This self-interest is also borne out in enforcement practices. States tend to enforce regulations nominally serving the global interest if there is something in it for them too: law-enforcement resources are limited after all.[17] That regulation and enforcement practices protecting common concerns are partly informed by parochial considerations need however not undermine their legitimacy, as long as they are not protectionist in nature. Protectionist abuses could occur when states stop imported goods at the border, citing concerns over 'human rights abuses' committed in the supply chain, while in reality protecting the state's own industry from foreign competition.

10.1.5 Reasonable Extraterritoriality

The main question animating the project was whether jurisdictional assertions pursuing global values and common concerns were in keeping with public international law, as well as whether the foundations of the law of jurisdiction were shifting. Does the law of jurisdiction more readily accommodate states' wishes to unilaterally address common concerns, global governance challenges, or transnational problems?

The conclusion of the project is that by and large, states continue to rely on territoriality or other classic principles of jurisdiction to address global governance problems and transnational threats. Globalization has, at first sight, not undermined the jurisdictional relevance of territoriality. At the same time, however, territoriality has been pushed almost to breaking point. Territoriality seems to be such a capacious concept that 'anything may go'. This begs the question whether it can still have analytical purchase: can it serve its role as a delimiter of regulatory spheres?

[17] See regarding the (non-)exercise of universal jurisdiction, C. Ryngaert, 'Cosmopolitan Jurisdiction and the National Interest', in S. Allen, D. Costelloe, M. Fitzmaurice, P. Gragl, and E. Guntrip (eds.), *Oxford Handbook of Jurisdiction in International Law* (Oxford: Oxford University Press, 2019), 218–21.

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Recently, Dan Svantesson, who mostly writes on cyber issues, has suggested to simply do away with territoriality, as it does no longer mean anything.[18] Our project does not go that far. Arguably, territoriality still serves as a restraining factor, in that it eliminates entirely unconnected states from the circle of regulators. Still, it is true that transnational challenges will have connections with multiple states. To bring some order in the chaos that may ensue, second-order jurisdictional principles may be necessary.

In my previous work, I have suggested 'reasonableness' as the overarching concept of jurisdictional restraint.[19] Reasonableness also informs the various case studies of the UNIJURIS project. Depending on the issue area, reasonableness may take on different guises. However, some basic principles can be listed that may apply across the board, and may boost the reasonableness of unilateral jurisdictional assertions. They mitigate the imperial overtones of cosmopolitan extraterritoriality, and legitimize unilateral assertions serving global values and common concerns.

The first principle pertains to the international proscription of, or at least the international concern regarding a specific challenge. This implies that if a problem has been considered as of international concern, and in particular if conventions have been adopted to address that concern, the lawfulness of unilateral action is enhanced. Sometimes there may even be a duty to exercise jurisdiction.[20]

The second principle is democratic legitimacy and participation. This is an issue which Eyal Benvenisti in his Global Trust project at Tel Aviv has looked at in particular.[21] It should be conceded that unilateralism with extraterritorial effects may be inherently undemocratic. Therefore, one may have to inquire whether unilateral jurisdictional assertions are sufficiently 'other-regarding', in the sense of factoring third-country interests affected by such unilateralism.

[18] D. J. B. Svantesson, 'A New Jurisprudential Framework for Jurisdiction: Beyond the Harvard Draft', *AJIL Unbound*, 109 (2015), 69–74.

[19] C. Ryngaert, *Jurisdiction in International Law* (2nd ed., Oxford: Oxford University Press, 2015), ch. 5.

[20] For example, Art. 11 of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2016) (requiring port state denial of entry to visiting foreign vessels suspected of IUU fishing); Art. 5.2 UN Torture Convention (requiring states to exercise *aut dedere aut judicare* based jurisdiction if a presumed torturer is present on its territory).

[21] http://globaltrust.tau.ac.il/ (accessed 20 Sept. 2019).

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A third principle is the principle of equivalence. Arguably, states and the EU should only exercise unilateral jurisdiction if the value or issue in question is not adequately protected by foreign or international regulation and action. This means that they should defer to foreign or international norms which provide equivalent, although perhaps non-identical protection. Such deference prevents foreign operators from becoming overburdened with multiple layers of slightly different regulation.

Fourth, we should bear in mind that foreign states may find themselves at a lower level of economic development and may not be able to meet stringent Western standards imposed via unilateral jurisdiction. To enable these states and their operators to actually comply, in line with the principle of common but differentiated principles, richer states may be under an obligation to provide technical or financial assistance to poor states.

What extralegal factors influence the adoption of extraterritorial regulation, and how enforcement priorities are set, are important fields for future research on actual practices of protecting global values and common concerns. As far as enforcement practices are concerned, the relevant question is whether, assuming there is a jurisdictional grant, states also *act* on it. For instance, in what cases do they enforce global anti-corruption norms; what social dynamics inform enforcement strategies?[22] This empirical question is an important one, as in terms of international legality, many unilateral assertions are presumptively valid, within certain bounds of course.[23] An important challenge then is to move from the law on the books to the law in action. Such research requires that legal methods be combined with social science techniques.[24]

10.2 Claus Zimmermann

The serious research undertaken around the emerging doctrine of Common Concern of Humankind reflects that countries worldwide, in light of our joint responsibility towards future generations, share a number of serious problems, preoccupations and challenges that countries cannot, at least not most of the time, solve on their own.

[22] F. Haijer, *Minding Their Own Business: Enforcement of Anti-Foreign Corruption in the Netherlands and the USA* (Utrecht University, forthcoming 2019).

[23] See regarding corruption, K. Davis, *Regulation of Transnational Bribery: Between Impunity and Imperialism* (Oxford: Oxford University Press, forthcoming 2019).

[24] G. Shaffer and T. Ginsburg, 'The Empirical Turn in International Legal Scholarship', *American Journal of International Law*, 106 (1) (2012), 1–46.

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There is no denying that finding effective solutions to shared, or common, concerns depend upon the degree to which the international community, through enhanced international cooperation and effective enforcement will be able to find ways towards identifying appropriate responses to the many sizeable challenges at hand.

In an ideal world, countries worldwide would organize a major multilateral conference, to do three things: first, reach agreement, with proper involvement of civil society, as to which perceived problems or challenges are properly to be viewed as 'common concerns of humankind'; second, revise and expand the multilateral treaty framework to spell out what exactly the international community should do to address these shared concerns; and, third, set up the proper institutional framework to monitor and ensure compliance.

It is obvious, that this is a sizeable challenge and that, in reality, progress will have to be made in an incremental manner, along much less ambitious, second-best, options.

It seems safe to say that the key prerequisite for making progress towards addressing common concerns of humankind is to make state leaders and the populations electing them to public office realize that there is indeed no inherent conflict between the principle of common concerns of humankind, on the one side, and national sovereignty and self-determination, on the other.

I could not agree more with how Professor Cottier put it in his contribution: sovereignty cannot, at least not today, be reduced to self-determination and independence. The concept of sovereignty has indeed always been deeply rooted in safeguarding peace, order, and prosperity, in accordance with ultimate goals of international law. And in light of contemporary challenges, such as global climate change and the increasing integration of financial markets, these goals can best or exclusively be achieved by means of international cooperation. Cooperative, or shared, sovereignty is therefore indeed the only realistic option at hand.

The contemporary mainstream view of states being instruments at the service of their peoples as true holders of sovereignty may be regarded as a corollary of the fundamental idea of popular sovereignty or sovereignty of the people. As was first explained by Samantha Besson, this form of sovereignty triggers duties of cooperation, on the part of the entities which cannot ensure the protection of all the values they should protect, or, translated into the concept we are discussing here, which cannot ensure that the common concerns of humankind are properly addressed.

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This duty to cooperate in addressing the common concerns of humankind must be strictly framed by the principle of subsidiarity. Respecting the principle of subsidiarity is fundamental to ensure that the regulatory decisions that are needed to address common concerns are taken at a decision-making level not more distant than absolutely necessary from the people to whom those in power are ultimately responsible.

Professor Cottier rightly framed this as 'responsibilities at home', explaining that Common Concern primarily entails responsibilities to act within a given jurisdiction. States are not only entitled to, but also obliged, to address Common Concerns as defined by the international community within their own boundaries.

While it is of course of vital importance that everyone does their own homework, the principle of Common Concern of Humankind indeed has the potential to shake the balance and equation of extraterritorial application of domestic law.

As discussed in the various contributions to this workshop, this emerging principle rightly questions the existing system of international sanctions considering that the Security Council of the United Nations is not properly equipped and authorized to address most of the pressing common concerns of humankind.

It indeed appears vital to find new modes within the UN system and in other international organizations. I agree that the general exception provisions of the WTO treaty framework and the introduction of WTO-compliant labels linked to certain production methods provide some limited margin of manoeuvre to address common concerns of humankind already under the existing treaty framework. This said, however, one should be very careful not to provoke the explosion of the WTO legal framework by stretching too far what the WTO treaties were meant to achieve. A proper renegotiation of the treaty framework certainly appears to be the only real long-term solution.

In the meantime, and in parallel, unilateral countermeasures by big countries with large markets addressing common concerns of humankind remain an option but one that should be treated with utter care.

From a conceptual point of view, there is no doubt that rights and obligations relating to common concerns go beyond the traditional precepts of territoriality. It is equally plausible to say that the principle of Common Concern of Humankind may be understood as providing a certain degree of authorization, or even obligation, for a state to take action in relation to facts relating to a common concern produced outside the proper jurisdiction of the state.

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Thus, governments may indeed take the view that they are authorized, and even obliged, to take appropriate action against highly polluting means of production bluntly ignoring the common concern of global warming by means of adopting appropriate production and process standards. Likewise, governments are authorized to take action in response to blatant and systematic neglect of the common concern of preserving the essence of fundamental human rights and combating systematic violations thereof.

The crucial point is not whether a foreign measure negatively affects persons and resources within a given jurisdiction, but whether it affects the attainment of the solution to what amounts to a common concern of humankind. But the theoretical possibility of unilateral actions should not serve as a false excuse for delaying the urgent need to revise the global treaty framework.

Ideally, unilateral actions to address common concerns of humankind would be taken only once the international treaty framework has been revised. It then indeed becomes a realistic, and a much more appealing option to have large markets with bargaining power shoulder a larger burden of the international community's shared responsibility to address common concerns of humankind. Countries with large markets and rich economies are indeed in a better position, in purely practical terms, to take action and exert focused pressure on others to comply.

Ideally, such measures would not be imposed purely unilaterally, but as a means of collective enforcement, upon explicit authorization from the broader international community. Unless in absolutely exceptional situations, we certainly would not want to move towards a situation in which countries unilaterally decide that they need to raise trade barriers to address common concerns akin to what the United States currently does in the name of 'national security' under section 232 investigations.

Enforcement of international law may indeed not be left to powerful markets and actors, such as the EU, the United States, and China even if these actors are subject to the rule of law and to the principle of proportionality in shaping countermeasures. Shortcuts to strengthening the competent international organizations must remain an absolute exception.

In the meantime, I am convinced that, in particular as concerns large countries or markets, there is much room for fostering the promotion of common concerns of humankind even within the traditional view that extraterritorial action can be defended only if the nexus to the own territory is sufficient – precisely if and when the territory is large and the problems are blatant.

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As pointed out by Dr Lupo-Pasini in his presentation, international finance law is one domain where there are various notable examples of extraterritoriality, especially in the regulation of securities and clearing houses. The European Market Infrastructure Regulation is indeed an insightful example as it illustrates that much can be achieved already under a traditional approach to extraterritoriality. Thus, when two non-EU parties enter into a derivative contract that has a direct, substantial, and foreseeable effect within the EU, the transaction is considered as if it is operated by local firms and therefore subject to EU law. The only challenge that then remains is to ensure that the domestic laws having extraterritorial effects, are apt to address the common concerns at issue, here, financial stability.

Overall, considering the daunting nature of many of the potential common concerns of humankind, it appears vital to me that the international community progresses on various levels and at different speeds towards addressing these concerns:

- First, by better addressing common concerns of humankind on the domestic level, not shying away from justifiable and justified extraterritorial effects of the domestic measures.
- Second, by making better use of the existing treaty framework, notably at the WTO and the UN Security Council.
- And, third, in a long-term perspective, by aiming to achieve the much-needed reforms of the multilateral treaty framework, by ensuring that countries are subject to the right hard rules serving to address common concerns of humankind, combined with proper mechanisms for monitoring and effective enforcement.

10.3 Krista Nadakavukaren Schefer

Thank you very much. Extraterritoriality is a topic that has long been of interest to me. Although I haven't been working on it very recently, there are some thoughts that I would like to share. In relation to extraterritoriality, there are two additional issues that I think have come up throughout the conference, which are equally important. Those would be unilateralism and the positive duties. And to me, these three things go together.

Extraterritoriality to me is similar to what Gabrielle Marceau said this morning – extraterritoriality exists and it does not seem to be a big problem when it comes down into the case law. It is sort of a fact, as

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she said, and I agree. What becomes interesting is, if I start to think about the Common Concern project with the 'five-storey house' idea,[25] how does extraterritoriality fit there? When you talk about acting locally, for example, may local governments or local organizations also act extraterritorially in the same way as on the national level? I think that is an interesting question. How are you going to define extraterritorial concepts within a federacy or within the EU? And, if so, at what levels is that going to be allowed? Are we going to look at extraterritorial as any effect beyond the immediate jurisdiction of the unit you are talking about? I think there you can take up some interesting theoretical ideas, but in terms of the extraterritoriality of state action, litigation, and enforcement properly speaking, I do not see this as problematic. I see it actually as inherent in the concept of common concern and that it is absolutely necessary to have this extraterritorial aspect if you want to have common concerns really addressed effectively.

That brings me to the issue of unilateralism. Do you want this extraterritoriality to be exercised unilaterally, regionally, or multilaterally? As Michael Hahn mentioned, when you have an extraterritorial action that is exercised by a group of states, you do not usually talk about extraterritorial impact. It is only if it is unilateral that you seem to care about extraterritorial issues. I think it is a difficult issue on a normative level to say in our international system that we want to allow for unilateralism. Because we are coming from a UN community angle. To what extent should a single state be able to be the representative of the international community to foster a community ideal? My particular position on this is that unilateralism in and of itself is not the problem if it is unilateral action; unilateralism is a problem if it is a unilateral goal that a unilateral actor is trying to promote, a goal purely in the interest of a particular country. If it is a common concern, I again do not have problems with unilateral action. I believe in the need for leadership, a kicker off of the ball, which might be required to get others to follow. This, of course, does have some implications in terms of who is going to be the kicker. It is usually going to take a bigger country to really generate the after effects of what you are intending to achieve. However, I do not think that unilateralism is a problem in and of itself if it is for an established and recognized common concern.

[25] T. Cottier, 'Towards a Five Storey House', in Christian Joerges and Ernst-Ulrich Petersmann (eds.), *Constitutionalism, Multilevel Governance and International Economic Law* (Oxford: Hart, 2011). See also Chapter 1 in this volume, pp. 49–50.

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And, finally, the most interesting angle of common concern for me is the aspect of a positive duty to act. To what extent do we want to say you have an actual positive duty to do something? I think this again is absolutely critical for the success of the project of addressing common concerns and promoting common goals. Because if you do not have these duties, states are left with the *right* to act, and the right, I think, is something that is generally not used. It is unused because governments do not want to spend the resources to exercise that right: it costs something to promote a common goal, especially if you're the only one acting. If you are the only one acting, moreover, you might be at a competitive disadvantage. But a positive duty to act makes a state have to pursue this common concern even if it does not want to pursue it on cost grounds. We know from the experience in humanitarian interventions that the right to act is not sufficient and further steps, as outlined in R2P, are necessary. That is the critical element. It is the positive duty to act in the context of common concern which makes the difference. But you also need to figure out how you are going to enforce the positive aspect of it. And that is what is really hard because even if you have the possibility legally to do it, how are you going to make countries actually act on this and how are you going to enforce that if they do not act?

These are some of my thoughts. Thank you!

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