A Change of Environment for Common Concern and Human Mobility

2-3 October 2017, World Trade Institute, University of Bern

WORKSHOP FINAL REPORT

This document summarises the presentations and discussions that took place at the workshop titled "A Change of Environment for Common Concern and Human Mobility", held within the framework of the CLI_M_CO2 project. The minutes have been recorded in accordance with the order of the presentations delivered and aim to reflect upon the general themes and ideas discussed.

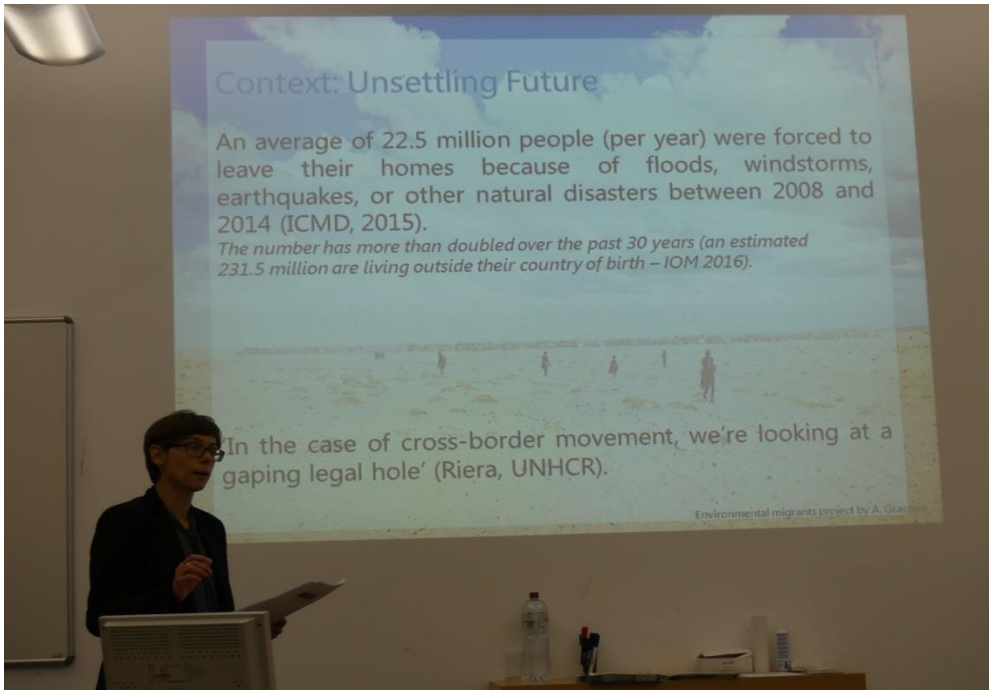
SWISS NATIONAL SCIENCE FOUNDATION

First Session: The Emerging Concept of Common Concern (14:30 – 18:30 Monday 2 October)

SNSF Prof. Elisa Fornalé, University of Bern:

-The workshop aims to address the multidimensional relationship between environmental changes and human mobility, under the broader normative conceptions of "common interests" and "common concern" in international law.

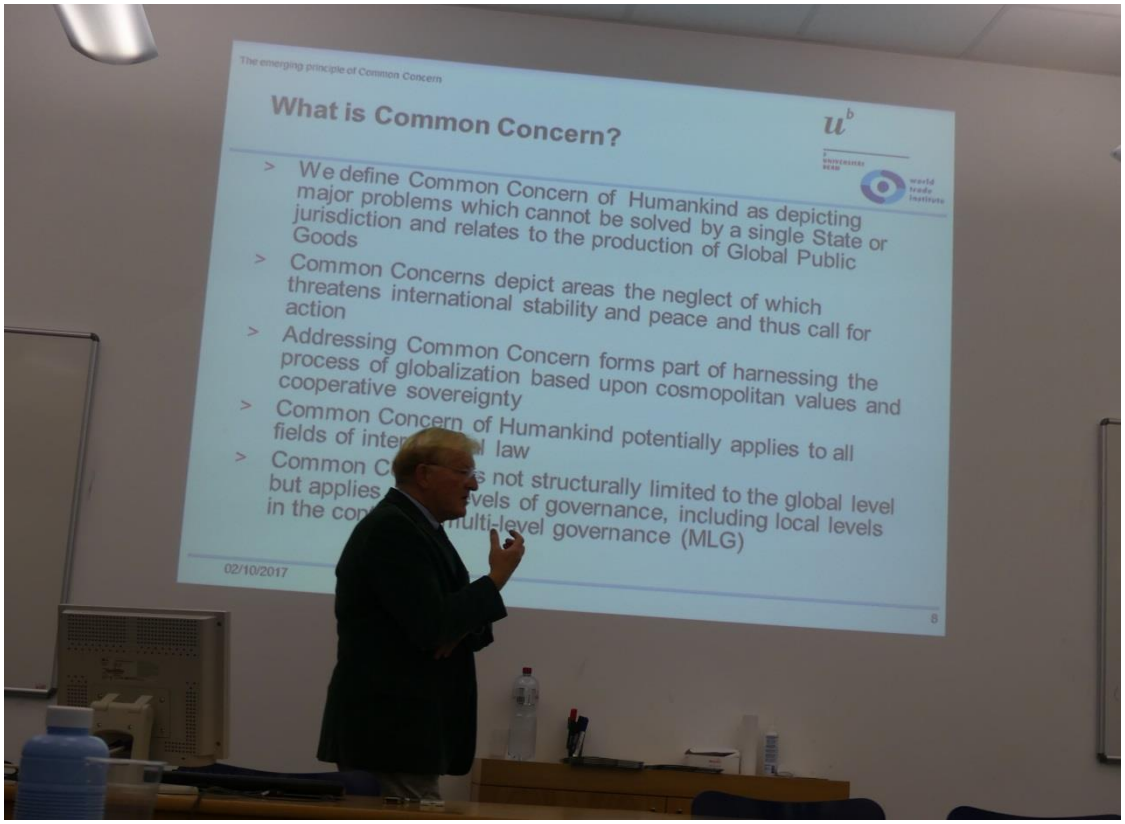
-When we examine the current state of research in environmentally induced migration, we come across a hybrid debate in transition. Firstly, there is a transition in terms of the terminologies adopted: "Climate refugees" and "environmental migrants". Secondly, the burden of responsibility is in transition. From a state centered approach, there is a transition towards individual responsibility. Multilevel governance theories play a key role in expounding on the arguments for responsibility sharing amongst different levels of society. There are persisting legal protection gaps and we will explore the emerging role of the principle of common concern.



Prof. Thomas Cottier, University of Bern:

One of the key issues we face with regards to migration is the conceptualisation of the common figurations. Migration cannot be defined in the Westphalian understanding of Statehood, which is based mainly on state interests. A normative framework recognizing collective action is needed.

How can we use the concept of common concern to address these current issues in relation to migration? The correct forum seems to be academia, as international organizations. We can see this as a process of claims and responses, and at one point, perhaps a court will recognize the claim.



What is the normative content and value of common concern? To what extent can we use it to interpret international, regional and bilateral agreements?

In this respect, the principle of common concern must be limited to the global scale. The initial hypothesis is that the ultimate motivation for States to act is for maintaining and/or achieving international stability and peace. This traditional presumption is preserved under the principle of common concern. Based on this hypothesis, we call States for action. Once the substantive part is formulated, we can focus on the

procedural part of the doctrine. Two significant features in relation to the procedural aspects of common concern- *(i)* Unlike in current international law, where we have selective duties to cooperate, common concern is based on a normative duty to cooperate; *(ii)* common concern requires countries to do their "homework" in domestic law, whereby the commitments by individual countries are their obligations. The public trust doctrine forms a template in this sense; *(iii)* any failure to comply triggers countermeasures. The responsibility to protect may be explored further as an example.

Common interest and common concern must be distinguished. Imagining climate refugees, we do not have common interests per se (as the interests of the affected countries would not mirror the interests of host countries), but we have a common concern.

How does common concern relate to values? Do we have a normative framework in migration to relate to? For instance, in migration, there is a movement to create an international agenda. But on the other hand, sustainable development goals do not consist of migration.

Discussion:

-How can we conjure the "common" concern when we have such contrasting interests in relation to polarised topics such as migration? For instance, the EU does not necessarily share the same problems in relation to migration with the Balkans or Turkey. One solution could be looking into multilevel governance. International law would override any conflict in domestic law, and upon rendering a decision on a common concern, the differing domestic interests would have to seek conformity.

-What is the relationship between common concern and common heritage of mankind? Common heritage of mankind was devised for deep sea mining issues.

-Where is the common ethos (values) in common concern and how can we relate this to governance? Common concern is a normative structure, and it triggers procedural obligations whereby the duty to cooperate is inherently in this procedure. But this structure does not tell us what norms or values must be set. It gives governments the element to act.

Prof. Wolfgang Benedek, University of Graz:

There is a growing trend of humanization in international law, whereby the concerns of the individual are placed at the centre. There is also an increase in the identification and enforcement of common interest(s).

The uses of the concept of common interest are diverse. For instance, the African Charter Art 27 talks about common interests in the framework of collective security. The EU Migration Agenda 2015 adopts a human rights based approach.

The distinction between common interest and common concern is very blurred.

To what extent can the principle of sovereignty block the effective enforcement of a common concern or interest? After the identification of a common concern or a common interest, it is important to emphasize multilevel governance. The importance of a multi-stake approach and the role of multitude of actors must be stressed. In this respect, seeing sovereigns as trustees and proposing a theory of global accountability is a possible solution.

Although common interest has mainly been adopted in the context of individuals, the concept does not exclude the concern for the environment. A remedial approach, similar to the one adopted in the human rights context, could be applicable for environment law.

Discussion:

-If we examine international, regional and bilateral treaty making, we can see that all such agreements have been entered into by States due to a "common interest". A common interest will inevitably exist in any agreement amongst its contracting parties, as obviously without an interest the countries in question would not have contracted. Hence, what sets the doctrine of "common interest" apart from this basic meaning of interest? One explanation would be through looking at several usages of the terminology. There is a clear distinctive use of the term "common interest" with respect to *erga omnes* obligations. These uses set it apart from its ordinary and broader meaning.

Dr. Elena Katselli, University of Newcastle:

Does the idea of an international community really exist?

Should international law recognize the idea of solidarity measures for the protection of community and collective interests?

Some peculiar characteristics of the international order are that it is based on an idea of equal sovereigns interacting based on consent. There is a lack of hierarchy. States have the right to be indifferent. Such a legal order has plurality of subjects. It also follows that this system is neutral in character (Prof Weil and Prof Guggenheim).

The ICJ makes a distinction between norms and recognises certain interests as being "owed to the community of states". This idea threatens the basic foundations of international law.

The hierarchy of norms (norms vs superior norms) triggers vigilance to make sure that international law fulfills its purpose.

Prof. Koskenniemi identified the trend of community interests as a neo-imperialism move, where the western states are imposing their values upon the rest of the world. We have to stay vigilant for possible abuses of the use of countermeasures in connection with the protection of community interests.

Once such community interests are violated, countermeasures are triggered. Draft Articles on Responsibility of States for Internationally Wrongful Acts ("DASR") to

construct the regime for countermeasures. The article is devised to create a venue of self-help. Crudely, countermeasures were developed because of a failure of other mechanisms to take charge of international law violations. This justifies why States do not need to refer to the UN Security Council before taking countermeasures.

Who is entitled to resort to countermeasures? *Enterprise v Great Britain* (1835) was against the idea that we break the law to enforce the law.

Some recent examples of the use of countermeasures include, *(i)* US restrictions against the Syrian government, certain citizens and the Syrian Central Bank. The justification provided consisted of responding to terrorism and human rights violations; *(ii)* EU restrictive measures against Russia for its annexation of Crimea in 2014; *(iii)* Cooperation Council for the Arab States of the Gulf are threatening Qatar with economic blockade for its support of terrorism. Hence, countermeasures span across a wide range justifications, from human rights violations to supporting terrorism.

The question of legitimacy must be considered with regards to countermeasures, and related to this is the impact of the restrictive policies on innocent civilians.

Countermeasures can also be considered from the framework of responsibility to protect. This invokes the relationship between rights and obligations which enable taking action in response to serious violations of community interests. This finds expression in Art 41 of DASR which provides that states shall cooperate to terminate serious violations of community interests.

Discussion:

-With respect to the case of *Bosnia and Herzegovina v Serbia and Montenegro* (2007), the ICJ held Serbia responsible for failing to prevent a serious violation of a peremptory norm, based on the Convention on the Prevention and Punishment of the Crime of Genocide. Would the ICJ have reached the same judgment against other involved actors such as the Dutch Peacekeepers, or third states such as the UK or the Netherlands? How far can we go in finding and enforcing obligations under community interest?

- The improvements in terms of the enshrining and the protection of human rights in the 20th century should play a role in how we perceive countermeasures. There has been a shift in international law from the law of coexistence to a law of cooperation. Although there is still a lack of definition as to what constitutes a community interest, the whole analysis of countermeasures from the perspective of enshrining community interests has more complexity than a simple portrayal of the situation as a "western domination" of the rest.

- Could the doctrine of common concern be used to find a solution for the identification and effective enforcement of community interests? Common concern as

structured by Prof. Cottier could provide a framework for triggering collective action for right reasons (and not just based on an arbitrary selection of cases to further individual state interests). An important problem with this assumption is that we still have to work with States which are in practice reluctant to be held accountable; hence they are not ready to accept obligations for violations of community interests. The very concept of solidarity measures still finds resistance from states. In such a context, the doctrine of common concern could face the same challenges.

- Would the use of concrete data provide a solution for defining what constitutes a community interest? For instance, climate change is to a large extent statistically provable. How can international law incorporate the increased amount of scientific findings in order to acknowledge and enforce rights and obligations? Is it possible to define a community interest from a preference-neutral point of view? One answer to this is that documentation, i.e. data, is not a problem in international law. For example, the human rights violations in Syria are well known and documented. The problem is rather a lack of willingness to act.

-Is a non-consensual structure of international law possible? If we think about the current state of affairs, the idea of community interest has already challenged the issue of consent. State-centric approach is losing its justifications.

Prof. Tamas Adany, Pazmany Peter Catholic University:

Focusing on the history of international law, it is evident that it worked on the basis of consent. If a State can choose to become a member of an international instrument, it follows that it can at any time choose to withdraw from that agreement. The major flaw of this argument is that according to current practice, withdrawing from a human rights instrument has severe consequences for a State. These consequences may be viewed as having a domino effect: giving up on a human rights instrument could mean losing EU membership and so on. The "price tag" is very high for "giving up" on human rights agreements.

Historically, we have seen a change in the notion of "sovereign". Especially, the rise of nationalism has had an impact on creating new countries and new ideas to sovereignty. Currently, our understanding of a sovereign is in transition, whereby three branches of government include multi actors. For instance, for legislation we can observe the increasing role of NGOs, or for judiciary, we see widespread resort to alternative dispute resolution mechanisms. Private actors are competing with state powers, and our conception of sovereign is being challenged.

Discussion:

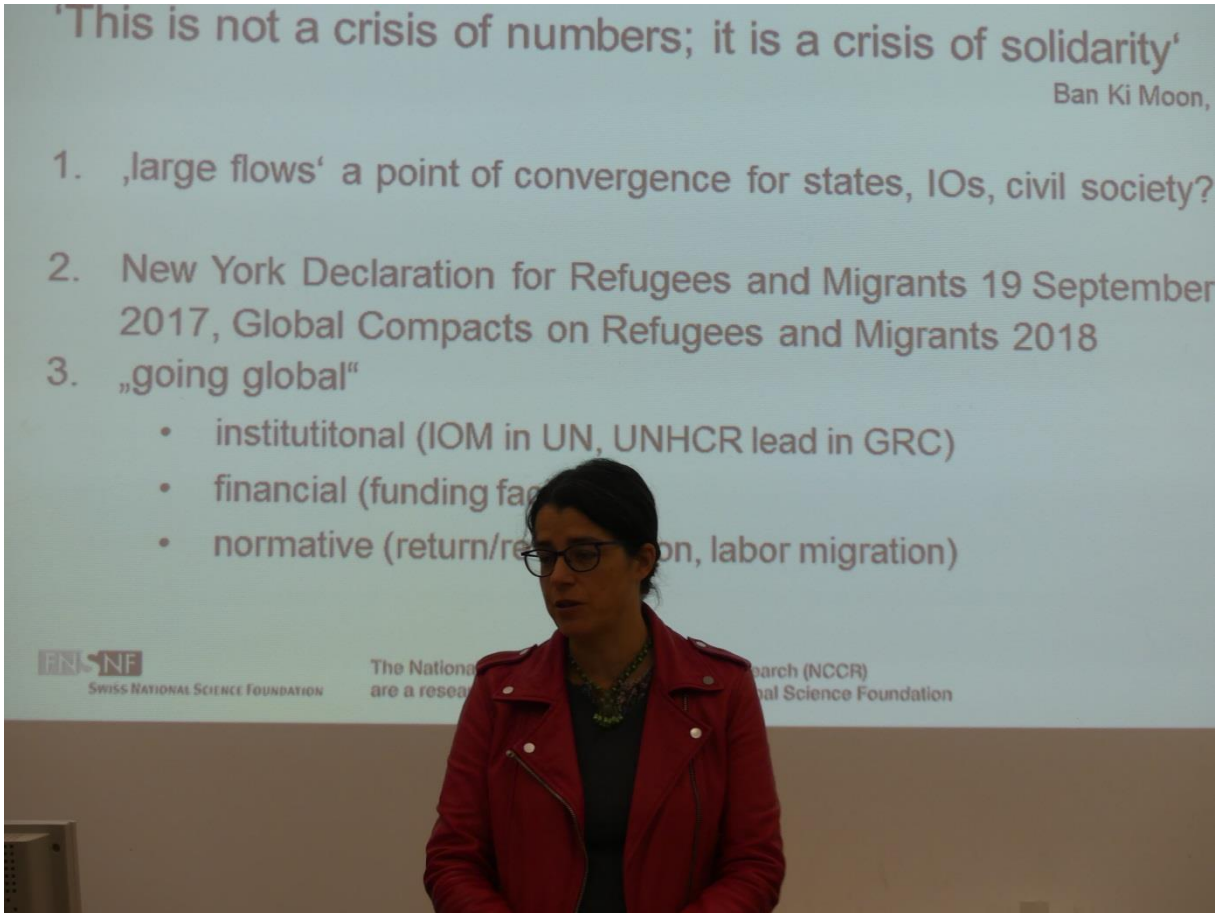
- Brexit would be an example of how a State can "go back" on its commitments under international law. How can we fit this in the framework? One answer would be that we can consider Brexit as a setback. Furthermore, whether a referendum result of 49-51 can be acknowledged as a sovereign decision is also a matter of dispute.

- The notion of going back in time may not completely depict the process of withdrawing from an international agreement, because a member state will find itself "lifting" a treaty in a totally different context than it first became entered into a treaty. Hence withdrawing from a treaty does not necessarily mean going back in time. The issue of costs for withdrawing from a treaty can be explored further, especially in the context of Brexit. However, it is also important to note that these costs may not be immediately realisable by the people. For instance, the current approach of the Hungarian government towards the EU relocation scheme will have ramifications but the cost may not be apprehended by the people.

Second Session: International Cooperation and Extraterritoriality in Migration (09:00 – 12:00 Tuesday 3 October)

Dr. Marion Panizzon, University of Bern:

Migration has, in time, been acknowledged as a crisis of solidarity and governance which requires collaboration to resolve. The New York Declaration for Refugees and Migrants is a turning point for realising that something needs to be done at the local level.



Is multilevel governance dead because of global governance?

Normatively speaking, are we moving towards a common concern for refugees and migrants, and how does the principle of cooperation affect such a process?

Multi-layered governance is a policy formulation and implementation by cooperation among public and non-public actors. Multi-layer governance is traditionally separated into two types; *(i)* federated allocation of powers, *(ii)* overlapping jurisdictions.

Multi-layered governance vs other governance theories: the former is hybrid, involves the non-negotiated instruments, it has a top down approach and includes bottom up deliberative solutions. It is sometimes associated with UN led global governance efforts. Conceptually, it also blurs the state / non-state actor divide.

The functionalist school tries to define multi-layered governance and set its limits. It has been criticised for being too descriptive and for not even qualifying as a theory due to the lack of a prescriptive element.

In terms of migration, multi-layered governance is important in debating about large migration flows. Some states are advocating for a loose conception of governance, *X and X v. Belgium* decision is important to note in this respect.

The partnership principle must be distinguished from the cooperation principle. Cooperation principle is ad hoc, spontaneous, it can strengthen governance capacities.

Multi-layered governance has three elements in responding to large flows of migration; *(i)* used to bypass anti-immigrant sentiment of the host state, *(ii)* circumvents good governance constraints to enshrine human rights, *(iii)* renationalises EU policy space in times of emergency.

Discussion:

-Does the theory of multi-layered governance work in the context of countries incrementally adopting more authoritarian practices (whereby the involvement of civil society and non-governmental bodies in governance is showing a decrease)?

-Can we observe institutional factors in certain areas of international law whereby the hybrid nature of multi-layer governance in fact achieves to establish certain rules that "stick"? In terms of labour migration, due to the national, bilateral and multilateral schemes, we may come across such patterns, however for refugee protection this is harder to conclude.

-Can we see the transfer of powers to different levels as a potential threat whereby states can avoid making or meeting their international commitments? Actually, in a way, multilevel governance brings States to commit to certain obligations and implement international treaties, especially at the regional level.

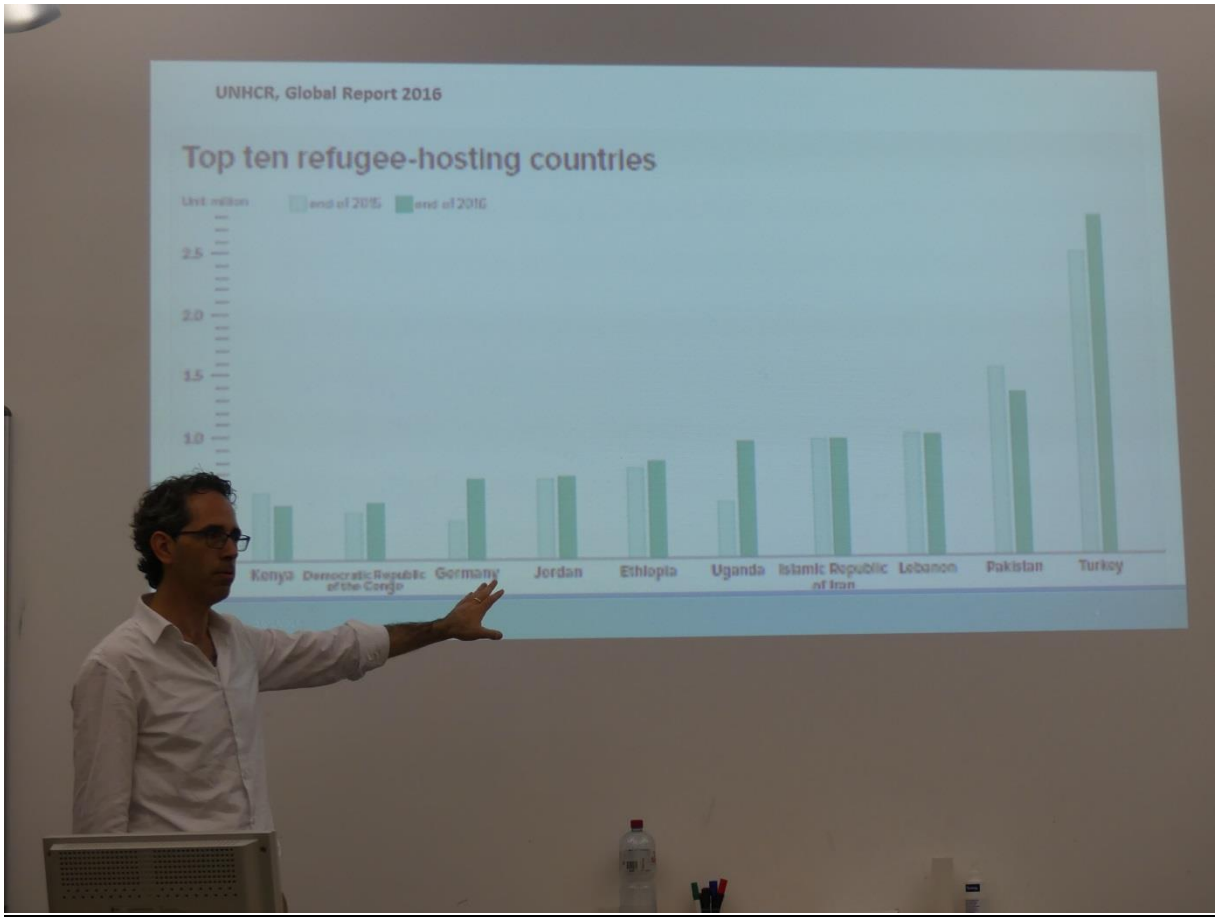
Dr. Avinoam Cohen, University of Tel Aviv:

Three problems in relation to the principle of common concern; *(i)* power disparities in the status quo may cause problems in the identification and enforcement of "common" concerns, *(ii)* whether States are the proper units for analysis must be elaborated, *(iii)* how can the doctrine be applicable in the context of migrants?

UNHCR Global Trends of 2015 show that much of migration today actually takes place from the global south to global south. On the other hand, we see the global north acting as donors. When considering migration flows, it is highly significant to take into account the happenings outside of the EU.

The multi-stake holder process is open, transparent and inclusive. The creation of coalition of organisations active in the field of migration, collective advocacy, and the production of coordinate strategies as well as non-binding and voluntary guidelines are the fruits of cooperation.

In this respect, overcoming local opposition towards migrants is a democratic deficit that needs to be addressed.



Discussion:

-The use of the term "democratic deficit" carries the idea that there is a sorry consequence of otherwise efficient institutions. To what extent is the use of the term appropriate for the adverse effects of multi-level governance? If we consider global

governance with regards to migration, there is a global north-global south endeavour. The topic has a politicisation potential.

-To what extent do the role of unequal power relations and partnerships in mobility schemes diminish the advantages of multi-level governance? One answer would be that regardless the unequal nature of certain partnerships, many afflicted parties are ready to make concessions in order to gain access to the labour market of host states. Hence, these partnerships can be utilised to further the interests of each partner.

Prof. Maura Marchegiani, University of Perugia:

The current migration crisis shows a failure to protect the rights of migrants. Especially, in the context of the EU migration scheme, we see a constant review of policies.

The recent EU-Turkey deal is one consequence of such revision, whereby the EU is conceiving partnerships with third countries. The deal has raised many human rights implications as well as procedural obstacles.

There is extreme divergence of interests within the EU member states with respect to migration policy and agreeing on a "common" concern seems hard when the interests are in conflict with each other.

Readmission agreements differ from traditional migration agreements.

Discussion:

-Building on the arguments put forward in "The Second Order Structure of Immigration Law" by Adam Cox and Eric Posner, to what extent should the EU move towards adopting a less rigid and more flexible migration framework (akin to the US) ?

-Certain countries choose to enter into separate agreements with individual EU member states, instead of the whole of the EU, such as in the context of certain African countries. Do such bilateral treaties give third countries more leeway to agree on migration policies, and to what extent should they be encouraged/favoured?

Prof. Romain Felli, University of Lausanne:

The imagery and language surrounding climate change and migration has been in transformation. In 1970s, the dialect started to focus on environmental degradation- The general view was that our societies could not adapt and respond to climate change induced migration. Then, there was a shift to the securitization framework, as a study of Climatological Research pertaining to the intelligence problems demonstrates. Later, there were economic critiques of the phenomenon. World Bank report in 2010 started reflecting on accommodating migration to promote adaptation to climate change, and migration was promoted as a contribution to economic growth. This approach was followed by a neo-liberal conceptualization, whereby the climate refugees were considered as having no resources to move; hence adaptation policies were given more importance. Finally, we have moved to seeing migration as management.

Discussion:

-How has scientific research on climate change affected the discourse on climate change and migration? Especially the IPCC reports have contributed to the dissemination of data about the phenomenon. One important element to consider in this connection is the possibility of politicization in science.