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Rüdiger Wolfrum · Chie Kojima (eds.)

Solidarity: A Structural Principle of International Law

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Herausgegeben von
Armin von Bogdandy · Rüdiger Wolfrum

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Rüdiger Wolfrum
Chie Kojima

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List of Abbreviations

AB	Appellate Body
ACP	African, Caribbean and Pacific Group of States
AdV	Archiv des Völkerrechts/Archive of International Law
AIDI	Annuaire de l'Institut de Droit international
AJIL	American Journal of International Law
Ala. Const.	Constitution of Alaska
Am. Econ. Rev.	American Economic Review
art.	article
arts	articles
B. C. L. Rev.	Boston College Law Review
Berkeley J. Int'l L.	Berkeley Journal of International Law
BYIL	British Yearbook of International Law
Cal. L. Rev.	California Law Review
CBD	Convention on Biological Diversity
CFSP	Common Foreign and Security Policy
CRC	Convention of the Rights of the Child
CRC-OPAC	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict
CRC-OPSC	Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
Doc.	UN Document
DRC	Democratic Republic of Congo
Duke L. J.	Duke Law Journal
EC	European Communities
ECOMOG	Economic Community of West African States Monitoring Group
ECOWAS	Economic Community of West African States
ECR	European Court Reports

ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
ed.	editor, edition
EDA	European Defence Agency
eds	editors
EEC	European Economic Community
e.g.	exempli gratia
EJIL	European Journal of International Law
ESDP	European Security and Defence Policy
ESIL	European Society of International Law
et al.	et alii
et seq.	et sequentes
etc.	et cetera
EU	European Union
Fla. Const.	Constitution of Florida
GAOR	General Assembly Official Records
GATT	General Agreement of Tariffs and Trade
Geo. Int'l Envtl. L. Rev.	Georgetown International Environmental Law Review
Geo. Wash. L. R.	George Washington Law Review
GNP	Gross National Product
GSP	Generalized System of Preferences
GYIL	German Yearbook of International Law
Harv. Envtl. L. Rev.	Harvard Environmental Law Review
Harv. Hum. Rts. J.	Harvard Human Rights Journal
Harv. Int'l L. J.	Harvard International Law Journal
Harv. J. Legis.	Harvard Journal on Legislature
Haw. Const.	Constitution of Hawaii
ibid.	ibidem
IBRD	International Bank for Reconstruction and Development
ICISS	International Commission on Intervention and State Sovereignty
ICJ/CIJ	International Court of Justice/Cour internationale de Justice
ICLQ	International and Comparative Law Quarterly
ICLR	International Community Law Review
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDA	International Development Association
i.e.	id est

ILC/CDI	International Law Commission/Commission du droit international
ILM	International Legal Materials
IMF	International Monetary Fund
ISAF	International Security Assistance Force
Israel L. Rev.	Israel Law Review
ITLOS/TIDM	International Tribunal for the Law of the Sea/ Tribunal international du droit de la mer
IVF	in vitro fertilisation
JACL	Journal of Armed Conflict Law
JCSL	Journal of Conflict and Security Law
J. Envtl. L. & Litig.	Journal of Environmental Law and Litigation
JIEL	Journal of International Economic Law
J. Land Use & Envtl. L.	Journal of Land Use and Environmental Law
La. Const.	Constitution of Louisiana
Law & Pol'y Int'l Bus.	Law and Policy in International Business
LDC	least developed country
Liverpool Law Rev.	Liverpool Law Review
LJIL	Leiden Journal of International Law
Loy. L. A. L. Rev.	Loyola of Los Angeles Law Review
Loy. U. Ch. L. J.	Loyola University of Chicago Law Journal
Mass. Const.	Constitution of Massachusetts
Max Planck UNYB	Max Planck Yearbook of United Nations Law
Mich. Const.	Constitution of Michigan
Mich. J. Int. L.	Michigan Journal of International Law
Mich. L. Rev.	Michigan Law Review
Mont. Const.	Constitution of Montana
MPEPIL	Max Planck Encyclopedia of Public International Law
NATO	North Atlantic Treaty Organization
N.C. Const.	Constitution of North Carolina
N.M. Const.	Constitution of New Mexico
N.Y. Const.	Constitution of New York
NYIL	Netherlands Yearbook of International Law
N.Y.U. Envtl. L. J.	New York University Environmental Law Journal
N.Y.U. J. Int'l L. & Pol.	New York University Journal of International Law and Politics
ODA	Official Development Assistance

OECD	Organisation for Economic Co-operation and Development
O. J.	Official Journal
OP	Operational Programme (GEF)
OUP	Oxford University Press
Pace Int'l L. Rev.	Pace International Law Review
Pa. Const.	Constitution of Pennsylvania
para.	paragraph
paras	paragraphs
Phil & Publ. Aff.	Philosophy and Public Affairs
RdC	Recueil des cours de l'Académie de Droit International de la Haye
R.I. Const.	Constitution of Rhode Island
SZIER/RSDIE	Schweizerische Zeitschrift für internationales und europäisches Recht/Revue suisse de droit international et de droit européen
TEC	Treaty Establishing the European Community
TEU	Treaty on the European Union
Tex. Const.	Constitution of Texas
TFEU	Treaty on the Functioning of the European Union
Tul. Envtl. L. J.	Tulane Environmental Law Journal
U.C. Davis L. Rev.	University of California at Davis Law Review
U. Chi. L. Rev.	University of Chicago Law Review
UN	United Nations
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
U.S.	United States Supreme Court Reports
U.S.C.	United States Code
USD	US dollar
Utah L. Rev.	Utah Law Review
Va. Const.	Constitution of Virginia
Vand. J. Transn'l L.	Vanderbilt Journal of Transnational Law
Wash. U. J. L. & Pol'y	Washington University Journal of Law and Policy
WEU	Western European Union

Wis. Int'l L. J.	Wisconsin International Law Journal
WTO/OMC	World Trade Organization/Organisation mondiale du commerce
Yale L. J.	Yale Law Journal
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

Opening Address

Armin von Bogdandy

Excellencies, Ladies and Gentlemen, dear colleagues, it is a great pleasure to have you at the Institute. Rüdiger Wolfrum, myself and the entire Institute are very pleased to have you here and to discuss with you the concept of solidarity as a structural principle of international law.

Please note that the title comes without a question mark. This puts us in a French tradition: As you probably know the concept of solidarity is rather young. It came up in the 19th century and it was a French sociologist, Émile Durkheim, who gave it the first scientific elaboration on basis of sociological facts. His approach was taken up by many, in particular by the law professor Léon Duguit, one of the founding fathers of modern French public law. In our context, it is useful to recall why Léon Duguit built his theory of public law on Émile Durkheim's concept.

He responded to two important challenges of his time. The first challenge was that *la Troisième République*, the French Third Republic, searched for a strong fundament of legitimacy, responding to the autocratic rule of Louis Napoleon during the Second Empire. The idea was to base the edifice of public law, so far an edifice built mainly on power, on *la puissance publique*, on a further principle and that was meant to be solidarity. This opened the path to another core concept of French public law: *le service public*.

The other reason was the antagonism with Germany. In those days when Duguit produced his seminal writings the French lead in legal scholarship was challenged by German authors. At that time, German public law, being the public law of the rather authoritarian German Empire, was based on the "will of the State" and the idea of public authority: *Über-/Unterordnungsverhältnis*. The idea of Duguit was to

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give an alternative, to develop a more democratic, a more liberal public law. By basing his teachings on solidarity and public service he gave to the system of public law a different thrust. It was this thinking that Georges Scelle brought to the international sphere. Since then it has been an important element of the international legal discourse, in particular of progressive international legal discourse. That is, very briefly, my introductory sketch of the history of the concept we study in this conference.

We now have four communications, four talks, which will last about 45 minutes, and then we will have plenty of time for discussion. We want to tap on all the knowledge and ideas which are in the room. I know that some are very critical and we are looking forward to those critiques so that we can engage into a very lively discussion on this very important topic. I think we can now start with the first talk, which is by Professor Karel Wellens from Nijmegen, who will now talk on solidarity as a structural principle of international law, once more without a question mark. So please, let us know why there is no question mark.

Revisiting Solidarity as a (Re-)Emerging Constitutional Principle: Some Further Reflections

*Karel Wellens**

Introduction

The International Court of Justice's advisory opinion on the Wall and its judgment in the case between the DRC and Uganda came too late to be included in my contribution to Ronny Macdonald's last collective volume.[1] The same goes for the Report of the High Level Group of Experts "A more secure world: our shared responsibility", the UN Secretary-General's Report "In larger freedom: towards development, security and human rights for all" and the World Summit Outcome document.

This paper contains some further reflections in light of these and other subsequent developments in both doctrine and State practice. I will first present the main features of the 2004 contribution (§ I) before turning to the principle of solidarity within the current paradigmatic debate (§ II). Revisiting the constitutional principle of solidarity will take place at both the level of primary and secondary rules (§ III). While the principle's constitutional role is still expanding (§ IV), and although it still

* A disclaimer applies. I try to be a general international lawyer. I can neither claim to have any special expertise in any of the branches I may refer to nor can I bring the pragmatic judgment of a practitioner.

1 K. Wellens, "Solidarity as a Constitutional Principle: Its Expanding Role and Inherent Limitations", in: R. St. J. Macdonald/D. M. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, 2005, 775 et seq.

R. Wolfrum and C. Kojima (eds.), *Solidarity: A Structural Principle of International Law*, 3
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has to face important challenges (§ V), we can already recognise its impact on the changing structure of international law (§ VI).

I. The Main Features of the 2004 Contribution

The 2004 contribution was intended to throw some light on what Bardo Fassbender called the "fog of the indistinct constitutional rhetoric".[2] I did not present a mere "house of cards" but neither was I an "idealist masquerading as a realist".[3]

40 years ago, Michel Virally laid the conceptual foundation for the subsequent evolution and development of solidarity: first as a notion, then as a political and finally as a legal principle of international law.[4] The principle has played a dual role: responding to dangers or events (*negative solidarity*) and creating joint rights and obligations (*positive solidarity*). In various branches of international law it has reached different stages of development.

I have tried to demonstrate how the universal value of solidarity has already been integrated into norms of positive international law. With regard to the principle's "*substantive*" mode, international human rights, international humanitarian law, disaster and refugee law, and development law constitute the natural habitat for the creation of, admittedly sometimes imperfect, solidarist primary rules. In international environmental law the two core elements of the notion of sustainable development – common but differentiated responsibilities and intergenerational equity – have been powerful tools towards further development and clarification of the principle of solidarity. We can find the highest degree of constitutionalisation of the principle of solidarity in the UN Charter provisions on the maintenance of international peace and security.

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[2] B. Fassbender, "The Meaning of International Constitutional Law", in: Macdonald/Johnston (eds), see note 1, 837 et seq. (848).

[3] K. Zobel, "Judge Alejandro Alvarez at the International Court of Justice (1946-1955): His Theory of a 'New International Law' and Judicial Lawmaking", *LJIL* 19 (2006), 1017 et seq. (1038), referring to critical remarks made towards Alvarez by contemporary scholars 50 years ago.

[4] M. Virally, "Le rôle des 'principes' dans le développement du droit international", in: M. Batelli/P. Guggenheim (eds), *Recueil d'études de droit international en hommage à Paul Guggenheim*, 1968, 531 et seq. (542-543).

In its *procedural* mode, the principle's focus is on secondary rules. Differentiated responsibilities were found to exist in international environmental and international trade law. We also examined the relevant articles on State responsibility through the prism of solidarity. Because the principle of solidarity is operating across various branches of international law and it has permeated both primary and secondary rules, thereby protecting fundamental values of the international community, it is endowed with constitutional status.

II. The Principle of Solidarity within the Paradigmatic Debate

A. The Rediscovery of the Ethical and Religious Foundations of Public International Law

Solidarity is because of its nature rightly referred to as "a value-driven principle"[5] with "a strong ethical underpinning".[6] It is always good to articulate the often unconscious ethical underpinnings of one's approach towards international law. The "introduction of ethical and moral concerns into the international legal system takes place for the first time in an overt manner"[7]: at least in modern times.

In his often quoted, 350 years old passage Emer de Vattel was referring to a moral duty of solidarity not giving rise to rights of affected States but merely to legitimate expectations.[8] In his famous monograph, *La*

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5 A. Peters, "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and structures", *LJIL* 19 (2006), 579 et seq. (601).

6 E. de Wet, "The emergence of International and Regional Value Systems as a Manifestation of the emerging International Constitutional Order", *LJIL* 19 (2006), 611et seq. (612).

7 A. Bianchi, "Human Rights and the Magic of Jus Cogens", *EJIL* 19 (2008), 491 et seq. (495).

8 O. Kimminich, "Die Genfer Flüchtlingskonvention als Ausdruck globaler Solidarität", *AdV* 29 (1991), 261 et seq. (265); the passage reads: "…when the occasion arises, every Nation should give its aid to further the advancement of other Nations and save them from disaster and ruin, so far as it can do so without running too great a risk…if a Nation is suffering from famine, all those who have provisions to spare should assist in need, without, however, exposing themselves to scarcity…To give assistance in such dire straits is so instinctive an

codification du droit international, published in 1912, Judge Alejandro Alvarez had already made clear that States "had to behave in a more co-operative manner, based on solidarity".[9] The "notions of solidarity and the interdependence of states were the cornerstones of his theory", and later also transpired in his judicial work.[10] Emmanuelle Jouannet rightly pointed out that the incarnation of moral values into the law "means that the boundaries between law and morality are becoming more difficult to discern".[11]

The ethical dimension of solidarity as a *fundamental value* and as a *principle enshrined in the Charter itself* has in recent times also been articulated by the General Assembly of the United Nations.[12]

Chairing a most interesting forum on "International Law and Religions" during the recent ESIL Conference held in this city, Joseph Weiler observed that religious sensibility – with its emphasis on obligations –

act of humanity that hardly any civilized Nation is to be found which would refuse absolutely to do so…Whatever be the calamity affecting a Nation, the same help is due to it" as cited by Special Rapporteur Eduardo Valencia-Ospina, in his *Preliminary Report on the Protection of Persons in the Event of Disasters*, Doc. A/CN.4/598 of 5 May 2008, para. 14.

9 Zobel, see note 3, 1020.

10 Ibid., 1020, 1032.

11 E. Jouannet, "What is the Use of International Law? International Law as a 21st Century Guardian of Welfare", *Mich. J. Int. L.* 28 (2008), 815 et seq. (820); on the relationship between ethical values and the international community see also Santiago Villalpando, *L'émergence de la communauté internationale dans la responsabilité des Etats*, 2005, 64 et seq.

12 A/RES/59/193 of 18 March 2005 on the Promotion of a democratic and equitable international order; such an order requires the realisation also of "§ 4 (f) Solidarity, *as a fundamental value* (emphasis added), by virtue of which global challenges must be managed in a way that distributes costs and burdens fairly, in accordance with basic principles of equity and social justice, and ensures that those who suffer or benefit the least receive help from those who benefit the most;" moreover, "§ 4 (o) The shared responsibility of the nations of the world for managing worldwide economic and social development as well as threats to international peace and security that should be exercised multilaterally"; see also A/RES/59/204 of 23 March 2004 on the Respect for the purposes and principles contained in the Charter of the United Nations to achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms and in solving international problems of a humanitarian character, fifth preambular paragraph and para. 4; both resolutions were adopted on 20 December 2004.

has been lost in the secularisation of law, where rights are at the forefront.[13]

The principle of solidarity is capable of bridging these two approaches, provided that solidarity rights are only labelled as such in "situations where there are obligations on *both* sides".[14] Solidarity is one of the multifunctional, constituent elements of the concept of justice in public international law.

B. The Distinction between the "International Society" and the "International Community"

This distinction gradually[15] entered into the doctrinal debate and also, but rather slowly, into the practice of States through the adoption of various General Assembly resolutions. The normative[16] distinction runs along criteria of objectives, membership and the way they operate.

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[13] During the presentations and the ensuing debate the focus was on the recovery of the ethical and religious foundations of public international law. Differences between catholic (community oriented) and protestant (individual responsibility) approaches were highlighted.

[14] Wellens, see note 1, 807 and the reference in note 344 to R. Macdonald.

[15] For an in-depth historical overview of the concept of the international community as a whole see P-M. Dupuy, "La communauté internationale. Une fiction?", in: O. Corten/J. Salmon (eds), *Droit du pouvoir, pouvoir du droit. Mélanges offerts à Jean Salmon*, 2007, 373 et seq. (376-385); for the most recent and clear overview of the normative distinction between international society and international community see R. Buchan, "A Clash of Normativities: International Society and International Community", *ICLR* 10 (2008), 3 et seq. [hereafter Buchan(i)]; see also by the same author, "International Community and the Occupation of Iraq", *JCSL* 12 (2007), 37 et seq. [hereafter Buchan(ii)], (42). The two articles are complementary, the last one dealing with the *ius ad bellum* with regard to Iraq, the first one addressing the *ius post bellum*.

[16] Many contemporary writers are using the "concept" of international community as a "descriptive tool" (R. Buchan(i), see above, 25; for "interpretative purposes" I. de la Rasilla del Moral, "*Nihil Novum Sub Sole* since the South West Africa Cases? On *ius standi*, the ICJ and Community Interests", *ICLR* 10 (2008), 171 et seq. (182). Buchan, in his first article, refers to "international community as also "imagined" in the sense that liberal societies bond their own identities to this association because its aggregation of members embraces a common normative standard which thus inspires a sense of belonging and solidarity…" (Buchan(ii), see above, 48; but see his corrective footnote 68). Dupuy

The objective of the *international society* is "to maintain international peace and security, to eliminate interstate conflict by locking all states into a regulatory framework that is premised upon reciprocated respect and mutual non-interference".[17] It is "a normative association to which all states belong"[18] and it is institutionalised in the UN Charter.[19]

On the other hand, the *international community* whose "ultimate objection of protection is the autonomy of each individual" [20] possesses "a distinct international identity" and "admission is conferred *only* to those states of the world whose government demonstrates respect for liberal democracy".[21] It is not institutionalised as it exists informally and in abstraction only.[22] The distinction between the two is inevitably reflected in the way they operate: whereas the "international society becomes characterised by its division, disagreement and ultimate inaction, [the] international community responds purposively with solidarity and single mindedness".[23] Already back in 1993 Christian Tomuschat in his Hague lectures pointed out that "the constitution of the international community" is a term "suitable to indicate a closer union than between members of a society".[24]

The common feature of various definitions used is that "la communauté internationale se caractérise par un degré de cohésion particulier qui découle de la solidarité des membres du groupe social dans la sauvegarde de certains intérêts identiques collectifs".[25]

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has convincingly argued that "the international community as a whole" is "*la fiction d'une solidarité universelle affirmée a priori, pour inciter les états à agir comme si elle existait vraiment*", see above, 396.

[17] Buchan(i), see note 15, 4.

[18] Ibid., 9.

[19] Ibid., 16.

[20] Ibid., 14.

[21] Ibid., 5.

[22] Ibid., 16; Constitutionalism will act as a normative framework for that international community; see further para. 3.

[23] Buchan(ii), see note 15, 50.

[24] C. Tomuschat, "Obligations Arising for States without or against Their Will", *RdC* No. 241 (211).

[25] Villalpando, see note 11, 26; see also Dupuy, note 15, 392; "... *l'affirmation d'une solidarité sociale fondée sur une communauté de valeurs et d'intérêts*

However, there is not as yet an international legal obligation to install or to have a democratic government; although being a democratic State under the rule of law has gradually become a requirement to be considered as a legitimate member of the international community.[26] In case a community is not ensuring fundamental values, sovereignty might be removed as reflected in the notion of the responsibility to protect, to be touched upon later.

There is "an ever-increasing consolidation of the notion of international community and its foundational normative tenets, such as *jus cogens* and obligations *erga omnes*...",[27] leading to a "growing paradigmatic role played by the notion of community interests in international law".[28]

C. The Constitutionalist School

The process of *constitutionalisation* which is "not intrinsically good, but is instrumental to the achievement of other values"[29] has to be viewed "as part of a wider tendency which has characterised modern international law for at least a century".[30] It is best viewed as a "continuing process of the emergence, creation, and identification of constitution-like elements in the international legal order".[31] The current trend towards the constitutionalisation of the international legal order had become inevitable as a result of the irreversible humanisation of international law.

The *constitutional approach towards international law* situates itself at what Judge Simma, in his Keynote address to the ESIL, called the third

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partagée par les Etats de la planète et, au-delà, par les peuples, mais aussi par chaque personne humaine qui les compose".

[26] See further in this regard "*L'Etat de droit en droit international*", Colloque de Bruxelles, 5, 6 et 7 juin 2008, de la Société Française pour le Droit International, proceedings forthcoming.

[27] Bianchi, see note 7, 494.

[28] De la Rasilla del Moral, see note 16, 171-172.

[29] J. Trachtman, "The Constitutions of the WTO", *EJIL* 17 (2006), 623 et seq. (630).

[30] Jouannet, see note 11, 816.

[31] Peters, see note 5, 582.

level of universality.[32] Quite a number of prominent representatives of this school of thought are present here today.[33]

Constitutionalism has not merely a descriptive element but also a prescriptive one as it seeks to provide arguments for further development of international relations in a specific direction.[34] One of the leading ladies of this school has succinctly described constitutionalism as "a strand of thought (an outlook or a perspective) and a political agenda which advocate the application of constitutional principles in the international legal sphere in order to improve the effectivity and the fairness of the international legal order".[35] We can discern various strands in the debate over constitutionalism: how to identify the values and the principles protecting them, what is their mutual relationship, and how to enforce them? In her presentation to a conference on "The Dynamics of Constitutionalism in the Age of Globalisation" held in The Hague last May, the other leading lady of this school, Erika de Wet, considered the rediscovery of values and principles limited and still fragile: this situation possibly giving rise to questions of legitimacy. In my view doubts about legitimacy are not so much based on an alleged lack of "demos" or lack of consensus over the values, but on a partly well-founded fear about the mechanisms for their enforcement.

At the end of a three year international research project under the direction of Professor Komori an international conference was held in November 2007. There we have tried to examine the effectiveness of the processes that have been put in place in various branches of international law to implement rules that are protecting public interests of the international community.[36]

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[32] "Universality of International Law from the Perspective of a Practitioner", during the Third Conference of the European Society of International Law, held at Heidelberg, 4-6 September 2008, proceedings forthcoming.

[33] On the German contribution to the constitutional debate within the community of international lawyers see S. Kadelbach/T. Kleinlein, "International Law as a Constitution for Mankind? An Attempt at a Re-Appraisal with an Analysis of Constitutional Principles", *GYIL* 50 (2007), 303 et seq.; a new OUP publication on Constitutionalism in the International Legal Order by A. Peters, J. Klabbers and G. Ulfstein is forthcoming.

[34] Peters, see note 5, 583.

[35] Ibid., 608 et seq.

[36] See further T. Komori/K. Wellens (eds), *Effective Protection of Public Interests of the International Community*, forthcoming.

My contribution to Macdonald's collective volume and also this presentation are based on a constitutionalist *Vorverständnis*[37] as I consider the principle of solidarity to perform a constitutional function in the international legal order.

D. The Responsibility to Protect as an Expression of a New Paradigm?

I will not really trespass here on the domestic jurisdiction of Professor Laurence Boisson de Chazournes or Professor Dinah Shelton but I may have to touch upon it.

In recent years international lawyers have devoted quite some time to addressing the fundamental issue of a change of paradigm in their discipline.[38] The responsibility to protect "est au cœur de l'évolution de la société internationale dans le XXIème siècle".[39] There is no need to go into the genesis of this novel concept.[40]

In the Memorandum on Protection of Persons in the Event of Disasters prepared by the UN Secretariat it has been succinctly observed that "protection is a concept which takes on different meanings in different contexts, and there is no definition appropriate to all situations".[41] Accordingly the responsibility to protect will take different shapes and modes of application throughout the international legal order: it will operate differently in situations of gross violations of human rights

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[37] Peters, see note 5, 606.

[38] See for instance Y. Sandoz (ed.), *Quel droit international pour le 21ème Siècle? Rapport introductif et actes du colloque international organisé avec le soutien du Département Fédéral des Affaires Étrangères, Neuchâtel, 6-7 mai 2005*, 2007.

[39] Préface par J-P. Cot, *La responsabilité de protéger, colloque de Nanterre, Société Française pour le Droit International*, 2008, 3 et seq. (5).

[40] See for instance J-M. Thouvenin, "Genèse de l'idée de responsabilité de protéger", in: Cot (ed.), see above, 22 et seq.

[41] *Protection of Persons in the Event of Disasters. Memorandum prepared by the Secretariat*, Doc. A/CN.4/590, 11 December 2007, para. 251.

compared with cases when States and the international community are facing pandemics.[42]

Moreover, it is important to make the distinction between "responsibility *sensu lato*", to be defined as a "duty to protect" and "responsibility *sensu stricto*" which is dealing with the legal consequences of failing that duty.[43]

The International Court of Justice still bases itself on conventional obligations when it has to deal with situations where the responsibility to protect is at stake. The Wall Opinion (obligation to protect the human rights in Palestine)[44] and the Judgment in the Bosnian Genocide case (on the duty to prevent genocide)[45] are cases in point.

Although the source of the responsibility to protect is the sovereignty of States,[46] international lawyers are still in disagreement whether the concept has already led to an evolution of the notion of sovereignty.

My view is that the growing recognition of the responsibility to protect in both, State practice and doctrine, constitutes the penultimate stage of the irreversible humanisation of international law. Admittedly the institutional, operational aspect is still more than defective but this does not necessarily turn the concept itself into "*kitsch*".

The responsibility to protect is gradually starting its role across various branches of the international legal order and as such it is the first major articulation *on a global level* of the constitutional principle of solidarity. The major challenge for the international legal order is now to put flesh to the bone of the responsibility to protect, as an outcome of the confrontation between the value of solidarity and sovereign egoism.[47] It is only then that the paradigm shift will become reality. Indeed, in order to be real, individual rights require a corollary collective obligation on the international community as a whole, coupled with a subsidiary duty on all States: this is the core of the responsibility to protect.

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[42] See for instance "Table ronde. Une responsabilité de protéger face aux pandémies? Le rôle des Etats, des organisations internationales et des acteurs non-étatiques", in: Cot (ed.), see note 39, 59 et seq.

[43] G. Gaja, "Introduction", in: Cot (ed.), see note 39, 87 et seq. (88).

[44] Thouvenin, see note 40, 32.

[45] M. Bothe, "Introduction", in: Cot (ed.), see note 39, 17 et seq. (17).

[46] Thouvenin, see note 40, 30.

[47] P. Daillier, "La 'Responsabilité de protéger' corollaire ou remise en cause de la souveraineté. Rapport général", in: Cot (ed.), see note 39, 41 et seq. (43).

III. Revisiting the Constitutional Principle of Solidarity

Professor Wolfrum has succinctly observed that "the principle of solidarity reflects the transformation of international law into a value based international legal order".[48] He also rightly pointed out that solidarity is a multifunctional principle and provided us with a useful tool to assess the principle's *modus operandi* in more detail.[49] We can indeed identify a different role for the principle in various branches of international law. In the UN law on the maintenance of international peace and security and in international humanitarian law (the obligation to ensure respect) solidarity operates as an instrument to achieve common objectives through the imposition of common obligations. In international environmental law, international development law (the topic of Dr. Philipp Dann's contribution) and to some extent in international trade law (through the GSP system) solidarity is instrumental in achieving common objectives through differentiated obligations. In international disaster law and, for instance, in Articles 49 and 50 of the UN Charter solidarity is used for actions to benefit particular States.[50]

There is no need to revisit the various branches dealt with in my previous contribution on the subject. I have only singled out international disaster law where the process of elaboration of relevant rights and obligations has been going on for 15 years now. Significant developments in other branches at the level of primary rules will be briefly touched upon in passing when we discuss their secondary rules. The *procedural or operational* and *substantive or normative* elements of the solidarity on which The High-Level Panel's "conception of a new security consensus rests"[51] do correspond to the distinction between secondary and primary rules.

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[48] R. Wolfrum, "Solidarity amongst States: An Emerging Structural Principle of International Law", in: P.-M. Dupuy (ed.), *Völkerrecht als Weltordnung. Festschrift für Christian Tomuschat*, 2006, 1087 et seq. (1087).

[49] Ibid., 1087 et seq.

[50] It is in fact only with regard to its second and third role that the principle of solidarity becomes operational in case of a State's failure to meet a particular challenge, thus working in tandem with the principle of subsidiarity.

[51] A-M. Slaughter, "Security, Solidarity and Sovereignty: The Grand Themes of UN Reform", *AJIL* 99 (2005), 619 et seq. (625); Buchan(i), see note 15, 20.

A. The Further Elaboration of Primary Rules in International Disaster Law

The 2001 Report of the International Commission on Intervention and Sovereignty of States had already considered natural disasters as potentially coming within the scope of application of the responsibility to protect, whereas the 2005 World Summit Outcome document did not mention this category of situations.[52] It is only gradually that the focus of the debate on the responsibility to protect also includes the right/duty to provide emergency humanitarian assistance in situations of natural disasters.[53]

Serious efforts are (being) made to articulate the norms, rights and obligations flowing from the predominant role the principle of solidarity inevitably has to play in these situations, both by the Institute of International Law and more recently by the International Law Commission.[54] The elaboration of the principle of solidarity has given rise to three separate but interconnected rights: the right to receive assistance, the right to offer it, and the right of access to the victims. Further, the debate mainly focused on the alleged existence of corresponding obligations to provide assistance and, for affected parties, not to refuse out of hand *bona fide* offers and to facilitate access to the victims.

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[52] Initially the emphasis in the debate on the responsibility to protect was almost exclusively on the right/duty of humanitarian intervention. See for instance P. Hilpold, "The Duty to Protect and the Reform of the United Nations – A New Step in the Development of International Law?", *Max Planck UNYB* 10 (2006), 35 et seq.

[53] See for instance L. Boisson de Chazournes "Présentation. Atelier 1. Responsabilité de protéger et catastrophes naturelles: l'émergence d'un régime?", in: Cot (ed.), see note 39, 149 et seq.; on the evolution of the position of the UN with regard to humanitarian assistance see *inter alia* A-L. Brugère, "Le droit international de l'assistance humanitaire en cas de catastrophes naturelles", in: ibid., 169 et seq.

[54] Whether the ILC's treatment of protection of persons in the event of disasters situates itself squarely within the responsibility to protect, is, at the preliminary stage of its work, rather unclear, also given the Special Rapporteur's position that extension of the responsibility to protect to the topic requires "careful consideration", *Preliminary Report*, see note 8, para. 55.

1. The Quality and Status of the Rules

The current state of international disaster law has recently been aptly described by the UN Secretariat. There is no generalised multilateral treaty on the topic, while various non-binding instruments "constitute the central elements of an expanding regulatory framework".[55]

International natural disaster regulation consists of a mixture of moral duties and legal obligations, a fact clearly demonstrated in the Secretariat's Memorandum[56] and also recognised within the ILC.[57] Also the rules discussed by the 16th Commission of the Institute of International Law "vary from *ius cogens* to *soft law* and from *lex lata* to *lex ferenda*".[58]

There is "a considerable number of soft law and non-legal pronouncements"[59] where, at present, the more solidarist rights and obligations with regard to humanitarian assistance are to be found.[60]

In its Resolution,[61] adopted at its Bruges session in 2004, after a decade of debate, the Institute of International Law noted that great disasters are a "matter of concern for the international community as a whole" (third preambular paragraph). Both international human rights and international humanitarian law should be further developed *inter alia* to mitigate human suffering caused by disasters (final preambular para-

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55 *Memorandum prepared by the Secretariat*, see note 41, 1.

56 See in particular Addendum/ 1 to the Memorandum: Doc. A/CN.4/590/Add.1 of 26 February 2008.

57 The ILC's exercise "was likely to be based more on *lex ferenda* than on *lex lata*. […] There were certain legal rights and duties which may be accepted as such in a legal instrument emerging from the Commission. At the same time, there were also moral rights and duties to be recommended *de lege ferenda*", Doc. A/63/10, *Report of the International Law Commission on its 60th Session*, Chapter IX, para. 251.

58 B. Vukas, Rapporteur, in: *AIDI* 70-2 (2004), 134 et seq. (150).

59 Special Rapporteur Eduardo Valencia-Ospina, *Preliminary Report*, note 8, para. 31.

60 *Memorandum prepared by the Secretariat*, see note 41, paras 62, 11, 258.

61 According to Rapporteur Vukas a text hardly resembling the first draft text: see note 58, 147.

graph),[62] thus illustrating once more the cross-branches operation of the principle of solidarity.

As existing international human rights obligations are at the heart of the protection needed,[63] the Special Rapporteur, Mr. Eduardo Valencia-Ospina, in his Preliminary Report follows a rights-based approach, in line with the title of the ILC's topic.[64]

2. The Primary Responsibility of the Affected State and its Duty to Seek Assistance

The primary responsibility of the affected State, affirmed by the UN General Assembly a long time ago,[65] entails a duty to take care of the victims in its territory[66] and, if need be, to seek external assistance.[67] The primary role of the affected State and the subsidiary role of other actors were also stressed within the ILC "as part of an overarching umbrella of international cooperation and solidarity".[68] Hence, the right of States and organisations to offer and provide humanitarian assistance is subject to the consent of the affected State.[69]

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[62] Resolution adopted by the Institute of International Law, *AIDI* 70-2 (2004), 262 et seq.

[63] *Memorandum prepared by the Secretariat*, see note 41, 3.

[64] *Preliminary Report*, see note 8, para. 12.

[65] See also recently General Assembly: A/RES/59/141, Strengthening of the Coordination of Emergency Humanitarian Assistance of the United Nations, adopted on 15 December 2004; A/RES/59/212, International Cooperation on Humanitarian Assistance in the Field of Natural Disasters, from Relief to Development, adopted on 20 December 2004, and most recently A/RES/62/94 adopted on 17 December 2007.

[66] See note 62, III, 1.

[67] Ibid., III, 3. In its Memorandum the UN Secretariat merely acknowledges "[a trend] towards greater recognition of a positive duty", *Memorandum prepared by the Secretariat*, see note 41, para. 57, referring to the resolution of the Institute of International Law and to the 2007 International Conference of the Red Cross and Red Crescent Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and initial Recovery Assistance, art. 3(2).

[68] Doc. A/63/10, *Report of the International Law Commission on its 60th Session*, para. 231.

[69] See note 62, IV, 2.

3. The Right to Receive Assistance and the Obligation to Provide It

The potential existence of a specific right to receive assistance within general international disaster law was considered by the UN Secretariat to be "a complex question" because existing positive law remains unclear and the doctrine is clearly divided.[70] "While references to a right to humanitarian assistance are virtually non-existent in multilateral treaties, it is included in various non-binding texts",[71] a fact also acknowledged by the ILC's Special Rapporteur.[72] "At most", he adds, "it could be said to be implicit in international human rights law".[73]

The Resolution of the Institute of International Law points out that leaving victims without assistance constitutes a violation of fundamental human rights.[74] Compared with the draft resolution, the following has to be noted: while the right for victims to request and receive assistance has become a mere "entitlement",[75] the obligation of the affected State to seek assistance has been maintained. As the right to claim assistance was only *vis-à-vis* the territorial State, it is to be considered an "imperfect right".[76]

The recognition of the existence, *de lege ferenda*, of a right *erga omnes* of victims to be assisted and a corresponding universal obligation *erga omnes* for States to provide assistance, as originally proposed by the first Rapporteur[77] did not survive. In this regard the UN Secretariat rightly observed: "Notwithstanding assertions of the existence of a generalised "right to humanitarian assistance", such position, to the extent that it imposes a "duty" (as opposed to a "right") on the international

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[70] See note 41, para. 257 and notes 793-795.

[71] Ibid., para. 258.

[72] "[I]t appears that no legal instruments explicitly acknowledges the existence" of a right to humanitarian assistance, see note 8, para. 54.

[73] Ibid.

[74] See note 62, II, 1.

[75] Ibid., II, 2.

[76] See the exchange of views between R. Müllerson and A. Cassese, *AIDI* 70-2, 155 and 164. Also some other members would have liked more emphasis on the solidarity the international community should display (Ranjeva, ibid., 158), and on the exercise of a "*fonction publique internationale*" by third States providing assistance (Picone, ibid., 171), to the extent that providing humanitarian assistance "was a duty, not just a right" (El-Kosheri, ibid., 160 et seq.).

[77] Wellens, see note 1, 786, note 75.

community to provide assistance is not yet definitively maintained as a matter of positive law at the global level".[78]

4. The Right to Offer and Provide Assistance and the Prohibition of Arbitrary Refusal

States and organisations have a right to offer humanitarian assistance.[79] Its exclusive humanitarian character would prevent such an offer to be considered as an unlawful interference in the internal affairs of the affected State.[80]

The affected State is under an obligation not arbitrarily or unjustifiably to reject *bona fide* offers to humanitarian assistance.[81] This obligation for the affected State is the corollary of the duty of third States to offer and provide humanitarian assistance, thus giving expression to a perfect balance of solidarity as formulated by Ronny Macdonald.[82] Here, the principle of solidarity prevents an abuse of right by an affected party. If the prohibition to refuse was indeed *erga omnes*, then as Giorgio Gaja pointed out, any State was "entitled to invoke the affected State's international responsibility".[83]

The possibility, as provided for in the draft resolution, for third States in case of such a refusal to take (counter) measures did not survive the final discussion in favour of collective action by UN bodies.[84]

5. The Right of Access to the Victims and the Obligation to Facilitate It

All States, including the affected State, have a duty to cooperate, and to facilitate humanitarian assistance,[85] as modalities to implement the principle of solidarity.

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[78] See note 41, para. 61.

[79] "A more definitive obligation also exists in the context of the responsibilities of international organisations", see note 41, para. 63.

[80] See note 62, IV, 1.

[81] Ibid., VII, 1.

[82] Wellens, see note 1, 807.

[83] See note 76, 161; Verhoeven, ibid., 178.

[84] See note 62, VII, 2, 3. In the *Memorandum prepared by the Secretariat*, the suggestion that consent should not arbitrarily be withheld is linked to the obligation to request assistance: see note 41, para. 65.

Although humanitarian efforts are predicated *inter alia* on the principle of solidarity,[86] from this perspective, the final text adopted by the Institute of International Law clearly falls short of what could have been realised, given the imperfect balance between rights and obligations for all parties concerned.

B. Further Reflections on Secondary Rules in Some Branches

With regard to the law of treaties, it suffices here to recall that the "duty of a state not to defeat the object and purpose of a treaty which it has signed or approved (though not yet ratified or become a party thereto) represents a duty of solidarity to other States Parties. It also represents a duty of collective solidarity to the international collectivity of States and to the institutional framework created by the treaty".[87] Moreover when article 53 of the Vienna Convention on the Law of Treaties is referring to the international community as a whole it means in fact the international society but "déjà transcendée par la perception qu'ont ses membres d'une commune appartenance sinon toujours d'un devoir de solidarité".[88] We will deal with the general law on State responsibility in section 3 below.

1. International Humanitarian Law

Referring to international case law the ICRC Study on customary international humanitarian law reminded us that legal obligations of a humanitarian nature do not depend on reciprocity in neither category

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[85] See note 62, VI, VII. Facilitating implies the removal of legal and administrative obstacles: K. Beeckman/A. Miron, "Règles, lois et principes applicables aux actions internationaux en cas de catastrophes: les récentes initiatives", see note 39, 161 et seq. (166). Establishing an appropriate legal framework at the domestic level has been considered as one of the priorities in the Hyogo Framework Programme for Action, 2005-2015, adopted at the World Conference on Disaster Reduction, 18-22 January 2005, Kobe, Hyogo, Japan.

[86] A/63/10, *Report of the International Law Commission on its 60th Session*, 320, para. 241.

[87] R. St. J. Macdonald, "The International Community as a Legal Community", in: Macdonald/Johnston (eds), see note 1, 853 et seq. (871).

[88] Dupuy, see note 15, 377.

of armed conflicts.[89] The Study also made it clear that the prohibition of starvation of the civilian population, the duty to allow and facilitate rapid and unimpeded passage of humanitarian relief for victims in need are norms of customary international law, while there is practice recognising the right of the civilian population to receive humanitarian relief.[90]

Legal obligations of a humanitarian nature do not depend on reciprocity in neither of both categories of armed conflicts.[91] The duty in article 1 of the Geneva Conventions "to ensure respect" is an expression of a solidarity obligation.[92]

The *erga omnes* character of the humanitarian obligations gives every State "the right (unilaterally or in cooperation with other States) to ensure their observation in relation to every other member of the international community…".[93]

In judicial practice divergent views are being held on the extent of the impact of the *erga omnes* character of this obligation. Are there any additional individual duties for States?[94] Has the obligation a limited[95] or universal scope of application?[96] Do States Parties in the performance of their duty to raise violations, have *locus standi*, irrespective of the victims possessing the nationality of the claimant State?[97]

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[89] J-M. Henckaerts/L. Doswald-Beck, *Customary International Law*, 2005, Vol. I (499).

[90] Ibid., 186, 194 and 199.

[91] Ibid., 499 referring to international case law.

[92] In my 2004 contribution it was only briefly mentioned in note 183, as relevant international judicial practise was not available at the time of writing in the spring of 2004, see note 1.

[93] T. Rensmann, "Die Humanisierung des Völkerechts durch das *ius in bello* – Von der Martens'schen Klausel zur '*Responsibility to Protect*' – ", *ZaöRV* 68 (2008), 111 et seq. (128).

[94] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004, 136 et seq.; Separate Opinion of Judge Kooijmans, 219 et seq. (231, para. 41); Separate Opinion of Judge Higgins, 207 et seq. (216, para. 37).

[95] Ibid., 233, para. 47.

[96] Ibid., 217, para 39.

[97] *Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, 168 et seq.; Separate Opinion of Judge Simma, 336 et seq. (346-347), paras 33-34. The ICRC Study, while rec-

Dieter Fleck rightly observed that the study did not address the issue of the scope of the obligation towards other States,[98] neither the "[m]ilitary, economic and political consequences of violations".[99] Instead, Rule 144 of the study states that the "obligation to stop violations" is "limited to an admonition that states should exert their influence, to the extent possible", whereas State practice provides relevant examples "ranging from monitoring activities and diplomatic measures to specific actions aimed at stopping violations and providing assistance to victims".[100]

I agree with Rensmann that "the revolutionary feature of common Article 1 lies in the fact that it stipulates a corresponding duty, making it the first positive expression of what is traded today under the label of the 'responsibility to protect'".[101] From the perspective of the principle of solidarity Article 1 is a perfect example of the necessary balance between rights and obligations as envisaged by Ronny Macdonald.

2. *International Trade Law*

The 2001 Doha Declaration conceded that "international trade *can* play a major role in the promotion of economic development and the alleviation of poverty". It is correct to say that the WTO "is an engine for creating global wealth", but it is also correct to observe that it has "not yet confronted directly questions regarding the global distribution of its benefits".[102] Before returning briefly to secondary rules, we have to recall two important features of the primary rules.

As a structural principle solidarity still has a long way to go within the WTO, although its substantive component has from the outset found

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ognising the customary nature of the obligation, in both categories of armed conflict, clearly takes the view that its scope is limited to a party's own armed forces, and other persons acting on its instructions, or under its direction or control: Henckaerts/Doswald-Beck, see note 89, 496.

[98] D. Fleck, "International Accountability for Violations of the *Ius in Bello:* the Impact of the ICRC Study on Customary International humanitarian Law", *JCSL* 10 (2006), 179 et seq. (182).

[99] Ibid., 188.

[100] Ibid., 186 and 182.

[101] Rensmann, see note 93, 128. Also Fleck makes the connection with responsibility to protect, see note 98, 182.

[102] Trachtman, see note 29, 641.

its expression in the most-favoured-nation clause. The most-favoured-nation clause is a *permanent* expression of solidarity at the level of primary rules,[103] while special and differential treatment, accorded to developing countries by other Members, as another expression of the principle of solidarity, is "of a transitory nature" as it is only a "*temporary* derogation from the key principle of non-discrimination in the WTO".[104] Although the general system of preferences (GSP) itself "may be seen to result from an altruistic concern for the less fortunate",[105] the potential scope of application of the solidarity principle gave rise to a difference of opinion between the Panel and the Appellate Body. India was successful in convincing the Panel but failed at the level of the AB in the EC Preferences case. The WTO was thus indirectly confronted with the distributive aspect of solidarity.[106]

Suffice it to say for the moment that while "the GSP is inherently a 'unilateral' trade instrument, any conditionality should reflect a genuine 'partnership for development'".[107]

3. Revisiting the General Law on State Responsibility

It is not surprising that in recent years the principle of solidarity has become a recurring theme in both doctrinal writings and judicial practice dealing within the general State responsibility regime.[108]

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[103] Also Wolfrum, see note 48, 1097.

[104] Mitchell, "A legal principle of special and differential treatment for WTO disputes", *World Trade Review* 5 (2006), 445 et seq. (446, 451 and 469).

[105] G. Grosmann/A. Skyes, "A preference for development: the law and economics of GSP", *World Trade Review* 4 (2005), 41 et seq. (67).

[106] WTO law experts disagree as to whether the AB was saying that there is no obligation to address the needs of developing countries: see for instance "Internet roundtable. The Appellate Body's GSP decision", *World Trade Review* 3 (2004), 239 et seq. On the question whether the GSP+ Arrangement complies with the AB's interpretation of the Enabling clause see L. Bartels, "The WTO legality of the EU's GSP+ Arrangement", *JIEL* 10 (2007), 869 et seq. See also S. Switzer, "Environmental protection and the generalized system of preferences: a legal and appropriate linkage", *ICLQ* 57 (2008), 113 et seq.

[107] Switzer, see note 106 (147).

[108] See for instance A. Nissel, "The ILC Articles on State Responsibility: between Self-Help and solidarity", *N.Y.U. J. Int'l L. & Pol* 38 (2005-2006), 355 et seq.

A distinction can be drawn here between aspects of active *solidarity* when third States come to the rescue of injured States in order to help them to bring about the consequences from State responsibility they have invoked[109] and *passive solidarity* when there is plurality of responsible States that have to face the invocation and the consequences of their responsibility for wrongful acts committed.[110]

In 2004 I have already observed that the solidarity that gave rise to the creation of primary rules has been transported in an almost evident way to situations of their violation.

(i) The *Active Side of Solidarity*: Plurality of States Invoking Responsibility

Within the sphere of *active solidarity*, a doctrine has made a further distinction between *solidarity stricto sensu* – based on the so-called auxiliary rights of ILC articles 42(b)(ii) and 48(1)(a) on State responsibility – and *solidarity sensu lato* – based on original rights of articles 48(2) and 54.[111]

With regard to obligations *erga omnes* Ignacio de la Rasilla del Moral has rightly observed that their characteristic features – universality and solidarity – are correlated.[112] That is why article 48 did recognise "an automatic right to protection which any state could invoke in the general interest",[113] thus giving expression to solidarity by way of a qualified balance between rights and obligations. But it has to be recalled of course that where the initial proposals by the Special Rapporteur instituted a general right of solidarity, the final version of the articles has considerably reduced the possibilities for States to enforce serious vio-

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[109] See in this regard the thorough analysis by M. Dawidowicz, "Public Law Enforcement without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and their Relationship to the UN Security Council", *BYIL* 57 (2006), 333 et seq.

[110] With regard to plurality of responsible States see a fascinating analysis of the solidarity problems involved: S. Besson, "La pluralité d'Etats responsables. Vers une solidarité internationale?", *RSDI* (2007), 13 et seq.

[111] Further Wellens, see note 1, 800-801.

[112] De la Rasilla del Moral, see note 16, 189.

[113] Ibid., 190.

lations of peremptory norms of international law, a reduction only partly remedied by article 54.[114]

(ii) The *Passive Side of Solidarity*: Plurality of Responsible States

Samantha Besson's findings do illustrate the extent to which future State practice, which undoubtedly will increase as a result of growing joint actions,[115] will have to take care of the necessary further refinement of the principle of solidarity. Indeed, is there an obligation for the injured State to institute an action for joint reparation against all responsible States (*divided solidarity*) or does it have the choice to single out one State for global reparation (*strict solidarity*)?[116] The grounds for responsibility may be of a different nature (*imperfect solidarity*) (as a result of the application of articles 16-18 of the ILC articles on State responsibility)[117] – for instance the violation of the obligation to prevent genocide – or of a similar nature (*perfect solidarity*).[118] As to the consequences of plural States responsibility, restitution and satisfaction do not pose real problems in contrast to compensation: "c'est lorsque la dette est financière que la solidarité prend toute son importance",[119] given the absence of damage as a constitutive element for State responsibility.[120]

The responsibility of each of the responsible States may be invoked, without regard to the responsibility of the others involved, as happened in the *Corfou Channel* case. The successful invocation of the *Monetary Gold rule* undoubtedly has a negative impact on the effective implementation of the alleged solidarity between plural responsible States.

[114] For an interesting example of an unbalanced relationship between rights and obligations see R. O'Keefe, "World Cultural Heritage: Obligations to the International Community as a Whole?", *ICLQ* 53 (2004), 189 et seq. (191, note 18). Intergenerational concern may be expressed in instruments such as the World Heritage Convention, but this does not yet make it, in peacetime, the object of obligations owed to the international community (ibid., 193, 207).

[115] Besson, see note 110, 17.

[116] Ibid., 14.

[117] Ibid., 21.

[118] Ibid., 14.

[119] Ibid., 23.

[120] Ibid., 28.

Hence it is relevant to look into the way the ICJ has been dealing with it in recent years.

(iii) Cases of *Joint State Action*

The rule was not upheld in the *Nauru* case[121] where in his Separate Opinion Judge Shahabuddeen persuasively drew a fine distinction between "judicial determination purporting to produce legal effects for the absent party, as was visualised in the Monetary Gold case", and "merely an implication in the sense of an extended consequence of the reasoning of the court".[122]

In contrast, the rule was upheld in the *East Timor* case in spite of the *erga omnes* character of the rights allegedly breached.[123]

(iv) Cases of *Distinct Wrongful Acts*

In contrast, in cases of *distinct wrongful acts* the *Monetary Gold rule* is not likely to be an obstacle for the establishment of solidarist responsi-

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[121] *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections*, *Judgment*, ICJ Reports 1992, 240 et seq. Compare in this regard the position of the Court (ibid., 258-259, para. 48, 261-262, paras 55-56) with the view expressed by Judge Shahabuddeen in his Separate Opinion, 286 et seq.

[122] Ibid., 296. This distinction was later echoed in the *East Timor* case by Judge Weeramantry; the fact that a judgment may *affect* the interests of a third party State is "always part of the judicial process and (will be) manifesting itself increasingly as the world contracts into a more closely interknit community": *East Timor (Portugal v. Australia)*, *Judgment*, ICJ Reports 1995, 90 et seq. (155). In the *Nauru* case, Judge Schwebel, in his dissenting opinion, held a different view, referring to the possibility of subsequent serial litigation by the applicant State, ICJ Reports 1992, 329 et seq. (342). According to Judge Ago, also dissenting, had "New Zealand as well as Australia been parties to the proceedings, it could fairly safely have been assumed that the United Kingdom would not have left its two former partners in the administration of Nauru and the exploitation of its mineral resources on their own". ICJ Reports 1992, 326 et seq. (327), para. 5.

[123] *East Timor (Portugal v. Australia)*, *Judgment*, ICJ Reports 1995, 90 et seq. (102, para. 29, 104, para, 33); the wisdom of this position was questioned by Judge Ranjeva in his Separate Opinion, ICJ Reports 1995, 129 et seq. (131).

bility.[124] In the *Oil Platforms* case the Court saw no need to attribute responsibility for certain incidents to either Iran or Iraq,[125] the latter being considered as "a hidden party" by Judge Owada in his Separate Opinion.[126] In his Separate Opinion Judge Simma saw no objection "to holding Iran responsible for the entire damage even though it did not directly cause it all" as both have "conducted their activities against neutral shipping".[127] In the *DRC v. Uganda* case the Court found no probative evidence of Sudan's alleged involvement.[128] With regard to Rwanda's alleged involvement, Uganda invoked the *Monetary Gold rule*, whereas the DRC relied on the approach of the Court in the *Nauru* case.[129] However, the Court considered the interests of Rwanda not to constitute the subject-matter of the decision to be rendered, neither was the determination of Rwanda's responsibility a "prerequisite to such a decision".[130] Two months later, in the *DRC v. Rwanda* case (*new application 2002*) Judge *Ad Hoc* John Dugard, observing in his Separate Opinion that the Court in the *DRC v. Uganda* case retreated from the *Monetary Gold* case and relied on *Nauru*, added that "[a]lthough the Court did not indicate that its choice was influenced by the fact that norms of *ius cogens* were involved in this case, it may safely be assumed that the gravity of the issues raised influenced the Court's choice".[131]

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[124] Besson, see note 110, 28; referring to the *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment*, ICJ Reports 2003, 161 et seq.

[125] Ibid., 189, para.57.

[126] Ibid., 320, para. 43.

[127] Ibid., 357-358, para. 73, 359, para. 77 and 345, para. 43.

[128] *Armed activities on the territory of the Congo (Democratic Republic of the Congo v; Uganda), Judgment*, ICJ Reports 2005, 168 et seq. (217-219, para. 123, paras 125-131).

[129] Ibid., 236-237, paras 198 and 200.

[130] Ibid., 238, para. 204.

[131] *Armed activities on the territory of the Congo (New application 2002), (Democratic Republic of the Congo v. Rwanda) Jurisdiction and admissibility, Judgment*, ICJ Reports 2006, 6 et seq. (89-90, para. 11).

(v) Outlook

Article 47 of the ILC articles on State responsibility leaves intact the possibility to institute either an individual or a joint action against each of the responsible States, without this reducing their individual responsibility.[132] Divergent views are being held in doctrine and judicial practice with regard to the question of divided or undivided action (article 47(1)) and of concurring or cumulative actions (article 47 II a).[133]

With regard to the passive side of solidarity, the general regime as laid down in article 47 does not take a clear position on joint responsibility or on the right of subsequent recourse against the other responsible States.[134] Redress between the responsible States afterwards, a possibility provided for by article 47 II b, would restore "perfect solidarity".[135]

Overall the general State responsibility regime is not very satisfactory from a solidarity point of view. The current underdeveloped regime "révèle plus largement d'importantes lacunes dans le régime de solidarité entre les sujets de la communauté internationale".[136] Therefore, from the perspective of a more efficient operation of the principle of solidarity the following proposal by Samantha Besson appears to be very reasonable indeed: "Un régime complet de solidarité d'Etats co-responsables serait clairement légitime dans le cas d'un *fait illicite conjoint,* sur le modèle de ce qui est prévu par l'art. 47 CDI, mais de manière plus affirmée et développée".[137] In case of "*faits illicites distincts*", not provided for in article 47, a regime of solidarity between the responsible States, even if it is not to the same degree, seems also more legitimate and thus to be preferred.[138]

Finally, with regard to article 54 of the ILC articles on State responsibility, it is important to note that there is a large volume of State practice of countermeasures adopted by non-directly injured States in defence of the public interest i.e. as a response to a serious breach of a peremptory norm.[139] In assessing the available State practice, Dawidowicz con-

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[132] Besson, see note 110, 32.

[133] Ibid., 32-33.

[134] Ibid., 34.

[135] Ibid., 29, referring to the *Nauru* case.

[136] Ibid., 17.

[137] Ibid., 36.

[138] Ibid., 37.

[139] For an overview of that practice Dawidowicz, see note 109, 351-398.

vincingly rebutted the three arguments motivating the non-inclusion of a right of third-party countermeasures in article 54: the practice is not limited, embryonic and selective; it is not dominantly Western; and there is a relevant *opinio juris*.[140] The study clearly demonstrates that for more than five decades States have already put flesh to the bone of the principle of solidarity, in its "organic" mode[141] in defence of the public interest of the international community, thus constituting "un stade avancé de la solidarité organique".[142] In fact, in the frequent cases that a collective institutionalised approach is failing, such solidarity is the only way to protect the collective interest.[143]

4. The UN Law on the Maintenance of International Peace and Security

The assistance all Member States shall give the UN in any action it takes in accordance with the UN Charter is the expression of the solidarity underpinning the Charter as a whole.[144] In this sense, Articles 41 and 42 correspond to *the more substantive facet* of solidarity while Articles 49 and 50 cover *the procedural side* of this duty, reflecting what I have called the positive aspect of solidarity.[145] Both articles deal with one of the modalities of solidarity, burden-sharing and equitable distribution of costs. At the San Francisco Conference Canada has viewed Article 49 as the basis for a plan of mutual assistance, a mechanism to burden sharing.[146]

Article 49 has in a systematic way been invoked as a complement to Article 50.[147] Both articles share a common objective, namely to maximise the potential of solidarity with regard to the maintenance of international peace and security, by reducing as far as possible potential disincentives. In spite of the fact that Article 49 lays down an obligation of

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[140] Ibid., 408-415.

[141] Villalpando, see note 11, 20.

[142] Ibid., 32.

[143] Ibid., 69.

[144] Macdonald, see note 87, 861.

[145] Wellens, see note 1, 780.

[146] P. Klein, "Article 49", in: J-P. Cot/A. Pellet/M. Forthiau (eds), *La Charte des Nations Unies: commentaire article par article*, Third Edition, 2005, 1303 et seq. (1304, note 4 and 1309).

[147] Ibid., 1308.

mutual assistance, the Security Council and the General Assembly have limited themselves to mere appeals for mutual assistance between Member States.[148] During the period 2000-2003, the interpretation and application of Article 49 "did not give rise to any significant *constitutional* discussion in the Council's deliberations".[149]

Nevertheless the UN has given Article 49 "une certaine portée concrète en vue de renforcer, même si c'est de façon indirecte, en tant que fondement d'un devoir de solidarité entre Etats membres, l'action de l'organisation mondiale dans le domaine du maintien de la paix et de la sécurité internationales".[150]

As to Article 50, Venezuela had proposed at the San Francisco Conference to recognise a right to obtain such assistance.[151] Calls for the establishment of "more permanent mechanisms and measures" for the holding of the consultations were made during meetings of the SC on "General issues relating to sanctions" in April 2000.[152]

An interesting example of a perfect application of the principle of solidarity has been the temporary denial to Macedonia of the right to benefit from any Article 50 assistance because it had not lived up to its duty of solidarity by non-compliance with SC sanctions.[153] That Article 50 gives rise to legitimate expectations[154] is at present a correct interpretation.

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[148] Ibid., 1310. For more details on the assistance actually provided as result of such appeals see P. Klein, "Article 50", in: Cot/Pellet/Forthiau (eds), see note 146, 1318 et seq. (1325-1326); and of course the *Répertoire of the Security Council*.

[149] *Répertoire of the Security Council*, Part VII, 161.

[150] Klein, see note 146, 1310-1311.

[151] Ibid., 1314. An interpretation according to which Art. 50 would vest such a right has been defended for instance by a number of Eastern European countries in the 1990s, but this has been denied by a majority of States: Klein, see note 148, 1319-1320.

[152] *Répertoire of the Security Council*, Part VII, (172).

[153] Klein, see note 148, 1318.

[154] Ibid., 1320.

The fact remains that the imposition of financial sanctions "seemed to limit costs for neighbouring third States".[155]

IV. The Principle's Constitutional Role is Expanding

In my 2004 contribution I have tried to filter the principle of solidarity as one of the "common constitutional characteristics"[156] of a selected variety of branches, one of the underlying links between the "patchworks" of the various branches[157] based upon an assessment of their development in recent years. I have also tried to demonstrate how modern international law has transported and imposed the fundamental ethical value of solidarity.[158]

Solidarity is more than just an inspirational principle, but it is also that. As a constitutional principle it performs a combination of functions depending on the degree of interpenetration in various branches of international law. In some branches like, for instance, the UN law on the maintenance of international peace and security, it undoubtedly has a normative role, whereas in general international disaster law it is limited, at present, to a more inspirational but still constitutional role in facilitating inter-branches cross-fertilisation. The inspiration for a proper answer to the question whether a State affected by a natural disaster has an obligation not to refuse arbitrarily offers of humanitarian assistance clearly comes from relevant provisions of international humanitarian law.

Solidarity as a principle operates most prominently in those areas of the international legal system, such as international human rights and international humanitarian law, where the subject-matter does not allow the principle of reciprocity to play its traditional role, or at least not to the fullest extent. There the principle of solidarity has put aside the principle of reciprocity.

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[155] L. Boisson de Chazournes, "Collective Security and the Economic Interventionism of the UN – The Need for A Coherent and Integrated Approach", *JIEL* 10 (2007), 51 et seq. (62).

[156] C. Walter, "International Law in a Process of Constitutionalization", in: J. Nijman/A. Nollkaemper (eds), *New Perspectives on the divide between National and International Law*, 2007, 191 et seq. (214).

[157] G. Abi-Saab/Y. Sandoz, in: Sandoz (ed.), see note 38, 96 and 152.

[158] Jouannet, see note 11, 833.

Solidarity as a constitutional principle is instrumental in promoting the interpretation and application of primary rules in consonance with the foundational normative tenets of the international community. This happens for instance, as we have seen, in international refugee law.

In other situations or branches it has been used in a non-interpretative way to resolve a dispute, such as the *EC Preferences* v. *WTO* case at the level of the Panel.[159] We have also encountered both modes of the principle of solidarity which are also reflected in the divergent views in doctrine and in judicial practice with regard to article 47 of the ILC general State responsibility regime. Although the principle of solidarity has in recent years led to a proliferation of normative and operational conventional instruments strengthening the deepening of pre-existing obligations,[160] we should not forget that it can also be expanded through the customary law process.[161]

The obligation to prevent serious violations of fundamental norms of international law is a good example. It may be noted that in the *Bosnian Genocide* case the Court gave a list of other examples of conventions providing for an obligation to prevent,[162] while it was not aiming at finding out "whether, apart from the text applicable to specific fields, there is a general obligation to prevent the commission by other persons or entities acts contrary to certain norms of general international law".[163] Judge Ranjeva in his Separate Opinion pointed out that in international law "la responsabilité pour omission est admise pour la sauvegarde d'intérêts fondamentaux de la communauté internationale".[164]

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[159] For the distinction between interpretative and non-interpretative use of principles see A. Mitchell, "The Legal Basis for using Principles in WTO Disputes", *JIEL* 10 (2007), 795 et seq. (816 et seq. and 834). Given the AB decision in the case, the Panel's more "solidarist" decision was ultimately more of a symbolic nature.

[160] A. Miron, "L'Obligation de prévention des catastrophes naturelles: statut et visages", in: Cot (ed.), see note 39, 177 et seq. (179).

[161] Sandoz, see note 38, 26.

[162] *Application of the Convention on the Prevention and Punishment of genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007 (not yet reported), para. 429.

[163] Ibid.

[164] *Application of the Convention on the Prevention and Punishment of genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007 (not yet reported), Separate Opinion of Judge Ranjeva, para. 1.

The provision on the obligation to prevent genocide "s'inscrit dans une approche des relations juridiques internationales fondée sur la solidarité internationale, voire mondiale".[165] The obligations contained in the Genocide Convention are obligations *erga omnes*, having their basis in international solidarity. As a result the obligation to prevent cannot be considered to be just a network of juxtaposed bilateral obligations.[166] Moreover the obligation to prevent genocide has acquired customary status now. Although the Court was right in pointing out that "the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result – averting the commission of genocide – which the efforts of only one State were insufficient to produce",[167] Judge Ranjeva made the valid argument that the "force obligatoire de l'obligation découle non pas de l'engagement particulier de l'Etat, mais de la valeur que le droit attribute à cette obligation".[168]

Their "obligation to take such action as they can to prevent genocide from occurring" remains intact even when States have called upon the Security Council pursuant to article VIII of the Convention.[169] There seems to be no compelling reason, as I have stated during the Tokyo conference mentioned earlier, why this reasoning should not apply to calls for institutional enforcement of other public interest rules, as part of an emerging general duty of prevention.[170]

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[165] Ibid.

[166] Ibid.

[167] *Application of the Convention on the Prevention and Punishment of genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007 (not yet reported), para. 430.

[168] *Application of the Convention on the Prevention and Punishment of genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007 (not yet reported), Separate Opinion of Judge Ranjeva, para. 4.

[169] *Application of the Convention on the Prevention and Punishment of genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007 (not yet reported), para. 427.

[170] It is with regard to the duty to prevent that responsibility to protect may constitute a normative enrichment of international law: Beeckman/Miron, see note 85, 164.

V. Challenges and Limitations

In our assessment of the current state of international law we have to take into account two important factors.

The "re-emerging" character of the principle of solidarity is inevitably linked to the recognition that the "international law of solidarity is to be *progressively realised*"[171] and because of its substantive component solidarity is *bound to create conflict*.[172] We can find an example of each factor in two adjacent branches.

It is fair to say that the debate about the norms with regard to emergency humanitarian assistance may be considered as a genuine effort to strike a balance of solidarity between the rights and duties to offer and to accept on the part of the respective authorities involved. However, the *travaux préparatoires* of the resolution adopted by the Institute of International Law demonstrates that, even in a branch where solidarity plays a foundational role, progress is not achieved without difficulty. In fact, the emphasis is more on the limitations of the autonomy of the affected States than on the scope of the real solidarity third parties are expected to deliver.[173] On the other hand the resolution provides that the duty to offer assistance as an expression of that solidarity could be subject to considerations of an economic, social or political nature.[174]

In international refugee law, burden-sharing is based on both a solidarist and a functional motive.[175] Indeed, burden-sharing "certainly in cases of large-scale refugee movements, is a virtual sine qua non for the effective operation of a comprehensive *non-refoulement* policy".[176] Solidarity from non-directly affected States to participate in the provision of durable solutions may be "even more critical for the success of

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[171] De la Rasilla del Moral, see note 16, 196.

[172] Jouannet, see note 11, 818.

[173] Daillier, see note 47, 48.

[174] See note 62, V, 1; Daillier, see note 47, 57. This safeguarding clause is a clear illustration of the coexistence between the law of cooperation and the law of solidarity.

[175] We cannot neglect these "ulterior" or "first" motives for State conduct, but this does not prevent us from looking at these phenomena from a constitutionalist perspective through the prism of the solidarity principle.

[176] J.-P. L. Fonteyne, "Burden-sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees", *Australian Yearbook of International Law* 8 (1978 - 80), 162 et seq. (175).

an international refugee policy".[177] International solidarity "must go beyond the facile provision of financial assistance by a group of rich nations to countries initially affected by the refugee problem at hand, and, of necessity, must carry over into the second stage of refugee protection", especially with regard to the resettlement in third countries option.[178] The prospect of a lack of this second stage assistance may be an incentive for affected States to disregard the non-refoulement obligation.[179] Here the principle of solidarity operates as a functional, necessary corollary of a pre-existing and high-ranking primary obligation. The principle of solidarity "is a virtual requirement for a reasonable compliance"[180] with other applicable norms. That the principle can act as an incentive towards compliance has been recognised in State practice.[181]

The major challenge for the principle of solidarity is to be endowed more widespread with an efficient, institutionalised mechanism for its implementation, to give it an ever more operational impact. However, the principle of solidarity may encounter its inherent limitations. In international refugee law, for instance, attempts to maximise its opera-

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177 Ibid.

178 Ibid., 176.

179 Ibid.

180 Ibid., 171.

181 Ibid., 182. Another example of conflicting demands of solidarity has been Bosnia-Herzegovina's unsuccessful attempt in July 1993 to have one solidarist obligation (to respect an arms embargo against Yugoslavia) be suspended, or withdrawn altogether, in favour of being able to benefit from and to invoke the solidarist right of collective self-defence: *Application of the Convention on the Prevention and Punishment of Genocide, Provisional Measures, Order of 13 September 1993*, ICJ Report 1993, 325 et seq. (332, para. 6 and 344-345, paras 40-41). A similar argument was made by the United Stats in the *Nicaragua* case in the sense "that if the Court, as it was requested by Nicaragua, were to enjoin the United States from cooperating militarily with those States, the consequence would be to prevent them from obtaining any lawful military assistance from the United States and in turn to impair their legal right of self-defence", as referred to by Judge Shahabuddeen in his Separate Opinion to the *Nauru* case*: Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections*, *Judgment*, ICJ Reports 1992, 240 et seq. 289-294; on the further implications of this aspect of the *Nicaragua* case, see in more detail Judge Schwebel in his Dissenting Opinion to the *Nauru* case*: Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment*, ICJ Reports 1992, 240 et seq. (332-335).

tional aspects, such as apportionment of individual quotas on resettlement ability, may bring States to "calling into question the essential, if somewhat amorphous general principle of international solidarity itself".[182]

VI. Outlook

Is the principle of solidarity a powerful tool for the future of international law or is it nothing more than another academic fiction?[183]

In both my 2004 and this contribution I have tried to demonstrate that the content and application of the principle of solidarity is not "coincidental"[184] anymore.

Doctrinal hesitation fed by fragmented State practice, scattered over a variety of the most relevant branches of international law, has undoubtedly led to the almost omnipresent qualification of the merely "emerging" character of the solidarity principle. But in my view the principle, which represents an incommensurable value, has reappeared on the international scene and it is there to stay. Recent developments in some branches have given it "un soufflé nouveau".[185]

Modern international law, the guardian of collective wellbeing,[186] has become "a positive instrument of solidarist regulation".[187] The reflection of solidarity in positive law has only a declaratory character as it does exist concomitant with the international community.[188]

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[182] Fonteyne, see note 176, 187.

[183] The debate on the normative implications of solidarity also takes place in international relations theory: see M. Weber, "The Concept of Solidarity in the Study of World Politics: Towards a Critical Theoretic Understanding", *Review of International Studies* 33 (2007), 693 et seq.

[184] Sandoz, see note, 38, 15.

[185] Ibid., 159.

[186] Jouannet, see note 11, 821.

[187] Ibid., 837.

[188] H. F. Köck, "Neutralität *versus* Solidarität", in W. Hummer (ed.), *Paradigmenwechsel im Völkerrecht zur Jahrtausendwende. Ansichten österreichischer Völkerrechtler zu aktuellen Problemlagen*, 2002, 85-89.

The principle of solidarity has become a catalyst, triggering both a normative and an operational dynamic, although the degree of its penetration varies between the branches.

The principle of solidarity may rightfully claim constitutional status because of the high degree of constitutionalisation it has acquired within the UN law on the maintenance of international peace and security, because it is instrumental in protecting fundamental values shared by the international community, because it is increasingly ensuring the cohesion and consistency of the international legal order across various branches and because it operates with regard to both primary and secondary rules. Because of its constitutional function the principle of solidarity is gradually becoming one of the cornerstones of the normative framework.

"The *telos* of the international community is to dissolve the distinction between itself and international society"[189] but for the time being they coexist[190] as a result we have a "bifocal structure of the contemporary world order".[191] That also explains why the law of coexistence, the law of cooperation and the law of solidarity continue to "co-exist" in parallel.[192] It is relevant in this regard to note, in various branches, the inevitable emphasis on the primary responsibility of the territorial State to comply with its protective duties. But "their mutual interrelationship will gradually change over time and the law of solidarity will influence the respective and combined role and impact of the two pre-existing approaches to international law".[193]

There has been "a shift from actor-centrism to subject-matter orientation in the general structure of international law", also as a result of the diversity of various branches.[194]

"Die Grundstruktur des Völkerrechts hat sich allerdings trotz aller Wandlungen und Fortschritte nicht geändert. Deshalb erfolgt auch der Ausbau des Solidaritätsprinzips im Rahmen des geltenden Völkerrechts praktisch genau so wie zu Zeiten Vattels auf der Ebene des zwi-

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[189] Buchan(i), see note 15, 21.

[190] Ibid., 26-27.

[191] Buchan(ii), see note 15, 43; also Peters, see note 5, 586.

[192] Wellens, see note 1, 804.

[193] Ibid.

[194] Walter, see note 156, 193.

schenstaalichen Verkehrs".[195] Otto Kimminich's assessment was correct back in 1991.

I have tried to identify "patterns of solidarisation"[196] and by doing so "to construct an explanatory framework" in order to "elucidate the generic transformations to the structural and normative configuration of the world order".[197] The principle of solidarity has been at the origin of the paradigm shift. The "communitarian ontology can provide a basis for the advocacy of solidarist late Westphalian international practices".[198]

The rediscovery of values and principles is limited and fragile as Erika said at a conference earlier this year in The Hague, and that is why the principle of solidarity is still facing important challenges. However, the overall picture seems to indicate that it is on its way to achieve normative superiority.

Ronny Macdonald has placed my contribution to his collective volume in part 6 entitled "Idealism and the Arena: International Law under Stress".

"Advancing the cause of world constitutionalism … requires a combination of political realism and intellectual imagination".[199]

We international lawyers should follow Pierre-Marie Dupuy's wise advice that our "actions in the promotion of universal values, which have now been integrated into the rules of positive law, must always be carried out resolutely but with vigilance, without naivety but also without compromise".[200]

In other words, il ne faut pas "naviguer contre le vent qui nous pousse vers un véritable ordre public mondial".[201] Let me conclude by citing

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[195] Kimminich, see note 8, 265.

[196] Weber, see note 183, 694.

[197] Buchan(i), see note 15, 6.

[198] P. Becon, "Community, Solidarity and Late-Westphalian International Relations", in: E. Newman and O. Richmond (eds), *The United Nations and human Security*, 2001, 83 et seq. (86).

[199] D. Johnston "World Constitutionalism in the Theory of International Law", in: Macdonald/Johnston (eds), see note 1, 3 et seq. (27).

[200] P.-M. Dupuy, "Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martii Koskenniemi", *EJIL* 16 (2005), 131 et seq. (137).

[201] Sandoz, see note 38, 151.

the vision Otto Kimminich so eloquently put forward back in 1962: "Es besteht daher die Hoffnung, daß das Völkerrecht durch die Bestrebungen unserer Zeit aus einem Recht der souveränen Staaten zu einem Recht der gesamten Menschheit verwandelt wird".[202]

[202] Kimminich, see note 8, 269.

Discussion Following the Presentation by Karel Wellens

T. Eitel: At first, let me thank you for your thorough and profound presentation. All the same, I have a remark, or rather a question, regarding the structural aspect of the principle. Has solidarity really become a normative principle yet? I believe that there are many rules in international law which express one or the other aspect of solidarity and you have given us quite a number of examples. But is there a rule expressly prescribing solidarity? Until now I have seen solidarity as a principle that does not structure a legal field, but, like fairness and equity, is underlying many rules and is not yet a rule by itself. Otherwise, development assistance might, among others, have to be structured differently. Thank you!

E. de Wet: My question concerns the "core content" of the notion of solidarity. I would like Professor Wellens to elaborate on the definition of the concept and indicate its benchmarks. In addition, I would appreciate his view on the added value of the concept of solidarity. Stated differently, what does it add to the already existing, albeit controversial, notions of *jus cogens* and *erga omnes*?

H. Neuhold: [His elaborated remarks are contained in his own paper in this volume.]

K. Wellens: The first question raised by my colleague from our neighbouring university of Münster *deals with* the structural aspects of the principle: are there any consequences if we do not find the trace of solidarity; maybe it is better to look at the principle as an underlying principle, like fairness and equity; and you referred to the area of development assistance where we sometimes cannot find any trace of solidar-

ity at all. Now, fairness and equity are of course important elements and notions in the international legal order. The reason why I think – and I am not the only one – that the principle of solidarity is a structural one derives from the functions it performs. If you look – as I did in 2004 and other colleagues did as well – into various branches of international law and you try to find what someone called "islands of solidarity" in the law of cooperation then it is not difficult to find them. As I said in my presentation, the function of the principle of solidarity is not coincidental anymore, it is not temporary but permanent and irreversible. I ended my presentation by taking Pierre-Marie Dupuy's advice in order to have the opinion of a realist at the same time. It would be futile and stupid and a loss of energy, time and resources to look at international law from a merely idealistic point of view. But even from a combined progressive and realistic point of view, you find that the principle is working its way through the various branches of international law. And I fully agree, it is not sufficient – and that is certainly not what I did in 2004 or at any other time – to look at an international instrument's face value and then to say: "Well, there is a reference to solidarity, that is good, let us put it into the catalogue of application of the principle of solidarity". I ended my presentation by referring to the principle of solidarity as an inspirational, but at the same time as a normative one. If you look at the current state of international law in various branches you can recognise and identify the patterns of solidarity. And of course you can say the same about equity and you can say the same about fairness. But I think that fairness, equity and solidarity, may, at the same time, be the underlying ethical foundations of law. But that does not prevent them from becoming or having become a structural principle too. In my view those two functions are not mutually exclusive. It is not because equity and fairness are playing in the background of the elaboration of norms and principles in international law that they cannot work at the same time as structural elements in the international legal order. If you permit me, I am not going into the area of development assistance because this topic will come up later this afternoon in another presentation.

Now, Erika de Wet's question: "Which are the conceptual characteristics of the notion? Which are the benchmarks?" You are saying that we already have the *erga omnes* notion and the *jus cogens* norms and you are asking what the principle of solidarity gives us that *jus cogens* and *erga omnes* do not have at the moment. Now, I think the concept of *jus cogens* is the basic foundational tenet of international law at the moment. *Erga omnes* obligations have to do with the procedural, opera-

tional aspect of *jus cogens* norms. But the principle of solidarity has, as Ronny McDonald explained in one of his writings, to operate as a material principle containing rights and duties. You can only talk about solidarity rights and solidarity obligations if there is a real balance between the two. Without trespassing on the topic of development assistance, let me just say that providing development assistance out of a sense of solidarity is a unilateral kind of thing. So that is the challenge for the branch of development assistance. With regard to *jus cogens*, in order to have a solidarity approach and solidarity elements in the way *jus cogens* is operating, you need rights and obligations on both sides. If you have the right to invoke State responsibility for a serious violation of a peremptory norm, that is one thing. What is lacking at the moment or what the international legal order is stopping short of is providing the corresponding obligation on all members of the international community to respond. I know that is nothing new, we are fully aware of that flaw in the actual system. Attempts to remedy this flaw failed and that is also the reason why I referred to this study in the British yearbook, which is a very thorough and a very convincing one. And so I do not think that it is fair to say that the principle of solidarity is not adding anything to the *jus cogens* concept. The principle of solidarity is instrumental or could be instrumental in remedying the failing institutional enforcement aspects of the *jus cogens* concept. And it is true, we have to admit – that is the reality of the current state of international law – that our international courts and tribunals are stopping short of making an attempt to even allow access to their forum when the purpose is to bring about the implementation and enforcement of *jus cogens*. That would be a manifestation of solidarity. What the courts and tribunals actually do is either obstructing access or trying to divert the problem altogether, if it is not necessary to reason and to justify the decision they want to reach. And there are numerous examples in recent case law that can testify to that. And it is just a matter of crossing that river. But until that bridge has been crossed, of course you can say: what is the point of making serious attempts in order to make that happen? But that is exactly the way progressive development of international law works.

Now, with regard to Hanspeter Neuhold's observations: From a non-legal point of view and the three foundations you named for solidarity and the references to the reality of solidarity within the international peace and security system, NATO, or even within the European Union, that is a fair comment and something scholars dealing with the principle of solidarity have to take on board. But on the one hand, on the list of

the increasing number of articles dealing with the principle of solidarity there is the article by Heribert Franz Köck about neutrality and solidarity. It is an extensive article dealing with exactly that problem. On the other hand, my basic reply would be a reference to what I said earlier out of an honest sense of realism: it is only fair to say that the law of coexistence and the law of cooperation do still exist and they will continue to stay with us for quite a long period of time. And it would be science fiction to say that there is an inspiration or aspiration to replace them altogether. But the main thing is to recognise and to identify that the law of solidarity is there to stay as well and that it is becoming operational. That is also the reason why I refer to the law of solidarity as being progressively implemented. That is my reply at this stage.

U. Beyerlin: I have just one question and a short comment. My question is whether the characterisation of solidarity as a principle of international law implies that it has normative quality and that it has already gained the status of a legally binding norm. Personally, I am not in favour of such an understanding of solidarity. In my view, solidarity is not a legally binding principle but an ideal that stems from an international moral order which is distinct from the international legal order, but not subject to the latter. In my view, both international value orders are on an equal footing. No doubt, the moral idea of solidarity is very important but in my view it is too abstract and too indefinite in contours and contents to become a normative concept that produces steering effects on States' behaviour in international relations. In my view, solidarity is a very important source of values from which more concrete concepts, including legally binding norms, may flow. I can also imagine that solidarity gives meaningful guidance for the interpretation of already existing international norms. Thank you.

E. Riedel: First of all, hello Karel! It is nice to see you after more than 30 years. It is the first time since the ILC seminar in 1976 that we meet again. Thank you for this wonderful and masterful analysis, with which you started this important topic off, and thanks also to the Institute and its directors for choosing, as already mentioned, such a great topic.

There are two points I would like to raise. The issue of constitutionalism was raised and you said descriptive and prescriptive dimensions are involved. And then you spent most of your time on the prescriptive dimensions. And as a descriptive dimension of solidarity, I find it extremely interesting and political scientists and sociologists could tell us

a great deal about it. But from an international law point of view, the question is: You said solidarity is there to stay. To stay as what? Several people have already asked this and Mr Beyerlin just did so too. Take Rüdiger Wolfrum's principle of value orientation: Values, is it a legal value? Is it a moral value? Is it a political value? Or is it a concoction of several of these elements? In the past, we used to discuss public interest norms; we used to discuss the common heritage of mankind, now humankind; we also used to discuss *jus cogens* principles and *erga omnes* norms and universality values and all this to get away from the "S word" (State sovereignty) and to find a roof above States. The example that solidarity as a normative concept might be used in a positive and negative sense, I find particularly intriguing. I am a member of the Committee on Economic, Social and Cultural Rights and we have to interpret article 2(1), which obliges the States to render technical co-operation and assistance within their available resources. And of course that is always a difficult thing to determine, but State parties to the Social Covenant have a duty to give technical assistance and co-operation and one might call this positive solidarity. The negative side is that if a State refuses to accept it, and I think you referred to such a case, this might be a real breach of international law and in particular in the area of human rights. We had such a case two years ago in our Committee following the Tsunami situation that one fairly large Asian State refused to accept technical cooperation and assistance, and above all NGO support. The State argued that it was part of its *domaine réservée*, leaving it up to itself how to cope with the problems. The Committee said: "We consider this to be a breach of the State party's negative obligation, i.e. if assistance is offered in times of emergency, and a State refuses to accept it, this might be a real breach of international and in particular of human rights law". But of course, the whole issue is very complex, since solidarity affects international economics – which we will discuss later on today – and humanitarian law; plus Chapters VI and VII of the UN Charter. And maybe the solidarity principle underlying the Charter principle of Chapter VI might be a really fundamental principle. So maybe, we should spend a little more time on that if we regard the normative framework as norms, institutions, procedures and actors, and look at the procedural side, i.e. that we should perhaps look at the modalities of adjudication, mediation, negotiation, through the lense of a solidarity principle. Perhaps, non-State actors and solidarities should also be kept in view, and I would be interested to hear what you think about that. Thank you.

C. Tomuschat: First of all, I would like to thank Karel Wellens for a wonderful presentation. He gave a masterful overview of the issues which can be categorised under the principle of solidarity. And he gave very good answers to the questions which we put to him.

Let me just state my conviction that I am also deeply convinced that solidarity is the glue which keeps States together. We are not just an ensemble of individual States, there is something more. There is an overarching legal regime. And, well, we can find different names for that regime. I missed, however, one particular word, namely cooperation. To what extent is solidarity the same as cooperation between States? Maybe with regard to cooperation, we are on safer ground as it is one of the principles which perhaps has better foundations than solidarity, but solidarity is everywhere as you have pointed out.

Let me furthermore raise one particular point and that is the distinction – you introduced this distinction when you started your presentation – between international society and international community. That really struck me. We are international lawyers and as such we are oscillating between international society and international community. If my recollection is correct, Mosler designated his general course at the Hague Academy: "The international society as a legal community". So he used both terms in the title of his course. Now what you said is that just one group of States belongs to the international community whereas there is a broader international society, which encompasses all the States of the world. I would object to that distinction because what we are introducing is that, on the one hand, we have good civilised countries and, on the other hand, barbarian States which are of a lower level of civilisation. It reminds us of the formulation of Article 38 of the Statute of the International Court of Justice which mentions principles which have been provided by the civilised community of States. I think this contradicts really what you then presented to us because for you solidarity is a principle which operates within the entire world: between States which may belong to the international community and States which belong, according to your views, to the international society. I cannot accept that distinction. It seems to me that it is, in somewhat drastic terms, a kind of neo-colonial device to say: "We are the Western world, we of course belong to the international community and there are the third world countries, which are part of the international society, but still they are not at the same level of education and civilization", etc. We should rigidly and resolutely reject that distinction. I think there is one world only. The weaker countries, in particular, need solidarity and we should not expel them from the circle of the international community

of States. I really see the world as one unity. Many times, this concept of oneness does not really operate well, but at a legal level we have to refrain from any kind of discrimination. We should not overlook the principle of sovereign equality of States, a crucial principle which is still the foundation stone of the international legal order.

K. Wellens: Well, first of all I have to say the richness, the level and the quality of the questions are very promising for the rest of today. Professor Beyerlin, with regard to your question: does the principle of solidarity imply a normative function and a legally binding force? I did not actually say, neither in my 2004 contribution nor my written paper or today's presentation, that the principle of solidarity is a legally binding principle. I hope I made it clear but maybe not sufficiently clear if I may say so that the various functions the principle of solidarity actually performs are making it difficult to identify the various stages the principle has reached in various branches. You are making a sharp distinction between the moral order and the legal order. In my presentation, I made a reference to the ethical debate which at the moment has been reopened in international law. And I fully agree with Emmanuelle Jouannet when she said that bringing moral values into the realm of law will make it very difficult to distinguish between the two and I think that is exactly your point. I also indicated and it is in my written paper that one of the functions of the principle of solidarity is to work as an interpretative tool to interpret primary rules of international law. And if you would consider that to be a normative aspect, then that is a normative aspect but I would not go as far as that. There are a variety of functions the principle of solidarity performs, and in this sense we are only at the beginning. In his article Professor Wolfrum has skillfully identified and described the principle's different functions. The various functions are cumulative and I gave the example of the EC preferences case in the WTO: there the principle has been used in a non-interpretative way trying to solve a dispute between States. So the degree of normativity varies between the various branches and I think that is one of the starting points for any analysis of the principle within the international legal system. For the time being, we have to accept that the principle has reached different stages of development. So you cannot look at the principle and say that it is performing such and such a function across the board. I think that is not really what is happening at the moment. Still with regard to the principle's normative function, you could imagine that it gives indeed, as you pointed out, meaningful guidance for the interpretation of already existing international norms. In some bran-

ches, like in international refugee law, guidance is – at the moment – its main function. However, in other branches, there is more normativity in its function. And I do not think that there is anything special or uncommon in principles of international law doing different jobs in various branches. The same goes for equity and fairness. Equity and fairness have been mentioned before and they do play a variety of roles in various branches of international law.

I was not sure whether you would be here, otherwise I would have said "good morning Eibe Riedel after 30 years". I am really glad that you are here. You raised the question about constitutionalism; you asked me whether the principle of solidarity was going to stay as what, and then you joined Professor Beyerlin with regard to the duality of moral and legal values. Now, in the 50th volume of the German Yearbook of International Law there is this article on constitutionalism and principles. I am not going to say that it provides a kind of definitive answer to the problem but it provides a very good framework for dealing with the phenomenon and the duality of moral and legal values. Now, one of the things you did was to use positive and negative solidarity in a different way. Maybe it is just a matter of terminology. The negative solidarity I was talking about four years ago was the solidarity which is trying to prevent events from happening: The duty to prevent genocide, the challenges of pandemics, etc., that kind of thing. But you are using it in another quite interesting way. You gave the example of a particular State refusing assistance and this kind of case would apply in various situations. Further, it brings us to the debates within the Institute of International Law and the ILC. But I have to say that the proposals within the Institute of International Law went well beyond this principle. They rather went in the direction of an obligation *erga omnes* to provide humanitarian assistance. The first rapporteur had that in his report and in the first draft resolution but that approach did not survive the debate within the Institute. If that approach would have won the day that would have been a perfect example also in practical terms. Thank you also for the reference to Chapter VI of the Charter because it has often been a little lost in the debate focusing on Chapter VII. And with regard to the non-state actors, I think this is a field wide open to analysis and research.

Professor Tomuschat, thank you first of all for your kind words with regard to my presentation. May I refer to my written paper where you will find a reference to what you submitted to The Hague Academy in your lectures. Now, let me talk about the distinction between international society and international community. We can look at that distinc-

tion as just an interpretative tool in order to describe and to interpret what is happening. You were right in pointing out that so many definitions of international community have been proposed in various circles but the bottom line is the common value shared by that international community. I think the distinction between the two has been made perfectly clear by Russel Buchan in his two recent articles I refer to in my written contribution. He spoke about the normative distinction. And of course it is very tempting to say: "Why would there be a practial distinction between the two, the members of the international society and the members of the international community?" When replying to previous questions I pointed out that it is important to take a realistic stance on what is happening in international law. I think that the distinction is a real one. We may or may not agree with the reasons behind it or with the position taken by particular States, but some States have placed themselves outside the international community; they have been put on guard by the international community because they do not live up to their earlier primary permanent commitments. So I do not think it is just an academic kind of distinction: it is a real one. Whether it is a wise one in practical terms, is another story. But we will hear more about that later when Laurence makes her presentation. The debate about the responsibility to protect is also an instrument and a tool either to confirm that distinction or to make it work or eventually to come to the conclusion that the distinction is wrong all together and that we have to abandon it. So I think on the one hand, it is a matter of agreeing about terminology and on the other hand, we have to recognise that there may be adverse consequences and effects of keeping that distinction too strict and too rigorously. You are right in saying that we have to mitigate the potential consequences of keeping that distinction at a 100% all the time.

J. A. Frowein: Many have already said that our speaker, Professor Wellens, did an admirable job in trying to find out where solidarity plays a role in international law. I have three short remarks. First of all, whether you call it an underlying principle or a structural principle may not be of such importance but what I think is important is that all legal systems, if they are based on equality among the subjects, are also based on a certain idea of solidarity. I think that is easy to show and in fact this is a very old phenomenon in the history of international law. Immanuel Kant made the famous remark that since the space on the globe is limited, this must have an influence on the rules applied. And if you look into the literature of the 19th century, this plays a very important

role. From there let me come to my question: "To what extent do we discuss solidarity among States or nations or solidarity among humankind?" I think that is a very important problem. And again, if you look into the literature of the 19th century, there it was stated that there is a certain obligation, if not a fully legal one, not to exclude one State from the commerce among nations. The idea was that you transgress the State and go to the human beings and solidarity among humankind is the main idea. Now with the human rights being positive law, this solidarity among humankind must be taken into account and our speaker reminded us of the whole area of the law of human rights. And in that respect I would like to add a short remark concerning solidarity in the European system on the one hand and the worldwide system on the other hand. Of course the interstate complaint system in the European Convention is based on the idea that you have solidarity among the European States to uphold these values. We know that only in two cases brought before the system – namely the Greek and the Turkish cases – the idea of solidarity was the intention or the driving motive. All the other cases are cases where you have a legal interest pursued by the specific complaining State. But – and I think there I would fully join what Professor Wellens said – third-party reactions to fundamental breaches of international law have been more frequent during the last 20 years. This proves that a law concerning third-party reactions, where States do not comply with very fundamental rules based on solidarity, is evolving.

W. Hinsch: My question is rather a request for further information regarding the content of the principle of solidarity. I wonder whether you have something like a most favoured interpretation or a most favoured formulation of what the principle of solidarity demands. You said in one of your previous remarks that the principle of solidarity is not so much a normative principle but a principle that guides the interpretation of international law. Still, I assume that even as a principle of interpretation "solidarity" has normative implications: in one way or other its application will affect the allocation of rights and duties among the agents of international law. Now I wonder whether you think of the principle of solidarity as a principle that confers rights on subjects, be they States, groups of peoples or peoples; or as a duty-conferring principle; or as both at the same time. It, then, would be interesting to know whether you think that the "international community" is actually a proper bearer of legal duties. Of course, there is a problem here. One may say that, in any case, the "international community" is not an agent

capable of sufficiently consistent and target-driven collective action and hence, may not be seen as a proper bearer of legal duties.

D. Shelton: Thank you for that opening presentation. I was struck by many of the words that you used in connection with solidarity: cooperation, coexistence, cohesion, community, coordination, all of them sharing those first two letters co, which suggest a kind of unity or joinder. It is almost like a binary star where we look at either States or individuals or the entire community as a system, which would make solidarity more descriptive of something like the circulatory system and nervous system in the human body which cannot exist or function on its own. Now if that is true for all human or State activity, how does solidarity then as a structural principle – and I am glad you used the indefinite article and not the definite article – interrelate with others. And here the influence of many years in Strasbourg will show because I have seen solidarity in part as an effort to bring the other half of the human race in what was admitted by the French *fraternité* and the other two principles – *liberté*, which I think is inherent in the subsidiarity principle, that is now widespread regionally, internationally and certainly within domestic legal systems, and the principle of *égalité*, equality, which has already been mentioned. Are they reinforcing or are they in tension?

K. Wellens: Professor Frowein, your question deals with solidarity among States and solidarity among humankind. It brings us back to the way we described the international society and the international community, whether we consider the international community as being the ultimate protector of the individual or not. And then of course solidarity on the level of humankind is everywhere and it is there to stay. With regard to solidarity amongst States, we have already heard this morning quite a number of examples where solidarity is actually presenting itself or where it is completely lacking. The remark you made with regard to the two cases before the European Court of Human Rights, is very much to the point. It is no surprise that I fully agree with you with regard to third-party measures being taken by States. There are many more examples and I think for the sake of saving the project on State responsibility, the special rapporteur was cautious in that respect.

With regard to Professor Hinsch, the rights for subjects: may I just briefly refer to the debate within the Institute of International Law on humanitarian assistance. One of the questions debated there was

whether the right of victims to receive humanitarian assistance was a right *erga omnes* with a corresponding obligation on the international community as bearer of legal duties or not. Later today we will find out how that debate ended.

Dinah Shelton, the tension in the relation between the principle of solidarity and other principles is of course an important observation. May I just refer to the universal criminal jurisdiction as one example where the principle of solidarity and the principle of subsidiarity through the principle of complementarity in fact are working together in order to protect the fundamental value of the international community in order to make sure that those international crimes will not pass unpunished. Thank you.

A. G. Koroma: I would like to thank the Institute and the directors for organising this important symposium on such a very useful and relevant topic as solidarity. And of course, Professor Wellens has made an excellent presentation. It is interesting for me, coming from The Hague, to learn about the thinking of the rest of the international community concerning the issue of solidarity which has come before the Court frequently of late. Whilst I was listening to the excellent presentation by Professor Wellens, I was thinking – and I know that the topic you were given was solidarity as a structural principle of international law – that by virtue of your presentation, we could have worded this topic differently: "Solidarity as an inherent or normative principle of international law based on our universal values". You did allude, for example, to the principle of solidarity in respect of the maintenance of international peace and security, the prevention of genocide and the principle of collective security, provision of relief and disaster relief and so on and so forth. All fall under different headings of international law but they all have in common the principle or the communality of our universal values. So, what I am missing in the title is whether solidarity is a structural principle or not.

I thought you would also deal with the implementation of this principle. I know you could immediately have said that for the maintenance of international peace and security, we have the Security Council, for international humanitarian law, we have other institutions and, say for international assistance, we have the World Bank and so on and so forth. My main advice for future research would be to outline how to design a structure or institutions for implementing the principle which is commensurate there with. If I may intervene in the excellent discussion introduced by Professor Tomuschat on the international commu-

nity and the international society, I think that we are not unduly perturbed by the reference to international society nowadays because almost all States of the international community are members of the United Nations and when you join the United Nations, you commit yourself to the principles of the United Nations: the principle of peace, the settlement of disputes, the non-use of war, and respect for human rights. So in that sense, I do take his point when he says that the reference to civilised States was considered offensive at the time when the Statute was written but I think nowadays, if you are a member of the United Nations, by definition you are committed to the principles of the Charter, therefore you are civilised. That is how I see it. Thank you.

F. L. Morrison: I also want to congratulate the speaker, both on the fine paper that was distributed and on the presentation, and further, I want to thank the Institute for organising this discussion.

I came here from a conference in Sweden last week, a conference about something quite different. At one point, the word solidarity arose and it caused a chill down in my spine. It arose in the following context: There was a discussion of terrorism and the cooperation of nation States in dealing with terrorism. And then quite spontaneously, one of the Swedish participants stood up and said that during the 1930's the Swedish State police had justified their cooperation with the Gestapo on the basis of solidarity among nation States combating terrorism. That is definitely one way you can think about solidarity. This brings us back to Professor Frowein's question: "Is this actually solidarity of nation States with one another in a system which might lead to the protection of the States, not the people? Or is it solidarity with respect to humankind which might lead to a different result?"

We see many examples of solidarity of States among themselves – for the self-preservation of the States and their current elites. The pathological cases are the solidarity of States with the discredited leaders of other States – I think of the support given by some African States in recent months to the regimes of other African States with notorious human rights records. Or one could mention the solidarity of the Group of 8 or of the Group of 77. If you think about the word solidarity in descriptive use, this is what the word solidarity means today. I do not think that this is the solidarity that was put forward today. Solidarity is a euphonious word, but it can have multiple meanings. Be careful in the way you use it. Thank you.

B.-O. Bryde: When some speakers congratulated the organisers that they used the title solidarity without a question mark, one got the impression they did something very daring. I do not see it that way. Since I have started to work in international law, I always thought of solidarity as one of its most important principles. My remarks are about some distinctions you made, which I find potentially misleading. I do not know whether you used them misleadingly, but at least in the discussion, to a certain extent they led to misunderstandings. One example is the distinction between "interpretative" and "normative". If you call only the second one normative then you invite the misunderstanding that the principle is only a moral or political principle. I think we are rather dealing with a methodological difference between principles and rules. In all constitutional systems we have principles which cannot easily be applied to a concrete case without additional normative material. But this does not make them any less normative. If a constitutional principle like human dignity or social justice or solidarity require me as an interpreter or as a judge to interpret a rule or another constitutional norm in the light of this principle, then it is a normative principle. It is not a moral or political principle.

I also understood the distinction between descriptive and prescriptive different from Eibe Riedel who said that descriptive means sociology or history or political science. Please correct me, but I understood descriptive in your presentation differently: we look for instances of solidarity all over the international law field. We find something there, we find something here, we find it everywhere. This is descriptive but not sociological. Those are all legal norms. And from these findings we can deduct a general principle, which now might become prescriptive in different fields where up to now it has not been explicitly spelled out. This is the interesting question. Can we deduce from these different uses of solidarity a general principle, which is then more meaningful and helps us to solve cases in areas, where up to now solidarity has not been focused on. And this could also make the principle a constitutional principle and contribute to international constitutionalism. Jochen Frowein said every legal community has solidarity. This is true, but this is a very weak definition of solidarity if you use it so broadly. For me, what you described correctly is that there is a principle of solidarity and that we find it in many places. That very much proves that the international system today is a constitutional system because in a Westphalian co-existence system, you would not speak so much about solidarity. You would merely have State interests. The moment you speak about solidarity as we do today, there has to be more than a system of co-existing

States. There has to be a community, an international community to which we owe solidarity, not to the other States but to a higher order. Thank you.

K. Wellens: Yes, Judge Koroma. I do apologise if I changed the title of my presentation because of the program. Solidarity is really a structural principle and I explained why I went for some further reflections. But I do agree that the structural aspect of the principle has to deal with, and that is part of the debate, how to identify the values and the principles. How do they interconnect? And how do we enforce them? I did not go into the enforcement implementation aspect of the problem but in my written paper, there are a few references and examples. But I hope you allow me to refer to research we have done in a different context last November. We had an international conference in Tokyo on the effectiveness of the mechanisms we have in order to enforce rules protecting the public interest of the international community. Allow me to refer to the forthcoming publication "Public interest rules of international law: towards effective implementation" by Ashgate which will be published in November 2009. So that is also one of the reasons why I did not include it in this paper because it has been dealt with rather comprehensively on that particular occasion. The distinction between the international society and the international community, once more, the difference is of course that the international society is institutionalised within the UN Charter whilst the international community is looked upon as being abstract, not institutionalised and so forth.

With regard to my colleague from Minnesota, just one brief point: in his writings Bardo Fassbender warned against the inflationary use of the notion of constitutionalism and I think the same goes for the notion of solidarity. We have to be cautious and careful in using it and we should only use it when it is called for. And I would strongly advocate against using it on every single occasion when there is no reason to use it at all. Solidarity in the international society and in the international community lead to different results. Let me give you one single example which is in the paper too. There is the example of Macedonia, who was not given the assistance provided for or at least the possibility of getting assistance under Article 49 and 50 of the Charter by reason of Macedonia, in those days, not complying with the sanctions imposed under Chapter VII. So that is another example.

Finally: the descriptive and prescriptive aspect. I used the descriptive aspect of the principle of solidarity on purpose. In passing I mentioned it in order to dispel any doubts and any remarks with regard to the re-

search looking at the principle of solidarity being merely a descriptive kind of thing. There is more to it. And that is why I mentioned the prescriptive aspect as well. And of course the distinction between interpretation and application is a perennial problem. The reference in the paper is to international refugee law. The interpretative use has of course normative implications, the example is given of the non-refoulement principle – where does it start, where and when does it apply? Does it mean that States can send people back at the border or do they have to allow them into their territory before making a final decision? Thank you.

Solidarity and the Law of Development Cooperation

*Philipp Dann**

Solidarity and the law of development cooperation make for a difficult topic. Especially two aspects pose problems. Firstly, the word "solidarity" is hardly used in any of the legal documents that concern development cooperation. There is thus scant indication in the law on what the notion of solidarity is actually supposed to mean. And secondly, solidarity is such a morally loaded notion that every use evokes suspicion. It is easily invoked as ideal but as easily used as a smokescreen for inaction or to dilute clear responsibilities. Or to put it differently: It is a particularly short distance from apology to utopia when somebody uses the notion of solidarity.[1]

So, how to deal with the notion of solidarity and its role in the law of development cooperation? This contribution will proceed in three steps: First, it will try to clarify the notion of solidarity by going back to its conceptual origins in the domestic sphere. After discussing some problems with regard to its transfer to the international plane, the first

* Dr. iur., LL.M. (Harvard), Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law.

[1] For a general introduction to the concept of solidarity in public international law, see R. St. J. Macdonald, "Solidarity in the practice and discourse of public international law", *Pace International Law Review* 8 (1996), 259 et seq.; Ch. Tomuschat, "Ensuring the survival of mankind on the eve of a new century", *RdC* No. 281 (261 et seq.); R. Wolfrum, "Solidarity amongst States: An Emerging Principle of International Law", in: P.-M. Dupuy (ed.), *Völkerrecht als Wertordnung*, *Festschrift für Christian Tomuschat*, 2006, 1087 et seq.; M. Kotzur, "Soziales Völkerrecht für eine solidarische Völkergemeinschaft?", *Juristenzeitung* 63 (2008), 264 et seq.; and K. Wellens, in this book.

R. Wolfrum and C. Kojima (eds.), *Solidarity: A Structural Principle of International Law*,
Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 213,
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part will conclude by proposing a working definition for the further analysis. On this basis and through this lens, it will then analyse the law on development cooperation. To that end and in the second part of the paper, it will describe an ongoing process of international standard-setting with respect to development cooperation that gives an indication of where the international discussion stands today – and which seems to reflect the use of a surprisingly comprehensive notion of solidarity. Finally, the third part of this paper will analyse the law of specific development organisations (the World Bank and the European Community) which (in comparison to the general international declarations) seems to contain much less evidence of solidarity.

I. On the Concept of Solidarity

A. Historical and Conceptual Starting Point

In order to better understand the concept of solidarity, but also to grasp the challenges that it faces, it is useful to take a look back into the history of the concept. A helpful starting point could be the birth-moment of the modern notion of solidarity, and that is the French Revolution.[2]

In 1790, the help for poor citizens was declared a fundamental right in France. Three years later, in 1793, the *Assemblée Nationale* even adopted a law that gave every citizen the guarantee that he would receive subsistence in case of need.[3] These laws, first linked to the notion of *fraternité*, later called solidarity, introduced an entirely new concept into the sphere of political ideas and law; in fact, they introduced a truly revolutionary concept: why?

Obviously, the question of how to deal with economic inequalities and the poor was an old problem. Every society had developed different answers to deal with it. In some, the Christian idea of charity played the major role; since the 18th century the idea of philanthropy became also increasingly influential; and finally, in many States, poverty was mainly treated as a problem for the police.[4]

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[2] H. Brunkhorst, *Solidarität. Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft*, 2002; K.H. Metz, "Solidarität und Geschichte", in: K. Bayertz (ed.), *Solidarität. Begriff und Problem*, 2002, 172 et seq.

[3] A. Forrest, *The French Revolution and the Poor*, 1981, 28 and 82.

[4] Metz, see note 2, 173.

Against this backdrop, how was the concept of solidarity different? How did it transform the understanding of how and why to help each other? The revolutionary core of the concept of solidarity is the idea of equality of donor and recipient.[5] In contrast to the *vertical* notions of charity or philanthropy, where the donor feels pity and therefore gives, the concept of solidarity is based on a *horizontal relationship*. In the concept of solidarity, help is not an act of mercy, but a right of every citizen. It is guided by the idea that "I share with you because I recognise you as an equal citizen of a common polity, and not because you are poor and I feel compassion". Equality of citizens and reciprocity in their relations therefore lie at the heart of this new concept which went on to become one of the central political notions of modernity.

But the idea of solidarity in this original concept goes beyond this. It served not just the purpose of helping the poor, but it took on a broader *political* meaning: As its terminological root (the Latin word 'solidum') implies, the notion of solidarity connotes a shared responsibility for the whole common objective (solidum), not just the care for an individual.[6] Solidarity was meant to secure the autonomy of every person as citizen, that is: as a member of a common society.

In these respects, the concept of solidarity, born in the French Revolution, provided a democratic and modern answer to the problems of mass poverty, especially in connection with industrialisation and the demand for political inclusion.

But how is it possible to transfer this certainly meaningful concept to the international sphere – and especially to international *law*? Is it at all possible to do so?

B. Doubts about and Alternatives to a Concept of International Solidarity

A concept of *international* solidarity and hence solidarity in public international law, encounters serious doubts. Two lines of doubt stand out:

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[5] Brunkhorst, see note 2, 12-13; W. Sweet, "Solidarity and human rights", in: W. Sweet (ed.), *Philosophical Theory and the Universal Declaration of Human Rights*, 2003, 213 et seq. (217).

[6] Brunkhorst, see note 2, 127; Ch. Taylor, "Aneinander vorbei", in: A. Honneth (ed.), *Kommunitarismus*, 1993, 122.

First, one might ask whether it is possible to reconcile the rather collectivist idea of solidarity with the sovereignty – i.e. the independence-based structure of international law. Of course, there has been a shift from the law of coexistence to the respect for community interests even in international law.[7] But then again, this still poses a problem where it comes to concrete and positive obligations and especially so, when it comes to financial demands – as in the case of development cooperation.[8]

But there is also a second line of doubt: One also has to ask whether solidarity can be a universal (in contrast to a particularistic) concept. Here we encounter a crucial difference between the concept of solidarity and that of justice: justice (as we learn from moral philosophy) is per se a universal idea, applicable to everybody and everywhere. The concept of solidarity on the other hand is closely linked to the idea that solidarity is owed only between people who share a common bond.[9] In this respect, it is above all telling that the transformation of personal solidarity (traditionally within a family or small group) into mass solidarity (within a State) took place in the 19th century and coincided with (or is even necessarily linked to?) the emergence of the nation State; while the nation State closed its boundaries to the outside, it was able to increase the burden of cooperation on the inside.[10] Is it possible to widen this concept now to cover a global community, which would be necessary especially if we want to use it for the problems of development cooperation?[11]

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[7] B. Simma, "From bilateralism to community interests in international law", *RdC* 1994, vol. 250 (1997), 221; J. Frowein, "Konstitutionalisierung des Völkerrechts", in: *Berichte der Deutschen Gesellschaft für Völkerrecht* 39 (2000), 427 et seq.

[8] On this sensitive point especially U. Scheuner, "Solidarität unter den Nationen als Grundsatz in der gegenwärtigen internationalen Gemeinschaft", in: J. Delbrück (ed.), *Recht im Dienst des Friedens*, *Festschrift für Eberhard Menzel*, 1975, 251 (254-255).

[9] W. Kersting, "Internationale Solidarität", in: K. Bayertz, see note 2, 411 et seq.

[10] On this connection, J. Habermas, "Solidarität jenseits des Nationalstaats", in: J. Beckert et al. (eds), *Transnationale Solidarität*, 2004, 226 et seq.; H. Münkler, "Enzyklopädie der Ideen der Zukunft: Solidarität", in: J. Beckert et al. (eds), *Transnationale Solidarität*, 2004, 21.

[11] Two more doubts could be added: First, can one transpose the concept solidarity onto States? In the domestic order it addresses individuals and their

These are serious doubts but on the other hand, the reality of today could not call more urgently for a meaningful concept of international solidarity. In the 19th century, solidarity became a central concept which dealt with the mass poverty caused by the industrialisation; today it would be more than appropriate to have a similar concept to react to the scandal of absolute poverty of about 25% of today's world population (and relative poverty of more than 50 per cent).[12] In this situation, the need for an international concept of solidarity seems more than obvious.

But then again, a moral appeal is not a sharp tool when it comes to international law. Since solidarity seems to encounter such doubts, is it then perhaps more promising (and more honest) to look for alternative routes, especially when it comes to justifying development cooperation? Two alternatives come to mind and are discussed in the literature:

The first alternative is to give up on a legal concept of international solidarity. One could well consider it as an important notion of the *political* language, but look for alternative concepts to justify development cooperation *law*. Two such alternatives come easily to mind: a first route is that of *human rights*. One could forgo the concept of international solidarity and concentrate on human rights as a justification for development assistance. This is certainly an important idea but a different one to solidarity. One could say that human rights and development are different means to achieve the same end,[13] but they are nevertheless different means.[14] Human rights do not capture quite the same idea as

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morality – as donors as well as recipients; it is not charity, but the recognition of the humanity of every citizen. And second, can solidarity "work" without a State or a central institution which forces States to participate? Even within the nation State, systems of general solidarity did not come easily; the 19th and 20th century is a long history of the slow implementation of the Welfare State.

[12] Absolute poverty meaning having less than $1.25 a day, relative poverty meaning less than $2.5 per day. See numbers in C. Shen/M. Ravallion, "The World is Poorer than we thought, but no Less Successful in the Fight Against Poverty", *World Bank Policy Research Working Paper* 2008, 33, table 5; P. Collier, *The Bottom Billion*, 2007, 3-7; see also the statistics in the annual Human Development Reports, issued by the United Nations Development Program (UNDP).

[13] Most comprehensively and convincingly argued by A. Sen, *Development as Freedom*, 1999.

[14] On the tentative merger of human rights and development agenda in the late 1980s and 1990s, see D. Trubek, "The 'Rule of Law' in Development As-

solidarity, since they view the world through the lens of the individual, while the concept of solidarity has a more collective aspect:[15] it appeals to our commonness and to a very basic idea of shared values and destiny. Another alternative to the principle of solidarity would be the concept of *distributive justice*. This is obviously even less a legal notion but can well be used as a normative justification for development cooperation.[16] One could also dispense with the notion of solidarity as such and rather speak of a *social principle* in international law.[17] This again is a valid approach but still doesn't save the notion of solidarity.

But do we really have to give up the concept entirely? Another alternative could be to just water down our notion of solidarity in the face of the sovereignty dogma in international law and to use a less ambitious concept of solidarity. One could use "solidarity" as a rather flat and narrow concept, something that is actually not much more than a notion of cooperation, shared responsibility or not to harm each other. This has been the approach of the International Law Association which analysed solidarity in international law in 1986 (Seoul Declaration).[18]

But is it convincing to use such a narrow concept, even though it is far away from what the notion of solidarity originally meant? I do not think so. I think such a narrow concept of "solidarity" would have little to do with where the notion came from and what it actually meant. It would mean to seriously deflate an important concept of political lan-

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sistance: Past, Present and Future", in: D. Trubek/A. Santos (eds), *The New Law and Economic Development*, 2006, 8 et seq.; on the legal interconnections between both fields B.-O. Bryde, "Menschenrechte und Entwicklung", in: E. Stein (ed.), *Auf einem Dritten Weg. Festschrift für Helmut Ridder*, 1989, 73 et seq.; Ph. Alston/M. Robinson (eds), *Human Rights and Development: Towards Mutual Enforcement*, 2005; on the lasting difficulties, see Ph. Alston, "Ships passing in the night: Millennium Development Goals and Human Rights", *Human Rights Quarterly* 27 (2005), 755 et seq.

[15] But see on the more collective concept, e.g. of a right to development, E. Riedel, "Menschenrechte der Dritten Dimension", in: E. Riedel, *Die Universalität der Menschenrechte*, 2003, 329 et seq.

[16] Th. Franck, *Fairness in International Law and Institutions*, 1995, 8, 413.

[17] With strong arguments B.-O. Bryde, "Von der Notwendigkeit einer neuen Weltwirtschaftsordnung", in: B.-O. Bryde, P. Kunig, Th. Oppermann (eds), *Neuordnung der Weltwirtschaft*, 1986, 29 et seq. (37).

[18] Th. Oppermann/E.-U. Petersmann (eds), *Reforming the International Economic Order*, 1987, 47. See also M. Bulajic, *Principles of International Development Law*, 1986, 261 et seq.

guage. One would devalue a critical concept rather than strengthen it. It is at this point where a narrow notion would easily turn into an apologetic notion.

C. Proposal for a Meaningful Notion of International Solidarity

Faced with these problems, it seems expedient to distinguish between the content and the legal validity of the concept of solidarity for the analysis of the law of development cooperation. One can hold on to a meaningful notion of solidarity but conceive it as a *non-legal* notion. This enables us to use the notion of solidarity as a tool of critical analysis and to measure the state of law without being drawn into the question of whether it is law and without overburdening it with the question of whether it is a legal principle or not.

Which elements would then make up a concept of international solidarity? Drawing on the original idea of solidarity as sketched out in the beginning, three elements are essential: Solidarity means an obligation

- to provide *help* to one another in order to advance a *common objective* (*solidum*),[19]
- based on the recognition of the *equality* of the partners involved, despite any form of economic or other asymmetry, and finally
- the *mutuality* of obligations.[20]

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[19] The element of a "common objective" is a rather neutral and purposely short formulation for a variety of aspects that are often noted as elements of solidarity. It refers to the recognition of a common bond between those helping each other which is often formed on the basis of shared values. It also implies that solidarity exceeds a mere obligation to cooperate.

[20] Two aspects should be made more explicit about this element of mutuality: First, it should be distinguished from reciprocity. Mutuality does not mean that the partners owe the same amount of help to each other or should contribute equally. It is less demanding. But it underlines that the achievement of the common objective is a common task and not a one-sided effort (on this aspect, see also Macdonald, note 1, 265-266). Second, the mutual efforts have to contribute to the same common objective. A contribution by the recipient which only pleases the donor but does not help to achieve the common goal would therefore not suffice. For example, in the context of development cooperation the tying of aid (i.e. the obligation on the side of the recipient of aid to spend in the country of the donor) is not mutuality since it is not aiming at the development of the recipient but of the donor's economy.

On this basis and understanding of solidarity as a non-legal concept but as a tool of critical analysis, one can explore to what extend the law of development cooperation reflects this concept.

II. The Framework for the Law of Development Cooperation: The Declarations of the "Millennium Process"

Legal aspects of development cooperation are mainly to be found in the legal regimes of those organisations that concretely deal with development cooperation, such as the World Bank, the European Commission or other donors.[21] However, there is also a more general layer of law that touches on the topic. Three recent international declarations which deal specifically with questions of development cooperation give especially interesting insights into where the international discussion on development cooperation currently stands. These declarations are part of an ongoing political process that started with the Millennium Declaration and shall therefore be termed "Millennium Process".

The UN *Millennium Declaration*[22] is a resolution that was adopted by the UN General Assembly in September 2000 and lays down the values and principles of the world community (as assembled there) as well as the central areas of engagement. One (out of seven) area is titled "Development and poverty eradication" (paragraphs 11-20). This declaration is the basis of what is now known as the "Millennium Development Goals", which lay down eight central areas of engagement and goals to be reached by 2015.

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[21] On this concept of the law of development cooperation, S. Kadelbach, "Entwicklungsvölkerrecht", in: Fischer-Lescano et al. (eds), *Frieden in Freiheit. Festschrift für Michael Bothe*, 2008, 633 et seq.; P. Dann, "Grundfragen eines Entwicklungsverwaltungsrechts", in: C. Möllers/A. Voßkuhle/C. Walter (eds), *Internationales Verwaltungsrecht*, 2007, 7 et seq.; G. Feuer/H. Cassan, *Droit International du Développement*, 1991.

[22] UNGA Res. A/55/L.2 of 18 September 2000; G. Pleuger, "United Nations, Millennium Declaration", in: R. Wolfrum (ed.), *MPEPIL online edition*, 2008, at: <www.mpepil.com>.

The second declaration, the *Monterrey Consensus of the International Conference on Financing Development* (2002)[23] is a follow-up document to the Millennium Declaration.[24] It deals specifically with the question of how to raise funds for development and how to put the existing funds to more efficient use. Here, development cooperation is one area, next to debt reduction, foreign direct investment and trade. The Consensus was also adopted as a resolution of the UN General Assembly. However, its preparation was marked by the cooperation of donor and recipient countries as well as multilateral organisations, such as the World Bank or the International Monetary Fund.

Finally, the *Paris Declaration on Aid Effectiveness* (2005) is a follow-up on the Monterrey Consensus and focuses entirely on the effectiveness of development cooperation.[25] The Paris Declaration is not a General Assembly resolution but was adopted (by acclamation) by a so-called High-Level-Forum on Aid Effectiveness which mainly consists of ministers of donors and recipients. It is called a "Statement of Resolve" and lays down five partnership commitments as well as indicators on how to check the compliance with them.[26]

As they are resolutions of the UN general assembly only, and in case of the Paris Declaration not even that, these declarations are not binding law. However, they deal extensively with questions of development cooperation and frame the current discussion. How do they deal with the concept of solidarity and to what extent do they square with the notion laid down above?

Before we turn to these questions, as a backdrop and comparison, one should recall two General Assembly resolutions from 1974 which also dealt with the relation between developing and developed countries. The "Declaration on the Establishment of a New International Economic Order"[27] and the "Charter of Economic Rights and Duties of States"[28] did not mention but certainly reflected a principle of solidar-

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[23] A/Conf.198/11, Annex, also at: <www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf>.

[24] Para. 14 of the *Millennium Declaration*, see note 22, committed to holding such an event.

[25] *Paris Declaration on Aid Effectiveness* of March 2, 2005, at: <www.oecd.org/dataoecd/11/41/34428351.pdf>.

[26] More on these declarations, Dann, note 21, 16-18.

[27] A/RES/3202-3203 of 1 May 1974.

[28] A/RES/3281 of 2 December 1974.

ity. However, they did so in a somewhat curtailed way: Compared to the notion of solidarity sketched out above, they followed a rather one-sided approach by which the developed countries should be obligated to allocate more public resources to development cooperation (among other elements) whilst they hardly demanded any contribution from the developing States.[29]

Using these earlier resolutions as backdrop, one can ask how do the declarations of the Millennium Process compare? How is solidarity dealt with in these declarations? Here, for the first time, one can find the word "solidarity" not only used but defined in a document. In paragraph 6 of the Millennium Declaration "solidarity" is named as one of the "fundamental values to be essential to international relations in the twenty-first century".[30] And it is defined in the following words: "*Solidarity. Global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most.*" Hence, solidarity is mostly understood as a notion of fair burden-sharing and not much more. It is conceptualised as a rather narrow notion compared to the tripartite definition given above according to which equality and mutuality are essential elements of the concept too. Given the fact that this definition seems to give away important elements of a meaningful notion, and considering that it was not used again in follow-up documents,[31] it seems sensible to stick to the more meaningful concept sketched out

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[29] Macdonald, see note 1, 263-265; Ch. Tomuschat, "Die Charta der wirtschaftlichen Rechte und Pflichten der Staaten", *ZaöRV* 36 (1976), 444 et seq. (457); R. Schütz, *Solidarität im Wirtschaftsvölkerrecht*, 1994, 65.

[30] The word "solidarity" is also mentioned in the "European Consensus on Development" of 20 December 2005, a joint declaration of the Member States, the Council, the European Parliament and the European Commission (para. 13), but it is not defined nor further used there.

[31] It is interesting to speculate why the word is used so little in legal documents. During the time of the Cold War there was probably strong resistance on the side of the industrialised countries to use it, since solidarity was certainly rather a word of the then Second World, i.e. the socialist countries. But today, after the end of the Cold War, there would not be any need to avoid the notion anymore; so why is it still not used? Is it just not so essential? Is it really vague? Or is it considered to entail real duties?

above.[32] How do the declarations fare through the lens of the tripartite notion of solidarity?

A. Help Each Other to Achieve a Common Objective

With regard to the first element, the solidarity norm itself invokes the idea of help and fair burden sharing and the need for the stronger to contribute more.[33] But the idea is found in more concrete terms throughout these three documents. The Millennium Declaration, for example, declares that the "industrialized countries [...] grant more generous development assistance" (paragraph 15), while the Monterrey Consensus states that parties "recognise that substantial increase in ODA (Official Development Assistance) [is] required"[34] and confirms the old target of 0.7 per cent of GNP which the industrialised countries should contribute as assistance (paragraph 42). Perhaps more interesting is the fact that these new declarations lay out more specific duties that clearly go beyond just giving money. They demand, for example, the untying of aid[35] and the harmonisation of donor procedures in order to reduce the complexity of aid systems.[36]

B. Equality

The recent declarations also differ from those of the 1970s in that they do not so much insist on sovereign equality of the States but rather stress the new key word of a *partnership* of developed and developing

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[32] Another aspect worth mentioning is that solidarity is hardly found in the Anglo-saxon literature (with the notable exception of the writings of the English School, see A. Hurrell, *On Global Order*, 2007, 57 et seq.) but very prominent in the French (Durkheim, Duguit, Scelle, on these see M. Koskenniemi, *Gentle Civilizer of Nations*, 2002, 266 et seq.). See also Metz, note 2, 180 et seq.

[33] Millennium Declaration, note 22, para. 6.

[34] Monterrey Consensus, note 23, para. 41

[35] Monterrey Consensus, note 23, para. 43.

[36] Paris Declaration, note 25, para. 31.

countries.[37] Equality is thus not so much used as a formal and somewhat shielding aspect, but more as a term of engagement. It is especially noteworthy that the central aspect is the call for an increase in the "effective and equitable participation of developing countries in" the "formulation of standards", international dialogues[38] and to broaden the base for decision-making.[39]

C. Mutuality

It is the third element, however, which demonstrates most clearly the significant shift in the conception of the relationship between developing and developed countries. In a clear departure from the one-sided concept of the 1970s declarations, one can now find the recognition of important obligations also on the side of the developing countries – and hence the idea of mutuality.

All declarations emphasise that each developing country carries the primary responsibility for its own economic and social development.[40] The central term (next to partnership) is now *ownership* and the expression that development needs national leadership ("Effective partnership [is] based on national leadership and *ownership*") of recipient countries in development policies.[41] This idea is also reflected in the call for Poverty Reduction Strategy Papers, i.e. mid- and long-term development plans issued by the developing country itself to guide the contributions of donors.[42]

In a striking reversal, the entire first part of the Monterrey Consensus is dedicated to concretely list internal duties of recipient States.[43] This list covers a host of aspects, like ensuring consistency of macroeconomic

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[37] Monterrey Consensus, note 23, paras 4, 8, 40; Paris Declaration, note 25, paras 9, 13, passim.

[38] Monterrey Consensus, note 23, paras 57, 63.

[39] Ibid., para. 61.

[40] Ibid., para. 6.

[41] Monterrey Consensus, note 23, para. 40; Paris Declaration, note 25, para. 14.

[42] Monterrey Consensus, note 23, paras 40, 43; Paris Declaration, note 25, para. 14.

[43] Ibid., paras 10-19.

policies, increasing productivity, but also hot-button issues like good governance, care for solid democratic institutions[44] or fighting corruption.[45] Moreover, mutual accountability between the countries is an important element of this idea. Such accountability is supposed to be based on shared information, on the inclusion of parliaments and further actors in the developmental decision-making process as well as the naming of objective measurements as yardstick of achievements.[46]

To come to an interim conclusion: Compared to the resolutions of 1974, we can observe a shift from a rather one-sided and in this respect deficient concept of solidarity to a more reciprocal approach. The tripartite concept of solidarity, as given above, is therefore more fully accomplished in more recent declarations. In fact, one could say that with respect to our notion of solidarity, the Declarations of the Millennium Process sketch out a very comprehensive understanding of solidarity.

How does the law of concrete development institutions compare to the declarations? To what extent do we find the principle of solidarity in the law of concrete development institutions?

III. Solidarity in the Law of Development Institutions

The law of development cooperation becomes more concrete and more binding as one looks at the law of concrete development organisations. For a better and more tangible understanding of whether the concept of solidarity shapes the law and reality of development cooperation, one therefore has to look at the law of such organisations. In the following part, we concentrate the analysis on the law of two organisations: the World Bank and the European Union, and more precisely on that branch of the World Bank that deals with the poorest countries (i.e. the International Development Association/IDA) on one side and the cooperation between the European Community and the so-called ACP countries on the other side.[47]

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[44] Ibid., para. 11; Millennium Declaration, note 22, para. 13.

[45] Monterrey Consensus, note 23, para. 13.

[46] Paris Declaration, note 25, paras 47-50.

[47] The ACP countries are a number of countries from Africa, the Caribbean and the Pacific which (mostly due to former colonial ties) have a special aid relationship to the European Communities (EC). On the EC-ACP connection, see C. Cosgrove-Twitchett, *Europe and Africa: from association to partnership*,

Perhaps one should mention first that the word "solidarity" does not occur in any of the relevant legal documents. What they formulate as goals or purpose is in case of the World Bank/IDA to "promote economic development, [...] raise standards of living in the less-developed areas of the world" (article I Articles of Agreement [hereafter AoA/IDA]) and in case of the EC-ACP-Agreement to "promote and expedite the economic, cultural and social development of the ACP States, with a view to contributing to peace and security and to promoting a stable and democratic political environment" (article 1 Cotonou Agreement).[48] Therefore, we are left to use our own notion and its three elements (of help each other to achieve a common objective, equality and mutuality).

A. Help Each Other to Achieve a Common Objective

For a clearer understanding, the first element should be split up into two separate inquiries: First, is there any legal obligation to provide funds?[49] And second, are there any provisions to prevent harm from recipient countries in connection with development projects?

1. Obligation to Provide Funds?

Each project that is funded by the World Bank is based on a Financing Agreement between the bank and the recipient State. The question is then whether there are any rules which limit the discretion of the Bank to sign such an agreement. Relevant rules that might restrict the Bank's discretion can be contained in the Articles of Agreement/International

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1982; E. Grilli, *The European Community and the Developing Countries*, 1993; B. Martenczuk, "From Lomé to Cotonou: The ACP-EC Partnership Agreement in a legal perspective", *European Foreign Affairs Review* 5 (2001), 461 et seq.

[48] Interestingly enough, "solidarity" was used in predecessor agreements to Cotonou (see art. 23, Lomé Convention (IV), signed 15. December 1989), but has henceforth been omitted.

[49] Arguing in favour, H. Weber, "Der Anspruch auf Entwicklungshilfe und die Veränderung des internationalen Wirtschaftsrechts", *Verfassung und Recht in Übersee* 11 (1978), 5 et seq.; more nuanced and skeptical Schütz, note 29, 196-198, 234-236.

Development Cooperation[50] as well as internal policies which are binding on the staff of the Bank (so-called Operational Policies and Bank Procedures, OP/BP).[51]

These rules lay down clear conditions to be fulfilled before concluding an agreement. First, there are eligibility conditions: It has to be an eligible country (article V 1 a AoA/IDA), an eligible project (i.e. one with a high development priority and special focus, i.e. not an open-ended program, article V 1 AoA/IDA) and finally there are no other sources available (subsidiarity, article V 1 c AoA/IDA). There are also procedural conditions as the agreement has to be prepared and approved in accordance with the rules of a precisely regulated project cycle procedure (Operational Policy/Bank Procedure No. 10/8.60).[52] Finally, there are a number of material standards that have to be fulfilled: first, the project has to be economically justified and contribute to the eradication of poverty (Operational Policy No. 10.0, paragraph 3); second, the decision to give funds shall not be influenced by any political consideration (article V 6 AoA/IDA) and shall not be tied to specific conditions (article V 1 f AoA/IDA); and finally, the partners have to adhere to a variety of internal safeguard policies.

Once all these conditions are met, the Articles of Agreement formulate that the "Association *shall* provide financing" (article V 1a AoA/IDA). Hence, we indeed find a legal obligation to commit resources (not "may", like in IBRD, article III.4 AoA/IBRD). But then again, this obligation, first of all, depends on the condition that funds are available (follows from articles II 2, III 1 AoA/IDA): IDA funds have to be replenished by Member States and there is no duty to contribute to replenishment (article III1c AoA/IDA). Also, there are a number of very soft and open terms in these conditions (like "economically justified") which are wide open to interpretation. In sum: the Bank has a legal obligation to finance a specific project if it fulfils the various conditions.

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[50] I.e. the founding treaty of one of the two branches of the World Bank; abbreviated here as AoA/IDA.

[51] On the sources of legal obligations in IDA, see Dann, note 21, 13-15; A. Rigo-Sureda, "The Law Applicable to the Activities of International Development Banks", *RdC* No. 308 (2004), 297 et seq.

[52] Also, a project needs the approval of the recipient country (art. V 1 e) and of a Statutory Committee (art. V 1 d).

However, the conditions are so openly formulated that the discretion of the Bank in each individual case is extensive.[53]

How is the legal situation in the EC-ACP Cooperation? The EC also concludes individual financing agreements to bankroll development projects. Here, the legal rules to be considered are those of the multilateral Cotonou Agreement between EC and ACP-Countries[54] setting out the framework for cooperation and a variety of internal agreements and regulations that implement the Cotonou Agreement in the European legal order.[55]

However, these conditions are much less clear than those in the law of the World Bank. There is not one clear formula but a variety of overlapping prescriptions that have to be taken into account. The central, most imminent legal ground is the *Annual Action Program*. For each country it lays down concrete development aims, concrete areas of engagement and an available amount of money for each year; it also lists already a number of projects and the expected partners and outcomes of these projects. Any project has to be in accordance with this Annual Action Program. The Annual Action Program itself has to be in accordance with other provisions, most of all with the *Country Strategy paper* (which describes the mid-term development agenda for a particular country) and the thematic guidelines as laid down in the Cotonou Agreement. It specifies thematic areas of engagement, cross-cutting issues to be reflected in any project, and special regard for certain countries (LDC, landlocked, islands).[56]

The final decision on whether to conclude a financing agreement is taken by an EC Committee composed of the Member States (article 16 II Annex IV Cotonou Agreement). But there is no legal indication on

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[53] From a more practical perspective, one also has to mention that the Bank, as a multilateral donor organisation, is simply depending on its customers to earn money. In contrast to bilateral donors which are fully financed by States, international development banks like the World Bank (including IDA) earn money with every grant or loan they give. I am grateful to Laurence Boisson de Chazournes for pointing out this aspect to me.

[54] Signed on 23 June 2000, *O. J.* L 317, 1 et seq.

[55] For a general orientation see K. Schmalenbach, in: C. Calliess/M. Ruffert (eds), *EUV/EGV*, Third Edition, 2007, art. 177; also P. Dann, "Programm- und Prozesssteuerung im europäischen Entwicklungsverwaltungsrecht", *Europarecht Beiheft* 2008, 107 et seq. (108-111) and literature in note 47.

[56] In more detail on the conditions, Dann, see note 55, 111.

whether it "shall" or "may" approve of a proposal. Hence, even if a project proposal fulfils the conditions of all those programs and guidelines, the EC remains free in its discretion.

In sum and at first sight, the legal situation therefore might seem different in the two organisations: a legal obligation in the World Bank, but a free decision in the EC. On the other hand, there are also various discretionary elements in the law of the World Bank that give its decision-making organs wide leeway. At the end of the day, in either case there is no compelling duty to provide funds.

2. Standards to Prevent Harm

With respect to the first element of solidarity, one should secondly inquire whether the internal law of the World Bank/IDA or EC-ACP cooperation provides rules on how to prevent harm from recipient countries in the context of development cooperation. This may sound like a rather paradox inquiry, given that development funding is supposed to help and also because it is not the donor organisation but the recipient State who is implementing the projects. Nevertheless, a lot of harm can be done if projects are already planned poorly – with serious risks for the environment, sensitive social structures or cultural heritages.[57]

In this respect, the internal law of the World Bank is exemplary. The Bank has a number of so-called safeguard policies which set up standards for its staff to comply with.[58] These standards have to be examined and complied with before any project can be approved. The EC is much less explicit and transparent in this respect. Certainly, EC-financed projects have to comply with the various legal documents that lay down the positive ends of each project, but it is hardly recognisable which standards have to be met here exactly. In sum, with respect to

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[57] For a general critique of development as a bureaucratic task see W. Easterly, *The White Man's Burden*, 2007; for a more detailed critique from a human rights perspective, M. Darrow/A. Tomas, "Power, Capture, and Conflict: A Call for Human Rights Accountability in Development Cooperation", *Human Rights Quarterly* 27 (2005), 471 et seq.

[58] L. Boisson de Chazournes, "Policy Guidance and Compliance: The World Bank Operational Standards", in: D. Shelton (ed.), *Commitment and Compliance*, 2000, 281 et seq.

no-harm policies one can conclude that the World Bank has a fairly sufficient set of rules, while the EU has not.

With regard to the first element of solidarity (help to achieve a common objective), we have to conclude that the first and most important question (i.e. whether developing countries have a right to receive support) has to be answered in the negative. Even though the provisions of IDA contain an obligation to do so, this obligation is based on manifold conditions; in effect it therefore is not binding. However, with regard to ensuring that no harm should be done, the World Bank has an exemplary legal regime. In both respects, the EC-ACP regime is much less stringent and leaves the EC wide discretion.

B. Equality

The second element of the tripartite notion of solidarity concerns the relationship between donor and recipient, here the donor institution and recipient States. How are they structured? Is there a horizontal relationship in which donor and recipient meet each other as equals or is it rather dominated by the donors?

1. Contractual Basis

At a first glance, the relationships are clearly based on the principle of sovereign equality. All development projects are based on financing agreements. These are regular international agreements adopted by each side autonomously.[59] Also, all projects have to be formally based on the request by or at least approval of the recipient State.[60] Hence, from this perspective, respect for the sovereignty of the recipient State seems to be built into the legal structure of development cooperation. In principle, aid relationships are therefore based on equality.

However, this might not be the whole picture. Without looking into the non-legal asymmetries of power that certainly shape the behaviour of the contracting parties,[61] one might want to know whether the concrete

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[59] L. Gündling, "Foreign Aid Agreements", in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, 1995, 425 et seq.

[60] Art. 15 Annex IV Cotonou Agreement; art. V sect.1 (e) AoA/IDA.

[61] A. Fatouros, "On the Hegemonic Role of International Functional Organisations", *GYIL* 23 (1980), 9 et seq.

rules on decision-making also reflect the principle of equality. Here, the picture looks different.

2. Project Cycle

The financial agreements are only the end of a longer process of programming and negotiation which is called the project cycle. How are relationships between recipient and donor structured in this project cycle?

The first phase of this cycle covers the mid-term planning. In the World Bank this planning stage evolves around the preparation of a Country Assistance Strategy for each recipient country which covers a period of four years. In the preparation of these Strategies, the recipient country has no formal influence; it is only consulted but it has no veto or formally secured influence.[62] Here, the idea of an equal partnership is clearly missing. In the EC-ACP relation, on the other hand, this idea can easily be found. The mid-term planning process is divided in two phases: First, the preparation of a multi-year Country Strategy Paper and then the Annual Action Program. Both these documents are prepared jointly, i.e. with the Commission on the one hand and the recipient country on the other.[63] The multi-year Country Strategy Paper has also to be signed by the recipient country which gives it a veto power.[64]

After this first, mid-term planning phase, the second phase of the project cycle covers the negotiation of concrete financial agreements on projects. This is in both cases (IDA and EC) a more cooperative process and the final decision is to be taken on both sides autonomously. However, the EC-ACP relationship goes even beyond a contractual nature since it provides for a complaint mechanism in case the EC rejects a project.[65] The EC has to provide reasons for such rejection and hear the government. Either way, the final decision to commit financial resources remains in the hands of the EC.[66]

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[62] Bank Procedure 2.11, para. 7. In more detail, Dann, see note 21 (21).

[63] Art. 2 I Annex IV Cotonou Agreement, art. 7 II Regulation on the implementation of the 10th European Development Fund (Council Regulation (EC) No. 617/2007, *O. J.* L 152, 1 et seq.).

[64] Art. 4 VI Regulation 617/2007, see note 63; see generally art. 57 II Cotonou Agreement.

[65] Art. 16 IV Annex IV Cotonou Agreement.

[66] Art. 57 III Cotonou Agreement.

3. Representation

Another aspect is worth considering – and that is the question of representation. As is well known, in the World Bank recipient countries are members just as typical donor countries are, but they are not equally represented in its decision-making organs. In the Board of Governors, as well as the Executive Board, it is not the principle of "one-country, one vote" that applies, but voting power is based on the amount of money a country paid into the Bank (article V.3 AoA/IDA).[67] Hence, we have a clear departure from what one would consider as a solidarity-based system.

However, it would be unfair to compare the World Bank rules with those of the EU, since in the EU recipient countries are not members, hence the question of representation does not arise here. However, one could compare the World Bank rules on representation with those of the UN Development Program. There, although countries have not got equal voting power, a system was devised that is based on the idea of an "equitable and balanced representation" of developing and developed countries.[68] This was translated into a roughly equal division of votes in the governing council. In that light, the World Bank rules are clearly deficient.

Regarding the element of equality, we can summarise that behind a façade of contractual equality, clear deficiencies as well as obvious differences emerge. Especially the World Bank excludes the recipient country from central aspects of its planning process. It hardly stands up to the ideal of partnership; and it is obvious that the call for "effective and equitable participation" in decision-making procedures is targeted at these aspects.

C. Mutuality

If equality is (rightfully) demanded as basis for the relationship between donor and recipient, a meaningful concept of solidarity equally implies that recipients of help also contribute to the achievement of the common objective. It is this thought that in environmental law has found a

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[67] G. Wiegand, *Organisatorische Aspekte der internationalen Verwaltung von Entwicklungshilfe*, 1978, 239 et seq.

[68] Ibid., 97. See A/RES/2029 (XX) of 22 November 1965, para. 5.

valid expression in the principle of a "common but differentiated responsibility".[69] In development law, this idea has not been formulated as a separate principle, although the idea is increasingly found in general declarations of development law, for example in the Monterrey Consensus which speaks of the "primary responsibility" of recipient States.

But how is it in the concrete law of development institutions? To what extend do we find evidence of this idea here?

1. Faithful Implementation

A first legal expression of the idea of mutuality can be found in obligations on the recipient's part to faithfully implement the commonly agreed upon project. In the law of the World Bank we find plenty of evidence for this understanding. The recipient is obliged to carry out the project with due diligence and efficiency (sect. 4.01 General Conditions/IDA). It has to provide complementary funds to purchase land or provide additional facilities or services (sect. 4.03 General Conditions/IDA). And it has to prepare numerous reports and be accountable for use of funds (sect. 4.08 General Conditions/IDA). All of these duties are laid down in the so-called General Conditions which are formulated by the Bank and are as such incorporated into every agreement.[70]

The EC-ACP law again is much less transparent or demanding in this respect. There are no such generally formulated conditions. Due diligence and reporting duties are presumably concluded in the concrete agreement but they are not public.

2. Conditionality?

Next to such duties to faithfully implement the agreements, one might ask about further duties of the recipient State to contribute to the common objective. As we saw in the declarations of the Millennium process, developing countries do not shy away from acknowledging their primary responsibility and respective expectations, for example to fight

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[69] See Wolfrum, note 1, 1094-1095; U. Beyerlin, "Bridging the North-South Divide in International Environmental Law", *ZaöRV* 66 (2006), 259 et seq. (277-281).

[70] On these general conditions see J. W. Head, "Evolution of the Governing Law for Loan Agreements of the World Bank and Other Multilateral Development Banks", *AJIL* 90 (1996), 214 et seq.

corruption, to strengthen an independent judiciary or to enact necessary laws.

However, such actions on the side of the recipient countries involve rather broad policy decisions which are difficult to link to concrete development projects. Two mechanisms in the legal regime of the World Bank and the EC-ACP cooperation respectively have had only a limited impact. Both organisations used, and to some extent still use, so-called conditionalities, according to which the disbursement of funds is linked to the fulfillment of certain political reforms.[71] The EC-ACP Cotonou Agreement also knows the weaker instrument of the political dialogue (article 8 Cotonou Agreement). Such dialogue is supposed to accompany the aid-relationship and provide for a channel of communication between the partners.[72] However, both instruments have been of limited success and pose difficult questions with regard to the sovereignty of the recipient State.

With regard to the element of mutuality, we therefore have to conclude that, in general, it is still not very pronounced in the institutional law of development cooperation. The World Bank has a more clearly laid out but still fairly limited legal regime for it whilst the EC-ACP regime lacks respective provisions. Here, the effectiveness of aid, and thus the ability to achieve the common objective could be enhanced.

IV. Conclusion

This paper started out with the proposition to stick to a meaningful concept of solidarity in order to preserve the central ideas of this truly

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[71] In both organizations, conditionalities are only used in respect to less concrete forms of lending compared to concrete project lending, e.g. in the area of structural adjustment lending (within the World Bank now called development policy lending), OP 8.60, see M. Tsai, “Globalization and Conditionality: two sides of the sovereignty coin”, *Law & Pol’y Int’l Bus.* 31 (2000), 1317 et seq.; W. Meng, “Conditionality of IMF and World Bank”, *Verfassung und Recht in Übersee* 21 (1988), 263 et seq. For the EC, this is the case in the area of direct budget support, see art. 61 II Cotonou Agreement.

[72] If such a dialogue fails and if clear violations of the principles of human rights, democratic principles and the rule of law occur or serious cases of corruption arise, either party can trigger a more urgent consultation procedure (arts 96-97 Cotonou Agreement). If this consultation has no effect, either side can even go so far as to suspend the aid relationship.

important concept – even at the cost of giving up the claim of its legal validity. Considering the lack of express definitions in international law, it proposed a tripartite concept of solidarity, which defines solidarity with three elements: helping each other to achieve a common objective, equality of the partners and mutuality of obligations.

Against this conceptual background, the paper analysed the law of development cooperation. It first described an on-going process of international standard setting with regard to development cooperation (the so-called Millennium Process) and found that the documents of this process formulate an understanding of development cooperation that matches the meaningful concept of solidarity. Finally, the paper analysed the law of the World Bank and of the EC-ACP development cooperation and came to a rather mixed result. While some elements of the concept of solidarity can be recognised in the binding law (e.g. no-harm policies and mutuality requirements in the World Bank's legal regime or equality in EC-ACP law), others were clearly missing (e.g. obligation to pay or no harm insurances in EC-ACP law or equality in World Bank law).

The aim of this contribution was not to proof the legal validity of a concept of solidarity, but to show that solidarity can and should be used as a tool of critical analysis. It turned out that there is plenty of material for such critical scrutiny. So far, solidarity in the law of development cooperation is certainly more promise than principle.

Discussion Following the Presentation by Philipp Dann

Y. Dinstein: I am glad that Dr. Dann brought us down to Earth from the stratospheric heights that Professor Wellens had tried to raise us to. Who can object to solidarity? Solidarity is like equity, fairness, and – for that matter – motherhood. One cannot speak against it. Nevertheless, the expression "solidarity" (a) scarcely appears in any international treaty of note; and (b) is missing from landmark statements articulating the general practice of States accepted as law, namely, custom. Professor Wellens talked about the bridges that cross international rivers. I hope that there is no need to remind a person coming from Nijmegen of the risk of going "A Bridge Too Far". In this case, the bridge too far takes us from the *lex lata* to the *lex ferenda*. As long as solidarity is endorsed in the context of the *lex ferenda*, who can oppose it? But sheer belief in solidarity as *lex ferenda* does not turn it into solid *lex lata*.

Dr. Dann rightly said that solidarity is a non-legal concept. This ought to bring us back to the important opening remarks by Armin von Bogdandy. I am particularly intrigued by his reference to the French social scientist Émile Durkheim (the coiner of the phrase "division of labour"). Durkheim had some influence on his jurist colleague Léon Duguit who wrote about solidarity and international law. Duguit alluded not simply to solidarity but to "*solidarité sociale*", in which he saw the element bonding together the international community. It must be perceived, however, that Duguit spoke about "*solidarité sociale*" in a sense not entirely dissimilar to Hans Kelsen's "*Grundnorm*", i.e., an axiomatic meta-juridical concept that underpins the international legal system. I see merit in a philosophical debate about solidarity in such a meta-juridical context, but clearly this will not suffice for the purposes of Professor Wellens.

The real question, raised by Professor Wellens, is whether the principle of solidarity can be regarded not as a meta-juridical notion but as part

and parcel of positive international law, that is to say, either custom or treaty. Professor Wellens rightly observed that the answer to this question requires a methodical analysis of the various branches of international law. Due to constraints of time, I am unable to cover here every branch of an ever-growing legal system. I shall just take one example: International Humanitarian Law (IHL). I find it symptomatic that solidarity plays no role in IHL, and I shall give you an illustration. The major premise of IHL is its equality of application to all Belligerent Parties in an international armed conflict, irrespective of their standing as aggressor States or victims of aggression fighting in self-defence, or even as participants in enforcement action following a binding decision of the UN Security Council. To paraphrase, the *jus in bello* (IHL) applies across the board, regardless of the issue as to who is in the right and who is in the wrong from the standpoint of the *jus ad bellum*. Take, for instance, the IHL rules governing the protection of prisoners of war. These rules are equally applicable to the combatants of aggressor States and to those of their victims. What is the rationale of this parity? Is it due to the fact that IHL is motivated by a sense of solidarity with the aggressor States? Of course not! The real moving force here is humanity. It is because of humanitarian considerations – and humanitarian considerations alone – that the captured combatants of the aggressor States are granted the same privileges as the captured combatants of the victims of aggression. Naturally, solidarity and humanity are, as it were, neighbouring concepts. Still, there should be no confusion between the two. Talking about them interchangeably is no different from talking interchangeably about the Heidelberg Cement and the Max-Planck-Haus only because they are neighbours physically.

S. Oeter: My emphasis is a bit different. I think Philipp Dann reminded us of a necessary corollary of the principle – if we phrase it as a principle – of solidarity. You phrased it under the concept of mutuality. I found your introductory comparison quite interesting, as an attempt to link the international legal solidarity discussion to the development of solidarity in the internal legal space, in the internal legal systems. And I think if we look into the development of internal solidarity subsystems and social welfare systems, we see a clear trend towards emphasising subsidiarity, one could also say: mutuality. The general rule is not only solidarity, but solidarity is made dependent on the other hand on the obligation of the recipients of solidarity to develop one's own initiatives to solve one's problems. If you look into the recent developments of social security systems, I think there is a really strong trend towards

that type of mutuality. And to a certain degree I think Philipp Dann reminded us that in the field of international development aid or development aid law, we have to a certain degree a comparable development starting from the high-ground's utopia of the new international economic order of the seventies now to the down-to-earth practice of international development aid documents. It seems clearly visible that we have again a strong emphasis on that other side of solidarity, namely the side of aid efficiency, of good governance. You need a certain minimum amount of good governance in order to take care that any kind of aid is not completely devalued by political mismanagement. So, let us phrase the argument that there is this other side – and whether that is true would be my question: Can we, if we try to pin down solidarity as a legal principle, talk of the principle of solidarity as such or isn't mutuality a necessary part of it – you could also call it conditionality? Isn't that an unavoidable corollary of such a principle?

J.-P. Cot: I thank Dr. Dann for his excellent presentation. Like him, I believe solidarity is a guideline, a political concept and a useful political tool but not a legal principle in international law.

I was fascinated by Professor Wellen's paper this morning, thoughtful and provocative as it was, but I was ill at ease with the legal principle of solidarity. It does not fit into the French legal culture and it is not part of our international law toolkit.

I think Dr. Dann was correct in originating the political concept of solidarity in the French Revolution where there was a clear break with the traditional concept of charity. But that does not transform it into a legal principle.

The concept of solidarity was expanded in France at the end of the 19th century. It was a sociological concept, at the heart of Émile Durkheim's sociology, with its distinction between "*solidarité mécanique*" and "*solidarité organique*". It also was a political movement initiated by Léon Bourgeois, a radical politician, under the name "*solidarisme*". It did contribute to the development of the French Welfare State at an early stage, but ran into scepticism in socialist and trade-union movements.

Léon Duguit did import the concept into administrative and constitutional law on the basis of the distinction between positive and objective law ("*droit positif et droit objectif*"), which was a curious reversal to natural law in the guise of sociological theory. Georges Scelle then developed the theory in the field of international law.

The political idea of solidarity had its day in pre-World War I in France and did come in support of Albert Thomas, himself a socialist, certainly not a solidarist, at the launching of ILO. The fuzzy legal construction of Léon Duguit and Georges Scelle did not survive. This is not to say that Scelle was not a major scholar in international law. His reflections on federalism, on international organisations and on treaties are an important contribution to this discipline. But his concept of solidarity, based on the "*droit objectif*", has not survived. I cannot quote a contemporary French international scholar operating within that legal framework.

More generally speaking, I do not think that solidarity has been embodied as a legal principle in French law. Dinah Shelton quoted our "devise": *liberté*, *égalité*, *fraternité*. Actually, "*fraternité*" was added as an afterthought in 1848. *Liberté* and *égalité* certainly became important legal concepts and were embodied in our principles of constitutional law whereas *fraternité*, to my knowledge, never became a legal concept as such. Our Welfare State used other concepts and principles over the years.

Turning to Dr. Dann's presentation and the issue of development aid. I was very interested by his presentation of the components of solidarity as a guideline and not as a legal principle. He insisted on the component of mutuality. In a distant past – the beginning of the nineteen eighties – I was closely associated with the overseas development office of my country. I always noticed the reluctance of our partners in the South to any introduction of an element of mutuality. This was often for good reasons, like refusal of conditionality or tied aid. But it did go beyond these issues because any form of conditionality was considered as neo-colonialism in disguise. We certainly sided with our Southern partners on issues such as the ultra-liberal policies of the World Bank at the time, but we had the greatest difficulties on policies relating to what is known as "good governance", to use the present and politically correct language. But these were political issues, not legal ones.

D. Thürer: Jean-Pierre Cot referred to Georges Scelle's "fuzzy" legal construction of solidarity as not having survived in French scholarship. I am disappointed to hear this. I always thought that Scelle made a major contribution to an all-embracing theory of federalism. The federal principle – and I hope I do his thoughts justice – extended vertically from the local and regional level of government within States to the federal State as such and finally into the structure of international and su-

pranational organisations. I have always found Scelle's thoughts highly stimulating and believe that they deserve to be taken seriously in contemporary legal and political discourse. Do not federal constitutional systems include, explicitly or implicitly, legal obligations of solidarity in relations between the constituent units and the Federation as well as between the constituent units themselves (see "*Bundestreue*", "*principe de loyauté*")? Could it not be argued that the principle of mutual loyalty gains in normative strength according to its legal setting? The principle of solidarity may also be considered – as Judge Koroma alluded – to be inherent in the international legal system as such.

Let me add that I think that the subject of our symposium was very well chosen. I thank the organisers and the speakers for their outstanding work.

P. Carazo: I come from Costa Rica and so I am a national of one of those developing countries. My feeling is that you come to the conclusion that solidarity exists on the paper only. Or at least after having heard what you have proven on the three elements, it seems to me as if there is only little substantial true development that would bring us to a point where we can say that solidarity has really trickled down from the resolutions to the real field. And maybe, especially on this issue of mutuality, developing countries, I think, are reluctant because it is really seen as conditioning and it is felt that it is a way of hiding charity, this charity donor-recipient relation, by saying: "Oh, we are mutual, we are equal, but really you have to dance to my tune." So, in that regard, maybe mutuality can only be true if it is based on equality. And all these three elements should be truly interconnected in order to conclude that solidarity really exists in international practice.

P. Dann: I would like to take up the question of mutuality, which came up in different comments now. To start with the very last remark: I do think that mutuality, equality and help have to be combined in order to speak of solidarity. I do not think that one can simply cherry-pick and focus just on one element of the solidarity concept. Looking at all three elements in the context of development law, though, my conclusion was a rather dire picture. I would also like to stress, in response to Judge Cot, one aspect of the mutuality element which perhaps I did not stress enough before: mutuality includes the obligation on the part of the recipient State to advance the common objective. It has to contribute actions which help to achieve the objective, in our case the pov-

erty eradication. That is why I am in fact not very happy with the example you brought up, the example of tied aid. As an explanation to those of you who are not experts in development matters: Tied aid is a terminology for aid which is given, but tied to the condition that the money is spent in the donor country. It is tied aid if, for example, Germany gives Namibia money to build a street, but the tar and all the rest have to be bought in Germany or at least German firms have to provide it. Tied aid used to be a very important element of development aid – and I would say a detrimental one. The objective was not the common objective of poverty eradication but the donor's desire to support its labour market. If we talk about mutuality, mutual obligation would mean to advance the objective of poverty eradication. Therefore, I would say that tied aid cannot be an element of that. It would have to be an obligation, for example, to provide good judicial expertise in the recipient countries or the like, but it should not primarily serve to benefit the donor. Mutuality does not mean to benefit the donor but mutuality means to benefit the shared goal.

J. A. Frowein: Concerning mutuality and conditionality: could it be that we find the key to that problem in what I earlier called solidarity among humankind? If I look at the development of the ACP conditionality, human rights clauses, democracy clauses, good governance clauses, I think there is more and more a recognition in Africa – I speak under the control of Judge Koroma – that in fact these clauses, which were fought a lot at the very beginning, are to the benefit of the countries concerned. And if that is so, I think what I tried to call solidarity among humankind is somehow included.

R. Wolfrum: Jochen, you could perhaps use your last remark as a counter-argument to Yoram, who pointed out that prisoners of war are treated alike although one may come from the aggressive State and the other may not. Can we not put that under solidarity amongst humans?

K. Wellens: I hate to ask for the floor again. First of all, with regard to Professor Dinstein's remark: I can easily understand why he is saying "beam me down, Scotty" in comparing the two presentations. And of course, you are right in pointing to the difference between *lex lata* and *lex ferenda*. I was not presenting the principle of solidarity as exclusively *de lege ferenda*. With regard to that aspect of your remark, let me just recall the debate you participated in within the Institute of Interna-

tional Law. The debate the ILC held this year (2008) was, amongst other things, on the combination of *lex lata* and *lex ferenda*, with regard to humanitarian assistance. So that debate will go on and I think it is perennial. With regard to IHL, of course, there is equal applicability of IHL norms to all categories of participants. But I did not talk about that. I spoke about Article 1 and Laurence will come back to Article 1 this afternoon. And, in fact, that brings us back to the *erga omnes* debate Erika was referring to and the ICJ's disagreement on the scope of that provision. Now, I have to congratulate you with your presentation. It was a very clear and structured one. And the only remark I would like to make is that of the mutuality of obligations. That is exactly what Ronny Macdonald was thinking of when he wrote that solidarity rights can only qualify as solidarity rights when there is a corresponding obligation on the other side. Just one minor remark. In my view, the three elements of the notion of solidarity you mentioned, do not disqualify the principle of solidarity from being a legal one because they are present in the way the principle of solidarity works – to varying degrees in various branches. And finally, if I may just build on what Jochen Frowein said with regard to conditionality and so forth: The EC preferences case demonstrated the vulnerability of trying to let it work in that particular way. Thank you.

T. Eitel: My congratulations for that presentation, which I found indeed very clear and well organised. I want to say something to the mutuality or reciprocity and I would like to dispute the need for that constituent part. In New York at the General Assembly many speakers were addressing the climate change and one, the head of State of a small island country, was very sure that within the next 30 to 40 years, his island would be under water. And he described what and how they were preparing for this – not – eventuality but for this certainly occurring event. And let's assume that he is right. What would happen to the mutuality? I think we would out of sheer solidarity, really out of sheer solidarity try to be of assistance by immigration laws. And there I do not see any reciprocity. And I would not know of any other principle, whether structural or non-structural, which would apply here. So I think there are cases where the principle or whatever rule of solidarity is working – hopefully working without reciprocity. Thank you.

Y. Dinstein: I spoke before about solidarity in the sole context of IHL. I feel that I ought to expand by offering you another illustration

about the role of solidarity, this time in the setting of human rights law. Some time ago, a brilliant article was published by a French writer of Czech origin, Karel Vasak. In this article, Vasak argued that the evolution of international human rights consists of three generations, patterned after the famous clarion call: "*liberté, égalité, fraternité*". The first generation of human rights – consisting of civil and political rights (based on *liberté*) – is now well entrenched. The second generation of human rights – comprised of economic, social and cultural rights (based on *égalité*) – is perhaps less well established, but it is also widely acknowledged. The time has come, said Vasak, to have a third generation of human rights based on *fraternité*, which he himself presented as identical to solidarity. What are the human rights which would qualify under this new rubric? The primary ones are the putative rights to development, to peace and to a free environment.

What has actually happened since the Vasak article was published? In terms of positive international law, nothing. There are many commentators – and even Governments – who support the adoption of all or some of the new human rights. But none of these rights has become a constituent part of existing law. We are back to the point that I have made in my earlier intervention. *De lege ferenda* there is much to say in favour of the third generation of human rights. But *de lege lata* what counts is custom and treaties, and none of the putative rights has, as yet, acquired the lineaments of full-fledged customary or treaty rights. Thus, there is nothing to show for all the efforts invested in advancing solidarity in the legal domain of international human rights.

But there is more to this than meets the eye at a cursory glance. Let us assume *arguendo* that, one of these days, a human right of the third generation – say, the right to development – will consolidate as customary law or will be enshrined in a treaty in force. What will this signify? The only clear outcome will be that the right to development will have come of age. As for solidarity, while its banner will be proudly hoisted on the parapets of development, this will happen only in a symbolic and non-juridical manner. Solidarity will remain the meta-juridical and conceptual foundation underlying the right to development. For solidarity as such to become a brick in the international legal edifice what is required is that it will get recognised *per se* as part of the law. With respect, I do not see this happening any time soon.

A. G. Koroma: I was not going to ask for the floor again, but I have been encouraged by the excellent paper presented by Dr. Dann. If I

may digress a little, I would like to comment on what Professor Dinstein stated a few minutes ago. You know, I have enormous respect for him but I would not agree with his statement that solidarity is not part of the law. When I spoke earlier on I said that solidarity is inherent in the law. Sure, you will not find solidarity in the law under the heading of solidarity as such but if you take, for example, the genocide convention and the responsibility to protect, I think that they are not only based on our common humanity, but also on the principle of solidarity. Otherwise, what interest has Mexico in protecting the rights of those people against whom genocide has been committed in Rwanda or in Bosnia? In that sense, solidarity is not the law as such but it is inherent in the law based on our common humanity and you could go beyond that. The principle of international peace and security, collective security, is only invoked if aggression or a threat to peace has been perpetrated in another part of the world. What interest would Germany have in resisting such an aggression? The basis is the principle of solidarity. So, I agree with him that there is no principle as such. Solidarity as such is not part of the law, but it is inherent in the law.

I have also been encouraged to speak, as I said, by the excellent paper presented by Dr. Dann. And I think that you give concrete expression, as it were, to the principle of solidarity, you brought it down to earth. And that is not to say that the theoretical aspect of it is not important, it is. When I was at the United Nations many, many years ago, we had to provide a theoretical basis for the international economic order and the rights and duties of States without which we could not have made progress on them. So there is a theoretical basis for it as provided by Professor Wellens this morning. But you brought it down to earth by your application of the solidarity principle to the ACP, to the World Bank and so on and so forth. It is, however, understandable that our colleague from Costa Rica should have complained about conditionality in that context. Judging from the professional experience of the early years of my career, I believe that in some cases it is important for aid to be tied, not in the sense in which you rightly explained, Dr. Dann, to say that you should purchase the material for road construction in Germany, but it would be appropriate if you provide aid to ensure that there is good governance, that there is accountability. In that sense, I think conditionality may have a place. In that respect I agree with what Professor Frowein said, some of those conditionalities are in our interest. I think that also found a place in your paper and as I said: Your paper was a very realistic and practical one. Thank you.

P. Dann: Let me start by responding to the remark by Professor Frowein. You were thinking about the connection between mutuality and conditionality and you proposed to have the humankind as a solution. I entirely agree. I think the aspect to look for is who to benefit. The idea would be not to benefit a particular State but the people living in that State and beyond that mankind. And perhaps that connects the other two contributions to the one made by Judge Koroma. What you find in the literature about development cooperation is very often that political activists from those countries demand mutuality in the respect that you just mentioned. They demand mutuality to force their governments to be more accountable. And in this respect, I think there is space for this mutuality element. Professor Wellens, you asked whether these three elements disqualify the idea of solidarity being a legal concept – not at all. My starting point was just to say: "We have to first of all clarify conceptually what we mean by solidarity and then we can go into the legal material and analyse whether we find it there." And if we find it, fine. Then we can say: "We have a solidarity principle." But with respect to the area of law that I was looking at, my conclusion was a negative one. My point was, that these elements should be taken seriously, and if so, conclude that it is not a legal principle. This might be the connection to the discussion: Of course I am not against solidarity, who is? But I am against deflating an important concept – it is a too important concept to be used more or less randomly as another word for cooperation. And that is why I, as a legal scientist, think that it is better to use it more forceful as a critical tool of analysis than to be an advocate and see it. That is why I took, at least with regard to my area of specialisation, this more careful approach.

With regard to Professor Eitel's remark whether mutuality always has to be there and your example of the island States. Now of course, that puts me on the spot. But perhaps we do not have to call everything which is social also solidarity. I mean I would help the island States out of compassion. I feel a certain compassion and therefore I contribute and help them. But that does not necessarily mean that I would call this solidarity. So again, my plea would be to stick to a more meaningful and more demanding concept of solidarity in order to not deflate it.

E. Riedel: It was so interesting. The questions that were raised to the excellent presentation by Dr. Dann gave us, I think, the underpinnings to what we heard earlier today. So thank you very much for that. First, let me begin with a footnote to Professor Cot who reanalysed the notions or picked up on the notions of *liberté*, *égalité*, *fraternité* and *soli-*

darité saying that in France, if I understood him correctly, *fraternité* and *solidarité* do not play such a big role. But maybe the reason for that is that in statute and ILO law France plays a very, very prominent role and there the solidarity concept is used quite a lot. In Germany, the Social State principle read in conjunction with article 1.1, the human dignity clause, which entitles you to the existential minimum, the survival kit, is in fact probably a bottom-up approach to solidarity, which then was taken over at the international level as a legal principle. Maybe we should look more at the Charter principles and look at the Preamble of the Charter of the UN, the three fundamental aims for which the UN was set up, the third one of which is usually forgotten by Western States, which produced the ECOSOC, but all the interest focuses on the Security Council and on peace keeping and maybe human rights but not on development of social progress as it is called, and here I think is a principle that could be developed a little bit more. In Europe, the Chapter IV of the European Fundamental Rights Charter – I will only refer to it although the Lisbon Treaty is not yet in force, but succeeding Advocates-General have cited the European Fundamental Rights Charter – a case law is slowly developing and it is only a question of time before these Chapter IV solidarity rights will be picked up by the European Court of Justice. So the nexus with economic and social rights is very clear. Solidarity as an economic and social right might be one way of saying it, but that makes it too small a coin. The acquis communautaire goes way beyond that and maybe we should look a little bit more at the European dimension. You refer, as does Mr. Frowein, to the question of the conditionality clauses, the human rights conditionality in relations with the ACP States. That is a very important focus, but a lot of development has taken place, and in practice a compromise was struck with more States, with the exception perhaps of Turkey, but a compromise was struck with most of these countries. Maybe we should look a little bit more into that. And the last question was put forward by Judge Koroma, with whom I totally agree on this point and respectfully beg to differ from Professor Dinstein, whom I admire in many ways but not on this point of third generation rights. Thank you.

W. Hinsch: This is a methodological question. When you say that solidarity involves the elements of help, equality and mutuality of obligation, do you take this to be a conceptual point about the meaning of solidarity to the effect that whatever counts as solidarity must (by mere linguistic necessity, so to speak) involve these three elements? Or do you take this to be a substantive point of moral or legal theory? If the

latter is the case there should be some kind of substantive moral or legal reasoning in the background leading us to the conclusion that any reasonable conception of mutual assistance in the international sphere has to incorporate these three elements. Your understanding of solidarity would, then, be a part of a more general theory of international justice.

T. Treves: I was quite struck by one of the last observations made by Dr. Dann, namely that solidarity is best used as a critical tool of analysis. I tend to share this approach according to which solidarity is regarded as something to be used to talk about the law rather than something to be found within the law. There is, in my view, an ideological background for this distinction. If we use solidarity as a component of existing law then we can build upon it. If we use it as a lens to look at what we have, it can be useful in understanding the law. The notion of the "common heritage of mankind", a very evident case in which the idea of solidarity plays a relevant part, seems a good example. For some, this notion is a normative concept that permits the interpreter to draw consequences beyond the legal texts in which it appears (especially the UN Law of the Sea Convention). For others, it is a label used to designate in synthesis a set of rules as set out in a given text or corpus of international law, such as the UN Law of the Sea Convention.

But the point for which I raised my hand some time ago is a much narrower one. It is connected to the debate that has been going on in this second part of the discussion and in which Judge Cot, Judge Koroma and others participated. It concerns the cases in which solidarity in aid is tied to some conditions. This discussion echoed that this relates to the notion of conditionality. I think this brings to the fore the question of solidarity by whom and especially with whom in the field of aid: solidarity by a State towards another State or towards the people in the other State? Of course, if you have in mind – I think Judge Koroma alluded to this situation – the question of recipients of aid such as a corrupt State or a totalitarian violator of human rights etc., this means that solidarity and aid should go towards the people of the State more than the government. It may be even a political tool against the government to favour the people. Of course, we have to be very prudent in saying that all forms of solidarity with the people are good forms of solidarity. For instance, if there is some condition, if aid is given on the basis of the requirement of respect to human rights, in principle who can object? One could say, nevertheless, that the people need the aid even if human rights are not respected. But what about a situation in which aid is given on the condition – this was the policy of the International Monetary

Fund – that a deflationary policy is followed. There is some doubt that can be raised about this kind of condition even though in its favour the well-being of the State in the long run might be invoked. What about the short run? Similarly, as another example from practice, aid conditioned upon the fact that the money shall not be used for abortion. There may be very divergent views as to whether abortion is good or bad. But here we thread on very slippery ground as ideology becomes very important. Thank you very much.

P. Dann: Yes, with respect to Professor Hinsch's question, I have to refer that to the break because I do not quite see the difference yet between the conceptual and the substantive point. Because he said in both cases, all three have to be fulfilled to apply. Perhaps we can discuss that in the break.

With regard to Professor Treves, solidarity to whom? Who is the recipient? Obviously, we also have had a certain development in the area of development law. And when development law started out in the 60s and 70s, it was the founding principle that the recipient would be the State. So there was no leeway and I guess rightfully so to insist on this kind of sovereignty-shielding element. When one looks into the law nowadays though, one can see a tendency that aid is not only paid or negotiated with the State government itself, but also paid to subunits or for example that parliaments are brought into the relationship. So we see over the past couple of years a tendency to open up the recipient side. And I think rightfully so because this can help to enhance the effectiveness and the purpose of it. And obviously, I also agree that conditionality can be very harmful. Large parts of the Washington Consensus of the 1980s were a disaster. Perhaps one might say that it was designed with good intentions but very clearly and soon to be seen with disastrous consequences. So obviously, one also has to see that conditionalities can only be used and applied if they actually benefit the people.

Responsibility to Protect: Reflecting Solidarity?

*Laurence Boisson de Chazournes**

Introduction

There are commonalities between, on the one hand, the notion of the responsibility to protect and, on the other, the notion of solidarity. However, each notion has characteristics which are not shared with the other. The shared characteristics and, more generally, the interplay between the two notions will be emphasised. The first part of this analysis will deal with the notion of solidarity, attempting to give a working definition of what it means in the context of international law (I). The notion of "responsibility to protect" as it has emerged in recent years will then be introduced (II). Having underlined the main elements of these definitions, we will switch to an analysis of how they interact in the fields of human rights and international humanitarian law (III and IV). The presentation will conclude with a discussion of international responsibility issues that are raised by the concepts of solidarity and the responsibility to protect, and, in particular, the issue of international responsibility where there is inaction (V).

I. The Notion of Solidarity: A Tentative Definition

References to the notion of solidarity in international documents and instruments are still rather rare and most often the notion of solidarity is used without any accompanying definition. Therefore, in this con-

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* Professor at the Faculty of Law of the University of Geneva. The author would like to acknowledge the invaluable assistance of Mr. Danio Campanelli in the preparation of this contribution.

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text, two resolutions of the UN General Assembly – namely resolutions 56/151 of 19 December 2001[1] and 57/213 of 18 December 2002,[2] both entitled "Promotion of a democratic and equitable international order" – are worth mentioning. They state that solidarity is:

> "a fundamental value, by virtue of which global challenges must be managed in a way that distributes costs and burdens fairly, in accordance with basic principles of equity and social justice, and ensures that those who suffer or benefit the least receive help from those who benefit the most".[3]

The notion of solidarity is referred to in international relations, but its contours are far from unambiguous and its legal status is unclear. The literature is no more generous in supplying a clear-cut definition and, in the absence of an unequivocal definition, the starting point for our reflection will be the above-mentioned definition found in some General Assembly resolutions. We will also refer to a definition of solidarity which we find in the day-to-day use of this concept. A French dictionary speaks of a "relation between persons aware of the existence of a community of interests, entailing for some the moral obligation not to harm others and to assist them" (*relation entre personnes ayant conscience d'une communauté d'intérêts, qui entraîne, pour les unes, l'obligation morale de ne pas desservir les autres et de leur porter assistance*).[4]

The core elements of the definition of solidarity that we will retain for the purpose of this contribution can be summarised in a few points: First, solidarity is a form of help given by some actors to other actors in order to assist the latter to achieve a goal or to recover from a critical situation. At the international level, one should stress that such form of assistance does not necessarily have to be understood in the context of a State-to-State relationship but it can be understood as the help provided by a State, or a group of States, to the *population* of another State. Second, solidarity takes place within a shared value system at the level of a

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[1] A/RES/56/151 of 19 December 2001.

[2] A/RES/57/213 of 18 December 2002.

[3] Cited by K. Wellens, "Solidarity as a Constitutional Principle: Its Expanding Role and Inherent Limitations", in: R. St. J. Macdonald/D. M. Johnston (eds), *Towards World Constitutionalism*, 2005, 775 et seq. (776).

[4] P. Robert, *Le nouveau petit Robert. Dictionnaire alphabétique et analogique de la langue française*, 2002, 1829.

given community (in our case the international community).[5] This can easily be supported by reference to the above-mentioned General Assembly resolutions, as well as to the legal literature, where a certain number of authors – irrespective of their own particular understanding of solidarity in international law – argue in terms of shared common "values" or "principles" among the members of the international community.[6] Third, solidarity entails a *moral* obligation in the sense that it is value-based, *i.e.* the moral obligation to take into account the interests of others and to provide them with assistance. A moral obligation can be coupled with a legally binding obligation. It may or may not find expression in a specific legal obligation. If not found in customary international law, a duty of solidarity can be negotiated between States through a treaty or even decided upon by an international organisation. Fourth, this moral obligation is owed by some members of the international community towards other members of the same community, and this will vary from one situation to another. This means that in a said community in a specific context, there are both providers and beneficiaries of solidarity. It is also to be stressed that the provider of solidarity does not act with the purpose of drawing from its action a direct and concrete benefit.

Having introduced some aspects of the notion of solidarity that will be retained in the context of this contribution, it is important to distinguish the notion of solidarity from other notions, although they might share common features. First of all, solidarity may be distinguished from cooperation. When linked by a cooperative relationship, two or more States aim at the achievement of a previously agreed upon or negotiated goal.[7] All actors involved in a cooperative endeavour are ex-

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[5] S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des Etats*, 2005.

[6] For instance Wellens, see note 3, 775 et seq.; A.-M. Slaughter, "Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform", *AJIL* 99 (2005), 619 et seq.; R. St. J. Macdonald, "Solidarity in the Practice and Discourse of Public International Law", *Pace International Law Review* 8 (1996), 259 et seq.; R. Wolfrum, "Solidarity amongst States: An Emerging Structural Principle of International Law", in: P.-M. Dupuy (ed.), *Völkerrecht als Weltordnung. Festschrift für Christian Tomuschat*, 2006, 1087 et seq.; S. Besson, "La pluralité d'Etats responsables – Vers une solidarité internationale?", *RSDIE* (2007), 13 et seq.; A. Nissel, "The ILC Articles on State Responsibility: Between Self-Help and Solidarity", *N.Y.U. J. Int'l L. & Pol* 38 (2005), 355 et seq.

[7] E.g., Arts 55 – 56, Charter of the United Nations read as follows:

pected to benefit from the cooperation in a direct and concrete manner. A solidarity relationship is not based on the same premises as cooperation. It only provides concrete benefits to some actors. This is not to say that States do not have moral, ethical or legal interests in acting in the name of solidarity. However, they do not act for the sake of getting benefits that have been foreseen by all concerned States and actors.

Solidarity can also be distinguished from the duty of mutual assistance, namely as it stands in Article 49 of the UN Charter. Mutual assistance is required by the UN Charter when Member States carry out obligations adopted by the Security Council. This means that they are asked to be mutually supportive to each other and to the Organisation in order to carry out the measures adopted by the Security Council in a more effective way.[8] The duty of mutual assistance requires that States cooperate in the enforcement of Security Council resolutions. It takes place in a regulated framework which differentiates it from a solidarity initiative which is usually taken outside an institutional framework and quite often on a spontaneous basis.

Finally, solidarity should be distinguished from the UN collective security concept. Some authors consider that the UN collective security system is based upon the idea of solidarity.[9] In my view, this would

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"Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56

All Members pledge themselves to take joint and separate action in cooperation with the Organisation for the achievement of the purposes set forth in Article 55."

[8] P. Klein, "Article 49", in: J-P. Cot/A. Pellet/M. Forthiau (eds), *La Charte des Nations Unies: Commentaire article par article*, Third Edition, 2005, 1303 et seq. (1303 and 1306).

[9] K. Wellens in this volume.

mean that each time there is a "threat to the peace, breach of the peace, or act of aggression", action would be required on the basis of solidarity considerations. This argument is difficult to sustain, taking into account the fact that the UN Security Council has a discretionary power not only to qualify the situation, but also to decide if and how to intervene in each case.[10] Of course, this does not mean that solidarity arguments cannot be invoked to exercise some influence on the decision-making process for the Security Council to act in one way or another. We will come back to this when reflecting on the concept of the responsibility to protect.

At this stage, it should be emphasised that the notion of solidarity can be seen as an autonomous notion, and not just as a mere terminological variation of another concept. It is, however, not yet an autonomous legal notion. Our understanding is that solidarity also finds reflection as part of some existing legal concepts and norms. This appears to be the case with the responsibility to protect.

II. The Concept of "Responsibility to Protect" and the Framework of its Emergence

Before examining the interplay between the notion of solidarity and the responsibility to protect, it is necessary to explain how the concept of responsibility to protect emerged and to underline its core elements. The concept of "responsibility to protect" first came to light in 2001 when the International Commission on Intervention and State Sovereignty (ICISS), working under a mandate of the Canadian government, issued a report entitled "The Responsibility to Protect".[11] We will begin by looking at the concept of the responsibility to protect as it has arisen in the context of this report.[12] The main idea of the ICISS was that

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[10] See in particular ICTY, *Prosecutor v. Dusko Tadic a/k/a "Dule", Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, IT-94-1AR72, 2 October 1995, paras 28-31.

[11] ICISS, The *Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, 2001.

[12] For an insightful account of the emergence of this concept, see G. Evans, "The Responsibility to Protect: From an Idea to an International Norm", in: R. H. Cooper/J. V. Kohler (eds), *Responsibility to Protect: The Moral Global Compact for the 21st Century*, 2009, 15 et seq.

States have a responsibility to protect their own citizens from catastrophes – such as massive violations of human rights, starvation, natural disasters, etc. When States are unwilling or unable to do so, this responsibility must be carried out by the international community.[13] In 2004, the concept was taken up in the same terms by the UN High-level Panel on Threats, Challenges and Change, in its report entitled "A More Secure World: Our Shared Responsibility".[14] The following year, the UN Secretary-General, in a report entitled "In Larger Freedom: Towards Development, Security and Human Rights for All", made express reference to the ICISS report as well as to the High-level Panel report. He endorsed the idea of the existence of a "responsibility to protect" the human rights and the well-being of civilian populations, with the possibility of an enforcement action under the Security Council's supervision.[15] The concept of the responsibility to protect was then endorsed by the 2005 World Summit Outcome which, however, limited the scope of the notion to cases of "genocide, war crimes, ethnic cleansing and crimes against humanity",[16] thereby excluding starvation and natural disasters from the ambit of the responsibility to protect, although they might come into play in relation to the commission of war crimes or crimes against humanity. The international reaction to the events which took place in Myanmar in May 2008 has illustrated the reluctance of some States and other actors to invoke the responsibility to protect in a natural disaster situation.[17]

The World Summit Outcome noted that:

> "the international community should, as appropriate, encourage and help States to exercise this responsibility and support the United

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[13] C. Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?", *AJIL* 101 (2007), 99 et seq.

[14] *A More Secure World: Our Shared Responsibility: Report of the UN Secretary General's High-level Panel on Threats, Challenges and Change*, Doc. A/59/565 of 2 December 2004, para. 201.

[15] *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General*, Doc. A/59/2005 of 21 March 2005, para. 135.

[16] A/RES/60/1 of 16 September 2005, para. 138.

[17] On the relation between the responsibility to protect, France's Efforts to Promote a Reference to the Concept and the Situation in Myanmar, see G. Evans, 'Facing up to our responsibilities', *The Guardian*, May 12 2008, available online at: http://www.guardian.co.uk/commentisfree/2008/may/12/facinguptoourresponsbilities (last accessed 12 May 2009).

> Nations in establishing an early warning capability. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity".[18]

Before adding that States are:

> "prepared to take collective action in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity".[19]

Every State is reminded of its responsibilities to carry out measures of prevention, protection and repression of genocide, war crimes, ethnic cleansing practices and crimes against humanity; and the World Summit Outcome emphasised that other States, the Security Council, or even the various relevant international organisations have a part of the "responsibility to protect", and are called upon, on that basis, to act in accordance with the United Nations Charter and international law in order to make the violations stop, using the complete set of available means where the competent State has not taken the measures it was supposed to adopt. Thus, in case a State fails to act, the collective responsibility of UN Member States (as well as the several institutions by means of which they cooperate) comes into play for acting against the most serious violations of human rights and international humanitarian law.[20]

The responsibility to protect is a powerful instrument to dissuade States from hiding behind the shield of their sovereignty to commit serious violations of the rights of the persons under their jurisdiction or to allow these violations to be committed. As a matter of fact, and of politics, if not as a matter of law, no State can remain indifferent and inactive while facing such grave violations, no matter where they are com-

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[18] A/RES/60/1, see note 16, paras 138-139.

[19] Ibid., para. 139.

[20] L. Condorelli/L. Boisson de Chazournes, "De la 'responsabilité de protéger', ou d'une nouvelle parure pour une notion déjà bien établie", *Revue générale de droit international public* 110 (2006), 11 et seq.

mitted. They have a responsibility to protect, which is yet to become an obligation to act.

The World Summit Outcome has the great merit of having gathered some legal *acquis* in a universally agreed upon document, stressing that human rights and international humanitarian law principles prohibit indifference and inaction. Committing or allowing the commission of serious violations of human rights is a violation of *erga omnes* obligations based on solidarity considerations. It follows that all the States and relevant international organisations are not only entitled to act in order to protect the victims of these acts of violence, but also that they have the responsibility to do so. Thus the notion of responsibility to protect implies that it is each State's duty to ensure respect for human rights to all the individuals placed under its jurisdiction, whereas its possible failures set into action the right of the other States through the various means at their disposal to act in order to protect the victims. The responsibility rests on each territorial State, but in the event of the said State's failure, the responsibility of the others comes into play.

The Security Council has confirmed this interpretation with the adoption of two resolutions in 2006 after the 2005 World Summit Outcome. The first is resolution 1674, entitled "Protection of Civilians in Armed Conflicts", where the Council explicitly reaffirmed:

> "the provisions of paragraph 138 and 139 of the 2005 World Summit Outcome regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity".[21]

The second is resolution 1706 on the situation in Darfur, where the Council made reference to its resolution 1674 in the following terms:

> "Recalling also its previous resolutions […] 1674 (2006) on the protection of civilians in armed conflicts which reaffirms inter alia the provisions of paragraphs 138 and 139 of the 2005 United Nations World Summit outcome document".[22]

The World Summit Outcome does not specify any new means of implementation of the responsibility to protect. It implies that one should refer to the methods used by international practice. In other words, diplomatic, humanitarian, economic means or any other pacific method

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[21] S/RES/1674/2006 of 28 april 2006; for the paragraphs referred to see notes 14 to 17.

[22] S/RES/1706 (2006); Evans, see note 12, 21.

(as for example criminal procedures) should only be used when the legal conditions are met. If necessary, coercive measures of an armed nature adopted under Chapter VII of the United Nations Charter might be taken. The qualification by the Security Council since the early 1990s of massive and large scale violations of human rights and international humanitarian law as threats to peace under Chapter VII of the Charter, and the subsequent decisions taken by the Council have established the basis for such a possibility.

This being said, resort to military measures deserves special attention in the context of the responsibility to protect. The Report of the High-level Panel envisaged such a possibility, but limited this option to circumstances by requiring that it ask the Security Council to consider and authorise an armed intervention where it would be necessary to put an end to a humanitarian crisis. In addition, it has proposed five legal criteria to be taken into account by the Security Council for evaluating the legitimacy as well as the legality of coercive actions, namely: 1) the seriousness of the threat ("is the threatened harm to State or human security […] sufficiently clear and serious?"); 2) a proper purpose ("is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question?"); 3) coercive actions as a means of last resort ("has every non-military option for meeting the threat in question been explored?"); 4) proportionality of means ("are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?") and 5) a balance of consequences ("[are] the consequences of action not likely to be worse than the consequences of inaction[?]").[23] In other words, the High-level Panel was willing to constrain resort to military measures, when exercised to implement the responsibility to protect, with assessment criteria to be met before using these measures. The report of the Secretary General made reference to these constraints, whilst the 2005 World Summit Outcome, for its part, does not mention them. This does not mean that a proper assessment in accordance with the above-mentioned conditions should not be made.

Another question which deserves attention is the following: in case there is a blocking of the Security Council in the context of Chapter

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[23] *Report of the UN Secretary General's High-level Panel on Threats, Challenges and Change*, see note 14, para. 207; L. Boisson de Chazournes, "Rien ne change, tout bouge, ou le dilemme des Nations Unies: Propos sur le Rapport du Groupe de personnalités de haut niveau sur les menaces, les défis et le changement", *Revue générale de droit international public* 109 (2005), 147 et seq.

VII, is there a possibility for States, willing to exercise their responsibility to protect, to act through other channels or on other legal grounds? Would there be a right to act under customary international law to exercise the responsibility to protect? Would there be a possibility to act through regional organisations without an authorisation of the Security Council?[24]

III. Solidarity and Responsibility to Protect: Two Matching Notions

Before addressing the similarities between the notions of solidarity and the responsibility to protect, we should recall that the notion of solidarity contains two dimensions. In its "horizontal" dimension, solidarity is to be viewed as an international attitude aiming at reducing casualties or inequalities between States; this is a State-to-State form of solidarity, hence horizontal. In its "vertical" dimension, solidarity is to be viewed as a means of rescuing a population encountering serious dangers that cannot be protected by its own State. This is a form of solidarity where the relationship is between States and populations of other States (and between international organisations and populations), hence "vertical".

The "vertical" form of international solidarity dominates the analysis of the commonalities between the notion of responsibility to protect and that of solidarity. The first element of the definition concerns the *direction* of solidarity: it goes from some actors to other ones or better from States endowed with the necessary means to organise a humanitarian assistance/rescue operation to States or populations encountering grave difficulties. This is precisely the essence of the responsibility to protect, when a group of States uses the means at its disposal under international law – whether of financial, technical, military or other nature[25] –

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[24] See the various interpretations given to article 4 of the African Union Charter, which reads as follows: "*The Union shall function in accordance with the following principles: […] h. The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity; […]*", in particular A. A. Yusuf, "The Right of Intervention by the African Union: A New Paradigm in Regional Enforcement Action?", *African Yearbook of International Law* 11 (2003), 3 et seq.

[25] See: 'Implementing the responsibility to protect: Report of the Secretary-General', UN General Assembly Document A/63/677, 12 January 2009, avail-

to help and secure a population that is suffering grave human rights violations. The second element of the definition points out that solidarity is based on shared values at the level of the international community. This is also true for the concept of responsibility to protect, which rests on the worldwide condemnation of genocide, war crimes, ethnic cleansing and crimes against humanity.[26] The widely shared sentiment of the importance of adopting appropriate measures in order to prevent the commission of such crimes finds a reflection in the notion of responsibility to protect. The third element concerns the moral facet of solidarity. Just as it is the case with solidarity, the responsibility to protect is characterised by a strong moral aspect, by virtue of the central role this notion gives to the well-being of civilian populations suffering from grave violations of human rights. The legal profile of the notion of responsibility to protect is progressively consolidated in law.[27] It may be too early to talk about a positive legal obligation to act in order to protect populations suffering grave violations of human rights, when the competent governmental authorities are unable or unwilling to do so, but, the strong moral contour of the notion of responsibility to protect may have some influence on the decision-making process leading to the adoption of collective security measures decided upon by the Security Council. Finally, it should be added that, as in the case of solidarity measures, there is no expected direct and concrete benefit for those intervening in order to help an endangered population in the name of the responsibility to protect.

This reasoning shows that the definition of solidarity matches the notion of responsibility to protect, which is thus to be considered as *one of the forms that international solidarity can take*. The link between solidarity and responsibility to protect stems directly from one of the

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able online at: http://www.un.org/french/documents/view_doc.asp?symbol=A/63/677&Lang=E (last accessed 12 May 2009).

[26] *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda)*, Judgment, ICJ Reports 2006, 5 et seq. (29 et seq.) para. 64; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 1 et seq. (60) para. 161; ICTY, *Kupreškic*, IT-95-16, 14 January 2000, para. 520.

[27] As for example through the prevention of the commission of genocide, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, see note 26, 155, para. 429.

key elements of the notion of responsibility to protect: not only State insecurity, but also human insecurity is to be viewed as a situation justifying international enforcement actions undertaken by the UN Security Council.

In solidarity terms, it can be said that an international solidarity action takes place when a State or a group of States intervenes in the context of grave human insecurity in a certain region of the world. In other words, the whole construction of the notion of responsibility to protect can be seen as an institutionalised (through the UN), and also moral and legal expression of solidarity.

IV. Solidarity, Responsibility to Protect and International Humanitarian Law

The responsibility to protect finds specific legal support in international humanitarian law through the obligation to respect and ensure respect for humanitarian law as enshrined in the four 1949 Geneva Conventions. This duty is one of the legal manifestations of the responsibility to protect, as well as of solidarity, even though the responsibility to protect has a broader scope of application. In contradistinction to the obligation to respect humanitarian law and ensure that humanitarian law be respected, the responsibility to protect may apply even where no conflict, be it international or internal, is in existence.

Common article 1 to the four Geneva Conventions is particularly pertinent in this respect. It reads as follows: "[t]he High Contracting Parties agree to respect and to ensure respect for the present Convention in all circumstances". This provision was reiterated in article 1(4) of the 1977 First Additional Protocol. As such, the obligation to respect and ensure respect applies to international conflicts and indeed, to non-international conflicts to the extent that the latter are also covered by common article 3.

The obligation to respect and to ensure respect for humanitarian law is a double-sided obligation, as it calls on States both *to respect and to ensure respect*. *To respect* means that the State is under an obligation to do everything it can to ensure that the rules in question are respected by its organs as well as by all persons under its jurisdiction. *To ensure respect* means that States, whether parties to a conflict or not, must take all pos-

sible measures to ensure that the rules are respected by all, and in particular by the parties to a conflict.[28]

Over the last half-century, the practice of States and international organisations, buttressed by jurisprudential findings[29] and doctrinal opinions, clearly supports the interpretation of common article 1 as a rule that compels all States, whether or not parties to a conflict, not only to take part actively in ensuring compliance with rules of international humanitarian law by all of the concerned entities, but also to react against its violations. Further, common article 1 speaks of an obligation to respect and to ensure respect "in all circumstances", making the obligation unconditional and, in particular, not subject to the constraint of reciprocity. Nowadays it is widely admitted that the obligation contained in common article 1 is binding on all States and competent international organisations.[30]

In its 2004 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[31] the International Court of Justice expressed itself in a very clear manner as to the obligations arising from the duty to ensure respect for international humanitarian law in all circumstances, pursuant to common article 1 to the four Geneva Conventions of 1949 and thus, from our point of view, as to the responsibility to protect.

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28 L. Condorelli/L. Boisson de Chazournes, "Quelques remarques à propos de l'obligation des Etats de 'respecter et faire respecter' le droit humanitaire 'en toutes circonstances'", in: C. Swinarski/J. Pictet (eds), *Etudes et essais sur le droit humanitaire et sur les principes de la Croix-Rouge*, 1984, 17 et seq.; see also L. Boisson de Chazournes/L. Condorelli, "Common Article 1 to the Geneva Conventions Revisited: Protecting Collective Values", *International Review of the Red Cross* 837 (2000), 67 et seq.

29 See e.g. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 136, pp. 199-200, para. 158; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, ICJ Reports 1986, p. 14, p. 11, para. 220; and *Armed Activities on the Territory of the Congo, (Democratic Republic of the Congo v. Uganda)*, Separate Opinion of Judge Simma, ICJ Reports 2005, p. 116, paras. 33-35.

30 J. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, 1952, 15 et seq.

31 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 et seq.

In its Advisory Opinion, the Court has shed light on all the implications of the obligation which is binding on the parties to a conflict in the field of international humanitarian law, the whole international community and all the States.[32] The substance of the obligation is not only to acknowledge wrongful situations, but also for each entity to take measures in order to make these violations stop, using all available and legally acceptable means for that purpose. They include diplomatic and economic measures as well as legal means such as those provided for by the rules of international responsibility. In particular, as recalled by the Court:

> "Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction."

The Court also defined the duty borne by "all the States" as a duty of the United Nations, and in particular of the General Assembly and the Security Council: these entities "should consider what further action is required to bring to an end the illegal situation [...], taking due account of the present Advisory Opinion".[33] This is a way to establish the general meaning of the principle (complementary to the one under article 1 common to the four Geneva Conventions of 1949) expressed by article 89 of the First Protocol Additional to the Geneva Conventions, according to which "in situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter".

With its 2004 Advisory Opinion the Court has thus supported the view according to which UN Member States have a common interest and a common responsibility, under the provisions of international humanitarian law, for the implementation of its norms. Serious violations of these norms induce not only the obligation of all the States to "ensure respect" for humanitarian law, but also the responsibility to protect, carried by the organisation itself. The United Nations is not formally bound by the Geneva Conventions or by international instruments out-

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[32] Ibid., 67 et seq., paras 158-160.

[33] Ibid., 68, para. 160.

lawing genocide and other crimes of international law, but it is definitely bound by the "intransgressible principles of international customary law"[34] among which there are most certainly the principles outlawing international crimes against which civilians must be protected. These intransgressible principles are an indication of solidarity requirements as they establish that all States have an interest in them being respected.

V. Solidarity and Responsibility to Protect Put to the Test of the Law of International Responsibility

Having spoken about what can be done when a situation calls for solidarity actions to protect distressed populations, it appears necessary to investigate briefly the question of what can be done in cases of *inaction*. In other words, can we read the issues of solidarity and responsibility to protect through the lenses of international responsibility, by holding responsible those States and/or international organisations which violate their responsibility to protect?

First, we would like to focus on the Security Council. The question is what impact the responsibility to protect can have on the Security Council and on its members.

It is important to stress that a qualification under Article 39 of the UN Charter launches what Article 24 of the Charter calls the Security Council's "primary responsibility": the Council must then carry out its "duties" to maintain or restore peace by bringing to an end whatever it is that endangers the peace. The principles are set down and even well-established. The means of implementation should therefore work effectively, every time the situation demands, taking into account the discretion of the Security Council in this context. As the Appeal Chamber of the International Tribunal for Former Yugoslavia in 1995 in the *Tadic* case pointed out:

> "The Security Council has a broad discretion in deciding on the course of action and evaluating the appropriateness of the measures to be taken. The language of Article 39 is quite clear as to the channelling of the very broad and exceptional powers of the Security

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[34] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226 et seq. (257), para. 79; Condorelli/Boisson de Chazournes, see note 20, 11 et seq.

> Council under Chapter VII through Articles 41 and 42. These two Articles leave to the Security Council such a wide choice as not to warrant searching, on functional or other grounds, for even wider and more general powers than those already expressly provided for in the Charter".[35]

The responsibility to protect implies the affirmation of "responsibilities" that have to be borne first by every State to protect its own population, then by the international community. The World Summit Outcome refers to these responsibilities as "collective action" to be taken by "the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis […], should peaceful means be inadequate and national authorities manifestly failing to protect their populations". "Inaction" as well as "inadequate action" of the Security Council concerning genocide, war crimes, ethnic cleansing practices and crimes against humanity could be analysed as internationally wrongful acts entailing the international responsibility of the organisation. Articles 3 and 8 of the draft articles on the responsibility of international organisations by the International Law Commission[36] are explicit on the point that, should there be a duty to act, an omission of an international organisation can be considered as an internationally wrongful act.

What is the meaning of solidarity in this context? The notion of international solidarity plays a part in determining when a duty to act exists: the case of a population suffering grave violations of human rights and in need of assistance from the international community constitutes a situation where organised solidarity action should take place, as common rules and principles are infringed. An institutional and organised expression of international solidarity of the international community towards a specific population can come into play within the United Nations.

The case of the blocking of the Security Council also raises issues of inaction. The 2004 UN Secretary General's High-level Panel Report on

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[35] ICTY, *Prosecutor v. Dusko Tadic a/k/a "Dule", Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, IT-94-1AR72, 2 October 1995.

[36] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two; see also L. Boisson de Chazournes/L. Condorelli, "Quelles perspectives pour la responsabilité de protéger ?", in: A. Auer/G. Malinverni (eds), *Les droits de l'homme et la constitution, Etudes en l'honneur du Giorgio Malinverni*, 2007, 329 et seq.

Threats, Challenges and Change recommended to the permanent members of the Security Council that they "refrain from the use of the veto in cases of genocide and large-scale human rights abuses".[37] In this situation, should the responsibility to protect be a duty, the international organisation's responsibility for a breach of its responsibility to protect would come with the question of the international responsibility borne by the States preventing the action of the organisation: by acting in such a way, the States would have breached their duty on the basis of the responsibility to protect and of solidarity.

One should also refer to the responsibility of each State and each competent organisation to act and to resort to the necessary means to that effect in accordance with international law in the event of a State's serious breach of an obligation arising under a peremptory norm of general international law.[38]

Concluding Remarks

Solidarity and the responsibility to protect are intertwined. From a legal point of view the responsibility to protect gives legal expression to the notion of solidarity in the sense that it specifies the conditions of action for protecting shared values which are of a human rights nature. The responsibility to protect stresses the responsibility to provide assistance to affected populations. This should be understood as a manifestation of solidarity of the international community towards human beings whose rights are impaired. The responsibility to protect also acts as a catalyst for reminding States of their duties in certain circumstances of grave violations of international law. It reveals that the protection of shared values can be achieved through solidarity measures, those measures not being geared by mutual interest or self-profit, but by a willingness to contribute to the promotion of common values.

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[37] *Report of the UN Secretary General's High-level Panel on Threats, Challenges and Change*, see note 14, para. 256.

[38] *Draft Articles*, see note 36; G. Gaja, "Introduction", in: *La responsabilité de protéger, colloque de Nanterre, Société Française pour le Droit International*, 2008, 87 et seq.

Discussion Following the Presentation by Laurence Boisson de Chazournes

C. Tomuschat: First of all I want to thank Laurence for a beautiful presentation, which indeed, as she said, demonstrated the interlinkage between solidarity and the responsibility to protect. I have maybe three points, some of them go to the heart of the conceptualising effort, and others may be more marginal. I heard several times that the responsibility to protect was understood as a duty, an obligation to respect and to protect whilst on the other hand in the General Assembly resolution, the drafters quite deliberately chose the word "responsibility". Now, is the responsibility a duty or an obligation? Is it something less? I think the drafters deliberately lowered the terminological reflection of the concept they had in mind to leave it in some kind of limbo, in a stage between a moral and a legal obligation. So, I think that responsibility is indeed something less. It is not a sharply cut duty. It is something else.

My second observation also relates to the responsibility to protect. Isn't that according to the World Summit Outcome much less than what already exists under the jurisprudence of the Human Rights Committee and all other international human rights bodies? According to the understanding of all of those bodies, human rights include positive obligations. States parties do not only have to abstain from interfering, but they are obligated to protect the rights actively. Accordingly, the right to life must not only be shielded from genocide and war crimes, but must be protected – like all other rights – in a comprehensive manner. So aren't we falling back? Isn't that just a decisive step back from what we have already achieved through the jurisprudence not only that of the Human Rights Committee but all other constitutional courts except from the US Supreme Court, which has not embraced the doctrine of protection? All the human rights bodies assert the existence of positive obligations. By contrast, the World Summit Outcome just mentions genocide, crimes against humanity and war crimes. That is much less.

And now my third point: You said that as far as solidarity is concerned, benefits accrue only to one party and not to both parties. So for you it is a one-sided and not a bilateral relationship. I really doubt that. Solidarity involves long-term and short-term aspects. Of course, in the short run, you do not derive any benefits if you give a loan of 10 million or even 10 billion dollars to one specific country. But in the long run, the lender does it in order to derive some benefits from that kind of operation. The transaction cannot be described as pure altruism. The lender expects something, but not immediately. So there is no immediate consideration but in a long-term perspective, even development assistance is based on reciprocity. Look at Afghanistan, what are we doing? We are sending troops to Afghanistan. It is not just on account of altruism because we find that the Afghans are such nice people. We want to protect ourselves against international terrorism. That is the bilateral relationship, the reciprocity. So if we look at it more accurately, we find that there is always some consideration but it is a question of time – long-term versus short-term.

E. de Wet: I have one comment and one question to Professor Boisson de Chazournes. The comment concerns the fact that it is perhaps difficult to distill any binding obligation for international organisations from the responsibility to protect. For example, not even in the face of genocide, crimes against humanity or war crimes would the United Nations Security Council be obliged to undertake any action. The veto system, which forms part and parcel of the United Nations Charter law and practice, underscores this fact. In addition, the language in the World Summit Outcome of 2005 (A/60/L.1) was rather cautious and did not seem to endorse any comprehensive obligations for international organisations in relation to the "responsibility to protect".

However, there are interesting developments happening on the regional level. The African Union has formally claimed for itself the right to intervene in member States in instances of gross human rights violations. In accordance with article 4(h) of the Constitutive Act of the African Union of 11 July 2000, the organisation may intervene in a Member State pursuant to a decision of the Assembly of Heads of State and Government in respect of grave circumstances, namely war crimes, genocide and crimes against humanity. Thus far this authorisation to intervene (which is not accompanied by any obligation to this effect) has not been utilised, as evidenced by the lack of action in instances such as Darfur and Zimbabwe. However, it remains possible in theory that in future the African Union – without any explicit authorisation by the

Security Council in accordance with Article 53(1) of the United Nations Charter – will rely on article 4(h) in order to intervene militarily in a Member State of the African Union. This brings me to my question, namely whether we may be observing the emergence of more concrete obligations pertaining to the "responsibility to protect" on the regional level? Also, would this "regionalisation" of the responsibility to protect (and which may possibly result in violation of the United Nations Charter) be a response to the inability of the United Nations to concretise these obligations on the more universal level?

H. Neuhold: This was an impressive presentation. However, I have two difficulties with your definition. Firstly, you emphasised that solidarity is a relationship between stronger and weaker actors. But think of the example I gave this morning. Would you not agree that the readiness of the less powerful NATO members to assist the United States after "9/11" was a manifestation of transatlantic solidarity? Moreover, Christian Tomuschat pointed to another problem. In my opinion, solidarity does not exclude advantages for the benefactor. An example that comes to my mind is the Marshall Plan which was not only in the interests of the European States that received American aid but also in those of the United States that wanted to prevent the extension of the Soviet sphere of influence by communist takeovers and to develop attractive economic partners in Western Europe.

My second remark concerns the responsibility to protect. What I would like to underline is that we are witnessing the change of a fundamental paradigm, that of State sovereignty. The new concept implies a shift from the rights and privileges of the almighty State whose subjects are supposed to serve to a State which, in turn, has to justify the existence by providing for the security and well-being of its citizens. It is also worth mentioning that this principle has been accepted, at least in general terms, at the highest political level by the World Summit and the meeting of the UN General Assembly at the level of heads of State or government in September 2005. The right of the international community to act if a State is unable or unwilling to live up to its responsibility to protect, opens another door to practice international solidarity and to give it more legal substance. Whether solidarity may eventually become a *Baugesetz*, a fundamental principle of the international legal order, is a question which only radical optimists would answer in the affirmative at the present time.

L. Boisson de Chazournes: I thank you all for your questions and comments. My instinct while writing included trying to push some of the limits of the notion of the responsibility to protect so as to better understand its rationale and to try to see if it fits with the notion of solidarity. I do not have a fixed view about the precise legal status of the notion of the responsibility to protect. Indeed, I do not think that vesting the principle with a more compulsory status adds much in practical terms in the field of human rights, because we can rely on the body of human rights law and Christian Tomuschat has mentioned the work of the human rights committee in this respect. We should also refer to the decisions of the European Court of Human Rights which provide clear indications of the notion of collective responsibility which contributes to the understanding of the notion of the responsibility to protect. And, further, we can refer to the ICJ's 2004 advisory opinion with respect to the duty to ensure respect for international humanitarian law, as well as human rights, where they found application. Those elements give some sort of legal corpus to the notion of the responsibility to protect. This being said, I do not think that the responsibility to protect as such brings new legal perspectives, but I think that it functions as a catalyser. It has helped us to think in unitary terms about what we should do in a collective manner in order to react to grave violations of human rights. The notion of the responsibility to protect has helped us to think in terms of the collectivisation of the responsibility to react to grave violations of human rights. Is this notion of collectivisation of the responsibility not an expression of solidarity?

Now, with respect to the definition of solidarity, I attempted to look at it as an autonomous concept and to distinguish it from other notions. When I referred to short-term benefits, I had in mind lucrative benefits. Maybe there are some benefits in the long-term, such as, for example, the pacification of a country or a region. Yet, the long-term is quite far away and we have to think and to act with a short-term perspective. Now, with respect to Afghanistan, with all due respect to Christian, I am not so sure that the current involvement of the UN and NATO is a case of application of the responsibility to protect. I would not consider it as an example of the application of this notion. There are a lot of ways to interpret paragraphs 138 and 139 of the World Summit Outcome. Can we speak in terms of obligations? Or a *de lege ferenda* basis perhaps?

Another issue is the content of an obligation. The General Assembly document refers to classical means for reaction. And there I would like to address something that Erika mentioned. Very often when we refer

to the responsibility to protect, what we have in mind is resort to armed force. But there are other ways to react to grave violations of human rights. This has been underlined by the General Assembly in the World Summit Outcome. Resort to force is a means of last resort when other means have not produced effects. As to a regional approach in terms of the interpretation of the responsibility to protect, the case of the African Union treaty is, so far, unique. Article 4 of the African Union Charter is not clear. There might be room for regional reactions to violations of human rights. My interpretation of the African Union treaty is that the African States were not willing to detach themselves from the United Nations Charter, but the idea was that in the event of inaction from the United Nations, they want to be in a position to react and to do something.

The weaker and the stronger are generic terms. I have also referred to the ones who are in need and the ones who can help. The perspective can change over time and the roles and the needs can be reversed. It is not a question of wealthy and poor States, but it is more a question of context. At one time there will be States which are in a position to act and at another time, other States are in a position to act and they will do so in the furtherance of common values. Thank you.

S. Oeter: Laurence, I think your elegant and enlightening talk has highlighted in my mind a very strong dilemma which is inherent in the principle of solidarity – and in the way of operationalising it in the sense of the concept of the "responsibility to protect". I think your contribution has highlighted why so many States voice strong reservations towards the concept of the responsibility to protect. I think if you reconstruct the principle of solidarity in such a way – I would call it a progressive way, and by progressive I mean in the sense how Tullio Treves has highlighted it this morning because you replace States as the beneficiaries of solidarity, which at the beginning of the process in the 70s they thought to be, by peoples – it means at the end turning the principle of solidarity against States. I think there is a logic in doing just this if you look at the problem from a perspective of political philosophy – and I have a strong sympathy towards looking at the problem from such an angle. But at the end, such reconstruction leads into a very strong dilemma, because it means alienating States from that normative development, driving them into a kind of revolt because they feel to be a potential victim of that kind of reconstruction. At the end we have the problem of how to construct a normative consensus on such an opera-

tionalisation of solidarity in a community like the United Nations, which is a community of States and not a community of peoples.

K. Wellens: With regard to your last remark, if I may, this morning I was thinking about the following when Tullio Treves made his intervention, and now you are saying: maybe that is a way of turning solidarity against States. One example, in my view, would be the phenomenon of targeted sanctions. The use of targeted sanctions is a qualified form of solidarity because in doing so, the Security Council is at least in the position to spare the population. Now, Laurence, thank you for clarifying the relationship between the responsibility to protect and solidarity. With regard to the question whether or not there is a moral or a legal obligation, you said at one point that, unless I misunderstood you, there is no legal obligation at the customary law level. And if I may refer to what came up this morning in the discussion about the Bosnian case: the fact that the Court did not want to go into an exploration of whether or not there is a general duty to prevent violations of international law is, in my view, at least leaving the door open to that possibility. Not a question, but a remark: You mentioned the relation between humanitarian assistance and the responsibility to protect: whether or not humanitarian assistance does fit in squarely with the responsibility to protect is still a matter of debate. In my written paper I made a reference to Eduardo's preliminary report, where he said that the relation between the responsibility to protect and humanitarian assistance needs careful consideration. So he has been very cautious about it. Several participants, starting with Professor Tomuschat, have raised the question about the responsibility to protect and the duty. Because you made reference to the State responsibility regime, the only thing I want to mention here is that during the discussion at the Société Française on the topic, Giorgio Gaja drew the distinction between the responsibility *sensu lato*, the responsibility to protect and the responsibility *sensu stricto* where you have a possibility of international legal responsibility. And I think the normative contribution of the responsibility to protect lies mainly not in introducing the principle of solidarity and giving it a legal status but with regard to the obligation to prevent. Thank you.

M. Wood: There has not been very much from the Anglo-American perspective at this conference, which is not surprising since they are not very well represented. I have to say that, like Jean-Pierre Cot, I think in the UK there is very little reference to any principle of solidarity as a principle of international law. And I would put myself on the side of

those who took the view that it is a moral idea, that it is something that may infuse and inspire rules of law, but it is not a principle of international law, still less a constitutional principle. Indeed, I think there are many in the UK who would not recognise the idea of a constitution in the field of international law. Just turning quickly to responsibility to protect: I would tend to agree with Professor Tomuschat that the word responsibility was used very deliberately by States. There was no intention in the General Assembly to create anything resembling a legal obligation to act. And when you think about it, a legal obligation to act could be completely unenforceable anyway. So many considerations have to be taken into account and not least resources, but many other political factors come into play. That is not to say that what the General Assembly did is not without legal consequences. And I think there are perhaps two of them at least: firstly, it confirmed the view that overwhelming humanitarian catastrophes and human rights violations can be a threat to the peace for the purposes of Article 39. Of course, the Security Council has acted in such circumstances before, but it was always controversial. Here you had the whole of the United Nations unanimously asserting that it was a right of the Security Council to act in these circumstances, that it had the power to act in these circumstances. And that is in principle very significant. But in practice, what the Security Council has done subsequently, in particular in the case of Myanmar (not the cyclone, but about a year earlier when the UK and the US put forward a very mild draft resolution) that may or may not have been wise. The arguments given against it by China and Russia to the effect that this was not a threat to the peace because all we were asserting was a humanitarian catastrophe, coming within months of the Summit Outcome, was not a very encouraging sign that the Security Council would be ready to take the signal that had come apparently from the General Assembly. And secondly, the emphasis by the General Assembly on any use of force in this context having to be authorised by the Security Council under Chapter VII is possibly significant in ruling out unilateral action by States or action by groups of States without authorisation under Chapter VII. You could certainly read that into it. If it were a legal obligation, there would be a whole host of difficult questions. Firstly, by whom is this obligation owed? Is it by each individual State? Is it by all States jointly? Is it by the United Nations? The Security Council is not a legal person, so if the Security Council had done something wrong, is it the United Nations that has responsibility? That is a very big question. The second question is: To whom is this legal obligation owed? Who could enforce it? Is it owed to the international community? Is it owed to the individual victims of the situation? And if

so, how can they bring an action? I think to say that, as Professor Gaja's draft articles have made it clear, the organisation is responsible if it fails to act is really taking things a bit far. Thank you very much.

L. Boisson de Chazournes: I prefer to adopt a broad understanding of the notion of international community. It includes States, international organisations (the United Nations and others) and maybe even some non-state actors. I do not think there is any direct link between the responsibility to protect and the international community as such. The concept of human rights, the concepts of *jus cogens*, *erga omnes* obligations, etc. are paving the way towards the fact that we should have another understanding of the functioning of the international legal order and the notion of collectiveness. Another question concerns the value added by the notion of human security. Does the notion of human security bring another perspective to the understanding of the functioning of Chapter VII and Chapter VIII? In the end, it constitutes a choice of values. I am not so sure that the choice between human security and State security has yet been made.

As regards Karel's comments, it appears that I was not clear enough. They are customary norms and the duty to prevent genocide I think has become a norm of customary law. The case-law of the international criminal jurisdictions provides elements of evidence of the customary nature of some of the prevention norms. As to the meaning of the General Assembly's World Summit Outcome, it seems to me that there was at least a clear political acknowledgement at the time of its adoption by consensus that inaction is no longer acceptable in the case of grave violations of human rights and international humanitarian law. What more can be done from a legal perspective? I have attempted to envisage some possibilities, but I am not sure that we are already at a *lex lata* stage. Thank you.

V. Röben: I wonder whether this is not another example of the law-making process in the UN, where you first essentially have to have the formulation of an idea that encapsulates a certain basic conviction of the organisation's Member States, which then needs to be put into practice or concretised in a cascading law-making process, and I think we have a couple of examples of exactly that kind of law-making process, prominently in the law of the sea and the protection of the environment.

Y. Chen: I would like to just make a comment from a linguistic perspective. Today I listened to three very excellent presentations on the solidarity principle and the responsibility to protect. However impressive they are, the doubt on whether these new concepts are practically useful seems to exist among the participants of the seminar. This morning Professor de Wet questioned whether the solidarity principle gives us anything new besides *jus cogens*, *erga omnes* and the principle of co-operation. And with regard to the responsibility to protect, I remember an article titled "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm" in the *American Journal of International Law* in 2007 that describes the responsibility to protect as old wine in a new bottle as the concept does not supply any additional normative implications. Dr. Dann and Professor Wellens themselves have admitted that the solidarity principle is mostly used for the critical study as well as for the progressive development of international law. Then the question comes why do we need them if in a normative sense they offer nothing more than what we already have? I hope to comment on the issue from a linguistic perspective as a response to this question. Language is something we use to understand and prescribe the world. By language, we create connections between the outside world and us, and also prescribe the relations between human beings. Reality and subjectivity, fact and value, are intertwined in the making and shaping of language. By reconstituting words and inventing new concepts, we are reconstituting the world. We are reconstructing the way of our thinking. We are trying to find new ways to approach the world and try to meet the new challenges and new needs of our society. For this purpose, from time to time, we make new interpretations to some old concepts and we also invent new phrases; whether these efforts succeed or not, it could indicate a kind of change of our paradigm to the world. In this sense, I would like to make further a brief observation on two new concepts, that of solidarity and that of the responsibility to protect. These two concepts are prominently characterised by combining the State dimension and the individual dimension together. We are introducing our moral responsibility to the legal dimension. A pure interstate approach in our legal thinking is consciously or unconsciously deemed insufficient to resolve the problems we are facing today. In my opinion, we should reflect these two concepts in an even grander process of international law: I mean the humanisation process of international law. These new concepts, in light of shaping our legal thinking and imagination, may contribute to the establishment of an international law to ensure the very survival of mankind advocated by Professor Tomuschat in his Hague course. Thank you.

A. G. Koroma: I would like to thank Professor Boisson de Chazournes for clarifying some issues and indicating how the principle of solidarity could work or be implemented. I would have stopped at an earlier point for some of the interesting questions, and I would possibly have invited her in her last response to respond to the allegation that the principle of solidarity is subversive to the nation State. I do not think of the allegation in such concrete terms but, according to my understanding, it could be potentially subversive to the nation State. Maybe you would want to dwell on that or throw some light on that question.

Another issue I would like to raise: I do not think we should dwell so much on the term of the "responsibility to protect". We all know how the United Nations operates and therefore we should look at the expression in its context. Why did Canada introduce such an item for example? Canada has been one of the leading peace-keeping nations of the world and so we should understand that Canada has an interest in these matters and is a dedicated member of the United Nations. Let me take the Genocide Convention as an example. If the Security Council is going to determine that genocide has taken place, then of course the Security Council has to act. So if you talk about the duty to protect, it obviously entails certain consequences and it is not for me entirely surprising that the United Nations should have resorted to what one would call an anodyne term when talking about the responsibility to protect. When we talk about the responsibility to protect, apart from action under Chapter VII of the UN Charter, I do not think we should immediately think of military measures. Maybe Canada might not be in a position to send troops to a place where genocide has occurred but she could provide resources. The responsibility to protect entails many divergent measures which might be taken.

Lastly I want to take up what my sister Erika de Wet said about the African Union's Article 4: again we have to view this in its context. As you know, the ECOMOG and ECOWAS had initially taken some measures in some African States. Then there was also the Rwanda experience, in which the African States played no part. The African Union saw this as an opportunity, of course, so that in certain circumstances when the United Nations or the international community had not acted, that there is a responsibility or duty on the part of African States to react. In the case of ECOWAS, Nigeria took the initiative. And now the African Union has taken upon itself to react in certain circumstances. But of course the action ECOWAS took in Liberia and Sierra Leone was later validated by the Security Council. Again, I think this provision in the

African Union Charter or Covenant should be seen in that context. Thank you.

J. A. Frowein: In line of the last three interventions, I wonder whether it is not really important to see the responsibility to protect in the context of international developments and in the context of shaping new ideas and clarifying important points through wording. It is still a rare phenomenon that customary public international law protects human beings against the State. We have no difficulties for some elements as prohibition of torture, we see that as clearly positive law. But otherwise, this is still a rare phenomenon. And the responsibility to protect is the idea to make States aware of the main purpose of constitutional government and of the social contract as its basis. Now where do these matters become relevant? I would like to turn to the Myanmar example and the cyclone. Probably it was to a certain extent a CNN phenomenon and a typical sort of exaggeration concerning the threat. But for some time, the picture existed that possibly more than a million human beings could starve to death because a military government without any sort of legitimacy in constitutional terms just on arbitrary grounds would hinder international help to come to these people. I think under those circumstances the shield of sovereignty becomes extremely weak. The danger is that you always turn immediately to military measures as the only way. Maybe in Myanmar, and it was discussed at that time, there were other possibilities. Waterways to a certain extent were open and were not really controlled. The question of dropping things, food and medical equipment from aeroplanes was discussed at that time. No international lawyer would have objected to a Security Council Chapter VII resolution. I think that was clear at that time and many people voiced it. I was asked by the German TV and I said: "Of course, this would be possible, but it is very unlikely because it is very difficult to think that China and Russia would not have blocked it." But I think this was an occasion when this idea played an important role and we may well experience other situations where this idea, to a certain extent, indicates the way. Thank you.

L. Boisson de Chazournes: In terms of the law making process, I would like to highlight that the General Assembly resolution was approved by around 185 States which were present in New York. It constitutes an interesting interpretation and understanding of what the responsibility to protect means at the universal level. Now, being in favour of the incremental approaches, I think the Summit Outcome

means more than just words looked at separately in an isolated manner. We should also have in mind the context of the adoption of this resolution: i.e. the reform process which was launched by the Secretary General Kofi Annan because of the 2003 Iraq conflict and some States' criticisms of the UN framework. The unilateralism was opposed to the UN collective system. The decision was taken by the Secretary General, I think quite bravely, to address the functioning of the collective security system and the tools and means at the disposal of the international community when there are serious breaches of international law. The ICISS report, the UN High-level Panel report and then the ensuing report of the Secretary-General and the World Summit Outcome are all bearers of the concept of collective action. There was a strong sense of rebutting unilateral armed action.

On another point, there should be great care not to narrow down the responsibility to protect solely to the resort to force. The notion of the responsibility to protect refers to each State. First and foremost, each State has a primary responsibility. The responsibility of others comes into play for violations of human rights and humanitarian law which are considered at the universal level as grave and massive when there is a lack of action from the responsible State. The Security Council is central for authorising resort to force should there be such a need. The General Assembly also has a role to play. It has even given itself the task of developing the understanding of the notion of the responsibility to protect. It has a mandate to do so. Thank you.

Intergenerational Equity

Dinah Shelton[*]

We do not inherit the Earth from our ancestors,
we borrow it from our children.
American Indian Proverb

You can't always get what you want
But if you try sometimes you might find
You get what you need.
Mick Jagger and Keith Richards, 1968

The concept of international solidarity is usually invoked in reference to links across present-day affinities, but the allegiance of individuals and groups to their local community, State of nationality, ethnic group, religion, or the human species as a whole, probably pales in comparison with the strength of intergenerational family bonds. In most societies solidarity between generations is an expected part of family life and a part of the individual psychology of "self-transcendence".[1] In the private sphere this is reflected in the families' care of the elderly, support for minor and adult children, and financial or other bail-outs of siblings and cousins. Succession and inheritance laws reflect a general human desire to transmit the benefits and accumulations of the present to existing and future descendants and collateral relatives.

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[*] Manatt/Ahn Professor of International Law, The George Washington University Law School. Address given at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, 29 October 2008. Thanks are owed to the symposium participants for their useful comments, to Chie Kojima for excellent editing, and to Chris Robinson for his generous and always helpful answers to questions about evolutionary biology.

[1] E. Partridge, "Why Care about the Future?", in: E. Partridge (ed.) *Responsibilities to Future Generations*, 1981, 203 et seq. (204).

R. Wolfrum and C. Kojima (eds.), *Solidarity: A Structural Principle of International Law*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 213,
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Evolutionary theory suggests that this desire is genetically predisposed, hard-wired into the makeup of every person (indeed, all primates).[2] Professor Paul Baressi has noted that evolutionary theory and experience suggests that the present generation cares for the future in proportion to our biological affinity for them:[3] we look first to our lineal ascendants and descendants, then to siblings and their offspring, then cousins and so on. Thus, humans looking lineally as well as spatially tend to divide humans into categories of "we" and "others". Developments in DNA analysis and genealogical research is continually expanding the "we"; indeed, it is now suggested that all humans descended from a single ancestral "eve" whose mitochondrial DNA persists in every living human, giving biological impetus to inter- and intragenerational solidarity.

Concern for survival of the family group means that even the childless will be concerned about the well-being of future generations of siblings, cousins and others related to them. While there is as yet no general agreement in evolutionary theory that each person is concerned with survival of other families or the species as a whole, there still may be genetic hard-wiring for intergenerational solidarity beyond the family. Some biologists and anthropologists argue that because a healthy species depends on genetic variation, which occurs through reproduction outside the kinship group, each family helps to promote its own success by ensuring that there is a strong and attractive gene pool from which to choose future mates. Thus, solidarity with "others" is necessary to preserve the "we". There is also an element of reciprocity and self-interest: everyone with or without children may support education because they believe that an educated populace will produce more wealth to support assistance to them in their old age or because they believe that children in school are less likely to engage in destructive mischief that would harm them or others. Some may be willing to acknowledge a sense of moral responsibility about making decisions for future persons who cannot speak for themselves.

Leaving aside biology, efficiencies of scale and recognition of broader interests have led communities to accept intergenerational obligations.

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[2] S. Sato, "Sustainable Development and the Selfish Gene: A Rational Paradigm for Achieving Intergenerational Equity", *N. Y. U. Envtl. L. J.* 11 (2003), 503 et seq. (520-521).

[3] P. Barresi, "Beyond Fairness to Future Generations: An Intragenerational Alternative to Intergenerational Equity in the International Environmental Arena", *Tul. Envtl L. J.* 11 (1997-1998), 59 et seq. (72).

In domestic law and policy, the emergence of pension funds for the elderly and public schooling paid for through taxation by all individuals in the community, whether or not they have children, is a manifestation of intergenerational solidarity.[4] Taking care of the elderly acknowledges that they have knowledge and traditions that may benefit present and future persons. Beyond the local community, each person on earth can be concerned about the rights, needs, and interests of future generations, and about how to counter the threats to their well-being, because many current threats have widespread negative impacts and the threats cannot be overcome or mitigated except by broad cooperative action. The dynamic planetary system, in which all are interrelated and interdependent, determines relationships in the contemporary world.[5] In such a system, there can be no isolation or independence, because all parts of the system are interrelated and mutually dependent now and in the future. Greenhouse gas emissions provide just one example of activities today that will produce effects for a century or more to come. In international law, recognition of this fact has led to the identification of common interests or common concerns in a variety of circumstances where harm to one is harm to all and protection of one helps protect all:[6] a "Three Musketeers" version of international law.[7]

In legal philosophy, most scholars view intergenerational equity both as a moral principle, that no generation has priority over another, and as a legal standard of equality among generations.[8] What this means and

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4 See, generally, E. Malinvaud, *Intergenerational Solidarity: Proceedings of the Eighth Plenary Session of the Pontifical Academy of Social Sciences, 8-13 April 2002* (2002), 27-28.

5 A. Kiss/D. Shelton, "Systems Analysis of International Law: A Methodological Inquiry", *NYIL* XVII (1986), 45 et seq.

6 K. Wellens, "Solidarity as a Constitutional Principle: Its Expanding Role and Inherent Limitations", in: R. St. J. Macdonald/D. M. Johnston (eds), *Towards World Constitutionalism* (2005), 775 et seq. One interesting question is whether common interest gives rise to joint responsibility, as when two debtors are jointly responsible: to the extent one cannot pay, the other must fulfil the entire obligation. At the least, global or regional interdependence means the common interest should be given priority over the interests of individual States.

7 In A. Dumas' book of 1844 the motto of the three musketeers is "All for One and One for All" ("*Un pour tous, tous pour un*").

8 J. Rawls, *A Theory of Justice*, 1970, 118 et seq.; Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and*

how it might be implemented in practice is the subject of this essay. It begins by considering the meaning of the two terms in the title: intergenerational and equity. It then looks at the various rationales given for concern with this topic and how they link to the topic of solidarity, followed by an overview of some of the main subject areas in which the issue of intergenerational equity arises. It proceeds to assess the status of intergenerational equity in international law and to identify various principles associated with the concept. Finally, it turns to a discussion of how intergenerational equity as a form of solidarity might be implemented in practice.

I. The Terms

A. Intergenerational

Alexandre Kiss noted the difficulty of defining a generation: life spans vary considerably among individuals, especially between those persons living in industrialised countries and those in the developing world.[9] At each moment hundreds of human beings are born and die, with the result that some six billion people of all ages coexist. Professor Kiss proposed speaking of future humanity rather than future generations and to recognise the common concerns of humanity, including all present and future generations, as a basis for global action.[10] Other authors have identified several different meanings of generation.[11] There is, first, a popular notion, reflected in terms like Baby Boomers, the Sixties Generation, and the Greatest Generation, that links individuals to historical, social or cultural events. It is a very imprecise notion of generation because all those alive at a particular time do not necessarily identify with the defining events. It is not clear, for example, where to draw the ending line of the Baby Boomer generation (whose beginning is set at the end of World War II in 1945). Common experience suggests that gen-

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Intergenerational Equity, 1989; James C. Wood, "Intergenerational Equity and Climate Change", *Geo. Int'l Envtl. L. Rev.* 8 (1995-1996), 293 et seq.

[9] A. Kiss/D. Shelton, *International Environmental Law*, 2004, 16-18.

[10] Ibid.

[11] The three meanings discussed in the text are from L. B. Solum, "To Our Children's Children's Children: The Problems of Intergenerational Ethics", *Loy. L. A. L. Rev.* 35 (2001), 163 et seq. (169-171).

erational affinity takes place when adolescents start to self-identify with their peers rather than their family members and it continues until members of the group have their own children. Thus, the Sixties Generation is not composed of those born in the 1960s, but those who were of high school or university age during that period.

Much easier to delineate, at first glance, are generations of lineal descendants: grandparents, parents and children. This second meaning probably is the most commonly understood. But if the children who were born to grandparents are numerous (e.g. eight) and the births are spread out over time (e.g. 30 years), the first born grandchild may be close in age or even older than the last born child. With the progressive lengthening of human life, intergenerational relations are more common in up to four or five levels of ascendants and descendants. Descent works to divide those generations only if there is a single line of descendants.

Yet another meaning of generations thus has been proposed, usually when referring to the term "future generations", to describe those who will not be born in the lifetime of anyone presently alive. Some laws appear to make distinctions on this basis, not only when looking forward, but also when looking back. Thus, customs and antiquities laws commonly define "antique" as something over 100 years old. Looking to the future, policies and laws to mitigate the consequences of natural disasters often require preparations based on the "100 year flood" or "100 year drought" – that is, the most catastrophic event predicted in a century.

Is it necessary to define a generation? Our ability to recognise the potential for human existence into the future and the legacies of the past may not demand a precise answer to the definitional question, but clearly raises numerous other issues: What will future humans be like and what will they want or need? If intergenerational equity is an accepted moral and legal principle, then how far into the past and the future do our obligations extend? Can future humans have "rights" we must respect?[12]

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[12] There are strongly voiced opinions contrary to the idea that non-existent humans can have rights; but legal systems recognise several types of legal persons that are societal fictions, from States to corporations, and deem them to have rights – and in the case of corporations, even human rights. While there may be practical problems with determining who can speak for future generations, there is no theoretical reason why legal systems cannot recognise future generations to have claims on the present that can be denominated rights. The

Finally, it should be asked whether "future generations" is a concept that is limited to generations of humans only or whether there is a broader temporal axis that includes concern for future life and well-being of other species? If intergeneratonial equity is limited to human well-being, as some international texts seem to specify, a third dimension of solidarity needs to be considered beyond inter- and intragenerational equity: the solidarity of humans with other species, ecosystems and nature as a whole. While humans are, to use the current term, "embedded" in nature, it has also been recognised that the latter has its own intrinsic value, an inherent importance "independent of any awareness, interest, or appreciation of it by any conscious being".[13] Moreover, the very idea of "equity" and "inequity" as a manifestation of distributive justice is increasingly recognised to exist in other species; they have a moral life.[14]

B. Equity

In most legal systems, equity has traditionally played its major part in determining the distribution of rights and responsibilities in conditions of scarcity and inequality. In economic terms, equity is often contrasted with the single minded effort to maximise the future stream of utility.[15] Equity normally should not arise as an issue with respect to access to or use of an unlimited resource, or where there is a non-exclusive exercise of a right. Exercising my right to vote, for example, does not take away or interfere with anyone else's exercise of the same right. It is scarcity

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European Court of Human Rights, while not deciding on the legal personhood of embryos, has nonetheless recognised that an embryo has protectable interests as a "potential human". See below, note 20. Past humans are also protected: legal systems throughout the world have enacted anti-desecration laws and allow present persons to bring legal actions against those who wrongfully interfere with the remains of their deceased family members.

[13] T. Regan, *All That Dwell Therein*, 1982, (199).

[14] Recent studies have found that dogs, and perhaps all species for which cooperation is important, have evolved a sense of equity or "inequity aversion". R. Stein, "Dogs Feel Envy – or At least Grasp Inequity When it Comes to Treats", *Washington Post*, 15 December 2008, A6. Empathy and altruism has also been found in non-human species. See M. Bekoff/J. Pierce, *Wild Justice*, 2009.

[15] W. Beckerman/J. Pasek, *Justice, Posterity and the Environment*, 2001, 46.

that produces questions of equitable allocation. In this context, the principle of non-discrimination demands that like cases must be treated alike and those that are different be handled otherwise, and in turn requires determining which similarities and differences are relevant in which situation. To cite an example from within national legal systems, income differences are generally accepted as a proper basis for allocating tax burdens but not for voting in elections.

Taking the above as a starting point, it may be asked whether there is any legitimate reason in allocating scarce resources or imposing burdens to make a distinction based on the timing of a person's life. Evolutionary biologists might argue that the future is always more important than the present because the measure of long-term success is survival and reproduction of the group.[16] Economists respond that human nature always discounts for an uncertain future. Both these views, which have widely divergent consequences if implemented, have their adherents. The approach of Rawls and Weiss, positing no *a priori* preference of one generation over another, is probably most widely accepted. If timing of birth is not a reason for *a priori* allocation, then it becomes important to determine the appropriate principle on which to determine what is an equitable allocation – whether decisions should be based on need, capacity, prior entitlement, "just deserts", the greatest good for the greatest number, or strict equality of treatment. Each factor may point towards allocation in favour of one generation or another. To complicate matters further, a single factor, such as need, may be asserted across generations.

Finally, are equity and solidarity the same thing? The Oxford English Dictionary defines solidarity as "unity or accordance of feeling, action, especially among individuals with common interest, sympathies, or aspirations". Catholic social doctrine teaches that solidarity is "… a firm and persevering determination to commit oneself to the common good; that is to say, to the good of all and of each individual, because we are all really responsible for all".[17] Social solidarity "implies putting aside the simple pursuit of particular interests, which must be evaluated and harmonized 'in keeping with a hierarchy of balanced values; ultimately,

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[16] There are certainly laws and policies that reveal a preference for protecting the future over the present: the "best interests of the child" text in custody disputes and other matters concerning minors is one example.

[17] John Paul II, *On Social Concern*, para. 38 of 30 December 1987. See, generally, E. Malinvaud, "Intergenerational Solidarity in the Social Teaching of the Church", see note 4, 39 et seq.

it demands a correct understanding of the dignity and the rights of the person'".[18] It seems then that solidarity is a sentiment, a feeling or intellectual recognition of affinity that may lend support to decisions based on equity; it is the foundation for expanding the "we" to include the "others". An EU Advocate General considered solidarity in terms of the actions that result: the "inherently uncommercial act of involuntary subsidization of one social group by another".[19]

Rudi Muhammad Riski, the UN Human Rights Council's special rapporteur on human rights and international solidarity, has focused mainly on intragenerational solidarity among the community of States, but he defines solidarity in a way that includes an intergenerational dimension: "the union of interests or purpose among the countries of the world and social cohesion between them, based upon the dependence of States and other international actors on each other, in order to preserve the order and very survival of international society, and in order to achieve collective goals which require international cooperation and joint action".[20] The UN General Assembly in its resolutions *on the Promotion of a democratic and equitable international order* and *on the University of Jerusalem "Al-Quds" for Palestine refugees* has referred to solidarity as "a fundamental value" that demands distributive justice: a fair distribution of the costs and burdens of global challenges.[21] Distributive justice is inherent in the concept of solidarity, and also a fundamental part of equity.

Solidarity among generations can be defined narrowly as equity between copresent different age groups to ensure a just distribution of benefits and burdens among them, recognising that what is done to the young will affect their descendants and that what was done in the past

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[18] *Address* of John Paul II, see note 4, 27 et seq. (28), citing *Centesimus annus*, para. 47.

[19] *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v. Regione Lombardia* C-70/95, ECR (1997), I-3395, para. 29. For further on the meaning of solidarity in the EU context, see C. Barnard, "EU Citizenship and the Principle of Solidarity", in: M. Dougan/E. Spaventa (eds), *Social Welfare and EU Law*, 2005; C. Barnard, "Solidarity and New Governance in Social Policy", in: G. de Burca/J. Scott (eds)., *Law and New Governance in the EU and the US*, 2006, 153 et seq.

[20] *Human Rights and International Solidarity*, Note by the United Nations High Commissioner for Human rights, Doc. A/HRC/9/10, 15 August 2008, 4.

[21] A/RES/56/151 of 19 December 2001, para. 3(f); A/RES/57/123 of 18 December 2002, para. 4(f).

often affects the present and those to come. Historic injustices that give rise to current consequences may need to be resolved equitably through judging the actions of past generations. Intergenerational equity or solidarity can also extend to the transmission of resources (cultural, ecological, and economic) from one generation to the next far into the future. This requires investing in the future and ensuring that production outweighs consumption in the present.

II. The Rationales for Intergenerational Equity

Bryan Norton asks "What do present people owe to people of the future?"[22] This may be reformulated: "Do present people owe anything to people of the future and if so why?" Ultimately, all rationales for intergenerational equity rest on a single premise: that the survival of the human species is a good thing. If so, there is a moral obligation to contribute to human continuity by maintaining the essential natural and manmade resources necessary to life. Add to this, first, the foundational concept of human rights that each present and future person is entitled to a life of dignity and well-being, and, second, the reality that resources are finite and degradable, and the need for intergenerational equity emerges from scarcity.

John Rawls prescribed neutrality among individuals as the requirement of justice, including across generations.[23] His neutrality principle calls for allowing each person the fullest enjoyment of rights compatible with a similar enjoyment by any other person. Thus, persons in one generation have no claim to priority over members of any other generation: solidarity assumes that all persons are persons of equal concern, past, present and future. Other authors use the language of social contract, assuming it exists across past, present and future generations in an open-ended partnership.[24] Edith Brown Weiss expanded on these basic

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[22] B. Norton, "Ecology and Opportunity: Intergenerational Equity and Sustainable Options", in: A. Dobson (ed.), *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice*, 1999, 122 et seq.

[23] Rawls, see note 8.

[24] Edmund Burke famously described the State in terms of a partnership over generations. See E. Burke, "Reflections on the Revolution in France (1790)", in: *2 Works of Edmund Burke*, 1854, 130 et seq. For a critique of this and Rawls theory of justice applied intergenerationally, see Solum, note 12, 205-208.

theories to establish a legal construct of trust: "each generation is a beneficiary of past generations and a trustee towards the future. In natural resource terms, this imposes an obligation of stewardship, so that present enjoyment does not endanger future access and beneficial use".[25]

A further rationale for intergenerational equity lies in the "just deserts" notion that those who cause harm are responsible for repairing or compensating for the damage caused to others (also known as the Shopkeeper's Rule: "you break it, you own it"). From this perspective intergenerational equity is not a matter of distributive justice but of corrective justice. As the past and present negative impacts of human activities on the future are accelerating, the foreseeability of harm imposes responsibilities of prevention and mitigation. Even when scientific and technological changes have uncertain consequences over the long-term, our ability to create or destroy imposes obligations of risk assessment and precaution to ensure future survival of societies. Jared Diamond's work has revealed the extent to which past unsustainable practices led to the collapse of various civilisations around the world and provides further justification for taking a long-range view of the consequences of present decisions.[26]

Unjust enrichment has also been cited as the basis of duties towards future generations. The living are indebted for all that has been transmitted from the past, whether in medical advances, culture, art, or technology, all of which have contributed to present well-being. Those living have also received a heritage of natural resources which imposes on them a special obligation to maintain the planet's integrity, because it has intrinsic worth and is essential to human survival. This limitation requires each generation to maintain the corpus of the trust and to pass it on in no worse condition than it was received. The debt to prior generations cannot be repaid to those who produced current welfare, and present generations would enjoy a form of "unjust enrichment" were the benefits not transmitted into the future.

Finally, from a humanitarian perspective, "the moral obligation not to deprive future generations of resources essential to their avoiding impoverishment is part of our natural duty to avoid inflicting unnecessary suffering on other people".[27] Poverty, environmental degradation, dis-

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[25] Brown Weiss, see note 8.

[26] J. Diamond, *Collapse: How Societies Choose to Fail or Succeed*, 2005.

[27] Beckerman/Pasek, see note 9, 68.

ease, and a host of other ills already disproportionately harm infants, children and the elderly. Future generations are being made worse off by present day malnutrition and unsafe water which cripple the learning capacity and the physical strength of the young.[28] Poverty is thus as much an issue of intergenerational equity as it is an intragenerational concern.

III. Issues of Intergenerational Equity

Intergenerational equity has been largely thought of in the context of natural resource conservation and use, but the issue is far more complex and far-reaching. It touches on public financing and budgets, social security and services for the elderly, education of the young, attention to pre-natal and neo-natal medical care, intergenerational transmission of wealth, and preservation of cultural goods and traditions. It also reaches back in time to address the need for reparations for historical injustices and their consequences today. Indeed, few areas of law are exempt from the implications of concern for equity and solidarity across generations, and the issues are often interrelated. Some of the major areas where the issue arises are discussed herein.

A. Economic Wealth and Development

The transmission of wealth across generations has macro and micro dimensions. Taking the latter first, in some legal systems, like the United States, descendants have no right to inherit from their parents or grandparents, because the transmission of wealth is a matter for decision-making by the person who accumulated the assets. Trusts may skip a generation, testators may choose to disinherit descendants or give preference to one over another, or they may decide to spend all their earnings before their demise. The law may presume that a decedent would

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[28] The UN Special Rapporteur on the Right to Food, Jean Ziegler, has noted the intergenerational links in nutritional status, where underweight and malnourished mothers are more likely to give birth to underweight babies whose mental and physical capacities are reduced and who may never recover. Hunger then is passed on through the generations. *Report of the Special Rapporteur on the Right to Food, Jean Ziegler*, Doc. A/HRC/7/5, 10 January 2008, para. 34.

choose to transmit his or her estate to descendants before others, but the express wishes of that decedent in a properly executed will or testament will be given effect. In recent years, gifts during lifetime, especially payments for university expenses, weddings, and other expensive items, have been charged against inheritance.

Society does step in on occasion, mandating in particular support for minor children and for the surviving spouse through a fixed share of the assets. This is often based on the realistic assumption that solidarity and aid of all within the family helped to produce the wealth accumulated; in addition, there is a desire to avoid the survivors becoming a burden on the community. But the view that those whose efforts created the assets have the right to dispose of them is widely shared. Inheritance taxes are the primary mechanism used to reflect the notion of solidarity, in taking from a decedent the wealth it is no longer to use and sharing it among living, needy persons. Some research suggests that the redistribution does not go far enough because there is still a presumption that the decedent should control the transmission of wealth and maintain it within the family, however great the concentration of wealth might be compared to others in the community. Thus, disposal of the billions of dollars earned by Bill Gates or Warren Buffet during their lifetimes will be controlled by their dispositions, unless society requires a redistribution.

On the macro level, countries engaged in the process of economic development cite the right to development as a "solidarity right".[29] The relatively recent shift towards the term "sustainable development" brings in intergenerational equity, as the term means development that is maintained over time. Thus the core idea of sustainable development has been described as a matter of preserving options and opportunities to give future generations freedom of choice.[30] Indeed, most theories of intergenerational equity in respect to development rely upon utility comparison, deeming fairness to the future to involve preserving the "opportunity of persons in future generations to be as well off as prior

[29] N. Roht-Arriaza, "Solidarity Rights (Development, Peace, Environment, Humanitarian Assistance)", in: R. Wolfrum (ed.), *MPEPIL online edition*, 2008. Roht-Arriaza notes the origin of the term "solidarity rights" in an article by Karel Vasak written in 1977 for the UNESCO Courier.

[30] Norton, see note 22.

generations have been",[31] comparing aggregated welfare opportunities at different times.

Questions of fiscal policy and deficits divide scholars and politicians. While some argue[32] that the level of economic growth already build into the system ensures that future generations will enjoy multiples of wealth beyond our current levels, despite current deficits, others critique national deficit spending as a drain on the wealth of future generations.[33] Those like Professor Buchanan who argue that government budget deficits will not cause hardships to future generations do so in assuming "no environmental tradeoffs", an assumption that is highly questionable given the reliance of modern economies on non-renewable extractive resources. Nonetheless, they may be correct that the focus should be on the resource limitations and not on the fiscal policies.

Finally, and importantly, this category includes the issue of reparations for past injustices, a matter of corrective justice. History is replete with episodes of genocide, slavery, torture, and mass expulsions of peoples that remain alive in memory and sometimes resurge as a background to modern conflicts. Equity insists that present generations have a responsibility for the past. Every individual is born into a society or culture that has emerged over time and that shapes each person, making the past part of the present and giving everyone in the society a historic identity. Reparation claims help to determine the moral and political significance of past actions, identifying arguments that are relevant and contributing to the emergence of a common set of values to judge the acceptability of present and future acts, as well as providing accountability for the past. In addition, some historical acts were illegal under national or international law at the time they were committed. The victims have been unable to secure redress for political reasons, because evidence was concealed, or procedural barriers prevented them from

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[31] Ibid., 119.

[32] E.g., N. H. Buchanan, "What do We Owe Future Generations?", *Geo. Wash. L. Rev.* 77 (2009).

[33] E.g., C. D. Block, "Pathologies at the Intersection of the Budget and Tax Legislative Processes", *B. C. L. Rev.* 43 (2002), 863 et seq. (925), asserting that "even in times of surplus, Congress has an obligation to future Congresses and to future generations to leave the surplus available to cover unforeseen costs, such as those of social security and the like"; D. N. Shaviro, "Accrual Accounting and the Fiscal Gap", *Harv. J. Legis.* 41 (2004), 209 et seq., arguing that current fiscal policy includes entitlements as to which no extra financing is foreseen, leaving it to future generations to pay the bill.

presenting claims. In such circumstances, lapse of time should not prevent reparation for harm caused by the illegal conduct. Finally, communities, businesses and individuals have unjustly profited from many of the abuses, garnering wealth at the expense of the victims. The economic disparities created have continued over generations, often becoming more pronounced over time. As one author has put it: "not seeking financial restitution, in the face of documented proof that financial giants worldwide are sitting on billions of dollars in funds made on the backs of … victims, which they then invested and reinvested many times over …, amounts to an injustice that cannot be ignored".[34]

Legal doctrine suggests that historical claims particularly warrant reparations in three circumstances. First, many historical wrongs have consequences that continue into the present; these continuing wrongs result in a convergence in the notions of inter- and intragenerational equity. Second, redress is due when the acts were illegal at the time committed and no reparations have been afforded.[35] Third, reparations are justified where reliance on the earlier law was not reasonable and expectations were not settled because the law patently conflicted with fundamental principles then in force.[36] Any benefit unjustly obtained may then be claimed by those who suffered or their descendants. When it is clear that there was considerable debate over the morality or legality of historical acts, it may be more justified to award reparations because the law at the time probably was not settled and those acting would have had some notice of the likelihood of change.

To most claimants, reparation is a moral issue involving a formal acknowledgement of historical wrong, recognition of continuing injury, and commitment to redress. Reparations are pursued because they are powerful acts that can challenge assumptions underlying past and pre-

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[34] M. Bazyler, "The Holocaust Restitution Movement in Comparative Perspective", *Berkeley J. Int'l L.* 20 (2002), 11 et seq. (41).

[35] Traditionally, States could and often did renounce claims on behalf of their nationals in time of war and peace. With the widespread recognition of the right to a remedy as a human right, it is open to question whether such waivers continue to be valid in international law without alternative means of redress.

[36] E.g., *Altmann v Republic of Austria*, 317 F.3d 954 (2002), giving retroactive application to the expropriation exception to the Foreign Sovereign Immunities Act, 28 U. S. C. s 1605(a)(3) on the ground that Austria could not have had any settled expectation that the State Department would have recommended immunity for the wrongful appropriation of Jewish property in the 1930s and 1940s.

sent social arrangements. For those who are not claimants, participating in reparations and ensuring redress has been called an "expression of solidarity" and a means for the international community to "keep[] faith with the plight of victims, survivors and future human generations".[37] At their best, reparations may involve restructuring the relationships that gave rise to the underlying grievance, address root problems leading to abuse and systemic oppression. This brings the notion of reparations close to the current idea of restorative justice as a potentially transformative social action. It also provides a reason why legislatures may be better suited to determine reparations: they are not bound by precedent and legal doctrine, but can fashion equitable remedies. Remedies thus become part of a healing process that may avoid the creation of future historical injustices.[38]

B. Culture and Knowledge

The deliberate destruction of knowledge and culture, from the Taliban's effacement of ancient Buddhist statues to the looting of museums in Baghdad and Kabul, strike many as particular egregious acts, because they erase generations of artistic achievement, cultural monuments and knowledge that could have provided the basis for further advancement in the human condition. The respect for libraries and museums and the desire to transmit their contents to future generations demonstrate intergenerational solidarity.

The present generation has benefited from past knowledge and invention, including vaccines against diseases, pasteurised milk (indeed recognition of the value of non-human milk itself), musical compositions, art works and literature that must be preserved if only so future generations are not put to the trial and error of determining anew which mushrooms are poison. Our very ability to communicate is owed to the development of language over time: Shakespeare alone is said to have

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[37] *UN, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted and proclaimed by A/RES/60/147 of 16 December 2005.

[38] S. Ratner, "New Democracies, Old Atrocities: An Inquiry in International Law", *Geo. L. J.* 87 (1999), 707 et seq.; C. Hesse/R. Post (eds) *Human Rights in Political Transitions: Gettysburg to Bosnia*, 1999; K. Christie, *The South African Truth Commission*, 2000, 44.

added more than 1600 words to the English vocabulary. President Abraham Lincoln saw the cultural heritage of society as including law, political institutions, and rights; these benefits were inherited from prior generations as a legacy that present generations have an imperative duty to pass on.[39] Here as in other aspects of intergenerational equity, the idea of unjust enrichment is prevalent: the present generation is obliged to transmit access to and use of the resources it received because its own welfare has been enriched by those resources and this generation would be enriched at the expense of future generations were it not to transmit what it has received. Thus, support for and contributions to public education are critical to the well-being of future generations, also expressed in recognition of the duty to be educated.

C. Life and Well-being

At one end of the spectrum of life, allocation of scarce medical resources between elderly and younger persons, choices about prolonging life, and the care of the elderly have been the focus of numerous policy discussions. These debates are increasing as more societies face an aging population. At the other end of the spectrum, questions concerning abortion, embryonic stem cell research, maternal and foetal health care, genetic testing and manipulation, all raise ethical and legal issues that may pit individuals in the present generation against concern for potential or future life. Should the rights of the present generation (the mother or/and father) outweigh those of the foetus in decisions about abortion? Should the potential life of embryos preclude stem cell research that might devise a cure for current diseases? Is there a right to genetic integrity that excludes in vitro genetic changes? In some societies, concern for the well-being of the future generation has led to laws that limit the choices of the child-bearer or make individuals liable for harm to the unborn. Does society have the right to tell a mother she cannot smoke during pregnancy or eat poorly or refuse to take pre-

[39] A. Lincoln, *The Perpetuation of Our Political Institutions, Address Before the Young Men's Lyceum of Springfield, Illinois (January 27, 1838)*, cited in: B. M. Frischmann, "Some Thoughts on Shortsightedness and Intergenerational Equity", *Loy. U. Chi. L. J.* 36 (2005), 457 et seq. (463-464).

natal vitamins? These issues raise passionate feelings in many individuals today.[40]

Reproductive rights appear to rest on the assumption that there is no obligation to reproduce, although traditionally a married woman had no right to refuse sexual relations with her husband.[41] The reproductive right was rather one of choosing with whom to reproduce by selecting a marriage partner and thus choosing the potential identity of particular offspring (and in some societies, it remains the grandparents who make the decision through arranging marriages for their children). Individuals may also forego reproduction altogether. Thus, while society as a whole has an interest in having some future citizens, no particular individuals have a right to be brought into existence.

Laws and jurisprudence that recognise a constitutional or human right to privacy generally protect a right of access to contraception, allowing individuals or a couple to control their reproductive decisions.[42] They thereby deny any claim that a specific "potential person" has a right to exist. Yet as a group, society depends upon reproduction to maintain itself over time. As Sherry Colb states it, "actual people have interests that include the existence of other people in the same generation who can assist them in caring for themselves and the older generation and the existence of a younger generation of people who can assist them in their old age".[43] One can then view reproductive obligations as com-

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[40] The release on December 12, 2008, of the Vatican's Instruction on bioethics, *Dignitas Personae*, drew sharp responses and clear lines in the debates mentioned in this section. Among the matters it considers, the Instruction calls for a ban on embryonic stem cell research, human cloning, and in vitro fertilisation. The text approves in principle "somatic cell" gene therapy (correcting a specific genetic defect in the cells of an individual patient) but it raises special caution about "germ line" gene therapy which would affect future generations. The latter it says is not acceptable "in its current state", due to its massive and unpredictable risks and its need to manipulate human embryos in the laboratory.

[41] J. E. Hasday, "Contest and Consent: A Legal History of Marital Rape", *Cal. L. Rev.* 88 (2000), 1373 et seq.

[42] *Griswold v. Connecticut*, 381 U.S. 479 (1965), recognising a substantive due process protection for access to contraception for married couples; *Eisenstadt v. Baird*, 405 U.S. 438 (1972), extending the right to privacy to allow unmarried persons "the decision whether to bear or beget a child" by affording access to contraception.

[43] S. F. Colb, "To Whom Do We Refer When We Speak of Our Obligations to 'Future Generations'? Reproductive Rights and the International Commu-

munal rather than individual and similar to the need to conserve other resources. This does not suggest that the individual decision to reproduce or not should be a communal one, although it may be affected by the incentives or disincentives societies determine are appropriate.

Are there obligations to protect the potential lives of future generations through recognising a right or interest in coming into being? Abortion can be seen either as preventing a person from coming into existence or killing an existing person. Since, as discussed above, no specific non-existent person has a right to come into being, the first option should not raise concerns about abortion. If, however, the foetus is viewed as an existing person, the issue is considerably more difficult as it involves the legality of terminating life. Some feminists have recast the abortion debate in recent years by conceding that the foetus is a person and asking under what circumstances that person may be killed, relying on traditional notions of self-defence against an aggressor, even one whose age or mental state makes them not responsible for their actions.[44] Where the presence of the foetus endangers the health and well-being of the mother, self-defence is argued to support the maternal decision to terminate the pregnancy. The balance shifts as the foetus matures towards viability, a person whose recognised rights may outweigh the mother's.

With in vitro fertilisation and other forms of assisted conception, further issues have arisen. Human embryos have been defined in at least three ways, as: (1) personal property of the donors, the IVF facility, or some combination thereof; (2) human beings with the full legal status afforded to children; or (3) as a *sui generis* intermediate category entitled to more respect than property because of the potential for human life the embryos represent. Most courts that have faced disputes over custody and disposition of embryos have opted for either the first or the last approach, without fully thinking through the implications of each one. In nearly all cases, the disputes have arisen in the context of divorce, where the couple disagreed about the disposition of the embryos. At least one case, however, was brought by an adoption agency

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nity", paper delivered at the GWU Law School, 24 October 2008 (on file with the author).

[44] S. F. Colb, *When Sex Counts: Making Babies and Making Law*, 2007; E. McDonagh, *Breaking the Abortion Deadlock: From Choice to Consent*, 1996. The theory is based on G. P. Fletcher, "Proportionality and the Psycholic Aggressor: A Vignette in Comparative Criminal Theory", *Israel L. Rev.* 8 (1973), 367 et seq.

and raised the question of independent representation for the embryos, akin to the separate representation now afforded to children during custody disputes. Such representation might be required should any State adopt the approach of viewing the embryos as fully human, but to date no court or legislature has taken this view.[45]

Twentieth century tort law over time increasingly recognised legal interests in pre-natal life. While in 1884, Justice Oliver Wendell Holmes held that there could be no recovery for pre-natal damages, on the assumption that a foetus had no legally-recognised existence, later cases allowed recovery if the foetus was viable and later born alive. In 1946, a U.S. federal district court for the first time held that injuries to a viable unborn child are compensable in a tort action brought by the child after birth. This rule is now well-established, even extending to maternal liability for injury to the foetus: a growing number of States provide for criminal prosecution of women who knowingly ingest harmful substances during pregnancy.[46] The rationale is that the pregnant woman is not only injuring a foetus but a future baby, a moral person. The impact of medical advances extending the period of viability has increased the period of time during which liability may be imposed as a practical matter, posing again the question of a dividing line between one who might exist and one who now exists and has current entitlements.

International human rights bodies have noted that the treaties contain no guarantees for foetal life. In *V.O. v. France*, the European Court of Human Rights faced the question of including pre-natal injuries in the scope of human rights protections. On this point, the Court compared the laws of Member States and found that there "is no consensus on the nature and status of the embryo and/or foetus, although they are beginning to receive some protection in the light of scientific progress and the potential consequences of research into genetic engineering, medically assisted procreation or embryo experimentation". The Court found "common ground between States that the embryo/foetus belongs to the human race" and that the potential and capacity for it to become a person "require protection in the name of human dignity, without

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[45] E.g., *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa, 2003).

[46] M. Reutter, "Laws About Pregnant Women and Substance Abuse Questioned", in: *News Bureau*, University of Illinois at Urbana-Champaign, 8 November 2005.

making it a "person" with the "right to life" for the purposes of Article 2".[47]

The question of equitable protection for future life arises also in respect to the question of whether there is a right to genetic integrity. Is each human entitled (or mandated) to retain the genetic code imprinted at fertilisation? The so-called right of genetic integrity is increasingly debated with (re-)emerging eugenics: the ability to select specific characteristics through genetic manipulation. Recently, a leading evangelical minister provoked considerable controversy with his published article raising the issue of what his adherents should do if in the future it is possible to determine *in utero* that a foetus will be born homosexual: have it, abort it, or "fix" it? Clearly, this is a long way from respecting the individual rights of the developing foetus and its personal "potential and capacity". While genetic cures for life-threatening diseases such as leukemia might be acceptable to avoid a short life full of pain, allowing parents to select for appearance, gender and personality reduces the next generation to the equivalent of designer clothing.

Finally, on this point, the demography of future generations is a matter of great importance and will matter to them. What are the obligations of the present generations to manage the birthrate to ensure a future population, but to avoid overcrowding and resource shortages in the future? Can solidarity as intergenerational equity mean choosing not to produce some members of future generations? As with many other questions in which individual actions may impact the larger commu-

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[47] See also *Boso v. Italy* (App. 50490/99), ECtHR Report 2002-VII, Admissibility Decision of 5 September 2002 in which the applicant challenged Italian Law no. 194 of 1978, under which his wife had been able to terminate her pregnancy, as a violation of article 2 (right to life) of the European Convention on Human Rights and Fundamental Freedoms. The European Court held that it was not required to determine whether a foetus may qualify for protection under article 2. Even supposing that, in certain circumstances, it might be considered to have rights protected by the Convention, the mother's rights were also at stake. Evidence showed that the wife's pregnancy was terminated in conformity with Italian legislation, which authorised abortion within the first twelve weeks of a pregnancy if there is a risk to the woman's physical or mental health. It followed that abortions were performed to protect the woman's health and, the Court held, "such provisions strike a fair balance between, on the one hand, the need to ensure protection of the fetus and, on the other, the woman's interests". In the particular circumstances of the case, the Court found that the respondent State had not gone beyond its discretion in balancing the rights and interests of the present and the future.

nity, perhaps the most fundamental question is that of who is entitled to make these decisions.

D. Natural Resources

Intergenerational equity in respect to natural resources is based on the recognition of three key points: (1) that human life emerged from, and is dependent upon, the Earth's natural resource base, including its ecological processes, and is thus inseparable from environmental conditions; (2) that human beings have a unique capacity to alter the environment upon which life depends and (3) that no generation has a superior claim to the Earth's resources because humans did not create them, but inherited them. Taken together, these three points have led many to the concept of trust: imposing obligations on present generations to conserve and maintain the planetary resources for future beneficiaries. In fact, the present generation is both beneficiary of the past and trustee for the future. Meeting the obligation does not mean that no development is possible, but it does call for minimising or avoiding long-term and irreversible damage to the environment.

There are already aspects of trust in international law, which recognises that certain resources, such as those on or under the deep seabed, belong to the common heritage of mankind by virtue of their location in commons areas. Inclusion of the word "heritage" connotes a temporal aspect in the communal safeguarding of areas or resources incapable of national appropriation. Based on this concept, special legal regimes have been created for the deep seabed[48] and the Moon. The nature of the common heritage is a form of trust, whose principal aims include restricting use to peaceful purposes, rational utilisation in a spirit of conservation, good management or wise use, and transmission to future generations. Benefits derived from the common heritage may be shared through equitable allocation of revenues, but this is not the essential feature of the concept. Benefit-sharing can also mean sharing scientific knowledge acquired in common heritage areas like Antarctica.

Climate change offers particularly difficult challenges to intergenerational equity. The greenhouse gases sent into the atmosphere in 2008

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[48] UN, Division for Ocean Affairs and the Law of the Sea, *The Law of the Sea, Concept of the Common Heritage of Mankind*, 1996.

will be there for at least a century.[49] Thus, throughout the 21st century the world in general and the world's poor in particular will have to live with the consequences of human activities already undertaken or underway. The full consequences of today's actions may not be known, but the risks are: increased flooding, extreme storm activity, drought, melting sea ice, expanded range of disease vectors, and extreme heat events. In addition, the damage caused by present emissions may be irreversible. Development is already being hindered due to the consequences of climate change and this is likely to increase over time. There will be significant short term costs, but the cost of mitigation and adaptation will grow the longer action is delayed. Moreover, the impacts will be felt unequally, with the already poor and marginalised suffering disproportionately from the consequences of climate change. Future generations will inherit a more unequal world with potentially irreversible changes to the ecological resource base on which they depend. As Desmond Tutu has expressed it, there is an increasing "adaptation apartheid".

IV. The Status of Intergenerational Equity in International Law

Most of the existing references to intergenerational equity in international law are in the context of natural and cultural resources. Although mention of future generations can be found as early as the 1945 UN Charter[50] and the 1946 Convention for the Regulation of Whaling,[51] it is only more recently that a growing number of binding and non-binding international instruments make reference to future generations or intergenerational equity. The 1972 Stockholm Conference on the Human Environment considered a proposal from the UN Secretary-General that the final declaration should proclaim the "duty of all na-

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[49] UNDP, *Human Development Report 2007/2008: Fighting Climate Change, Human Solidarity in a Divided World*, 2007, at p. v.

[50] Charter of the United Nations (25 June 1945), 59 Stat. 1031, Preamble, "determined to save succeeding generations from the scourge of war…".

[51] International Convention for the Regulation of Whaling, 2 December 1946, "Recognizing the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks…".

tions to carefully husband their natural resources and to hold in trust for present and future generations the air, water, lands, and communities of plants and animals on which all life depends".[52] The United States similarly proposed that air and water be declared "a common trust".[53] Both of these far-reaching proposals were ultimately rejected in favour of the language of Principle 2: "The natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management as appropriate".

Twenty years later, the Rio Declaration incorporated the reference to future generations into its statement on the right to development, reflecting the Brundtland Commission's definition of sustainable development,[54] a right which is to be fulfilled so as to equitably meet the developmental and environmental needs of present and future generations. Principle 6 calls for giving special priority to the situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable. While these principles focus on elements of need as a basis for distributive justice, Principle 7 shifts to take into account responsibility and capacity, with its enunciation of the principle of common but differentiated responsibilities. Thus, the declaration identifies at least three factors that could be taken into account in the equitable allocation of benefits and burdens: need, responsibility, and capacity.

In treaty law, the 1972 Convention for the Protection of the World Cultural and Natural Heritage is expressly aimed at conserving the world's cultural and natural patrimony for the future. It contains a duty on the part of States parties "of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage" situated on its territory (article 4). Numerous other treaties contain references to future generations in their pre-

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[52] Doc. A/CONF.48/PC/SG.1/CRP.4, 13 (1971).

[53] Secretary of State's Advisory Committee on the 1972 United Nations Conference on the Human Environment, Stockholm and Beyond 143 (May 1972). On the drafting history of the Stockholm Declaration, see L. B. Sohn, "The Stockholm Declaration on the Human Environment", *Harv. Int'l L. J.* 14 (1973), 423 et seq.

[54] *Our Common Future*, 1987; defining sustainable development as development which meets the needs of the present generation without compromising the ability of future generations to meet their needs.

ambles.[55] The parties to the 1992 Convention on Biological Diversity expressed their determination "to conserve and sustainably use biological diversity for the benefit of present and future generations," establishing intergenerational solidarity as part of the general framework in which to apply the Convention.[56] The 1992 Climate Change has similar preambular language, but goes further in placing concern for future generations in article 3(1) of the Treaty as well. It provides that the parties should protect the climate system "for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities". A chapeau to article 3 insists that States are to be "guided by" these principles in their actions to achieve the objectives of the Convention, a chapeau apparently intended to limit the legal consequences of the principles. A similar chapeau is added to article 5(c) of the 1992 UNECE Convention on the Protection and Use of Transboundary Watercourses and Lakes, which provides that water resources "shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs". The 1997 International Atomic Energy Agency's Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management is perhaps most specific on the duty to protect future generations. Article 4 of this convention obliges States parties to take steps to avoid actions that impose reasonably predictable impacts on future generations greater than those permitted for the current generation and generally to avoid imposing undue burdens on those to come.

Beginning in 2005, the UN Human Rights Commission began a study of human rights and international solidarity, much of which concerns

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[55] E.g., 1968 African Convention on the Conservation of Nature and Natural Resources; 1973 Convention on International Trade in Endangered Species; 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques; 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals; 1979 Berne Convention on the Conservation of European Wildlife and Natural Habitats; 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources.

[56] D. Bodansky, "International Law and the Protection of Biological Diversity", *Vand. J. Transn'l L.* 28 (1995), 623 et seq. In addition to the CBD and UNFCCC, other examples of references to future generations as a motivating factor in taking action can be found in the preambles to the 1992 Convention on the Transboundary Effects of Industrial Accidents and the 1994 Convention to Combat Desertification.

the right to development and international cooperation to address current crises.[57] Recent resolutions adopted by a highly-divided Human Rights Council nonetheless recognise the link with intergenerational equity, asserting "the necessity to establish new, equitable and global links of partnership and intragenerational solidarity for the perpetuation of humankind".[58] The 2008 resolution also "[r]*esolved* to strive to ensure that present generations are fully aware of their responsibilities towards future generations", and that a better world is possible for present and future generations. It also "[e]*xpresse[d] its determination* to contribute to the solution of current world problems through increased international cooperation, to create such conditions as will ensure that the needs and interests of future generations are not jeopardized by the burden of the past, and to hand over a better world to future generations". There is a clear emphasis on distributive justice as an expression of solidarity. With this in mind, the special rapporteur has been given the task of preparing a draft declaration on the right of peoples and individuals to international solidarity.

Existing human rights instruments express concern for future generations in specific treaties concerning children, as well as provisions in general human rights treaties on the rights of the child.[59] The Universal

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[57] Doc. E/CN.4/RES/2005/55 of 20 April 2005. The mandate was reaffirmed in Doc. A/HRC/7/7 of 9 January 2008 by a vote that divided largely along North/South lines. Adopted by a recorded vote of 34 to 13. The voting was as follows: *In favour*: Angola, Azerbaijan, Bangladesh, Bolivia, Brazil, Cameroon, China, Cuba, Djibouti, Egypt, Gabon, Ghana, Guatemala, India, Indonesia, Jordan, Madagascar, Malaysia, Mali, Mauritius, Mexico, Nicaragua, Nigeria, Pakistan, Peru, Philippines, Qatar, Russian Federation, Saudi Arabia, Senegal, South Africa, Sri Lanka, Uruguay, Zambia. *Against*: Bosnia and Herzegovina, Canada, France, Germany, Italy, Japan, Netherlands, Republic of Korea, Romania, Slovenia, Switzerland, Ukraine, United Kingdom of Great Britain and Northern Ireland.

[58] A/HRC/9/7 of 18 September 2008. See also A/HRC/6/3 of 27 September 2007, adopted by a vote of 32-12, with one abstention. No industrialised western country voted in favour of the resolution; Switzerland abstained and the remainder voted against it.

[59] Convention on the Rights of the Child (CRC); Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (CRC-OPSC); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC-OPAC); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182).

Declaration of Human Rights was the first to proclaim that childhood is entitled to special care and assistance. While there is no treaty on the elderly, the United Nations Principles for Older Persons, adopted by General Assembly resolution 46/91 of 16 December 1991, seeks to protect the participation, independence and rights of the elderly.[60] Humanitarian instruments also reflect concern for future well-being in prohibiting the employment of "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment".[61]

V. Principles of Intergenerational Equity

Malaria is a serious problem in many parts of the world, causing numerous deaths. What are the options for confronting this problem in the present, while not causing undue problems for the future? Mosquito nets and anti-malarial medications can prevent or treat many current cases, without improving the situation for the future; spraying of pesticides could eliminate the present problem in some areas, while causing future health problems and reducing biodiversity. People could be moved away from areas where malaria is endemic, ceding the field to the mosquitoes and creating large numbers of displaced persons, with loss of culture, property and rights. Swamps and other wetlands could be drained to remove the mosquito habitat, but with attendant loss of ecosystems and biodiversity. Genetic engineering could be attempted on mosquitoes to eliminate their ability to be a malaria vector, with uncertain and unknowable consequences. What is the equitable option for present and future generations?

Intergenerational equity is primarily a principle of distributive justice, concerned with the allocation of benefits and burdens. In part it asks whether a given resource should be used today or saved for possible future use. From this perspective, the implications of the principle of solidarity with future generations are three: first, that each generation

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[60] Other standards include the International Plan of Action on Ageing and the conventions, recommendations and resolutions of the International Labour Organization, the World Health Organization.

[61] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), adopted on 8 June 1977.

should conserve the diversity of the natural, cultural and economic resource base so that it does not unduly restrict the options available to future generations to satisfy their own values and needs. Second, the quality of ecological processes passed on should be comparable to that enjoyed by the present generation. Third, the past and present cultural and natural heritage should be conserved so that future generations will have access to it. Prior assessment should be done to ensure that the benefits from a proposed activity outweigh the costs and that the burdens are equitably borne by all or there is adequate compensation for those who bear the greater burdens. These rights and obligations derive from a notion of human solidarity that extends beyond the totality of the current planetary population, giving it a temporal dimension that places its focus on prevention of harm.

Economic analysis using traditional cost/benefit methods of valuation is inadequate because it gives preference to the present over the future. Economists measure the value of a benefit by the price a willing buyer would pay for it, discounted to the present on the assumption that individuals count immediate benefits more highly and discount deferred gratification due to uncertainties about future enjoyment. Future values thus are always corrected by a percentage that attempts to represent this discounting, usually by the rate of real interest. The time preference of an individual is assumed to correspond roughly to the price of money, the rate at which the individual could enhance money by loaning it out at the going rate of interest. Discounting is particularly problematic when applied to public goods, multi-generational goods, and especially to long-term intergenerational harms.[62] The most significant objection is that it requires reducing future values and welfare to what present consumers are willing to pay to support them. Since future generations are not available, they cannot express their willingness and the present generation must estimate, but cannot know, the future preferences nor future risks. As traditional cost-benefit analysis examines alternative projects and selects those that maximise the present value of net benefits, it will reject any project yielding benefits only in the long term.[63] Only a zero discount rate counts the future for as much as the present.[64]

[62] Frischmann calls discounting the future unethical, see note 39.

[63] R. Solow, "The Economics of Resources or the Resources of Economics", *Am. Econ. Rev.* 64 (1974), 1 et seq.

[64] T. Cowen, "Caring about the Distant Future: Why it Matters and What it Means", *U. Chi. L. Rev.* 74 (2007), 5 et seq.

An assumption that generations should stand in equality one to another is basic to intergenerational equity, and arguably makes discounting morally impermissible. To take the example used by Cowen, a 5 percent discount rate means 1 death 200 years from now would be counted as equal in value to 131.5 deaths 300 years into the future. "Under a positive discount rate, no matter how low, one life today can be worth more than one million lives in the future, or worth the entire subsequent survival of the human race, if we use a long enough time horizon".[65] In fact, time preferences only work within a generation, where individuals can express a desire to have a given benefit sooner rather than later. Future generations are not deprived of a benefit now that they are not alive to enjoy.

Economic measures also are problematic when looking at intergenerational equity in respect to historic injustices. If slave reparations should be awarded for the value of unpaid labour during the 300 years of slavery, how should that be measured? Compounding interest would produce values in the trillions of dollars, but it is pure speculation to assume that the original amount due would have been invested at the time and passed on via slave descendants to the present without loss or diversion.[66]

Economists are devising alterative methods to reflect intergenerational equity, including a method that eliminates discounting,[67] another that uses zero discount rates for projects with long-term benefits,[68] and one that applies a "generational discount rate".[69] Discounting for risk in-

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[65] Ibid., 9; Cowen objects that in addition to the inequality of numbers, the discount assumes that the lives are worth the same, but if a future life is happier and has greater well-being, any inequality should favour the future over the present. Theodore Seto also objects that discounted cost-benefit analysis fails miserable to consider the long-term consequences of the most important issues faced today; T. P. Seto, "Intergenerational Decision Making: An Evolutionary Perspective", *Loy. L. A. L. Rev.* 35 (2002), 235 et seq.

[66] Cowen notes that $1000 wrongfully taken in 1850 and compounded at 7 percent would be worth roughly $35 million today; Cowen, see note 64, 9, note 9.

[67] J. Broome, "Discounting the Future", *Phil. & Pub. Aff.* 23 (1994), 128 et seq.

[68] T. Cowen/D. Parfit, "Against the Social Discount Rate", in: P. Laslett/J. S. Fishkin (eds), *Justice Between Age Groups and Generations*, 1992, 144 et seq.

[69] Generally Woods, see note 8, 317 et seq. for the critiques to discounting and the alternatives.

stead of for value also supports the idea of caring about even the distant future.[70] An evolutionary perspective calls for a negative discount rate, because the future is always more important than the present because the present is only important as a prelude to the future. In other words, happiness or well-being today is completely irrelevant from an evolutionary perspective since it does not contribute to the long-term survival and reproduction of the group. Thus, "traditional economic discounting at market rates is revealed to be maladaptive, in evolutionary terms, to the survival of our species – an end which serves as the entire purpose of sustainable development …".[71]

Notions of entitlement stemming from prior uses, strict equality, proportional use based on population, and priority accorded to certain uses all have been asserted at one time or another as a basis for determining what is an equitable allocation. In some instances, the parties agree in advance on certain divisions or priorities. The idea of equitable utilisation today appears to recognise that some resource uses have priority over others. In the use of freshwaters, for example, emphasis is being placed on the satisfaction of basic human needs – that is, the provision of safe drinking water and sanitation. The Watercourses Convention provides that in the event of a conflict between the uses of an international watercourse, special regard is to be given to the requirements of vital human needs (art 10), while the UN Committee on Economic, Social and Cultural Rights, in its General Comment 12 on the Right to Water, insists that priority be given to safe drinking water and sanitation, with a guaranteed minimum amount to be provided to every person. Thus, a strictly legal approach grounded in human rights may alter the weighing of factors by designating one use as inherently more important than all others.

What specific principles are relevant to determine fairness or equity (distributive or corrective justice) between generations? And do they lead to the same result or outcome?

Formal equality is one method of allocating resources and burdens. As noted earlier, rules are generally deemed just if they apply to all without discrimination. Yet equal treatment may yield extreme outcomes when pre-existing economic or other inequalities already exist in society. In scholarship about intergenerational equity, equality surfaces as a key

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[70] Cowen, see note 42, 6.

[71] Sato, see note 2, 506.

concept. Rawls[72] and Sen[73] both emphasise equality of opportunity as a crucial element in distributive justice between generations. Goodin calls for guarantees that each generation will have roughly equal benefits.[74] When resources are finite, however, is equality of allocation the appropriate principle? Most people would probably not view equality as an appropriate measure of intergenerational equity, because they hope that future generations will be better off, just as they are thankful not to have lived in the less salubrious conditions of the distant past. Equality, perhaps, may be viewed as the floor, not the ceiling, in terms of transmission to future generations. In other words, it is unjust to make future generations worse off through no fault of their own, recognising that this may produce its own inequality as the present generation makes sacrifices for the future. This inequality may be justified, however, because we have an inequitable advantage over those who lived earlier; we cannot rectify their poor living conditions, but we can reduce our welfare in some small amount in favour of the future. Also as a practical matter, we cannot determine our equal share of resources in the absence of knowledge about the total amount of resources and the number of future generations (assuming an infinite number of generations, the present share of resources would be zero).

Notions of *entitlement* uphold the existing distribution of goods if they were justly acquired according to the rules in force at the time of acquisition. Entitlement protection is contained in some environmental laws and agreements that "grandfather" existing activities by exempting them from retrofitting to meet more exacting and newly enacted standards or allowing emissions to continue at pre-existing levels. For example, some international environmental agreements, such as the 1987 Sulphur Protocol to the Convention on Long-Range Transboundary Air Pollution, require equal reductions in pollution from historic baseline levels. The rewards that this system grants to those who have the goods may be too high to result in what is considered to be a fair distribution. An entitlement approach may also serve to deny essential goods to others in the future.

Traditional international law protects entitlement. All States, including those newly created, have equality of opportunity as sovereigns, but

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[72] Rawls, see note 8.

[73] A. Sen, *Inequality Reexamined*, 1992.

[74] R. Goodin, "The Ethics of Destroying Irreplaceable Assets", *International Journal of Environmental Studies* 21 (1983), 55 et seq.

pre-existing natural endowment and activities make older States substantially stronger in wealth and power and developing States substantially stronger in natural (biological) resources. Since traditional international law entitles all States to an equal right to obtain or use common resources, from fish in the high seas to the geostationary orbit, technologically advanced States have the ability to, and may choose to, acquire the greatest part of the resources from the common area. Equality of rights, however, does not necessarily bring about equality of outcomes and the least favoured may find themselves in a continually declining position.

Different *capacities* may be the decisive factor chosen to achieve distributive justice with regard to future generations, because those presently living are the only ones who can protect or waste resources needed by the future. Inequalities in the ability to access the benefits of natural resources and address environmental impacts are evident. While the reality of interdependence imposes a need for cooperation, States are impacted differently by specific threats, have greater or lesser interest in or impact on a particular problem, and may lack the human or financial capacity to take actions deemed prudent or necessary by the international community. It is clear that the expenditures necessary to prevent or abate certain environmental hazards, for example, can be high in the short term. This factor often provokes in developing countries rational fears that participation in international environmental treaties may decelerate or limit industrial development. The principle of common but differentiated responsibilities takes into account these differences of capacity.

Different *needs* (to each according to her need) as a basis for equitable allocation are recognised in the Rio Declaration and reappear, for example, in the UNFCCC. In implementing the convention, the parties are to be guided by "the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the convention".[75] The question of what would be "disproportionate" is left open. Article 4(8) adds that all parties are to consider what actions, including funding, insurance, and transfer of technology, may be necessary to meet the specific needs of specially affected States. Determining need, like determining capacity,

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75 Art. 3.2 of the UN Framework Convention on Climate Change.

may require the development of objective criteria and the assessment of the situation over time of each State party.

Different *historical responsibility* or "just deserts" – that is, past and present contribution to present and future harm, another factor in allocating benefits and burdens. The 1991 Beijing Declaration on Environment and Development stated the view of the developing world that "the developed countries bear responsibility for the degradation of the global environment. Ever since the Industrial Revolution, the developed countries have over-exploited the world's natural resources through unsustainable patterns of production and consumption, causing damage to the global environment, to the detriment of the developing countries". Fairness and a morally coherent response suggest that these States, which attained their current developed status through imposing noninternalised costs on the environment, take the major abatement actions, rather than demanding that everyone equally mitigate the externalities, including those not responsible for initially creating the problem. Equity, in this sense, is justified as a means of corrective justice, requiring remedial conduct to correct past wrongs. The polluter pays principle is compatible with corrective justice since it serves a reparative function by making those States that caused most environmental harm pay for the remediation or losses suffered by others. Similarly, compensatory or reparative justice for historical wrongs and takings may be a basis for equitable (preferential) treatment for developing countries, especially where colonising States built their industrial development on the exploitation of natural resources of their colonies.

VI. Implementing Intergenerational Equity

Any move from morality and ethics to law poses questions of process: who is to decide what to preserve and what costs should be imposed on today's generations in favour of the future? How far into the future and the past should we look? At the outset, when specific legal protection is sought for future generations, it may be objected that there are no rights-holders present to correspond to the obligations being imposed and that without identifiable individuals there can be no rights and duties. Edith Brown Weiss posits that the rights-holders are not individuals, who remain in the future and cannot be identified, but generations, some of which are here and some of which are in the future. Generations hold these rights as groups in relation to other generations. Since the future individuals are indeterminate, a guardian or a representative

of the group may enforce their rights.[76] For example, in *Minors Oposa v. Secretary of the Department of Environment and Natural Resources*, the Philippine Supreme Court found that present generations have standing to represent future generations in large part because "every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology".[77]

It is clear that many legal mechanisms that aim to protect present generations (intra-generational equity) and the legacy of past generations from harm also serve to represent future interests. The EU introduced in 1998 a "solidarity mechanism" in its Regulation reducing the total allowable catches for stocks of overfished highly migratory fish.[78] The mechanism operated to reduce the tonnage of bluefin tuna for three States in favour of two other States in which the quota reduction had the greatest impact. The redistribution of the fish was upheld by the European Court of Justice.[79] The measure is both intra- and intergenerational in its impact: the reduction of quotas generally serves to restrict present day takings to preserve fish stocks for future generations, while the benefits and burdens of the present generation were redistributed. The idea of marine reserves for the protection of fish stocks, as public trusts, has been proposed as a better example of intergenerational equity[80] because simply regulating over-fishing is inadequate: other environmental problems, including pollution, interactions of various species, weather and climate, pose even greater threats to the marine ecosystems.

Economists have constructed various proposals for implementing intergenerational equity. For natural resources, Daly and Cobb proposed adding to national income accounts a category of natural capital that could be depreciated to ensure that the impacts of currently unsustainable consumption patterns and environmental degradation are correctly recognised and measured. They do this by creating an Index of "Sustainable Economic Welfare" on which they deduct an amount estimated

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[76] Brown Weiss, see note 8, 95-97.

[77] *Minors Oposa v. Secretary of the Department of Environment and Natural Resources*, Philippine Supreme Court, reprinted in *ILM* 33 (1994), 168 et seq.

[78] EU Council Res. 49/1999, O. J. (1999) L13/64.

[79] *Italy v. Council*, C-120/99, ECR (2001) I-7997.

[80] D. R. Christie, "Marine Reserves, The Public Trust Doctrine and Intergenerational Equity", *J. Land Use & Envtl. L.* 19 (2003-2004), 427 et seq.

to compensate future generations for the loss of services from non-renewable resources, loss of wetlands and croplands, etc. as depreciation of natural capital. Resources necessary for the future are equated with the income stream from a trust fund. The problem with the proposal is that money today cannot substitute for loss of a critical resource in the future – you can't drink money. Both "fair savings" and compensation for resource loss essentially constitute "polluter pays" systems that compensate for destruction, based on inability to know needs and desires of future generations and an assumption of fungibility among resources. Instead, sustainability structured according to solidarity with future generations must identify features and processes that are essential for future well-being – any bequest to the future which does not protect them will inevitably leave the future worse off than they would have been had these features been protected. There is no fungibility and no amount of money can compensate for loss of critical natural base.

Another approach places its focus on externalities and demands that the costs of decisions made by each generation should be fully borne by that generation. Assuming that future well-being includes aesthetic and cultural values, wilderness and art need to be protected as well as freshwater and soil. Integrated planning that takes into account all the complexities is most likely to preserve the options. This is reflected today in strategic environmental evaluation, which looks at entire sectors of the economy, such as transportation, and develops long range policies and plans. What does not seem adequate is the market, which persists in emphasising short-term profits over long-term planning. The emphasis on deregulation and privatisation that emerged in the 1980s has proven inadequate for ensuring intergenerational equity.

In domestic law, many countries have relied on the long-established property doctrine of public trust to protect for the future those resources deemed to fall within the public domain.[81] It is a doctrine that

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[81] One author asserts that "[e]ach of the successful provisions [in state constitutions] invokes some combination of the concepts undergirding the public trust doctrine: conservation, public access, and trusteeship", M. T. Kirsch, "Upholding the Public Trust in State Constitutions", *Duke L. J.* 46 (1997), 1169 et seq., 1173. Provisions that refer to "trust", include Haw. Const. art. XI; Pa. Const. art. I, para. 27; Va. Const. art. XI, Para. 3. For provisions outlining public trust principles, see Ala. Const. art. VIII; Cal. Const. art. X, para. 2; Fla. Const. art. II, para. 7; La. Const. art. IX; Mass. Const. art. 97; Mich. Const. art. IV, para. 52; Mont. Const. art. IX, para. 1; N.M. Const. art. XX, para. 21; N.Y.

recommends itself to international law, which could modify and adapt the notion of common heritage of mankind into a global public trust for the high seas, the atmosphere and the ozone layer. The doctrine of public trust traditionally held that navigable waters, the sea, and the land along the seashore are common property open for use by all.[82] Modern courts have adopted and applied the public trust doctrine, conferring trusteeship on governments, with an initial focus on fishing rights, access to the shore, and navigable waters and the lands beneath them.[83] After the publication of Joe Sax's influential law review article in 1970,[84] courts began to expand the doctrine and apply it to other resources, including wildlife and public lands.[85]

The public trust doctrine emphasises the duties of the trustee rather than the individual rights of the beneficiaries, often imposing a constitutional obligation on the government to conserve the corpus of the trust and ensure common access to and use of it by present and future generations.[86] The grant of a constitutional right to a specific environmental quality adds to the public trust guarantees. While both doctrines impose duties on the public authorities in favour of the environment, the public trust doctrine extends only to those natural resources that are viewed as part of the corpus of the trust and not to the environment as a whole.[87] Public lands may be included, but not the regulation of activities on private property, unless they impact on public lands.

Const. art. XIV; N.C. Const. art. XIV, para. 5; R.I. Const. art. 1, para. 17; Tex. Const. art. XVI, para. 59.

82 *Institutes of Justinian* (T. Sanders Trans., 1st Am. ed., 1876), 2.1.1.

83 E.g., *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892); *City of Milwaukee v. State*, 214 N.W. 820 (1927). Fishing rights, free access to the shore, and navigation are traditional rights that are reaffirmed in several State constitutions as well as in jurisprudence; E.g., Cal. Const. art. I, section 25; R.I. Const. art. I, section 17; Ala. Const. art. I, section 24.

84 J. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention", *Mich. L. Rev.* 68 (1970), 471 et seq. See also B. Cohen, "The Constitution, the Public Trust Doctrine, and the Environment", *Utah L. Rev.* (1970), 388 et seq.

85 E.g., *Wade v. Kramer*, 459 N.E.2d 1025, 1027 (Ill. App. Ct. 1984).

86 Alaska's constitution guarantees the latter: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use", Ala. Const. art. VIII, para. 3.

87 For various approaches to the reach of the public trust, see: S. W. Reed, "The Public Trust Doctrine: Is it Amphibious?", *J. Envtl L. & Litig.* 1 (1986),

Article I, section 27 of the Pennsylvania State constitution provides an example of a constitutional public trust doctrine. It sets forth:

> Section 27 Natural resources and the public estate
>
> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

There are several evident features about this text. First, it declares the "people's" right to environmental amenities with a directive to the State to act as a trustee for the "public natural resources" of the State (excluding private property). The resources mentioned are declared to be common property and held for future as well as present generations. Hawaii's constitution created a public trust over all of the State's natural resources, again with reference to future generations:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.[88]

The adoption of a public trust concept at the international level could bring with it several subsidiary rules from domestic trust law that would help effectuate the principle of intergenerational equity, such the requirement that the trustee to monitor and report on the status of the trust corpus. Such monitoring and reporting requirements are already common in national and international environmental law,[89] and, in a

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107 et seq. (107-108, 118); C. F. Wilkinson, "The Public Trust Doctrine in Public Land Law", *U.C. Davis L. Rev.* 14 (1980), 269 et seq. (316); A. Rieser, "Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory", *Harv. Envtl. L. Rev.* 15 (1991), 393 et seq. (398-399).

[88] Haw. Const. art. XI, para. 1.

[89] Monitoring and reporting are required of States Parties to most major environmental agreements, including the Convention on International Trade in Endangered Species of Wild Fauna and Flora, art. VII; the Convention on Biological Diversity, art. 26; the UN Framework Convention on Climate Change,

few instances, the gathering and dissemination of information is implicitly or explicitly linked to intergenerational equity. The International Convention for the Regulation of Whaling, for example, establishes a commission that collects and analyses statistical information on the current condition and trend of whale stocks and the effects of whaling activities on the "great natural resource" of whales, which the preamble says should be safeguarded for future generations.[90] Article 4 of the UNESCO Convention for the Protection of the World Cultural and Natural Heritage requires each State party to ensure the identification, protection, conservation, presentation, and transmission to future generations of the cultural and natural heritage situated in its territory. Each State party is asked to submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage. The committee keeps the list up to date and also periodically prepares a list of world heritage in danger.

Going further than public trust concepts, rights-based approaches emphasise the right to a certain quality of environment because that quality is linked to, indeed a prerequisite for, the enjoyment of a host of internationally and domestically guaranteed rights. Rights-based approaches were initially thought to have the defect of being non-justiciable, however courts are increasingly enforcing constitutional and international rights to environmental quality.[91] Many courts have broadened standing to permit legal redress for violations of environmental rights, without requiring individualised injury to health or property, because one major motive for guaranteeing environmental

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art. 12; and the Montreal Protocol on Substances That Deplete the Ozone Layer, art. 7.

[90] International Convention for the Regulation of Whaling, Washington, DC, 2 December 1946, 161 *UNTS* 72 at Preamble, para. 1, "recognizing the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks" and art. 4.

[91] The Montana Supreme Court indicated some of the parameters of its constitutional provision in the case *Cape-France Enterprises v. The Estate of Peed*, 305 Mont. 513, 29 P.3d 1011 (2001), describing the right to a clean and healthful environment as "a fundamental right that may be infringed only by demonstrating a compelling state interest…" one that is, "at a minimum, some interest 'of the highest order and … not otherwise served', or 'the gravest abuse endangering [a] paramount [government] interest [ ]'". *Armstrong v. State* Mt. 261, 296 Mont. 361, 989 P. 2d 364 (1999), note 6.

rights is to prevent injury from occurring.[92] The ability to pursue a rights-based approach has been extended to future generations in at least one case[93] in which the Supreme Court of the Philippines granted standing to sue in *obiter dictum*, to present children on behalf of future generations.

VII. Conclusions: Equity Matters in a Just Society and Instrumentally

There is growing recognition of the interdependence of States and of problems that are insoluble through unilateral action, leading to acceptance of the moral principle of solidarity or partnership. Interdependence underscores the search for a just global society, which is a quest as old as human civilisation. To many, a just society involves ensuring that the natural components of the environment continue to sustain life in all of its diversity and that the natural benefits that humans enjoy are fairly shared among all those present and to come. The moral dimension of equity is such that it is often deemed synonymous with justice and is an end in itself.

The recognition that global resources are shared or of common concern or heritage has given rise to a duty to assist those States unable to participate in the utilisation of the resources. Equity in international environmental law thus means a rational sharing of the burdens and costs of environmental protection, discharged through the procedural and substantive adjustment of rights and duties. Equity in the sense of fairness also means warning States of imminent peril and cooperating to resolve problems that will impact the ecological processes or resources on which future well-being depends.

Equity is important and, with its emphasis on fairness, is more attractive to many than economic efficiency or open conflict as a means of

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[92] E.g., *Montana Environmental Information Center v. Department of Environmental Quality*, 296 Mont. 207, 988 P. 2d 1236 (1999).

[93] *Oposa v. Factoran*, 224 SCRA 792 (1993), reprinted in *ILM* 33 (1994), 173 et seq. For a critique of the case, see D. Gatmaytan, "The Illusion of Intergenerational Equity: Oposa v. Factoran as Pyrrhic Victory", *Geo. Int'l Envtl. L. Rev*. 15 (2003), 457 et seq.; arguing that the distinction between present and future generations was inconsequential in the case because the rights of future generations require protecting the rights of the present.

deciding how to allocate and sustain limited commons resources. Without a cooperative and equitable solution to the issue of allocation, competitive utilisation of the resource may continue until the resource is depleted. Equitable or differentiated obligations may induce participation in action among the competing States as well as among States that may not have any direct interest in a specific environmental issue.

Equity also may be justified on the basis of self-interest. Environmental protection is in everyone's interest, and the adjustment of legal obligations to achieve better protection is self-interested. An allocation of burdens that takes into account the more vulnerable position of future generations may benefit all. Moreover, Scott Barrett's work has indicated that agreements perceived to be fair are not only likely to induce greater participation but are more likely to be self-enforcing and thus successful over the long term.[94]

In sum, equitable approaches are not only based in morality and a sense of justice but may also foster more effective action on issues of common concern and more effective implementation of norms. Fairness and legitimate decisions may produce more or better compliance with legal obligations. Yet, it should not be forgotten, as Thomas Franck has noted, that "[t]he law promotes distributive justice not merely to secure greater compliance, but primarily because most people think it is *right* to act justly".[95] We could do well to consider the Iroquois Law of Seven Generations, a centuries-old tradition that all major decisions must be based on how those decisions will affect the next seven generations.[96]

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[94] S. Barrett, *Environment and Statecraft: The Strategy of Environmental Treaty-Making*, 2003.

[95] T. M. Franck, *Fairness in International Law and Institutions*, 1995, 8.

[96] Iroquois [League of Six Nations], "The Great Law of Peace of the Longhouse Peoples", in: *Akwesasne Notes* (1978) section 28.

Discussion Following the Presentation by Dinah Shelton

A. Horna: My comment relates, on the one hand, to the concept of sustained development within the framework of foreign investment law, and on the other hand, to the role of institutions such as the International Centre for the Settlement of Investment Disputes. As for the former, I consider it to be a reflection of the idea or the notion of solidarity in international law as it focuses not on the mere attraction of foreign investment to foster development, but on the attraction of the right kind of investment. That is, investment that does not undermine the sustainability of natural resources for future generations. The latter, in turn, constitutes the most important means to settle investment disputes among which one could imagine disputes based on the violation of the so-called solidarity principle.

P. Carazo: Dr. Shelton, congratulations on your presentation, covering principles of solidarity in so many distinct fields of international law. As I can infer from it, you consider that each field of international law has its own principles, not shared by the others. It would be interesting, however, to analyse whether it is possible (by comparing the principles of each field with one another) to distill general principles of solidarity that could apply to all fields of international law.

C. Tomuschat: Is there not a huge gap between very nice talk about intergenerational equity and hard facts? Take the oil reserves. We are consuming the oil and we know that in 40 to 50 years or maybe 60 years, all the wells will be depleted. There will be nothing left. Or take another example: The fishing industry is systematically destroying the fish stocks of the oceans and no real action has been taken to prevent that from taking place. Not the States, but the societies are acting. They

want everything. They want well-being as we live now and here. And they want of course social and economic rights. Article 11 of the Covenant on Economic and Social and Cultural Rights says: "Everyone has a right to the continuous improvement of living conditions." This comes down to an extremely brutal form of self-affirmation. We take everything, we take the natural resources which exist at the present time and we really do not care about the future. That is a tremendous challenge. But we should not despair, there should be hope. How can we establish institutions that would look a little bit into the future? Unfortunately, the example of the oil reserves is very telling. The world expects that some new oil deposits will be discovered in the Arctic, under the Arctic Ocean or somewhere else. But the intention is to exploit these new reserves now, in the next decades, and not to leave anything for later generations. Accordingly, what is going on is indeed extremely brutal. 100 years from now, there will not be much left according to what we can see currently. So where is the hope? How can we institutionalise hope?

Y. Dinstein: I have no problem with the idea that some binding norms of international law are engendered for the benefit of future generations. This is implicit in customary and treaty provisions relating to the protection of the natural environment. Such protection is of greater consequence to our children's children than to us. Nobody really believes that the natural environment is likely to be destroyed in our lifetime, but – the way we are behaving – there is no guarantee that it will endure intact for many more generations.

My concern for the natural environment transcends the adverse effects of the combustible engine, oil pollutants, etc. The reason is simple. I trust and hope that, in the not too distant future, alternative sources of energy will replace oil. It is true that not enough has been done so far to identify and develop such alternative sources of energy. However, the pace will probably quicken in the years ahead, and for future generations oil may not play the dominant role that it assumes in our own era. Unfortunately, by itself, that may not be enough to save the natural environment. There are numerous other ways to cause devastating ecological harm, ranging from over-fishing to deforestation.

Having said that, I want to stress that imposing legal obligations with a view to safeguarding the natural environment – for the benefit of those who will succeed us on the face of the Earth – is not the same as directly conferring legal rights on future generations. When legal obligations are created, they must obviously have corresponding rights. But, then, the

question is: "Who is entitled to these rights?" or, in other words, "On whom do these rights devolve?" My firm understanding is that the rights in question – as much as their corresponding obligations – devolve on all of us. We owe these obligations to each other: all of us have an interest protected by law in the survival of the human species, and that cannot be accomplished without preserving the natural environment.

That is not equal to the proposition advanced by Professor Shelton that there are actually "rights of future generations". I am familiar with this idiom, which goes back to the La Laguna Declaration on the Rights of Future Generations. Yet, I reject it altogether. The reason is rooted not in international law *per se*, but in fundamental jurisprudential concepts. I find incongruous the idea that we can vest future generations with rights that belong them. After all, if future generations – as yet unborn – have rights, how can they exercise these rights in the world of reality? More concretely, how can future generations stand on their rights in the face of infringement? By sending emissaries to us through a reverse time machine? By transposing from the Future to present-day Earth a new Terminator who looks suspiciously like the Governor of the State of California and who says to the person depleting the planetary resources: "Hasta la vista, Baby"? I put it to you that this is science-fiction, not law. Law can countenance the creation of rights (and corresponding obligations) only for and *vis-à-vis* living human beings.

For that very reason, even from a utilitarian perspective, speaking about "rights of future generations" appears to me to be counterproductive. It lends proponents of the preservation of the natural environment to the aura of beyond-the-fringe radicalism, as if they were advocating the rights of specters, ghosts and phantoms. To my mind, it is much preferable to stick to mainstream jurisprudential thinking by emphasising that environmental rights (and obligations) exist today among the living. These rights belong to us. It is true that the third-party beneficiaries of the rights are future generations. But future beneficiaries must not be confused with those actually vested with the rights at the present time: all of us.

E. Riedel: Thanks very much for a very interesting presentation on the problems of intergenerational equity. Most people have already raised the points that I would have liked to raise but one aspect remains which I liked. I was thinking of a couple of cases, in fact of the few cases we have in international environmental law like the Oposa case,

the grandmother caring for her children because of the depletion of the rain forest and their burning down, and the global heritage involved, and in the European context, under a very extensive reading of article 8 of the European Convention on Human Rights, the Lopez Ostra case, where very clearly well beyond the text of the privacy provision of article 8 ECHR, suddenly the ambit of privacy was widened to include the environmental effects of exhaust fumes from waste. And the point why I raised it was because whenever Christian Tomuschat raises this, he will forgive me if I respond on that score because he always tried to egg me on in this issue: yes, the language of the two Covenants is very lyrical. As is the language of the Universal Declaration whose 60th anniversary we are going to celebrate on 10 December 2008.

The meaning and the contents that the practice of the treaty bodies and the United Nations bodies have given to these words is much more restrained, is much more careful. And ultimately, we are not talking about a grand design of everything that is desirable. The wording of the Social Covenant, such as "the highest standard of physical and mental health" in article 12 is vague and general. And you also cited article 11.1 of the Social Covenant and the same could be said of article 2.1 of that Covenant. But it always has the rider "within the available resources." And the treaty bodies have always interpreted these terms in a restrictive manner saying that what we are talking about is a survival kit. What we are talking about are the absolute bare essentials that are necessary and need to be protected. And that is the reason why economic, social and cultural rights can be treated the same way as civil and political rights because they are interrelated and they are both emanations from the human dignity principle. So, the intergenerational aspect and your linkage, Dinah, with the principle of solidarity in a more sober analysis probably will be a useful instrument, but one has to be very careful not to overstretch it, as other discussants have said.

D. Shelton: It is always good to get a reality check from you, Christian. And I can just add a few more things that sound even more pessimistic. The latest human development report on greenhouse gases said that if every developing country wants to rise to the level of energy usage and greenhouse gas production of the richest countries, we will need all nine planets in the solar system in order to survive. And I do not see as how we are going to inhabit all nine since we have only got 8, now that they discount Pluto. But it is clearly unsustainable. And I think there are several things that I can point to in a ray of hope.

One is that a prevalent bumper sticker of the 1980s has disappeared. It read: "He who dies with the most toys wins." We need to have a real shift in culture and a shift in values. From greed is good – which was very prevalent in the 80s. And I think it is happening, and it is happening through education. Just one little vignette on this, I do not want to make all of this too personal, but when my daughter was 8 years old, I took her to the supermarket with me and she said: "We are not buying tuna any more." And I said: "Why not?" She said: "Because there are not enough tuna. We are not going to eat tuna any more." Fine, no more tuna! But this was something that she got in school through studies of ecology. And I think this is having an impact on many young people. I think that education needs to go further. How do we get back to this idea of the Iroquois that all our decisions should look forward seven generations for the type of long-term impact that they will have? We need to perhaps think about changing the very idea of what is capable of ownership. And we had that paradigm shift when we decided human beings could not own each other any longer. Well, maybe there are certain types of resources that should not be subject to private ownership either, but should be considered common to the present and the future.

I did not realise I had used rights of future generations; I try to avoid that term. But you provoke a question. And at the risk of sounding even more out in the fringe, I have been intrigued by the Ecuadorian constitution that has just been completed because it has done something that is really innovative. And I am not sure yet quite how this is all going to play into long-term thinking and future generational interests and intergenerational equity. The new constitution declares nature a legal person in Ecuador. Nature now exists as a person and it goes on to explain the implications of this: "The government has a duty to protect nature on behalf of all of the inhabitants of Ecuador present and future." And then it adds: "Should the government fail in its duty at any level, any citizen of Ecuador can still on behalf of nature force the government to take the appropriate action". So it is essentially a standing provision they use on behalf of nature. I do not know whether any society is ever going to determine that future humanity or its future citizens have some sort of similar legal personality. I think a lot of that is already incorporated in the concept of public trust.

And the last thing I would say because you wanted a ray of hope. Much of where I think this is happening is at the local level. We are seeing rivers being cleaned up; we are seeing toxic waste sides being cleaned up; we are seeing increased emphasis on conservation, green buildings and

green cities. It seems to get worse the higher up the governance ladder you go. And we saw this with *Massachusetts v. EPA* where you had a dozen States and cities suing the Federal Government saying: “Do something about greenhouse gases.” I think that a lot of this is the old cliché: “Think globally, act locally.” I think that is where the hope is.

Military Intervention without Security Council's Authorisation as a Consequence of the "Responsibility to Protect"

*Tania Bolaños**

I. Introduction

The United Nations (UN) is an organisation created "to save succeeding generations from the scourge of war". It is the principal institution for building, consolidating and using the authority of the international community in order to fulfil the principles and purposes of the Charter of the United Nations, which endows its decisions with legitimacy. The United Nations' first and foremost obligation is to protect peace and security as well as to promote international cooperation, in order to solve, among other things, problems of social, economic and humanitarian nature and to encourage the respect for human rights and fundamental freedoms on a global scale.[1] In this regard, solidarity and cooperation between the members of the organisation play an important role in promoting human security.[2]

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* LL.M., Germany; PhD Candidate, University of Heidelberg; guest researcher at Max Planck Institute for Comparative Public Law and International Law. E-mail: taniagicela@web.de. The author would like to express her gratitude to Professor Dr. Ulrich Beyerlin and Marc Schlagenhoff for critical comments on earlier drafts of this contribution. All views and opinions are personal.

1 See Preamble and Art. 1, UN Charter.

2 I. Voicu, "Solidarity and Security", *Romanian Journal of International Affairs* VIII (2002), 51 et seq. (52-54, 70); A.-M. Slaughter, "Security, Solidarity and Sovereignty: The Grand Themes of UN Reform", *AJIL* 99 (2005), 619 et seq. (622): "international security include[s] both state security and human security".

R. Wolfrum and C. Kojima (eds.), *Solidarity: A Structural Principle of International Law*,
Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 213,
DOI 10.1007/978-3-642-11177-8_6, © Springer-Verlag Berlin Heidelberg 2010

For example, when a State does not or is not capable of fulfilling its obligation to protect its people, the international community needs to compensate for this failure by offering the required assistance through the United Nations, especially when international peace could be affected as a result of the negligence on the part of the State.[3] The main responsibility in maintaining peace and international security lies with the UN Security Council, which in case of acts of aggression, breach of the peace, or in the presence of internal armed conflicts, as well as of serious violations of human rights representing a threat to international peace, can decide what measures shall be taken in order to maintain or restore peace and security. Such recommendations or coercive measures include the use of armed force.[4] Nevertheless, situations may arise where the Security Council does not act, or due to a veto of any of its permanent members can not take any decision. In these instances, the question arises whether, in order to save the life and goods of the civil population as well as to prevent violations of international law, the international community is under an obligation to act, and if it is, whether it is legally authorised to intervene without having obtained the Security Council's authorisation.

The aim of this contribution is to put forward thoughts on how to solve these problems, which are among the most controversial aspects of military intervention for human protection purposes.[5] Consequently, the second part of this contribution analyses to what extent the concept of the responsibility to protect can justify (military) interventions by the international community in internal affairs of individual States. The third part focuses on the possibility of military intervention based on the primary meaning of the responsibility to protect, i.e. with prior authorisation of the Security Council pursuant to the UN Charter. The fourth part outlines the opposite positions. It outlines how the armed

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[3] A/59/565 of 2 December 2004, para. 29; Voicu, see note 2, 56; Slaughter, see note 2, 620; H. Köck, "Neutralität versus Solidarität", in: W. Hummer (ed.), *Paradigmenwechsel im Völkerrecht zur Jahrtausendwende*, 2002, 85 et seq. (104).

[4] Arts 24, 39-42, UN Charter.

[5] For a change of the terminology from humanitarian intervention to intervention for human protection purposes see: ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, 2001, available at: <www.iciss.ca/pdf/Commission-Report.pdf>; G. Evans, "From Humanitarian Intervention to the Responsibility to Protect", *Wis. Int'l L. J.* 24 (2006), 703 et seq.

force can legally be used by the international community without a prior Security Council's authorisation but in accordance with the obligation derived from the concept of the responsibility to protect where the Security Council fails to reach a decision. Finally, the fifth part analyses the possibility that the UN General Assembly recommends military enforcement actions because the Security Council was inactive or paralysed by veto cast. These analyses lead to the conclusion that military intervention for human protection purposes is normally authorised by the Security Council, but in certain limited instances may also be recommended by the General Assembly.

II. Responsibility to Protect[6]

Each UN member is obliged "to protect the welfare of its own people and meet its obligations to the wider international community".[7] Hence, based on national sovereignty and the principle of non-intervention in matters essentially within the domestic jurisdiction of States,[8] every country has to provide security and protection to its citizens and guarantee the exercise of their rights and fundamental freedoms.[9] The economic differences cause nations to perform these duties differently; however, the important point is that all nations do fulfil them.[10]

Nonetheless, in some occasions the government may not be capable of fulfilling these obligations, and in some others the government itself may be the perpetrator of serious violations of human rights and human dignity. In these instances, the obligation of mutual assistance between States is engaged. It is based on the principle of solidarity, which strives

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[6] The concept of "responsibility to protect" comprises the responsibility to prevent, to react, as well as the responsibility to rebuild; however the references to the "responsibility to protect" in this contribution should be understood as reference to the responsibility to react.

[7] A/59/565, see note 3, para. 29.

[8] Art. 2 para. 7, UN Charter.

[9] Köck, see note 3, (94-95); Slaughter, see note 2, (620); K. Annan, *Intervention*, Ditchley Foundation Lecture XXXV 26 June 1998, Press Release SG/SM/6613, (3); ICISS, see note 5, paras 2.7-2.15.

[10] R. St. J. Macdonald, "Solidarity in the Practice and Discourse of Public International Law", *Pace Int'l L. Rev.* 8 (1996), 259 et seq. (281).

to foster common welfare on a national and international level.[11] This understanding is supported by the World Conference on Human Rights of 1993, the Universal Declaration on Human Rights and the Convention for the Prevention and Punishment of the Crime of Genocide, both of 1948, which among others underline the competence of the international community to promote and protect human rights.

Consequently, massive violations of human rights and international humanitarian law involve an attenuation of the principle of non-intervention, and legitimise actions taken by the international community in order to halt such violations. In this regard, the International Commission on Intervention and State Sovereignty (ICISS) stated that "where a population is suffering serious harm, as a result of internal war, insurgency, repression or State failure, and the State in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect".[12] In the face of war cruelty and the apathy of the established government, the international community cannot remain an observer. Thus, the responsibility to protect is not so much a right to intervene in an internal conflict, but rather an obligation to support the population in danger or under serious threat. Consequently, when the State itself does not protect its citizens or commits grave violations of human rights, the responsibility to protect is transferred from that State to the international community, that is entitled to take, if necessary, military actions to avert the crisis.[13]

Since the principle of non-intervention remained the general rule, and cases that justified military intervention by the international community were the exception, the scope of the concept of the responsibility to protect needed to be limited.[14] At first, it was thought that any significant loss of human life as a consequence of mass atrocities in the context of internal conflicts or State repression, large scale ethnic cleansing, or even natural catastrophes, obliged the international community

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[11] Köck, see note 3, 100.

[12] ICISS, see note 5, Synopsis 1 lit. B; as well as A/59/565, see note 3, para. 200.

[13] A/59/565, see note 3, para. 201; A/59/2005 of 21 March 2005, para. 135; ICISS, see note 5, paras 2.31-2.33; S. Wills, "Military Intervention on Behalf of Vulnerable Populations: The Legal Responsibilities of States and International Organisations Engaged in Peace Support Operations", *JCSL* 9 (2004), 387 et seq.; in regard to the obligation of the international community to avoid the crime of genocide see ICJ General List 91 (2007).

[14] ICISS, see note 5, paras 4.10-4.14.

to act on the basis of the responsibility to protect.[15] Some years later, the High-level Panel on Threats, Challenges and Change stated that the responsibility to protect of the international community is engaged in cases of genocide and other large-scale killing, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease as well as in cases of serious violations of international humanitarian law such as rape.[16] This concept was further specified by the General Assembly in the resolution bases on the 2005 World Summit Outcome document. In this document the responsibility to protect was limited to cases of genocide, war crimes, ethnic cleansing, and crimes against humanity.[17]

Even though the notion of responsibility to protect is fairly recent – it appeared for the first time in the ICISS report of 2001 – and is still in evolution, it has doubtlessly met a growing acceptance so far. In fact, 149 nations sent the World Summit Outcome document to the General Assembly,[18] which then adopted it as a resolution, thus giving a significant impulse to the notion and the obligations referred to as "responsibility to protect".[19]

At the same time, it also limited the concept of humanitarian intervention by restricting the applicability of the responsibility to protect to the four cases stated above.[20] As a consequence, the responsibility to protect is not a viable argument for justifying any other kind of interventions which, unless carried out in accordance with the procedures

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[15] ICISS, see note 5, paras 4.19-4.27.

[16] A/59/565, see note 3, paras 200-202.

[17] See A/RES/60/1 of 24 October 2005, paras 138-140.

[18] UN News Service, 16 September 2005, available at: <www.globalsecurity.org/wmd/library/news/un/un-050916-unnews05.htm>.

[19] I. Winkelmann, "Responsibility to Protect", in: R. Wolfrum (ed.), *MPEPIL online edition*, para. 13; S. Breau, "The Impact of the Responsibility to Protect on Peacekeeping", *JCSL* 11 (2006), 429 et seq. (445-453); R. Hamilton, "The Responsibility to Protect: From Document to Doctrine – But What of Implementation?", *Harv. Hum Rts. J.* 19 (2006), 289 et seq. (294-295); Evans, see note 5, 715.

[20] Winkelmann, see note 19, para. 20; ICISS, see note 5, para. 4.25; L. Brock, "Von der humanitären Intervention zur Responsibility to Protect: Kriegserfahrung und Völkerrechtsentwicklung seit dem Ende des Ost-West-Konflikts", in: A. Fischer-Lescano et al. (eds), *Frieden in Freiheit, Festschrift für Michael Bothe*, 2008, 19 et seq. (29); Wills, see note 13, (389-390).

set out in the UN Charter, could be seen as a violation of international law and even as an acts of aggression.

There is a general consensus demonstrated by the practice of the Security Council that serious violations of human rights and international humanitarian law in any country can constitute a threat to the international, or at least regional, peace and security, and permit the activation of the collective security system established in Chapter VII of the UN Charter together with Chapter VIII where the participation of regional organisations is required to execute the relevant resolutions.[21]

Whether the responsibility to protect allows a military intervention by the international community without the prior authorisation of the Security Council, or whether on the contrary, the authorisation is a *sine qua non* requirement for the intervention, is much argued about. Doctrines as well as nations have opposite opinions on this subject, and the main positions will be analysed below.

III. Military Intervention Requires Prior Security Council's Authorisation

One position upholds that, based on an exegetic interpretation of the UN Charter, any use of force which is outside the parameters of the UN Charter is unacceptable. Indeed, the prohibition of the use of armed force is one of the fundamental principles of the UN Charter. Consequently, every military intervention constitutes an act of aggression unless it is justified by the exercise of the right of self-defence or is authorised by the Security Council.[22] Moreover, bearing in mind that the Security Council chooses the UN members who are to carry out its

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[21] R. Cryer, "The Security Council and Article 39: A Threat to Coherence?", *JACL* 1 (1996), 161 et seq. (174); Brock, see note 20, (23); F. Grünfeld, "Human Rights Violations: A Threat to International Peace and Security", in: M. Castermans-Holleman (ed.), *The Role of the Nation-State in the 21st Century, Human Rights, International Organisations and Foreign Policy*, 1998, 427 et seq.; I. Österdahl, *Threat to the Peace, the Interpretation by the Security Council of Article 39 of the UN Charter*, 1998, 26 et seq.; K. Wellens, "The UN Security Council and New Threats to the Peace: Back to the Future", *JCSL* 8 (2003), 15 et seq. (43-46); M. Brown, *The International Dimensions of Internal Conflict*, 1996, 594.

[22] Preamble and Art. 2 paras 4 and 7, UN Charter.

resolutions discretionally, it is possible to conclude that only they are authorised to intervene in order to execute the Security Council's resolutions. This means that no other nation can execute these resolutions *sua sponte* and even more none of them is allowed to initiate military actions against the territorial integrity of any other State, even if serious violations of human rights and international humanitarian law are being committed.[23]

The UN Charter strengthens this interpretation when it refers to the actions of regional organisations which, due to their more accurate knowledge of and deeper insight into the specific regional situation, may be in a better position to execute measures of peace maintenance in their area of influence. In spite of the fact that such organisations are legitimated to adopt and execute coercive measures, the UN Charter clearly denies them the possibility to take coercive military measures without the Security Council's authorisation.[24] This prohibition does not provide for an exception regarding military intervention for human protection purposes.[25] Therefore only the Security Council can order military sanctions when they are necessary. To this end, it uses binding resolutions following the previous determination of a breach of or threat to peace or the existence of an act of aggression.[26]

As mentioned before, when a State is unwilling or unable to fulfil the obligation of protecting its own population, it is the international community which should assume this responsibility. Rather than acting

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[23] Art. 48 para. 1, UN Charter.

[24] Art. 53 para. 1, UN Charter; U. Villani, "The Security Council's Authorization of Enforcement Action by Regional Organizations", in: J.A. Frowein and R. Wolfrum (eds), *Max Planck UNYB* 6, 2002, 535 et seq. (538-540); C. Walter, "Security Council Control over Regional Action", in: J.A. Frowein and R. Wolfrum (eds), *Max Planck UNYB* 1, 1997, 129 et seq. (142); see also SCOR 17th Year 992d-998th Mtgs. of 14-23 March 1962 quoted by: L. Goodrich et al., *Charter of the United Nations Commentary and Documents*, 1969, 365 et seq.; M. Hakimi, "To Condone or Condemn? Regional Enforcement Actions in the Absence of Security Council Authorization", *Vand. J. Transn'l L.* 40 (2007), 643 et seq. (650-651).

[25] C. Greenwood, "Historical Development and Legal Basis", in: D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 2008, 1 et seq. (9); J. Gonzalez et al., *Curso de Derecho Internacional Público*, 2008, 1035; Hakimi, see note 24, 644-650; A/RES/60/1, see note 17, paras 79, 139; Walter, see note 24, 157-158; ICISS, see note 5, para. 6.13.

[26] Arts 39-42, UN Charter.

directly, it does so through the Security Council to which the States conferred the primary responsibility in maintaining peace and international security in order to facilitate prompt and effective action.[27]

All of the above lead to the conclusion that the Security Council, acting on behalf of the international community, has a monopoly in the use of armed force. Hence, the responsibility to protect must be assumed by the international community acting through the Security Council, which has the authority to take any kind of coercive measures, both of non-military and military nature.

Military intervention, in exercise of the responsibility to protect, is only permissible when non-military means would be or have proven to be inadequate and national authorities are manifestly failing to protect their population from genocide, war crimes, ethnic cleansing, and crimes against humanity. Only under these conditions have the members of the United Nations accepted to be prepared "to take collective action in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate".[28] Since the United Nations does not command its own army, whenever it is necessary to intervene militarily, the Security Council shall, based on Chapter VII, authorise the UN members to use armed force; or, based on Chapter VIII, mandate regional organisations with the execution of enforcement operations contained in Article 42 of the UN Charter.[29]

The thesis that the responsibility to protect must be exclusively exercised by the international community and only through the Security

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[27] Art. 24 para. 1, UN Charter; see also A/RES/60/1, see note 17, paras 79, 139; ICISS, see note 5, paras 6.1-6.27; A/59/565, see note 3, para. 203; A. Bellamy, "Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit" *Ethics & International Affairs* 20 (2006), 143 et seq. (164); ICJ Reports 1999, 916 et seq. (925, para. 33).

[28] A/RES/60/1, see note 17, para. 139.

[29] N. Bentwich, et al., *A Commentary on the Charter of the United Nations*, 1950, 97; G. Troost, *Die Autorisierung von UN-Mitgliedstaaten zur Durchführung militärischer Zwangsmaßnahmen des Sicherheitsrates in Recht und Praxis der Vereinten Nationen*, 1997, 174 et seq.; J. Quigley, "The Privatization of Security Council Enforcement Action: A Threat to Multilateralism", *Mich. J. Int. L.* 17 (1996), 249 et seq. (250-254); Villani, see note 24, 536; D. Sarooshi, *The United Nations and the Development of Collective Security – The Delegation by the UN Security Council of its Chapter VII Powers*, 1999, 248 et seq.

Council is further supported by the obligations assumed by the Contracting Parties of the Geneva Conventions of 1949, which in their first common article provide that "the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances". This norm could imply, as the ICJ stated in its advisory opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory, that "every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with".[30] It does not represent a *carte blanche* for States to enforce respect of the international humanitarian law regardless of the means. On the contrary, this postulate obliges each State to ensure respect for the norms while at the same time it has to respect the international law and the international humanitarian law itself. Therefore it cannot be used as a justification for intervening without the Security Council's authorisation. The obligations derived from the cited article will, however, constitute a base for the Security Council to adopt the corresponding military sanctions.[31]

Finally, it is important to mention that the notion of the responsibility to protect does not diminish the discretion of the Security Council to take military or non-military measures whenever a situation becomes a threat to peace, a breach of the peace or an act of aggression in cases different from the four cases triggering the responsibility to protect, as provided for in Article 39 of the UN Charter.

IV. Military Intervention Without Security Council's Authorisation

Throughout the history of the United Nations, situations have arisen where the Security Council, although having the responsibility to protect population against genocide, war crimes, ethnic cleansing, and crimes against humanity, has failed to do so, or in spite of discussing the matter did not adopt any effective measures to alleviate the crisis. These situations have caused States to seek recourse to unilateral military in-

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[30] ICJ Reports 2004, 136 et seq. (199-200, para. 158).

[31] Wills, see note 13, 413; ICJ Reports 2004, see note 30, 200, 202, paras 159, 163 lit. D.

tervention or to intervention through regional organisations on behalf of the vulnerable population.[32]

Through a different interpretation of the UN Charter, while respecting its principles, some countries and part of the legal literature argue for granting States more options to act and to uphold the possibility of military intervention for purposes of human protection even in the absence of the Security Council's authorisation.

This interpretation is, among other things, based on the fact that the UN Charter, although it prohibits the use of armed force, provides for exceptions. The UN Charter itself allows in some circumstances and under certain conditions the use of armed force. An example of this is the case of individual or collective self-defence under Article 51 of the UN Charter. In case of armed attacks against a UN member, it permits the State to exercise the right of individual self-defence, and allows other States to intervene once the nation under attack has requested their assistance (collective self-defence).[33] In any case, the use of armed force cannot exceed the limits imposed by the principles of proportionality and necessity,[34] and will only be admissible until the Security Council adopts the necessary measures to restore peace.[35]

The concept of the responsibility to protect has also been used to argue for the legitimacy of military interventions without the Security Council's authorisation. While according to Article 24 of the UN Charter it is accepted that the Security Council has the primary responsibility in maintaining the peace and security (including the human security), and that it is responsible to intervene on behalf of the community of nations, this responsibility is not necessarily exclusive.[36] Additionally, it is undeniable that occasionally the Security Council just remains inactive or even worse it cannot act because one or more of its permanent mem-

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[32] E.g. Rwanda and Kosovo.

[33] ICJ Reports 1986, 14 et seq. (103-106, paras 195-201).

[34] Greenwood, see note 25, 8-9; J. Gardam, "Legal Restraints on Security Council Military Enforcement Action", *Mich. J. Int. L.* 17 (1996), 285 et seq. (295).

[35] Greenwood, see note 25, 8; M.A. Osman, *The United Nations and Peace Enforcement – Wars, Terrorism and Democracy*, 2002, 90 et seq.; more about the current evolution of self-defence: T.M. Franck, "When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?", *Wash. U. J. L. & Pol'y* 5 (2001), 51 et seq. (57-62).

[36] ICISS, see note 5, para. 6.7.

bers block the resolution by exercising their right of veto against the decision of the majority.[37] In this context, part of the legal literature and the practice of some States affirm that when the Security Council does not act or is unable to do so, the United Nations has failed its obligation to protect. In these cases, this obligation should then be assumed by the international community through military interventions.[38]

This interpretation would respect the UN Charter and would neither violate the prohibition of the use of armed force nor the principle of non-intervention as the UN Charter only prohibits the illegal use of armed force. This is evidenced by a detailed reading of Article 2(4) which forbids the use of armed force or threat to use armed force in a manner inconsistent with the purposes and principles of the United Nations. In fact, one of the UN goals is "to achieve international cooperation in solving international problems of an (...) humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms".[39] If promoting and protecting human rights is one of the purposes of the United Nations, and this is exactly what is intended with the individual or collective military intervention, then it should not be forbidden even in the absence of the Security Council's authorisation.[40]

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[37] A. Pellet, "Le recours à la force, le droit et la légitimité. Notes sur les problèmes posés par le principe de l'interdiction du recours à la force armée en cas de carence du Conseil de sécurité", in: A. Fischer-Lescano et al. (eds), *Frieden in Freiheit, Festschrift für Michael Bothe*, 2008, 249 et seq. (252).

[38] A. Bannon, "The Responsibility To Protect: The U.N. World Summit and the Question of Unilateralism", *Yale L. J.* 115 (2006), 1157 et seq. (1158); ICISS, see note 5, para. 2.27; S. Wheatley, "The Non-Intervention Doctrine and the Protection of the Basic Needs of the Human Person in Contemporary International Law", *Liverpool Law Rev.* XV (1993), 198 et seq. (197-199); Hakimi, see note 24, 652-677.

[39] Art. 1 para. 3, UN Charter.

[40] Bannon, see note 38, 1161; Bellamy, see note 27, 163, 167; Brock, see note 20, 29; Greenwood, see note 25, 9: The ECOWAS intervention in Liberia and the intervention by US, British and French forces in Iraq in 1991 and 1992 are examples of interventions without the Security Council's authorisation invoking a right to resort to military action in cases of extreme humanitarian concern. The NATO States also relied on such a right when they intervened in Kosovo in 1999; ICJ Reports 1962, 151 et seq. (167-168); Hakimi, see note 24, 678-679; A. Randelzhofer, "Use of Force", in: Charter Commentary, 131, quoted by A. Pellet, "The Charter of the United Nations: A commentary of Bruno Simma's Commentary", *Mich. J. Int. L.* 25 (2003), 135 et seq. (149).

The ICISS report appears to encourage this sort of military intervention, since it recommends that where the Security Council fails to act, military intervention could be carried out by regional organisations as long as it is within the limits established by the notion of the responsibility to protect. This means:

a) A State's inability or unwillingness to protect its own population.

b) Inactivity of the Security Council.

c) Intervention will only take place in cases of genocide, war crimes, ethnic cleansing, and crimes against humanity.

Additionally, such an intervention must comply with certain requirements, like the existence of a serious threat, right intention of the prospective interveners, the use of armed force as a last resource, the use of proportional means, and that the intervention has reasonable prospects of success. Only if all of these requirements are met, a military intervention without the Security Council's authorisation may be justified.[41]

Nevertheless, this recommendation was not included in the 2005 World Summit Outcome document and for that reason not accepted by the General Assembly. The General Assembly emphasises that the Security Council has the exclusive power to order and authorise military interventions: including cases of the responsibility to protect. The General Assembly does, however, agree that the Security Council's authorisation can be granted to regional or sub-regional organisations as well.[42]

Even though regional organisations have intervened using military means without any clear order of the Security Council, in some occasions the approval has been obtained *a posteriori*: as in the case of the military intervention by the ECOWAS monitoring group (ECOMOG) in Liberia in 1992 and in Sierra Leone in 1997 or after the NATO intervention in Kosovo in 1999, when the Security Council did not condemn the event and afterwards created a peacekeeping and a peace enforcement operation.[43]

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[41] ICISS, see note 5, paras 6.5, 6.31-6.35; Winkelmann, see note 19, para. 18; Franck, see note 35; E. Leiß, *Interventionen des Sicherheitsrates bei innerstaatlich begangenen Menschenrechtsverletzungen nach Kapitel VII der Charta der Vereinten Nationen*, 2000, 262 et seq.

[42] A/RES/60/1, see note 17, paras 79, 139; Bannon, see note 38, 1163-1164; Evans, see note 5, 716.

[43] ICISS report, see note 5, paras 2.25, 6.5; Hakimi, see note 24, 666-677.

However, the possibility of an *a posteriori* approval cannot constitute a permanent basis for interventions without the Security Council's prior authorisation. An approval after the intervention does not legalise the intervention which therefore remains a violation of the UN Charter and international law. It only protects the interveners from adverse legal consequences. The community of nations cannot rely on the Security Council to approve the intervention once it has occurred merely because it was morally acceptable and in accordance with the notion of the responsibility to protect. The intervention remains, although it might be a legitimate one, an illegal intervention. Further, military interventions outside the UN framework could jeopardise the operation of the collective security system established by the UN Charter.[44]

V. Military Intervention with Prior Recommendation by the General Assembly

Following the above analysis, the military intervention without Security Council's authorisation is not permitted. Consequently a few questions unavoidably arise: What to do in cases where the responsibility to protect is applicable but the Security Council does not act, or a resolution is vetoed by a permanent member? And how to intervene militarily without violating the UN Charter? While a definitive answer to these questions remains to be found, an intermediate approach that addresses the issues outlined above will be presented in the following.

As stated above, the responsibility to protect lies primarily with the State itself, but whenever a population is victim of genocide, war crimes, ethnic cleansing, and crimes against humanity, and the State in question is unwilling or unable to halt or avert it, the responsibility to protect is transferred to the international community. The international community is congregated in the United Nations, whose authority to validate military operations as a means to settle breaches of or threats to peace and protect civilians under imminent threat of physical violence is universally recognised.[45] Normally, the United Nations would act through the Security Council.[46] While the operation of the Security

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[44] See Gonzalez et al., see note 25, 1034 et seq.

[45] ICISS, see note 5, paras 6.8-6.12.

[46] ICISS, see note 5, Synopsis 1. lit. B; A/RES/60/1, see note 17, para. 139; A/59/565, see note 3, para. 200; Evans, see note 5, 713.

Council could be obstructed as a result of the veto cast by a permanent member, this fact alone does not entitle States or regional organisations to intervene militarily without the United Nations' approval. However, neither does it release the international community from its obligation to protect the citizens at risk.

Consequently, since such a failure by the Security Council does not entitle the international community to act by itself, it appears to be necessary to exercise the responsibility to protect through the General Assembly, which is the only body of the UN where the community of nations as a whole is represented.

The ICISS was concerned that, as a consequence of such failures to act by the Security Council, humanitarian catastrophes would continue to arise throughout the world. It suggested that the General Assembly should endorse the military intervention in accordance with the procedures of the resolution "Uniting for Peace", developed in the context of the Korean War, as a solution to those situations in which the Security Council "*because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in a case where appears to be a threat to the peace, breach of the peace, or act of aggression*".[47]

The permanent members of the Security Council enjoy prerogatives that allow them, through their negative vote, to impede the adoption of resolutions in the Security Council, preventing it from taking any decision. To counteract this fact, the resolution "Uniting for Peace" empowers the General Assembly to recommend all kinds of measures, even the use of armed force, in case of breach of the peace or acts of aggression. Such actions are subject to two conditions:

a) The Council has failed to exercise its responsibilities as a result of a negative vote of one or more permanent members.

b) There appears to be a threat to the peace, breach of the peace, or an act of aggression.[48]

While some authors consider that this resolution has only been used twice, and that due to its age and its rare application, it would be difficult to use it again nowadays,[49] there is no doubt about the validity of

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[47] ICISS, see note 5, para. 6.29; A/RES/377 A (V) of 3 November 1950; ICJ Reports 2004, see note 30, 150-151, paras 29-32; ICJ Reports 1962, see note 40, 163; C. Gray, *International Law and the Use of Force*, 2008, 260.

[48] ICJ Reports 2004, see note 30, 150, para. 30.

[49] Brock, see note 20, 31.

the resolution "Uniting for Peace". Although it has been used only in a few instances, the Security Council and the General Assembly have taken several more decisions following the spirit of the resolution without explicitly making reference to it: the Council has referred situations to the General Assembly when, due to the veto of its members, it could not make a decision itself.[50] Finally, the proposition of the ICISS consists in applying the procedures of the resolution "Uniting for Peace" only in order to allow the General Assembly to make up for the failure to act of the Security Council, and not to encourage the General Assembly to take military measures whenever the Council rejects to order them.

1. Responsibility of the General Assembly Regarding Peace and Security Affairs

To maintain international peace and security, to take appropriate measures to strengthen universal peace, as well as to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained are among the purposes of the United Nations.[51] Since they oblige not only the Security Council but all UN members, there is no reason to prevent the United Nations as a whole from acting in order to fulfil these purposes when the Security Council remains inactive. The General Assembly could compensate for the Security Council's failure to act, as it is also bound by the aims and purposes of the UN Charter.[52]

On the other hand, Article 24(1) of the UN Charter states that "in order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carry-

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[50] K. Hailbronner/E. Klein, "Article 10", in: B. Simma (ed.), *The Charter of the United Nations. A Commentary*, 1994, 228 et seq. (234); Z. Drnas de Clemente, "Sentido y Alcance de la Determinación por parte del Consejo de Seguridad de una Amenaza para la Paz, Quebrantamiento de la Paz o Acto de Agresión", in: Secretaría General de la OEA (ed.) *XXX Curso de Derecho Internacional, agosto de 2003*, 2004, 78 et seq. (92); C. Binder, "Uniting for Peace Resolution", in: R. Wolfrum (ed.), *MPEPIL online edition*, paras 9-12.

[51] See Preamble and Art. 1, UN Charter.

[52] A/RES/377 A (V), see note 47; Binder, see note 50, paras 9-12; Drnas, see note 50, 87.

ing out its duties under this responsibility the Security Council acts on their behalf". The wording of this norm indicates that the relationship between the UN members and the Security Council is similar to that between principal and agent.

The maintenance of the peace was originally incumbent upon the UN members, who transferred this responsibility to the Security Council with the aim to guarantee a prompt and an effective action by the organisation. That is to say, they conceded to the Security Council a special function to be executed primarily by it. It does not mean that the UN members have renounced to the responsibility of maintaining and restoring the peace.[53] Indeed, the UN Charter also includes the General Assembly as a body in charge of maintaining peace[54] and furthermore, the ICJ has emphasised on several occasions that the Security Council has the primary, but not the exclusive responsibility of maintaining peace. Consequently, the General Assembly has a secondary responsibility, subsidiary to the Security Council, on this topic.[55]

One might argue contrarily that the UN Charter clearly differentiates between the respective assignments and competencies of the UN organs in order to avoid contradictory decisions. With regard to the General Assembly, Article 12(1) clearly prohibits it to make recommendations about conflicts or situations that are being considered by the Security Council, unless requested to do so by the Security Council.[56]

It seems then, that the procedure established in the resolution "Uniting for Peace" contradicts Article 12(1) of the UN Charter. Nonetheless, the mentioned article only prohibits the General Assembly to make recommendations when the Security Council is fulfilling its functions, i.e. when it adopts decisions in order to restore or maintain the peace and security.[57] The fact that the permanent members of the Security Council block the resolutions could be seen as a proof of the Security Council dealing with the issue, with the consequence that the General

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[53] Ibid., 87-88.

[54] Arts 10-14 and 25, UN Charter; Hailbronner/Klein, see note 50, 233-235.

[55] ICJ Reports 1962, see note 40, 163; ICJ Reports 2004, see note 30, 148, para. 26; Hailbronner/Klein, see note 50, 234; Drnas, see note 50 (86-91); ICISS, see note 5, para. 6.7; Binder, see note 50, para. 20.

[56] K. Hailbronner/E. Klein, "Article 12", in: B. Simma, see note 50, 253 et seq. (255).

[57] See Art. 24 paras 1-2, UN Charter.

Assembly would be unable to refer to the same matter in spite of the veto.

However, the negative vote of the permanent members does not necessarily mean that the Security Council's majority have decided not to authorise the military intervention or any other coercive measure, or even that the Security Council reaches any decision at all. Indeed, when the Security Council is paralysed by the exercise of the veto, it cannot take any decision, neither deciding in favour or hindrance of a certain coercive measure, nor deciding not to discuss the case at all. Therefore at that moment and for the specific case, the Security Council does not act and does not fulfil its functions.

Consequently, the General Assembly is not bound by Article 12(1), and therefore could assume the matter and make recommendations about it.[58] The ICJ confirmed this reasoning in its advisory opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory, in which it also gave the General Assembly the possibility to make resolutions regarding peace and security in cases where the Security Council is considering the case but it has not adopted any recent resolution.[59] Additionally, the competence of the General Assembly to decide about any questions relating to the maintenance of international peace and security is set out in Articles 10, 11 and 14 of the UN Charter. All of the above confirms the thesis that the responsibility to protect shall be exercised by the General Assembly on behalf of the international community when neither the State nor the Security Council protects the population in danger.

2. Competence of the General Assembly to Recommend the Use of Coercive Measures

While the competence of the General Assembly to make recommendations about peace and security issues is beyond doubt, it is debatable what type of recommendations it can make. Can the General Assembly recommend every kind of collective coercive measures, even those that imply the use of armed force?

As mentioned before, the General Assembly has the competence to discuss any questions or any matters within the scope of the United Na-

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[58] Hailbronner/Klein, see note 56, 257; Binder, see note 50, para 21.

[59] ICJ Reports 2004, see note 30, 149-150, paras 27-30.

tions. Even more, the UN Charter determines that the General Assembly has the power to consider any questions in relation to world peace and security, as well as to take position in this respect and to make recommendations to States, the Security Council or both. Nonetheless, the UN Charter expressly denies the General Assembly the competence to recommend coercive measures as pointed out in the second part of Article 11(2): "any question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion".[60]

When the ICJ was confronted with Article 11(2) cl. 2, it interpreted the word "action" as "coercive or enforcement action", referring to the coercive measures contained in Chapter VII of the UN Charter, which are of the exclusive competence of the Security Council.[61] The ICJ in its advisory opinion on certain expenses of the UN stated that "the word 'action' must mean such action as is solely within the province of the Security Council (…) The 'action' which is solely within the province of the Security Council is that which is indicated by the title of Chapter VI1 of the Charter, namely 'action with respect to threats to the peace, breaches of the peace, and acts of aggression'".[62] Additionally it reaffirmed that "it is the Security Council which is given a power to impose an explicit obligation of compliance if for example it issues an order or command to an aggressor under Chapter VII".[63] However, it is the prevailing understanding of the legal literature and even of the Security Council that economic and diplomatic measures do not quality as enforcement action, which includes military action only.[64]

From all the above, it results that only the Security Council has the power to bindingly order coercive measures, which includes the use of armed force or the authorisation for States or regional organisations to use armed force in its name. However, this interpretation does not mean that the Security Council is at the same time the only instance empowered to recommend coercive measures.

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[60] Arts 10-11 para. 2, UN Charter, see also ICJ Reports 1962, see note 40, 162-163; ICJ Reports 1999, 761 et seq. (773, para. 39).

[61] ICJ Reports 1962, see note 40, 164-165.

[62] Ibid., 165.

[63] Ibid., 163; see also ICJ, Reports 1999, see note 60, 773, para. 39; ICJ, Reports 1992, 114 et seq. (126, para. 42); Art 2 paras 5 and 25, UN Charter.

[64] Goodrich et al., see note 24, 366; Hakimi, see note 24, 650-651; Villani, see note 24, 538-540.

The notion of the responsibility to protect allows the UN members as principals to revoke the mandate conceded to the Security Council, when in cases of genocide, war crimes, ethnic cleansing, and crimes against humanity, the Security Council is paralysed by veto cast or remains inactive. As a consequence, the members of the UN reassume the responsibility to maintain peace and international security, along with the competences or means to fulfil this responsibility. This means that the States reassume the faculty to decide about coercive measures contained in Chapter VII of the UN Charter, including those which imply the use of armed force.

The only body of the United Nations in which all members have a seat is the General Assembly. Therefore it would be the most suitable forum for the international community to execute its re-established faculties. The fact that the discretion of the General Assembly concerning the scope of its recommendations is limited by Article 11(2) cl. 2, as mentioned above, does not prevent the General Assembly from making any recommendation in order to avert the crisis and to halt serious violations of human rights and international humanitarian law since the revocation of the Security Council's mandate by the UN members, effective only for the individual case, also removes this limitation. Further, this interpretation respects Article 1(1) of the UN Charter that allows the United Nations, and not exclusively the Security Council, to take all types of effective collective measures necessary to realise the safeguarding of world peace, which is the main objective of the UN.[65]

The practice of the General Assembly confirms this interpretation. In several instances, it has recommended the implementation of coercive measures, both non-military and military ones,[66] although it should be noted that the majority have been non-military. Notable examples are the resolutions relating to the Korean War of 1951,[67] the Suez Canal crisis where the creation of a peace keeping operation was recommended,[68] the resolutions adopted when Israel occupied Arabic territo-

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[65] Hailbronner/Klein, see note 50, 235; Binder, see note 50, para. 20.

[66] Drnas, see note 50, 92; Binder, see note 50, paras 9-12; ICJ Reports 1962, see note 40, 163, 168; ICJ Reports 2004, see note 30, 148, para. 26; Hailbronner/Klein, see note 50, 233-235; Drnas, see note 50, 88.

[67] A/RES/498 (V) of 1 February 1951; A/RES/500 (V) of 18 May 1951.

[68] A/RES/997 ES-I of 2 November 1956; A/RES/1000 ES-I of 5 November 1956; A/RES/1001 ES-I of 7 November 1956.

ries and the General Assembly requested its members to isolate Israel,[69] and those relating to the conflict between India and East Pakistan (today Bangladesh),[70] and even more explicitly the resolution regarding South Africa's illegal occupation of Namibia in which all States were called upon "in view of the threat to international peace and security posed by South Africa, to impose against that country comprehensive mandatory dealings with South Africa in order to totally isolate it".[71] Further, regarding the construction of a wall in the occupied Palestinian territory, the General Assembly expressed its conviction that "the repeated violation by Israel, the occupying Power, of international law and its failure to comply with relevant Security Council and General Assembly resolutions and the agreements reached between the parties undermine the Middle East peace process and constitute a threat to international peace and security". At the same time it condemned the illegal Israeli actions in occupied East Jerusalem and the rest of the occupied Palestinian territory, in particular the construction of settlements in that territory.[72] Additionally, the General Assembly requested an advisory opinion on the legality of the construction of that wall and recommended its members to act in accordance with the findings of the ICJ.[73]

Finally, the notion of the responsibility to protect also implies the use of peaceful and non-military measures in the first place, and only when they are not viable or their result would be insufficient to halt violations, then the use of armed force constitutes an alternative. The General Assembly has to respect these requirements when recommending military interventions.[74]

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[69] A/RES/ES-9/1 of 15 February 1982.

[70] A/RES/2793 (XXVI) of 7 December 1971.

[71] A/RES/ES-8/2 of 14 September 1981.

[72] A/RES/ES-10/2 of 23 April 1997.

[73] A/RES/ES-10/15 of 20 July 2004.

[74] A/59/565, see note 3, paras 201, 203; ICISS, see note 5, paras 4.7-4.43; J. Frowein, "Article 42", in: B. Simma, see note 50, 628 et seq. (631).

3. Binding Effect of the General Assembly's Recommendations

The General Assembly can make binding decisions concerning internal questions of the organisation, such as the admission, suspension and expulsion of members, the election of members to different committees, as well as decisions on budget affairs and UN Charter amendments.[75] However, in most of the cases the General Assembly can only make non binding recommendations.[76]

A recommendation is defined as "a legal act which expresses a desire, but which is not binding on the addressees".[77] The General Assembly has the competence to recommend collective enforcement measures, but it cannot oblige its members to respect, fulfil and execute these recommendations. The prerogative of adopting binding decisions regarding peace and security, i.e. the possibility to oblige other countries to carry out certain decisions, did not originally lie with the States. It is a power specifically created for the Security Council in order to allow it to fulfil its functions more efficiently.[78] Therefore, while in cases of inactivity of the Security Council, or of use of or threat to use the veto, the States may reassume their original responsibility to protect the population under imminent threat of physical violence and the power to recommend the military coercive measures needed to halt the crisis, they may however not extend their original scope of powers by assuming those of the Security Council. Since the States can only recover such power as they originally had, it remains the case that only the decisions of the Security Council create binding obligations on UN members in relation to the execution of coercive measures.[79]

The non binding character of the recommendations should in practice not decrease their value or their effectiveness.[80] Since States or regional organisations interested in the military intervention will have brought the case before the General Assembly in order to obtain a recommenda-

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[75] Arts 4-6, 23, 61, 97, 17, 108-109, UN Charter.

[76] Arts 10-14, UN Charter.

[77] Arts 10-14 and 25, UN Charter; Hailbronner/Klein, see note 50, (233-237).

[78] See Art. 25, UN Charter.

[79] Art. 25, UN Charter; ICJ Reports 1992, see note 63, 126, para. 42; ICJ Reports 1962, see note 40, 163; U. Beyerlin, "Sanktionen", in: R. Wolfrum, (ed.), *Handbuch Vereinten Nationen*, 1977, 376 et seq. (379).

[80] See Art. 2 para. 5, UN Charter.

tion regarding the use of armed force with the primary purpose of halting or averting human suffering, it is probable that in spite of the non binding nature of the recommendations, the promoters of the recommendation will enforce it when the General Assembly recommends the military intervention with a majority of at least two-thirds of the General Assembly's members present and voting.[81]

Furthermore, the approval of such a recommendation represents the interest of the community of nations in the face of a humanitarian catastrophe which constitutes a threat to the peace, and at the same time is a sign of their disposition to fulfil the recommendations.

This interpretation strengthens the collective security system, in the sense that the coercive measures which imply the use of armed force can only be executed after having been approved by the United Nations, which is the principal organisation in charge of maintaining and restoring the international peace and security.

VI. Conclusions

The inactivity of the Security Council in view of serious violations of human rights and international humanitarian law has led some States and regional organisations to intervene without the corresponding authorisation by the Security Council. However, the UN Charter does not provide for any kind of exception regarding the use of armed force for human protection purposes, traditionally known as humanitarian intervention. Not even the fact that the Security Council is paralysed because of the lack of unanimity of the permanent members justifies military interventions without the United Nations' approval. Disregarding this requirement could constitute a rupture of the collective security system conceived in the UN Charter.

The UN Charter expressly allows the use of armed force in cases of individual or collective self-defence, and in the presence of a threat to peace, breach of the peace or acts of aggression, provided that the Security Council authorises the use of military measures in accordance with Chapter VII of the Charter.

The States, exercising their sovereignty and following the notion of the responsibility to protect, are obliged to fulfil certain responsibilities to-

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[81] Art. 18 para. 2, UN Charter; see R. Wolfrum, "Article 18", in: B. Simma, see note 50, 317 et seq.

wards their citizens and the international community.[82] When a State is not capable or unwilling to protect its population, or when the government itself is the perpetrator of serious violations of human rights and international humanitarian law, the international community has to assume the responsibility to protect the vulnerable population in cases of genocide, war crimes, ethnic cleansing, and crimes against humanity.

Since the four cases stated above could also threaten the international peace and the stability of the region, the collective security system is well suited to solve the crisis. Therefore, while the responsibility to protect should be exercised by the international community, the Security Council will be competent to take the necessary measures in order to protect the affected population and to halt the crisis.

However, the permanent members of the Security Council enjoy prerogatives that allow them, through their negative vote, to impede the adoption of resolutions in the Security Council, preventing it from taking any decision. Nonetheless, the negative vote of the permanent members does not necessarily mean that the Security Council's majority have decided not to authorise the military intervention or any other coercive measure, or even that the Security Council reaches any decision at all. Indeed, an affirmative vote of at least nine members, but without the concurring vote of all of the permanent members, would result in the resolution being blocked.[83] In other occasions, although having discussed the issue, the Security Council does not take any decision, it just remains silent. These situations constitute a failure of the Security Council to duly carry out its functions since it does not take any decision, neither deciding in favour or hindrance of a coercive measure, nor deciding not to discuss the case at all.[84]

In such cases, and within the scope of the doctrine of the "responsibility to protect", the UN members would be permitted, in an exceptional manner and with effects only for the particular case, to reassume the re-

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[82] More relating to this dual responsibility D.W. Potter, *The Responsibility to Protect: No More Rwandas, The International Community and Humanitarian Intervention in the 21st Century*, PhD Thesis, University of Tasmania, 2006, 87 et seq., available at: <http://eprints.utas.edu.au/1418/>.

[83] See Art. 27 para. 3, UN Charter.

[84] The right to veto is a special prerogative, a power given also in order to maintain the peace and to impede tensions between the permanent members that would threaten the international peace and security much more. Therefore it should be accepted that military interventions, regardless of the use of the right of veto, remain problematic.

sponsibilities they transferred to the Security Council, and in this way, through the General Assembly, to recommend coercive measures, including a military intervention if necessary.

The recommendations of the General Assembly should in no way be considered as being more important than those of the Security Council. The recommendation by the General Assembly to intervene militarily in cases of genocide, war crimes, ethnic cleansing, and crimes against humanity can only be granted when the Security Council has not taken any decision. Permitting the General Assembly to recommend the intervention in spite of a negative decision by the Security Council would imply to reject the entire collective security system and the primary authority of the Security Council to decide about the maintenance and restoration of peace.

In conclusion, the recommendation of the General Assembly to use armed force has a legitimating effect for the States or the organisations that carry out the intervention. Since their actions are supported by the international community, they will not be considered as an international wrongful act.

Common Security: The Litmus Test of International Solidarity

Hanspeter Neuhold[*]

I. Introduction

Solidarity is one of the most frequently used and at the same time most elusive terms that is mentioned in everyday conversation as well as invoked in political speeches and official documents. Although there is general agreement on its hard core, definitions of solidarity vary and are often not stringent.[1]

A rather simple definition has been chosen for this essay. International solidarity will be understood as the readiness of a State to provide assis-

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[*] Professor of Public International Law and International Relations at the School of Law of the University of Vienna.

[1] Definitions in dictionaries which show how difficult a simple, straightforward definition is include: "the fact or quality, on the part of communities, of being perfectly united or at one in some respect, esp. in interests, sympathies, or aspirations", J. A. Simpson (ed.), *The Oxford English Dictionary*, XV, 2nd ed., 1989, 972; "an entire union of interests and responsibilities in a group; community of interests, objectives, or standards", Ph. Babcock (ed.), *Webster's third new international dictionary of the English language*, III, 1986, 2169. French definitions are not more stringent than their English counterparts. According to the Grand Larousse Universel, *solidarité* is a "*rapport existant entre des personnes qui, ayant une communauté d'intérêt, sont liées les unes aux autres en particulier dans le domaine social;…sentiment d'un devoir moral envers les autres membres d'un groupe, fondé sur l'identité de situation, d'intérêts.*" *Grand Larousse Universel*, vol. 14, 1997, 9676. For Le Nouveau Petit Robert *solidarité* signifies "*relation entre personnes ayant conscience d'une communauté d'intérêts qui entraîne, pour les unes, l'obligation morale de ne pas desservir les autres et de leur porter assistance.*" *Le Nouveau Petit Robert*, 2007, 2390.

R. Wolfrum and C. Kojima (eds.), *Solidarity: A Structural Principle of International Law*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 213,
DOI 10.1007/978-3-642-11177-8_7, © Springer-Verlag Berlin Heidelberg 2010

tance to another State and to accept the resulting costs. In the area of international security such help is offered and action taken by States in order to jointly cope with threats to or actual attacks on their essential values, above all the physical integrity of their population, their territorial inviolability and political independence.[2]

The degree of solidarity between given partners is in turn determined by several variables: on the one hand, shared interests based on common threat perceptions, more specifically concerning the gravity and the immediacy of a given threat. If States are actually attacked or see their existence imminently threatened to the same extent by the same enemy, they may join forces even if they have otherwise little in common.[3]

On the other hand, the scope of the common values uniting the partners has a decisive impact. The more numerous and the stronger shared values[4] are, the higher the degree of solidarity which may be expected.[5] In particular, a solid value platform ought to enhance the readiness for lasting and institutionalised cooperation beyond merely temporary measures. A high level of solidarity may also ensure further collaboration after the initial purpose of joint action has been achieved.[6] Moreover, mutual positive feelings of friendship and sympathy between political leaders and/or peoples provide a psychological anchor of solidarity.

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[2] These values are also reflected in the three constitutive elements required for the existence of a State under international law.

[3] In terms of International Relations theories, the foundations of solidarity according to this definition thus combine the divergent approaches of (neo-)realism, with its emphasis on – above all – military threats, liberal institutionalism stressing mutually beneficial cooperation, and constructivism focusing on values and identity. S. Burchill et al., *Theories of International Relations*, Fourth Edition, 2009.

[4] For instance, human rights and democracy or religious beliefs.

[5] These requirements are similar to those on which a pluralistic security community, as defined by Karl Deutsch, is built. The members of such a community solve their social problems by peaceful change and not by force. Empirical research showed that in addition to common values, responsiveness, i.e. awareness of the needs of other partners and willingness to help to meet them, is needed. K. Deutsch et al., *Political Community and the North Atlantic Area*, 1957.

[6] These aspects will be further developed below, see III.

Geographic proximity increases the likelihood of similar threat perceptions, a strong common value platform based on shared traditions and a community feeling – although a common history marked by recurrent conflicts and hostility may also have a divisive effect. The intensity of solidarity within a small group of homogeneous States, especially in a given region, is therefore likely to be higher than at the global level.

The degree of solidarity is reflected in and can be measured by the costs an actor is ready to incur for its implementation. The manifestations of solidarity may be limited to political support and economic assistance; they may also include the acceptance of material damage and human casualties caused by military action taken in order to defend the victim of an armed attack.

According to the understanding of solidarity chosen for this essay, assistance does not have to be reciprocal, as exemplified by a unilateral security guarantee or solidarity in the area of development aid. However, solidarity does not exclude benefits which also accrue to those who provide help unilaterally. Thus the party providing military or economic assistance may equally benefit from it, especially in a mid- or long-term perspective. Military support could also protect the state offering such assistance from becoming the next victim of the aggressor against whom joint action is taken. Economic benefits may include the development of new markets for the benefactor's products. Such advantages or the avoidance of disadvantages are increasingly likely to result for actors practicing solidarity in today's globalising international system in which security is becoming genuinely indivisible.

Moreover, if the costs of solidarity are jointly borne by two or more partners, the shares do not have to be equal for each of them. Even strong solidarity does not exclude differences of opinion on how the common burden ought to be distributed. Partners may indeed disagree on the military and financial resources each of them should contribute to the common cause. Furthermore, those who shoulder a greater part of the common costs tend to feel entitled to have more of a say when decisions are made, a claim often opposed or accepted only reluctantly by the weaker partners.

At the normative level, action motivated by solidarity[7] may not only be perceived as a moral duty but also "harden" into legal obligations,

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[7] In contrast to French (*"solidaire"*), German (*"solidarisch"*), Italian (*"solidale"*) or Spanish (*"solidario"*) there is no corresponding adjective in the English language.

above all by inclusion in an international treaty. Theoretically, solidarity between subjects of international law could also evolve into a rule of customary international law if practised repeatedly and with the necessary *opinio juris.*

The above assumptions will be tested in this essay by taking a closer look at three contemporary examples at the global, transatlantic and continental levels: the system of collective security of the United Nations (UN); the main military alliance in today's world, the North Atlantic Treaty Organisation (NATO); and the security dimension of the European Union (EU), the European Security and Defence Policy (ESDP) in the context of the EU's Common Foreign and Security Policy (CFSP).[8]

II. The UN: Collective Security Based on Continued World-War II Solidarity

The principal objective of the UN, the maintenance of international peace and security,[9] is to be achieved within a system of collective security under Chapter VII of the UN Charter. The Member States of such a system are required to take joint non-military or military enforcement action against the unlawful use of force by one member against another member.[10] A collective security regime is therefore one of the models for institutionalising solidarity in the realm of international security.

The requirements for effective collective security are met by the UN to a, for some observers surprisingly, great extent – except one. Firstly, the quasi-universality of membership, especially the participation of all the great powers, ensures an overwhelming military deterrence potential. A would-be aggressor State must therefore reckon with a crushing collec-

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[8] A discussion of the normative status of solidarity under general international law is beyond the scope of this essay.

[9] According to the first paragraph of the Preamble ("to save succeeding generations from the scourge of war"), and the first objective listed in Article 1 of the UN Charter. On this and the other provisions of the Charter mentioned below, see the commentaries in B. Simma (ed.), *Charter of the United Nations: A Commentary*, Second Edition, 2002.

[10] H. Neuhold, "Terminological Ambiguity in the Field of International Security: Legal and Political Aspects", in: K. Dicke et al. (eds.), *Weltinnenrecht: Liber amicorum Jost Delbrück*, 2005, 473 et seq. (474).

tive response in the event of actually launching an attack, even against a weaker State which it could easily defeat thanks to its military superiority in its bilateral relations with the latter.

Secondly, the comprehensive prohibition of the threat or use of force under Article 2(4) of the Charter and the clear-cut obligation to take part in enforcement action under Articles 2(5) and 25 closes legal backdoors.

Thirdly, in the centralised system of the UN an organ that consists of only 15 Member States and may therefore be expected to act rapidly and effectively makes decisions that are binding on all the other, currently 177 members. It is up to the Council to determine (1) whether a given situation requires the activation of the collective security mechanisms,[11] (2) against which State(s) (3) which type of enforcement measures (non-military or military)[12] must be taken (4) by which members,[13] and (5) when.

Unfortunately, the fourth pillar of collective security remains weak – it is precisely solidarity. More specifically, all members of such a system must regard peace as indivisible and feel directly concerned, no matter where and between whom a serious conflict erupts. Moreover, in accordance with the principle of anonymity, Member States must not have permanent friends and foes. This implies their readiness to also take action against States with which they traditionally have good and close relations and assist others with which their relations are less friendly or even hostile.

This condition was not met from the very beginning of the World Organisation. The collective security system of the UN was founded on the assumption that the cooperation between the Western powers and the Soviet Union, based on their solidarity against the Axis States, would continue after 1945. However, this coalition was only held together by the need to join forces against an otherwise too powerful common enemy.

As had to be expected, this coalition soon fell apart, and the conflicts that its members had shelved only temporarily erupted with renewed vigour. Occasional partners became adversaries again. East and West had few common interests beyond physical survival. Hence only mu-

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[11] The existence of a threat to the peace, breach of the peace, or act of aggression (Article 39).

[12] In accordance with Articles 41 and 42.

[13] In accordance with Article 48.

tual deterrence based on nuclear second-strike capabilities prevented the East-West conflict from escalating into a "hot" war, i.e. a military showdown. Given the fundamental and comprehensive nature of the confrontation between the communist and the Western camps, the two parties hardly shared any common values.[14] Their feelings towards each other were marked by deep-seated hostility.

Because of this East-West antagonism the voting rules under Article 27(3) of the Charter paralysed the UN system of collective security throughout the Cold War era. This provision confers on each of the five permanent members – those States that emerged as the main victorious powers at the end of World War II – the right to block the taking of a non-procedural decision by the Security Council.

As a result, the Council never took military enforcement action in accordance with Article 42 of the Charter during the Cold War. All it did was to authorise the use of the UN flag, under the unified command of the United States, by the States assisting South Korea against the North Korean and later communist Chinese invasion forces.[15] It also empowered the United Kingdom to use force in order to implement the oil embargo against Southern Rhodesia which had unilaterally declared independence and introduced a racist white minority regime in 1965.[16]

The Security Council adopted non-military sanctions under Article 41 of the Charter only twice, as just mentioned, against Southern Rhodesia in the 1960s[17] and against the apartheid regime in South Africa in 1977.[18] Although East and West disagreed on almost all issues during that period they at least agreed that racial discrimination would not be tolerated.[19]

Moreover, while military enforcement action against miscreant States by the Security Council was out of the question, its members were willing to launch "soft" military operations not provided for in the Char-

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[14] Opposition to apartheid was one of the few exceptions.

[15] S/RES/84 (1950) of 7 July 1950.

[16] S/RES/221 (1966) of 9 April 1966.

[17] Beginning with S/RES/216 (1965) of 12 November 1965 in which the Security Council called upon all States not to recognise the illegal racist regime in Southern Rhodesia and to refrain from rendering any assistance to it.

[18] S/RES/418 (1977) of 4 November 1977.

[19] See note 14.

ter.[20] Peacekeeping missions based on the consent of all parties involved at least helped to stabilise ceasefires after the parties to an armed conflict had agreed to end armed hostilities.

The collapse of the communist regimes and the disintegration of the Soviet sphere of influence in Eastern Europe and the Soviet Union itself in the late 1980s and early 1990s seemed to usher in a more peaceful era; hence hopes for enhanced effectiveness of the UN system of collective security seemed justified.

The Cold War had come to an end with one side peacefully prevailing over the other in the competition between two mutually exclusive ideologies, each of which claimed to offer mankind a "superior" political and economic system.[21] The universality of the hard core of Western values, individual-oriented human rights, was recognised by the entire international community, notably in the concluding documents of the 1993 Vienna World Conference on Human Rights.[22] Moreover, the worldwide scope of the main threats to security, from "total" terrorism[23] and the growing likelihood of the proliferation of weapons of mass destruction[24] to pandemics and ecological degradation,[25] organised

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[20] The legal basis may be found in the implied powers of the UN, customary international law, as well as the *argumentum a maiore ad minus:* If the Security Council may take non-defensive military enforcement action under Article 42 of the Charter, it may also resort to military operations that only permit the use of armed force in self-defence.

[21] In addition to traditional power rivalry between two heavily armed political-military blocs, each led by a "superpower".

[22] *Vienna Declaration and Programme of Action*, Doc. A/CONF.157/24; *ILM* 32 (1993), 1661 et seq.

[23] "Total" in terms of victims, means used, geographic scope and the goal to be achieved, i.e. for Islamic fundamentalists a worldwide caliphate. Muslim radicals reject Western values in favour of those embodied in the Koran. H. Neuhold, "International Terrorism. Definitions, Challenges and Responses", in: D. Mahncke/J. Monar (eds.), *International Terrorism: A European Response to a Global Threat?*, 2006, 23 et seq. (28 et seq.).

[24] As a result of easier access to the necessary materials and technology.

[25] The Security Council rightly discussed HIV/AIDS and climate change as security issues in 2000 and 2007, respectively.

crime and the scarcity of natural resources, concerns all nations, great and small, and requires global responses.[26]

This combination of the non-violent end of the East-West conflict, common security interests and shared values should in turn have remedied the critical weakness of the UN system of collective security: the lack of sufficient solidarity. After all, two principal foundations of solidarity were substantially strengthened. As a result, the Security Council ought to have been able to live up to its responsibility for the maintenance of international peace and security in accordance with the Charter.[27] Unfortunately, these expectations and hopes were only partly fulfilled. Even after the Cold War, the members of the Council, in particular those holding a permanent seat, find it difficult to agree on the qualification of a given crisis in terms of Article 39; if they reach agreement on this first step, they may still be divided over the measures to be taken in order to cope with the problem. Moreover, the common value platform is not as strong as it might appear at first sight. In particular, the members of the international community do subscribe to the respect for human rights in principle but interpret these rights differently in light of their ideologies or religious orientations. Freedom of speech or religion mean different things to governments shaped by the Age of Enlightenment, Marxism, Islam or Confucianism.

As a result, the Security Council is still not ready for centralised military enforcement action pursuant to Article 42 of the Charter, even against "rogue States" challenging the principles governing relations within the international community. The Council continues to be unable to take armed action itself since it has failed to call on Member States to provide it with the necessary resources on the basis of agreements in accordance with Article 43. The Security Council has merely authorised able and willing Member States to take all necessary measures or to use all necessary means, thereby also implying the use of armed force, in order to deal with threats to or breaches of the peace.[28] Solidarity is a decisive factor when a single State or a group of States decide to make use of such an authorisation. The most spectacular case

[26] Among the positive developments the diminishing threat of inter-State war, in particular a nuclear confrontation between the great powers, should be highlighted.

[27] Article 24(1).

[28] The obvious difference between mandatory military sanctions under Article 42 and a mere authorisation by the Security Council is that UN members may but do not have to make use of the latter.

in which the Council authorised the use of all necessary means was "Operation Desert Storm",[29] mounted by such an ad hoc coalition led by the United States, with the objective of driving the Iraqi invasion forces out of Kuwait in 1991. Since each State is free to act on the basis of such an authorisation or not, one may refer in this context to *"solidarité à la carte"*.

Furthermore, after the Cold War agreement on non-military sanctions was easier to reach within the Security Council, both on selective and comprehensive, on economic as well as other measures. Solidarity also comes into play when such enforcement measures, in particular far-reaching embargoes, have to be implemented, since they also tend to have negative consequences, such as the loss of important markets, for the States participating in them. The authors of the UN Charter took these aspects into account by inserting Articles 49 and 50. The former provision calls for mutual assistance in carrying out the measures decided upon by the Security Council; under the latter, members confronted with special economic problems arising from the carrying out of enforcement measures (only) have the right to consult with the Security Council with regard to a solution to those problems. At least in some cases, countries suffering particular hardships have been granted assistance beyond mere consultations with the Council.[30]

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[29] By S/RES/678 (1990) of 29 November 1990.

[30] In the context of non-military enforcement measures, the issue of common values and principles also came to the fore when, especially in the case of Iraq, sweeping sanctions led to malnutrition and declining health standards which in turn resulted in lower life expectancy of the population. The question arose of whether the powers of the Security Council as a political organ were unlimited under the Charter. This question was eventually answered in the negative on the basis of Article 24(2) which requires the Council to act in accordance with the purposes and principles of the UN. These purposes are laid down in Article 1(3) which includes promoting and encouraging respect for human rights. Among these rights, the right to life is evidently paramount. Consequently, the Security Council has switched to so-called targeted sanctions aimed at persons or entities responsible for or otherwise involved in the unlawful conduct of their State and not the population as a whole. The concept of targeted sanctions was also included by the High-level Panel on Threats, Challenges and Change, appointed by Secretary-General Kofi Annan, in its 2004 report *A More Secure World: Our Shared Responsibility*: *Report of the UN Secretary General's High Level Panel on Threats, Challenges and Change*, Doc. A/59/565 of 2 December 2004, paragraph 179; in Kofi Annan's own 2005 report *In Larger Freedom: Towards Development, Security and Human Rights for All*,

Moreover, the Security Council developed the "first generation" of peacekeeping operations which were limited to monitoring ceasefire agreements and inter-positioning troops between the conflicting parties after the cessation of military hostilities during the Cold War. Greater solidarity with the victims was reflected in more ambitious mandates conferred upon "second-generation" missions that extended the use of force beyond self-defence of the peacekeepers to protecting civilians against armed attacks. In addition, the tasks of these missions included political-administrative functions, such as helping with the maintenance of law and order and the preparation, organisation and supervision of democratic elections and other steps towards "nation-building", as well as humanitarian assistance. However, the extension of the mandates was one thing; accepting the higher costs of enhanced solidarity by providing the missions with sufficient military and other resources was another.

The UN did learn some lessons from the poor record of the new peacekeeping operations by realising that the next "generation" of these missions should have adequate armed forces at its disposal. In Europe these "enforcement-by-consent operations" were conducted by troops led by NATO, not the UN. Both the Implementation Force/Stabilisation Force (IFOR/SFOR) in Bosnia and Herzegovina and the Kosovo Force (KFOR) in Kosovo were indeed characterised by military superiority over the local forces. Another innovation was the administration of States/territories by several international organisations, including the UN, with a mandate from the Security Council as their legal foundation.[31] Helping the population concerned on the road to political stability and economic prosperity requires the readiness to make considerable manpower and financial resources available.

Doc. A/59/2005 of 21 March 2005, paragraph 110; as well as the World Summit Outcome, the concluding document adopted by the meeting of the UN General Assembly at the summit level on 20 September 2005, A/60/L.1, paragraph 106. The latter document also refers to the above-mentioned economic problems arising from the application of non-military sanctions in paragraph 108. See also E. de Wet, *The Chapter VII Powers of the United Nations Security Council*, 2004, 217 et seq.

[31] Again, the former Yugoslavia provided the "laboratory" for experimenting with such governance projects in Bosnia and Herzegovina and Kosovo; see H. Neuhold, *The United Nations as a Security Organization: The "Balkan Laboratory"*, 2007.

Unfortunately, the international community was unable to agree on a response to all conflicts after the sea change beginning in 1989/1990. NATO members launched an air campaign[32] without authorisation by the Security Council in order to stop ethnic cleansing of the Albanian majority in Kosovo by Serb forces in 1999. An ad hoc coalition, again led by the United States, resorted to armed force in 2003 against the regime of President Saddam Hussein in Iraq which was suspected of hiding weapons of mass destruction and supporting international terrorism. "Operation Iraqi Freedom" similarly was not sufficiently authorised by the Security Council. In both cases, solidarity with the victims of repression offered at least a moral justification for the use of force.

More recently, the Council adopted targeted sanctions, like travel restrictions or the freezing of financial assets, against persons or entities involved in actual or suspected nuclear weapons programmes (North Korea, Iran) or mass atrocities (the Sudanese government in Darfur).[33] The impact of these measures was at best limited.[34]

The difficulties complicating effective collective security remain and have even become more acute than in the era of "post-Cold War good feeling". The perception of peace as indivisible within the World Organisation is still weak. UN Member States are still reluctant to take action, especially by military means, in conflicts in remote countries. Traditional friendships and antagonisms continue to prevail over the principle of anonymity. Most importantly, the basis of perceived shared interests and values among the permanent members of the Security Council has eroded. As a result, they find it harder today than in the early 1990s to arrive at a common assessment of a given situation in terms of Article 39 of the UN Charter, and if they do, to agree on the appropriate measures to be taken. This negative was caused, *inter alia*, by the unilateralism practiced by the Bush administration, which, how-

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[32] "Operation Allied Force", see H. Neuhold, "Collective Security After 'Operation Allied Force'", *Max Planck UNYB* 4 (2000), 73 et seq., and the literature quoted there.

[33] H. Neuhold, "The International Community and 'Rogue States'", in: A. Fischer-Lescano et al. (eds.), *Frieden in Freiheit. Peace in Liberty. Paix en liberté: Festschrift für Michael Bothe zum 70. Geburtstag*, 2008, 215 et seq.

[34] The renunciation of its nuclear activities by the regime in Pyongyang in 2007 seemed primarily due to Chinese pressure and surprising U.S. flexibility and not the measures taken by the UN. On targeted sanctions, see note 30. In the meantime North Korea has resumed its provocations by testing another nuclear warhead and firing numerous missiles.

ever, may be reversed by his successor Barack Obama. It is also due to a more self-assertive, "revisionist" Russia bent on restoring its status as a great power and an increasingly self-conscious China which makes an effort to become a truly global player, above all, in order to promote its economic interests.[35]

III. NATO: A Military Alliance Surviving the "Loss" of its Enemy?

Another model of solidarity in the field of international security is provided by collective defence against a common enemy. It can either be practiced ad hoc against an armed attack that has already commenced or on a treaty basis against future attacks. Such a treaty may just commit the contracting parties to mutual assistance if one of them is attacked; it may also establish institutions such as common headquarters and integrated military structures, in other words create a military alliance. The inherent right of not only individual but also collective self-defence was enshrined in Article 51 of the UN Charter as one of the two exceptions to the prohibition of the threat or use of force under Article 2(4).

NATO was founded in 1949 as such an alliance. It was the Western response to the threat posed by the Soviet Union and its "satellites". Indeed a series of communist takeovers occurred in Eastern Europe, culminating in the Prague coup of 1948; the mighty Red Army was not demobilised after victory in World War II; and the Soviet Union proclaimed an expansionist ideology. It therefore made sense to ten Western European States and the United States as well as Canada to conclude an alliance treaty in accordance with Article 51 of the UN Charter. The Western European democracies felt that they were confronting a daunting threat to their existence as sovereign States. The United States had a vital interest in maintaining the strategic balance with the Soviet bloc by preventing the USSR from extending its sphere of influence to the rest of Europe.

Moreover, a look at the Washington Treaty, signed on 4 April 1949, reveals that NATO is not just a military alliance but also a Western value community. It was thus not only based on common security interests in

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[35] Similarly, the measures taken by the international community as a whole, acting, first and foremost, through the UN, against the above-mentioned "soft-security" threats can hardly be called adequate, see below, V.

fending off a major threat but also on the second foundation of genuine solidarity. In the preamble, reference is made to "the freedom, common heritage and civilization of their (the contracting parties, the author) peoples, founded on the principles of democracy, individual liberty and the rule of law". Article 2 includes the commitment to strengthen the parties' "free institutions, by bringing about a better understanding of the principles upon which these institutions are founded". Furthermore, political and other opinion leaders as well as peoples on the two sides of the Atlantic were united by mutual sympathy and friendship. Their alliance was thus built on the three above-mentioned pillars of solidarity: common strategic interests, comprehensive shared values and positive feelings.[36]

The key provision of the Washington Treaty, which consists of 14 articles only, is of particular interest in this context. It contains the standard formula of military solidarity reminiscent of the Three Musketeers' vow, that an armed attack on one will be regarded as an attack on all allies. However, pursuant to article 5, each party will assist another ally that becomes the victim of an armed attack by solely taking "such action as it deems necessary, including the use of armed force". The inclusion of this "watered-down" formulation was necessary in order to obtain the approval of the treaty by the U.S. Senate, known for its hostility to far-reaching commitments. However, the "soft" wording of an obligation does not necessarily mean that it will be less effective in practice than a more stringent version – and *vice versa*.[37] For, what determines the effectiveness of a commitment is not so much its legal qualification but the political will to implement the pledge. "Soft law" may indeed be more effective than a "hard" treaty that remains a dead letter because its parties refuse to live up to its provisions.

In fact, the Atlantic Alliance achieved its main objective, that of protecting its members, throughout the Cold War. Because of NATO's integrated military structures and the credible resolve of Member States to assist each other, a potential aggressor had to reckon with a collective response which would make an armed attack on any member of the alliance extremely costly. Thanks, above all, to the military strength of the United States, the strategy of deterrence was successful, so that for four decades article 5 never had to be applied in practice.

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[36] See above, I.

[37] H. Neuhold, "Variations of the Theme of 'Soft International Law'", in: I. Buffard et al. (eds.), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner*, 2008, 343 et seq.

The end of the Cold War meant for NATO that the alliance had "lost" its enemy and thereby its *raison d'être.* Consequently, forecasts seemed justified that sooner or later the Atlantic Alliance, like its adversary on the other side of the Iron Curtain, the Warsaw Treaty Organisation, would also be dissolved.[38] It has to be borne in mind that a military alliance not only offers advantages but also entails costs for its members. The benefits include, in addition to enhanced security thanks to the allies' collective military potential, a say on crucial strategic decisions and access to state-of-the-art technology. On the other hand, alliance membership may result in pressure exerted by more powerful members, involvement in conflicts of no direct concern to the ally concerned, or high defence expenditures.

With the weakening of the Russian Federation, the core power of the former Soviet Union, Europe's strategic importance for the United States diminished. However, the fall of the Berlin wall did not set the stage for lasting peace on the Old Continent. Unresolved conflicts in Eastern Europe, which the Cold War had merely frozen, erupted again, especially in the former Yugoslavia. Initially it looked as if Europeans could keep order in their own house without American assistance. When this assumption proved wrong, NATO was given a new lease of life. In accordance with the formula "out of area or out of business", coined by U.S. Senator Richard Lugar, the Atlantic Alliance assumed new tasks beyond the territorial defence of its Member States. It helped the UN Security Council to enforce sanctions adopted in the context of the Balkan conflicts, such as the ban on military flights in the airspace of Bosnia and Herzegovina.[39] NATO also conducted the above-mentioned "enforcement-by-consent" operations IFOR/SFOR and KFOR in Bosnia and Herzegovina and Kosovo, respectively. Moreover, its members launched "Operation Allied Force" without the authorisation of the Security Council but with a morally and politically tenable objective.[40]

The debate on the lawfulness of this mission led to the appointment of the International Commission on Intervention and State Sovereignty

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[38] "NATO's days are not numbered, but its years are." See K. N. Waltz, "The Emerging Structure of International Politics", *International Security* 18, no. 2 (Fall 1993), 44 et seq. (76).

[39] See S/RES/781 (1992) of 9 October 1992 and S/RES/816 (1993) of 31 March 1993.

[40] Neuhold, note 32, 102.

which developed the concept of a State's "responsibility to protect" its population.[41] According to this notion, if a State fails to live up to this responsibility, the international community may take the necessary action. What remains controversial is the question of whether this secondary responsibility may only be exercised by the UN Security Council or also, as the Commission claimed, by States without the Security Council's authorisation. The principle of the "responsibility to protect" itself has been widely accepted, notably by the World Summit, a meeting of the UN General Assembly at the highest political level in September 2005.[42] For the purposes of this essay, the new principle can be seen as another important manifestation of international solidarity.

From the legal point of view, the fact that those additional missions, extending both the functions and the area of operations, were undertaken without amending the constituent treaty of NATO is worth mentioning.

Article 5 of the Washington Treaty was invoked for the first and so far last time by the North Atlantic Council in response to the terrorist attacks of 11 September 2001 on the following day.[43] However, the United States did not accept this display of transatlantic solidarity but preferred to go it alone against Al Qaeda and the Taliban regime in Afghanistan that supported the terrorists. The Bush administration did not need the support of its allies who could only contribute little to the high-tech military campaign launched by the United States. It did not want the participation of the other members of NATO in the framework of the alliance in order to avoid involvement in a "war by committee", i.e. military action for which consensus within the alliance would have been required. Instead the American superpower opted for the exercise of its right of self-defence, which was widely recognised in-

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[41] See its report, The Responsibility to Protect published in December 2001, http://wwwdgait-maeci.ge.ca/iciss-ciise/report2-en.asp.

[42] World Summit Outcome, see note 30, paragraphs. 138 and 139.

[43] Ironically, the situation was completely different from the *casus foederis* envisaged by the founding fathers of the alliance. What they had in mind was an armed attack on one or more European allies by the members of the Warsaw Treaty Organisation, with the United States assisting the victim(s) of the attack. In contrast, the 9/11 attacks were not launched by States but by a non-State terrorist network and against the American superpower to which the other allies offered their help.

ternationally,[44] with the ad hoc support of numerous other States, not only NATO members.

"Operation Enduring Freedom" raised several interesting issues in the context of Article 51 of the UN Charter: Could an armed attack also be carried out with "unorthodox" arms such as hijacked civilian planes flown into buildings? Could it not only be perpetrated by States but also by non-State actors like a transnational terrorist organisation? Was a military response to an armed attack that had already been completed included in the lawful exercise of the right of self-defence? And did self-defence within the bounds of Article 51 extend to States actively aiding and abetting terrorists or failing to take action against them?

The cooling of transatlantic relations in the wake of "Operation Enduring Freedom" in 2001 was exacerbated by the rift within the alliance as a result of "Operation Iraqi Freedom" two years later. The Atlanticist Western European Member States, as well as the recently admitted new members[45] and applicants for membership from the former Soviet bloc, supported the use of armed force against the regime of Saddam Hussein in Iraq. In contrast, the States of "old Europe", led by France and Germany, opposed it. The legal reason for their opposition was their insistence on another Security Council resolution explicitly authorising the use of all necessary means, which the advocates of invading Iraq deemed desirable but not necessary.

Solidarity between the two sides of the Atlantic Alliance reached a low ebb during the two terms of office of the Bush administration. Transatlantic estrangement was further fuelled by growing awareness of differences in the value systems of the partners. They led to disagreement over the death penalty, the role of religion in politics and the emphasis placed on the protection of the environment. Moreover, although Americans and Europeans agreed on the main threats to their security, their responses differed considerably. The United States stressed unilateral action, including the use of armed force, and downplayed multilateralism and international institutions.[46] In contrast, the EU's strategic concept was and is founded on a broad understanding of security. The

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[44] In particular by the UN Security Council in the preambles to S/RES/1368 (2001) of 12 September 2001 and S/RES/1373 (2001) of 28 September 2001.

[45] The Czech Republic, Hungary and Poland became members of NATO in 1999.

[46] See *The National Security Strategy of the United States* of 20 September 2002.

Union also tries to tackle the root causes of conflicts by political and economic means. Furthermore, Europeans favour "an international order based on effective multilateralism", with "well-functioning international institutions and a rule-based international order".[47]

With regard to international law, even allies of the United States are irritated by the double standard practiced by the American superpower.[48] For instance, the United States demands that individuals responsible for grave breaches of international humanitarian law be tried by international judicial bodies but, at the same time, it insists that its own nationals must be exempted from the jurisdiction of international criminal tribunals and courts. In the same vein, the United States calls for worldwide respect for human rights but is reluctant to consent to be bound itself by international human rights treaties. Americans and Europeans also part company when it comes to accepting other, even more far-reaching restrictions on sovereignty, above all membership of supranational organisations.

Not for the first time, differences of opinion within the alliance were swept under the rug, and NATO returned to "business as usual". The centre of its activities has been transferred from Europe to Afghanistan in recent years.[49] As in Iraq, military victory claimed by the United States was short-lived and did not end the conflict in the country. The pro-Western government of President Hamid Karzai had difficulties in maintaining law and order in Kabul and its vicinity and was unable to extend its control over the rest of Afghan territory. Therefore the UN Security Council launched a peace operation with a moderately robust mandate. The International Security Assistance Force (ISAF) was tasked by the Council with assisting the Afghan Interim Authority in maintaining security in Kabul and its surroundings and was authorised to take all necessary measures to fulfil its mandate.[50] After individual States took turns as lead nations of ISAF, NATO assumed this function in 2003. In the meantime, the Taliban and Al Qaeda have resurfaced and

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[47] As stated in the European Security Strategy *A Secure Europe in a Better World* which was adopted by the European Council on 12 December 2003.

[48] On the legal dimension of transatlantic relations in general, see M. Byers/G. Nolte (eds.), *United States Hegemony and International Law*, 2003; H. Neuhold (ed.), *Transatlantic Legal Issues – European Views,* Vienna 2005.

[49] A. Khan, "NATO in Afghanistan", *Strategic Studies* 27 (2007), 59 et seq.

[50] S/RES/1386 (2001) of 20 December 2001, paragraphs 1-2. The area of operation was extended by S/RES/1520 (2003) of 23 October 2003.

the warlords gained control over large parts of the country. They have been reinforced by foreign fighters and terrorists from Iraq and elsewhere. Record poppy crops provide the necessary financial basis for the insurgency.

NATO forces in Afghanistan are thus involved in asymmetrical warfare against irregular forces and terrorists who are inflicting a growing number of casualties on them. ISAF is further weakened by dissent about national caveats, i.e. restrictions on the use of force and the area of operations of the contingents of certain Member States, for example, those of Germany, France and Italy. In contrast, others, notably the United States, the United Kingdom and Canada, conduct combat operations and suffer recurrent fatalities. This has led to complaints about a lack of solidarity and unequal burden sharing,[51] exacerbated by demands for troop reinforcements which Member States are reluctant to contribute.[52] It is thus ironic that NATO is confronting the litmus test for its continued relevance not in the North Atlantic region but in Central Asia where allied solidarity is again strained.[53]

The future of transatlantic solidarity seems uncertain. It may be eroded by more diffuse threats and different political and economic priorities, both domestically and internationally, of the main actors. Worst of all, Europeans may be tempted to define their identity by using the United States as "The Other" from which they are different. On the other hand, Americans and Europeans may and should realise that they have to cooperate in order to cope with the numerous global challenges humankind is facing and that they still have much more in common with each other than with the other major players in today's interdependent world. Therefore, Euro-American solidarity ought to exceed that between other major international partners. In any event, much will depend on the new administration of President Barack Obama who took office in January 2009. His views and policies are much closer to the

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[51] Thus a British Member of Parliament criticised the German troops for drinking tea while others were fighting.

[52] Although more than 50,000 ISAF troops are already deployed in Afghanistan.

[53] A. Khan, see note 49; A. A. Michta, "What Next for NATO?", *Orbis* 51, no. 1 (Winter 2007), 155 et seq. For a proposal to transform NATO into a global alliance of democratic States to meet today's global threats, see I. Daalder/J. Goldgeier, "Global NATO", *Foreign Affairs* 85, no. 5 (September/October 2006), 105 et seq.

positions of the European allies than those of his predecessor's administrations.[54]

IV. The EU: European Security Limited?

The development of the EC/EU is a unique integration project which could not have been achieved without unprecedented international solidarity, both in terms of common interests and values as well as growing sympathies between the partners. It was initiated as a political project to be realised by economic means within the framework of a supranational community. However, the "spill-over" of economic integration into the areas of foreign and security policy predicted by functionalist and neo-functionalist theory has only slowly and partly taken place.[55] In particular, the expectation that the exceptional solidarity within the Union would also lead to mutual assistance commitments against armed attacks on Member States, i.e. the creation of a military alliance within the EU, has not yet materialised. As will be explained below, a watered-down collective defence obligation is included in the 2007 Lisbon Treaty on European Union (TEU).

It may be recalled that the plan announced by the French Foreign Minister Robert Schuman on 9 May 1950 was designed to make war between participating States, first and foremost the "archenemies" France and Germany, practically impossible by creating a "*solidarité de fait*" between them. As a first step, the two key sectors of military industry, coal and steel, were submitted to the control of a supranational authority in the framework of the European Coal and Steel Community (ECSC) which came into being in 1952. Economic integration between the six founding members was placed on a broader foundation with the creation of the European Economic Community (EEC) and the Euro-

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[54] However, it is questionable whether NATO, a military alliance, is best qualified to cope with global threats in the areas of "soft security". These doubts include the struggle against terrorists who do use force which, however, is "irregular" and "asymmetrical" and may better be countered by special police units and not by soldiers.

[55] D. Mitrany, *A Working Peace System*, 1943; E. Haas, *The Uniting of Europe*, 1958, and *Beyond the Nation State*, 1964.

pean Atomic Energy Community by the two Rome Treaties of 1957 which entered into force the following year.[56]

The three key values on which European integration is built are democracy, human rights and the rule of law, coupled with a market economy which also has social and environmental underpinnings. These principles have been invoked time and again in EC and EU treaties and other documents. They are mainly, albeit not exclusively, of European origin, and enlightened Europeans had to fight for them for centuries. During the Cold War, these typically "Western" values were challenged by Marxist/Leninist ideology and Soviet power but eventually prevailed. After the collapse of the communist regimes in Eastern Europe, they were also embraced by the peoples and governments on the other side of the former Iron Curtain.

Solidarity is a term and a concept that can be found in relevant EC/EU instruments from the beginning. To solely focus on the programmatic parts of the relevant treaties, the 1951 Treaty constituting the ECSC already states in its preamble that Europe can be built only by concrete actions which create a real solidarity.[57] Interestingly, the 1957 Treaty establishing the EEC does not refer to solidarity among Member States but to solidarity which binds Europe and overseas countries and the desire to ensure the development of their prosperity.

The preamble to the 1992 Maastricht Treaty TEU proclaims the contracting parties' desire to deepen the solidarity between their peoples while respecting their history, their culture and their traditions. Article A(3) of the treaty tasks the EU with organising, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples. These principles are reiterated in the preamble to and in article 1(3) of the 1997 Amsterdam TEU.

Moreover, the principle of solidarity between Member States is enshrined in article 2(3) of the 1997 Amsterdam Treaty establishing the European Community (TEC). In addition, the preamble to this treaty

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[56] A step in the direction of broadening the positive psychological basis of solidarity, the community feeling, was the Élysée Treaty between France and the Federal Republic of Germany signed by President Charles de Gaulle and Federal Chancellor Konrad Adenauer on 22 January 1963. This treaty not only provided for cooperation in the areas of foreign affairs and defence but also education and youth, from language teaching to collective exchanges between young people.

[57] And by the establishment of common bases for economic development.

calls for the reduction of the differences existing between the various regions and the backwardness of the less-favoured regions.[58] As in the above-mentioned 1957 constituent treaty of the EEC, the preamble to the Amsterdam TEC extends the concept of solidarity to the Union's relations with overseas countries, whose sustainable economic and social development and a campaign against their poverty are to be fostered.[59] These principles are restated in the Lisbon TEU and Treaty on the Functioning of the European Union (TFEU) signed in the Portuguese capital on 13 December 2007.

However, the attempt to extend economic to military integration failed when the French *Assemblée Nationale* rejected the Treaty on the establishment of a European Defence Community in 1954. Moreover, with the exception of neutral Ireland, all EC Member States were members of NATO throughout the Cold War. They felt that their security was better guaranteed by the Atlantic Alliance, led by the American superpower, than by an exclusively European collective defence organisation. For the same reason, the Western European Union (WEU), an alliance of eventually ten Western European States, dating back to the 1948 Brussels Treaty on Economic, Social and Cultural Collaboration and Collective Self-Defence amended by the 1954 Paris Protocol, took a back seat to NATO.[60]

The result was a community of European States which was characterised by an insider as "an economic giant, political mouse and military worm".[61] In order to redress this imbalance, limited cooperation was developed in the areas of foreign and security policy. The modest be-

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[58] This goal is translated into reality through EC cohesion policies. See Title XVII (articles 158-162) of the TEC on Economic and Social Cohesion, with its focus on reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions or islands, including rural areas. The necessary financial means are mainly provided by the Structural Funds and the European Investment Bank. The admission of ten less wealthy former "socialist" countries to the EU in 2004 and 2007 increased the challenge of filling the prosperity and development gaps within the Union.

[59] Article 3(1)(r) and (s), article 177(1) and the other provisions of Title XX (articles 177-181) of the TEC on Development Cooperation. See also articles 182-188 on Association of the Overseas Countries and Territories.

[60] A. Bloed/R. A. Wessel, *The Changing Functions of the Western European Union (WEU): Introduction and Basic Documents*, 1994.

[61] "… Europa, economische reus, politieke muis en militaire worm, …", M. Eyskens, *Bron en Horizon: Het Avondland uit de Impasse*, 1987, 316.

ginnings in the context of European Political Cooperation[62] were enhanced after the end of the Cold War when undiminished U.S. engagement in Europe could not be taken for granted and Europeans realised that they had to do more to keep order on their continent, including the Balkan "backyard". Consequently, the CFSP was added as the "second pillar" of the new EU in the Maastricht TEU.[63] Article J.4(1) covered "all questions related to the security of the Union". Moreover, it envisaged the eventual framing of a common defence policy, which might in time lead to a common defence.[64] The Amsterdam TEU, especially with the inclusion of the so-called Petersberg tasks[65] as EU missions, and the 2001 Nice TEU also contained provisions strengthening the EU as an international political and military actor.

However, in contrast to the supranational "first pillar", the CSFP has remained intergovernmental. Member States were ready for unprecedented transfers of power to an international organisation in the economic realm. They accepted majority decisions by a ministerial council in numerous important areas. An independent organ, the Commission, was given a monopoly on legislative initiative and far-reaching executive powers. A genuine parliament, directly elected by the citizens, was endowed with legislative co-decision competences. Access to a court of justice with compulsory jurisdiction was also opened to natural and legal persons. In contrast, this institutional system of checks and balances within the EC was tilted in favour of the organs representing the governments of Member States at the "summit" and ministerial levels in the

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[62] Under article 30(6)(a) of the Single European Act of 1986, security cooperation was limited to closer coordination on the political and economic aspects of security, which meant the exclusion of the crucial military dimension.

[63] S. Keukeleire/J. MacNaughtan, *The Foreign Policy of the European Union*, 2008.

[64] Although the Maastricht Treaty did not define these two terms, they clearly indicate an enhancement of solidarity in the area of security policy. In particular, "common defence" could either be understood as the equivalent of "collective defence", i.e. joint action against an armed attack by an external aggressor, with Member States retaining their separate armed forces; or it could mean the creation of the EU's own armed forces, a European army.

[65] These tasks are humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, a euphemism for military enforcement operations. They owe their name to the Petersberg conference centre near Bonn where the foreign and defence ministers of the WEU had agreed on them as activities of their alliance in 1992.

"second pillar". As a result, the European Council and the Council dominate, with each member having the right to block basic decisions. The Commission shares the right of legislative initiative with the Member States. The European Parliament has no co-decision powers. The European Court of Justice is kept on the sidelines.

Solidarity among EU members has evidently not yet reached a degree where they are willing to substantially limit their sovereignty in its hard core, foreign affairs and security. At the same time, these States have also subscribed to solidarity as a principle in the treaty provisions on the CFSP. Thus article J.1(4) of the Maastricht TEU already obligated members to "support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity". This formula was reiterated in article 11(2) subparagraph 1 of the Amsterdam and Nice TEU. It was followed in subparagraph 2 by the obligation of Member States to work together to enhance and develop their mutual political solidarity and to refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.[66] These obligations were also included in article 24(3) of the Lisbon TEU.[67] Moreover, under article 24(2) of this treaty the Union shall conduct, define and implement a CFSP, based on the development of political solidarity among Member States, the identification of questions of general interest[68] and the achievement of an ever-increasing degree of convergence of Member States' actions.

However, only modest, although useful, progress has been achieved in the field of security policy, interestingly mainly outside the treaty framework through decisions of the European Council and Council.

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[66] That it was deemed necessary to include the latter commitments indicates the weak foundation of solidarity among EU Member States in these policy areas.

[67] Furthermore, article 23(1) subparagraph 2 of the Amsterdam and Nice TEUs introduced the possibility of "constructive abstention". If a member of the Council qualifies its abstention by making a formal declaration under this subparagraph it shall not be obliged to apply the decision. However, in a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on the decision and the other Member States shall respect its decision. This option was also retained in article 31(1) subparagraph 2 of the Lisbon TEU.

[68] As mentioned in the introduction, one of the foundations of solidarity. See above, I.

The initiative leading to the ESDP was taken by France and the United Kingdom against the backdrop of the failure of European States to stop the "ethnic cleansing" of the Albanian majority in Kosovo by Serb forces without U.S. assistance.[69] At a summit meeting held in Saint-Malo on 3-4 December 1998, the political leaders of the two main military powers within the EU pressed for a military crisis management capability within the Union.[70] One year later, at its meeting in the Finnish capital on 10-11 December 1999, the European Council adopted the so-called Helsinki Headline Goal 2003. Agreement was reached on a (relatively) rapid reaction force of 50,000 to 60,000 troops as the main instrument of the new ESDP. It was to be deployable within 60 days, sustainable for at least one year and capable of the entire range of the Petersberg tasks.[71]

Guided by the European Security Strategy adopted by the European Council on 12 December 2003, the EU has launched more than 20 ESDP operations since 2003, not only in Europe and its neighbour-

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[69] On the ESDP in general, see A. Deighton, "The European Security and Defence Policy", *Journal of Common Market Studies* 40 (2002), 719 et seq.; J. Klein/P. Buffotot/N. Vilboux, *Vers une politique européenne de sécurité et de défense*, 2003; H.-G. Ehrhart/B. Schmitt (eds.), *Die Sicherheitspolitik der EU im Werden – Bedrohungen, Aktivitäten, Fähigkeiten*, 2004; N. Gnesotto (ed.), *EU Security and Defence Policy: The First Five Years (1999-2004)*, 2004; A. Rotfeld, "L'Union a-t-elle besoin de la PESC?", *Politique Étrangère* 69 (2004), 361 et seq.; T. Salmon, "The European Security and Defence Policy: Built on Rocks or Sand?", *European Foreign Affairs Review* 10 (2005), 359 et seq.; S. Dietrich, *Europäische Sicherheits- und Verteidigungspolitik (ESVP)*, 2006; W. van Eekelen, *From Words to Deeds: The Continuing Debate on European Security*, 2006; J. Howorth, *Security and Defence Policy in the European Union*, 2007.

[70] French President Jacques Chirac and Prime Minister Lionel Jospin, as well as British Prime Minister Tony Blair, called for the EU's "capacity for autonomous action, backed up by credible military forces, the means to decide to use them, and a readiness to do so, in order to respond to international crises". Moreover, this capacity was to be developed within the institutional framework of the EU, and not NATO, as the United States would have preferred.

[71] At the Capabilities Commitment Conference in Brussels on 20-21 October 2000, all but one of the then 15 Member States pledged about 100,000 troops, 400 combat aircraft and 100 navy vessels. The exception was Denmark which the European Council had exempted in 1992 from participation in the EU's defence policy in order to facilitate a positive vote in the second referendum on the Maastricht Treaty in 1993, which Danish voters had rejected in a first popular vote in 1992.

hood, but also in Sub-Saharan Africa and Indonesia. In addition to peacekeeping operations, police, rule of law and security sector reform missions have been undertaken. This quantitatively impressive record should not conceal the fact that a typical ESDP operation is not tasked with a very demanding mandate, involves a low number of personnel and is of limited duration.[72]

After the Treaty establishing a Constitution for Europe, signed in Rome on 29 October 2004, had been submitted to a referendum and rejected by voters in France and the Netherlands, its main substance was included in the Lisbon "Reform Treaties" of 2007. Both the new TEU and the TFEU also contain innovations in the fields of the CFSP and ESDP.[73] In the latter area, several exceptions to the requirement of unanimity are introduced. They fall into the category of what in EU terminology is referred to as variable geometry; in the context of this essay's topic, they could also be called variable solidarity. Several provisions authorise those Member States that are ready to do so to engage in closer security cooperation, for which stronger solidarity between them provides the political basis.

Thus article 20 of the Lisbon TEU extends enhanced cooperation among a minimum number of nine Member States to the entire spectrum of the Union's non-exclusive competences which include the CFSP and ESDP;[74] in contrast, article 27b of the Nice TEU excluded matters having military or defence implications from such cooperation.

Participation in the European Defence Agency (EDA) is optional in accordance with article 45(2). The Agency's principal task is to help to improve the military capabilities of Member States, mainly through

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[72] For details of two recent major ESDP operations with more challenging tasks, EUFOR Chad/RCA and EULEX KOSOVO, see H. Neuhold, "The European Union at the Crossroads: Three Major Challenges", in: P. Fischer et al. (eds.), *Die Welt im Spannungsfeld zwischen Regionalisierung und Globalisierung: Festschrift für Heribert Franz Köck*, 2009, 253 et seq.

[73] Its name has been changed to Common European Security and Defence Policy in the two treaties. E. Regelsberger, "Von Nizza nach Lissabon – das neue konstitutionelle Angebot für die Gemeinsame Außen- und Sicherheitspolitik der Union", *integration* 31 (2008), 266 et seq.

[74] See also articles 326 et seq. of the TFEU.

proposals, harmonisation and coordination in the areas of research, technology and procurement.[75]

By virtue of article 42(5), the Council may entrust the execution of a task, within the Union framework, to a group of Member States in order to protect the Union's values and serve its interests.[76] The other members that do not take part in such action must observe loyalty and mutual solidarity.

Moreover, Member States with military capabilities fulfilling higher criteria and with more binding mutual commitments with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework under article 42(6).[77]

Most importantly for the topic at hand, article 42(7) provides: "If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter." However, this commitment is followed by the so-called Irish clause:[78] The assistance obligation "shall not prejudice the specific character of the security and defence policy of certain Member States." In addition, commitments and cooperation in this area shall be consistent with commitments under NATO, which for its members remains the foundation of their collective defence and the forum for its implementation.[79] Therefore, although article 42(7) marks a breakthrough in principle, it constitutes a compromise between Member States that prefer an independent European defence, the Atlan-

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[75] A general provision on the EDA is contained in article 42(3) subparagraph 2 of the Nice TEU.

[76] In other words, an ad hoc coalition of able and willing members may be authorised to take measures necessary to safeguard the two pillars of solidarity. This provision merely includes an already existing practice in the Treaty.

[77] Permanent structured cooperation is further specified in article 46 and Protocol No. 10 to the Treaty. In plain English, it essentially requires participation in the Battle Group project explained below and the EDA.

[78] This provision was already included in article J.4(4) of the Maastricht TEU at the insistence of Ireland which thereby safeguarded the continuation of its neutrality as a member of the Union. It was also reiterated in subsequent TEUs (article 17([1] subparagraph 3 of the Amsterdam TEU, article 17[1] subparagraph 2 of the Nice TEU).

[79] Both the "Irish" and NATO clauses are already mentioned in article 42(2) of the Lisbon TEU.

ticists who continue to primarily rely for their security on NATO, and those which still reject mutual military assistance obligations.

In addition, the TFEU comprises a provision explicitly mentioning solidarity already in its title. According to article 222 of this treaty, "The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the victim of a terrorist attack or man-made or natural disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States…" In other words, solidarity must be practiced by all and not only some members against attacks by non-State actors, who pose one of the main threats to national security these days. Yet, mutual assistance in the event of such major emergencies should of course be granted within a close-knit community like the EU, even without a formal contractual obligation. Moreover, according to the Lisbon Treaty it is up to each member to decide which resources it is ready to place at the Union's disposal.[80]

The main step forward accomplished by these provisions lies in the extension of solidarity to the area of "hard" security, at least in principle. Indeed, it is strange that the members of the international organisation with the highest degree of integration have been lagging behind the less homogeneous UN with its 192 Member States and NATO with the above-mentioned differences between the transatlantic allies. The reasons for this paradox are all too obvious. As already pointed out, some EU members still insist on maintaining neutrality, the opposite of solidarity (Austria, Ireland) or non-membership of military alliances (Finland, Sweden). Others, like the United Kingdom, Denmark, Portugal and the recently admitted post-communist States from Central and Eastern Europe prefer to have their security guaranteed by NATO and rely on the military strength of the American superpower. As a result, on the one hand, the new EU assistance obligation is more categorical ("by all the means in their power") than its counterpart in the Washington Treaty. On the other hand, the "Irish clause" makes the EU an alliance *à la carte*. Moreover, the reference to NATO is a reminder of the Atlanticist orientation of some members.

After the Lisbon Treaty was rejected in the Irish referendum on 12 June 2008, its entry into force is uncertain at this writing. However, similar

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[80] Pursuant to Declaration No. 37 annexed to the Final Act of the Lisbon Intergovernmental Conference which adopted the Treaty of Lisbon, each Member State has the right to choose the most appropriate means to comply with its own solidarity obligation.

to NATO,[81] some more progress in the area of the ESDP has again been achieved without a treaty basis in recent years.

For instance, the solidarity clause in the Constitutional Treaty was already activated by the Council after the terrorist bombings of two commuter trains in Madrid on 11 March 2004 and was made politically binding by the European Council's Declaration on Combating Terrorism two weeks later. Furthermore, the Council also established the EDA provided for in article I-41(3) subparagraph 2 of the constitutional treaty on 12 July 2004.[82]

Most importantly, on 17-18 June 2004 the Brussels European Council endorsed the Headline Goal 2010 which the General Affairs and External Relations Council had approved on 17 May 2004. The new goal set the stage for the development of the Battle Groups, the main military instrument of the above-mentioned permanent structured cooperation.[83] Each of these military units consists of approximately 1,500 soldiers from one or several Member States.[84] Battle Groups should be deployable worldwide within ten days after the decision to launch an operation. Consequently, they will constitute a genuine rapid reaction force.[85]

However, the remaining weaknesses of the CFSP/ESDP must not be overlooked. They range from a qualitative equipment deficit, including long-range force projection capabilities and satellite reconnaissance, to the lack of standing European armed forces. European defence expenditures are deemed insufficient for the Union to play a major international role as a military actor. To make matters worse, defence budgets and procurement remain a national and not an EU matter, which leads to duplication and a waste of scarce resources. The essentially intergovernmental nature of the CFSP continues to limit the latter's effectiveness. Moreover, despite the "Berlin plus" agreement,[86] relations be-

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[81] See above, III.

[82] Joint Action 2004/551/CFSP.

[83] G. Lindstrom, *Enter the Battlegroups,* 2007; J.-Y. Haine, "Battle Groups: out of necessity, still a virtue?", *European Security Review* 39 (2008), 1 et seq.

[84] EU Member States pledged contingents for 13 Battle Groups in Brussels on 22 November 2004.

[85] Unlike the force to be established according to the Helsinki Headline Goal 2003 which called for deployment within 60 days.

[86] Under this agreement contained in a classified exchange of letters of 16 December 2002, NATO gives the EU, in particular, assured access to its plan-

tween the Union and NATO, above all the United States, continue to be ambivalent. Finally, the international "*finalité politique*" of the EU, its ultimate role in world politics, has still to be agreed upon.

V. Conclusions

The picture that emerges from the developments discussed above is not very encouraging. On the positive side of the balance at the universal level, inter-State relations have become less antagonistic and polarised than during the Cold War. Governments are increasingly aware that global challenges, including those in the realm of international security, require worldwide cooperation. Unfortunately, in many cases national political, economic and ideological interests still prevail over global solidarity. For instance, although climate change, pandemics and poverty have also been recognised as security problems,[87] the measures taken against the greenhouse effect and HIV/AIDS, as well as in the field of development cooperation, are still woefully inadequate. The effectiveness of the UN system of collective security declined after the successful initiatives taken by the Security Council in the early 1990s. More recently, substantial agreement within the Council has become increasingly difficult. The result is consensus on a low common denominator at best, if decisions are not blocked altogether by the opposition of a permanent member. Recent examples include the failure of the Council to take effective action against the repressive regime of President Robert Mugabe in Zimbabwe, in the conflict between Georgia and Russia over South Ossetia and Abkhazia and the latest round of fighting between Israel and its Arab neighbours.

Solidarity within NATO has seen better days too. The alliance is confronted with more diffuse threats to which military action does not provide adequate solutions. Moreover, the price that had to be paid for NATO enlargement to the East has been diminishing cohesion. The security priorities of the newcomers from the former "socialist" bloc differ from those of "old" Member States. Moreover, some see the alliance as a tool of the United States for controlling the European allies and

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ning capabilities. The agreement owes its name to the fact that its contents go beyond the terms of an agreement reached between NATO and the WEU in Berlin in 1996.

[87] See note 25.

preventing them from taking action opposed by the administration in Washington D.C. What would be required is a genuine transatlantic partnership between equals. However, this would need, on the one hand, the acceptance of a larger part of the common security burden, including military expenditures, by the European partners and, on the other hand, the readiness of the United States to share leadership with its allies on the other side of the Atlantic. The Obama administration has declared its readiness to give Europeans more of a say in exchange for enhanced contributions to common security. Whether and to which extent this programmatic new beginning in transatlantic relations will lead to concrete action, especially in the context of NATO, remains to be seen.

Despite some undeniable progress, the EU is also struggling with a solidarity deficit in the area of security. To give two other examples that also have security implications: Member States cannot agree on an equitable sharing of the burden caused by African refugees whose boats land in southern Italy, the Canary Islands and Malta. Similarly, the crisis triggered by the stoppage of Russian gas supplies highlighted the lack of solidarity in the crucial energy sector.[88] What is lacking is a European "we-feeling" based precisely on the values invoked in EC/EU treaties and a common reading of the continent's history. In this context, it is interesting to note that over the years Eurobarometer opinion polls have shown that clear majorities of about 75% are in favour of a more active role for the Union in world politics. This strong support should encourage European political leaders to move ahead, albeit cautiously,

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[88] Energy security, defined as sufficient and reliable access to energy supplies at reasonable and affordable prices, is a dimension of security that has become increasingly important in recent years.. According to. the new article 194 of the TFEU, Union policy on energy shall aim, *in a spirit of solidarity between Member States* (italics added) to ensure: the functioning of the energy market; ensure security of energy supply in the Union; promote energy efficiency and energy saving and the development of new and renewable forms of energy; and promote the interconnection of energy networks. However, measures taken to these ends shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply. Actual solidarity between EU members left a great deal to be desired in the most recent energy crisis in January 2009. The shortage was caused by the interruption of deliveries of Russian gas in the context of the conflict with Ukraine over unpaid gas bills by the latter and the future gas price. Some EU Member States with sufficient reserves did not offer gas to those which badly needed it.

in the area of security policy, if necessary even without a treaty basis. Ironically, new initiatives in the "hard core" of State sovereignty could become the driving force behind further integration in Europe.

Concluding Remarks

Rüdiger Wolfrum

This has been a very interesting day with extremely valuable contributions. Although my expectations were quite high, the result is even better. Therefore, my concluding remarks are certainly tentative and open for challenge and correction.

Already yesterday I was asked: "What is the purpose of this seminar?" I could have said: "Look, we are an institute for doing fundamental research. And the only justification we have for doing research and having such a conference is curiosity". But I will give you four reasons, four reasons why I believe that this seminar was useful or even called for.

First of all, I believe that it is essential, or at least necessary, to fathom where we stand in respect of this principle referred to as solidarity – being referred to in statements of the General Assembly, the Security Council, in the context of the European system and very much in literature, but also in other regions. You find solidarity for refugees in the African Charter and many African constitutions. Africa has its own system for the protection of refugees, which is much more solidarity-oriented than our system and has a more humanitarian approach. And if you go through international instruments pertaining to other regions, you would find further examples. That was my first argument.

Secondly, I want to stimulate research in that respect. Later, I will indicate areas where further research can, should or should not be done.

Thirdly, I am taking up the words from Dr. Dann: "We want to develop a tool, one among others, which one may use to assess international law". And one may use it in the context of legitimacy. Please consider this seminar as a continuation of the seminar on legitimacy in 2006. You may remember that one may judge the legitimacy of a measure or an act against the procedure in which it was adopted or on the basis of its re-

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sult. If you consider the result as being relevant, meeting the standards of solidarity would be one of the parameters one might take into consideration.

Fourthly and finally, it is possible, empirically, to establish common features or leading features within a particular regime. This would be a tool to differentiate one regime from another. The consequential question would be: "Which are the consequences you draw from qualifying a regime being based upon solidarity?" Perhaps you would say: "None", but I have the view and the feeling that there might be consequences.

Further research should be undertaken to define the notion of solidarity. I would like to follow Laurence's definition, namely, mutual assistance as the first element within a system which shares common values. Jochen Frowein has put it differently stating that every community in the true sense of the meaning has to imply the principle of solidarity. Otherwise, since the entities within the community need a mechanism to harmonise their activities, this community will not survive. Dinah Shelton has advanced another chain of thinking in that respect, namely – and this was endorsed by Yoram Dinstein – that communities – you said it about the human race – have a mechanism of self-preservation. As we humans have the mechanism to preserve our species, so have communities a certain tendency for self-preservation. In that respect solidarity is the most important stabilising element.

What are the other roles of the principle of solidarity? The writers who have been referred to are Christian Wolff, Emer de Vattel and Johann Caspar Bluntschli, and it is interesting to note how Christian Wolff developed the principle of solidarity. Christian Wolff belonged to those who tried to explain international law without referring to the bible. Nevertheless, here he used an expression from the bible, namely that every single human being owes a certain obligation to assist one's next. And he said if that is an individual obligation, the same applies for States. The same approach has been adopted by Vattel and later by Bluntschli, however, it is not totally clear whether Bluntschli or Vattel considered solidarity as a legal obligation. This idea has been forgotten, but as it has been pointed out by several that within the French Revolution with *fraternité*, there was a certain reference to solidarity. It was Jean-Pierre Cot who indicated that the principle of solidarity was not so much coined in legal terms as the principle of *liberté*, for example. There are, however, also in international law, at least in regional contexts, references to solidarity I already alluded to, but also in international agreements such as the Convention against Desertification which

uses the word solidarity explicitly. Therefore, one should go through international law to see to what extent these international agreements or customary international law either explicitly refer to solidarity or where you can argue by looking into these agreements that they are structured or based upon the notion of solidarity.

Now let me come to the crucial question. First, I would say that solidarity is certainly not a principle which governs international law as such. That would be hardly sustainable, as clearly shown by our first speaker. The following presentations followed exactly the same path and therefore, this seminar as a unit gave a very clear picture of where we have this structure. Philipp Dann, by looking into the regime of development assistance, distinguished between horizontal and other forms of solidarity. And here the question came up first: "To whom solidarity is owed: to the other State, to another population, or to the community, or to individuals?" Let me put that aside for this is an intriguing question that raises certain further elements. Laurence has also looked into the responsibility to protect and showed the interaction with the principle of solidarity. For me, her presentation was kind of a test case for solidarity. And she went through the definition which I used at the beginning of this concluding observation, and established that there is the obligation or the responsibility for assistance as a value-based system and that there are mutual rights and obligations. The result of her presentation was quite clear, namely, that if this regime would ever enter into hard law we would face a change in the perception of the international law. For out of a sudden, we would not only have the obligation or the responsibility of a State, to adhere to human rights with respect to its own citizens in its territory, but we would go beyond that. In environmental law, intergenerational equity came into play. This has been well elaborated by Dinah. Further examples are argued by Hanspeter Neuhold that Chapter VII of the UN Charter is based upon solidarity. I also would like to refer to the Law of the Sea Convention in two cases: Part XI on deep sea-bed mining has definite elements of solidarity, but also the very traditional obligation to render assistance in case of a natural or other emergency for ships is built thereupon.

Let me come to my next point: Who is the addressee? I briefly touched upon that already. Is it State to State, State to the community, or State to the population? In respect of the last point, the argument has been made that this is being undermining the status or the role of the State. If there was a responsibility to render assistance to the population of a given State against the wish of the government, is this undermining the

role of the State? What is a State there for? Let us not render the State absolute. The State is a servant to the population and should not be in the position to stop the assistance which could have been rendered.

What is the relationship of this principle to other principles? Legitimacy – I have already touched upon that. Solidarity may be another mechanism to enforce legitimacy. I would not say legitimacy always requires solidarity, but this may be an additional tool.

To be qualified as a legal principle, there must be some form of mutual rights and obligations. This has nothing to do with reciprocity. Certainly, solidarity is something else and more than cooperation. Cooperation is lacking at least one of the three elements. Cooperation takes place outside a value-oriented system. And here, I see a difference to reciprocity. Reciprocity means that "one fulfills an obligation in the expectation that the other one is doing the same". If that is not working, then the obligation becomes void. This, I strongly emphasise, is not the case with solidarity. Here the action of the other side is not a precondition for fulfilling its solidarity obligations.

Let me finally say two things. To say what the principle of solidarity is achieving or what it is not achieving would, in my view, go too far. I do not consider the principle of solidarity as a legal principle from which one may deduct concrete rights or obligations. Certainly neither in international law, in general nor in particular regimes. In that respect I would consider the principle of solidarity as a misconception. You cannot say: "There is solidarity, therefore you have to do that and that". Whether international law will develop into this direction is a totally different question. I believe Laurence has made quite clear that this is even doubtful under the notion of the responsibility to protect and this responsibility is perhaps less than a legal obligation.

Having said what solidarity is not, now let me try to establish what it is. First, I take it that the principle of solidarity may be inherent in some regimes, but not in every regime. This principle gives us a better understanding of the content and structure of a particular regime. As such, it is a tool for the interpretation. Secondly it may be used to fill gaps or to modify inconsistencies. Also, it may be a tool to more properly differentiate between various legal regimes and to give an assessment of newly developing regimes. But in that respect, I consider the principle of solidarity rather as a mechanism for a better understanding of the international law and in the medium-term, perhaps as a means for progressive development of international law. Thank you very much.

List of Participants

von Achenbach, Jelena

Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Barbosa-Fohrmann, Ana Paula

Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg Germany

Bast, Jürgen

Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Bernhardt, Rudolf

Former Director at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany; Membre de l'Institut de Droit international

Beyerlin, Ulrich

Professor of Law, Max Planck Institute for Comparative Public Law and International Law, Heidelberg Germany

Binder, Christina

Assistant Professor of Law, Department for International Law and International Relations, University of Vienna, Vienna, Austria

von Bogdandy, Armin

Director at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Boisson de Chazournes, Laurence

Professor of Law, Department Public International Law and International Organization, University of Geneva, Geneva, Switzerland

Bolaños, Tania

Guest at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Brechtel, Cathrin

Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Bryde, Brun-Otto

Judge of the Federal Constitutional Court, Karlsruhe; Professor of Public Law and Political Science, Justus-Liebig-University Gießen, Germany

Carazo, Pía

Guest at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Chen, Yifeng

Guest at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Cot, Jean-Pierre

Judge of the International Tribunal for the Law of the Sea, Hamburg, Germany

Couma, Tidiani

Guest at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Dagron, Stéphanie

Research Fellow, Deutsche Hochschule für Verwaltungswissenschaften, Speyer, Germany

Dann, Philipp

Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Dinstein, Yoram

Former President, Tel Aviv University, Tel Aviv, Israel; Membre de l'Institut de Droit international

Doehring, Karl

Former Director at the Max Planck Institute for Comparative Pubic Law and International Law, Heidelberg, Germany; Membre honoraire de l'Institut de Droit international

Eitel, Tono

Former German Ambassador to the United Nations; Honorary Professor of Law, Ruhr-Universität Bochum, Bochum, Germany

Farahat, Anusheh

Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg Germany

Feinäugle, Clemens

Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Fernandez de Casadevante Romani, Carlos

Guest at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Frowein, Jochen

Former Director at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany; Membre de l'Institut de Droit international

Fuchs, Christine

Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Gebhard, Julia

Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Gogolin, Jana

Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Grewe, Constance

Professor of Law, Institut de recherche Carré de Malberg, University of Strasbourg, Strasbourg, France

Grote, Jenny

Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Havioglu, Berat Lale

Guest at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Heilmann, Daniel

Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Hilf, Meinhard

Professor of Law, Bucerius Law School, Hamburg, Germany

Hinsch, Wilfried

Professor of Philosophy, Faculty of Philosophy, RWTH Aachen University, Aachen, Germany

Holzer, Vanessa

Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Horna, Angel

Doctoral Candidate at the Graduate Institute of International and Development Studies, Geneva, Switzerland

Ioannidis, Michael

Guest at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Jacob, Marc

Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Kojima, Chie

Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg Germany

Koroma, Abdul G.

Judge of the International Court of Justice, The Hague, The Netherlands; Membre de l'Institut de Droit international

Lachenmann, Frauke

Senior Research Fellow at the Max Planck Institute for Comparative Law and International Law, Heidelberg, Germany

Macalister-Smith, Peter

Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Majinge, Charles

Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Mbuzukongira, Nzabona

Guest at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Molnár-Gábor, Fruzsina

Student Assistant at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Morales-Antoniazzi, Mariela

Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Morrison, Fred L.

Professor of Law, University of Minnesota Law School, Minneapolis, United States

Moshtaghi, Ramin

Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Neuhold, Hanspeter

Professor of Law and International Relations, University of Vienna, Vienna, Austria

Oellers-Frahm, Karin

Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Oeter, Stefan

Director, Institute of International Affairs, Faculty of Law, University of Hamburg, Hamburg, Germany

Pfeiffer, Julia

Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Philipp, Christiane

Senior Research Fellow/Head of the Editorial Department at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Reuss, Matthias

Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Riedel, Eibe

Professor Emeritus of Law, University of Mannheim, Mannheim, Germany; Professor of Human Rights, Graduate Institute of International and Development Studies, Geneva, Switzerland

Riegner, Michael

Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Röben, Volker

Professor of Law, School of Law, Swansea University, Swansea, United Kingdom

Rudolf, Walter

Professor of Public and International Law, Johannes Gutenberg University, Mainz, Germany; Membre de l'Institut de Droit international

Schmalenbach, Kirsten

Professor of Law, University of Graz, Graz, Austria

Seibert-Fohr, Anja

Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Shelton, Dinah

Manatt/Ahn Professor of International Law, The George Washington University Law School, Washington D.C., United States

Smrkolj, Maja

Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Steinorth, Charlotte

Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Sucker, Franziska

Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Tavakoli, Bijan

Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Thürer, Daniel

Director at the Institute of Public International and Foreign Constitutional Law, University of Zurich, Zurich, Switzerland

Tiroch, Katrin

Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Tomuschat, Christian

Professor of Law, Humboldt University, Berlin, Germany; Membre de l'Institut de Droit international

Treves, Tullio

Judge of the International Tribunal for the Law of the Sea, Hamburg, Germany; Professor of International Law, Faculty of Law, The State University of Milano, Milan, Italy; Membre de l'Institut de Droit international

Vöneky, Silja

Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Wellens, Karel

Professor of Law, Radboud University Nijmegen, Nijmegen, The Netherlands

Wenzel, Matthias

Student Assistant at the University of Tübingen, Tübingen, Germany

de Wet, Erika

Professor of Law, Amsterdam Center for International Law, Universiteit van Amsterdam, Amsterdam, The Netherlands

Wohlfahrt, Christian

Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Wolfrum, Rüdiger

Judge of the International Tribunal for the Law of the Sea, Hamburg, Germany; Director at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany; Associé de l'Institut de Droit international

Wood, Michael

Barrister, 20 Essex Street Chambers, London, United Kingdom

Zacharias, Diana

Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Zimmermann, Dominik

Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

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