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

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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

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* 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.

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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 –

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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 XXI^{ème} 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.

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