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Solidarity as a Practical Reason: Grounding the Authority of International Law

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Abstract

The article discusses the concept and the principle of solidarity in international law. It is often argued that solidarity is a(n) (emerging) principle of international law, yet its normative function in international law is not clear or well-defined. I trace the development of the idea of solidarity and show how its image gradually shifted from reflecting the factual societal bonds to being mainly normative and thus functioning as a reason for action. In international legal scholarship, solidarity is often portrayed as a principle of international law, but there is a lot of variety in which normative ideas we label as 'principles'. There are several groups of 'principles of international law' that are very different in the type of the normative function they perform in or for international law. I investigate to which of these groups solidarity belongs and what can it tell us about its role in international law. I suggest that solidarity is a kind of normative principle, which, though essential for legitimation of international law, is not legally normative by the function it performs. I draw a line between having a normative function within and outside the law, and use the concept of pre-emptive reasons to show why solidarity is not and should not be considered as a principle of international law in order to perform the normative function that it has. I argue that authority of international law requires that normative ideals such as solidarity are pre-empted, and therefore replaced in practical reasoning, by legal rules.

Keywords

Solidarity; Principles of international law; Authority of international law; pre-emption; legal normativity.

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Introduction

What does it imply to act on the basis of solidarity? What kind of practical considerations are involved when some actor (be that a person, a social group, or a political entity such as a state) claims that she acts in a certain way out of solidarity? More importantly, what is it to say that (international) law is grounded in, or structured by, the principle of solidarity? These questions are not only central to any attempt to justify a specific normative content of international law in the domains of environmental protection, climate change, international trade and development, etc. They may also relate to theoretical investigations into the nature and authority of international law, as well as its societal grounds. The issue of solidarity, then, exists at several levels of our conceptualisations of international law, revealing insights about its normativity and authoritative function.

Solidarity itself may be understood very differently and its meaning often depends on the particular context of use, and for this reason it is difficult to comprehensively define it. In fact, it is much easier to explain what solidarity means by elaborating on its particular manifestations, be that an emotional sense of unity of social groups and classes (e.g., when solidarity is discussed in the context of revolutions and social movements), a moral obligation of mutual assistance (e.g. solidarity as social co-dependence and cooperation), or a one-sided duty to help those in a need (e.g., solidarity with refugees or victims of social injustices). This makes solidarity a very nebulous concept, with risks that one instance of its use may not at all fit another instance.

Things get even trickier when solidarity is discussed as a matter of global community, in particular, as a matter of international law. In contemporary international law, solidarity occupies a peculiar position. On the one hand, it is one of the most important ideals that legitimise international law, alongside justice, peace, prosperity, sustainability, etc. Promotion of solidarity, then, is a moral duty of states and other international actors, just like the promotion of other values of universal significance. When seen as such, there is no need in international legal arguments to claim that peoples and states ought to show solidarity with other peoples and states. It is a moral duty, and moral duties, as is known, though they may be reinforced by law, do not depend on it. On the other hand, the idea of solidarity is often pictured as a principle of international law. From this perspective, there is something more to solidarity than just a moral value. If it is a principle of international law, states and other subjects of international law not merely *ought to* act out of solidarity as a matter of moral duty, but they $must$ do so as a matter of law.

As I will show, despite (or perhaps thanks to) the ambiguous normative and legal status of solidarity in international law, it is common to treat it as marking the features of the contemporary era of international law. We now live in the age of solidarity, as slogans go, and although it may sound rather too optimistic, there is certainly some truth in it. States and peoples grow more and more interdependent, which shapes the relations between them such

that there is more and more value in cooperation than there used to be. This makes the idea of solidarity even somewhat more mysterious; is there something more normatively robust behind it than political and moral pathos used to legitimise international law? How is solidarity reflected in the authority structure of international law?

This paper aims at discussing the issue of what normative status the principle of solidarity has in international law. I am not trying to unpack the meaning of solidarity in international law, nor do I focus on how this idea is manifested in different areas of international law (although these issues cannot be altogether avoided). Rather, I wish to explore what normative implications the idea of solidarity creates, especially in the context of a tendency to represent solidarity as a principle of international law. This enterprise also dictates the structure of this paper. I start with a short overview of how solidarity has come to be viewed as a principle of international law and what debates surround this view (section 1). I then turn to exploring what kind of a 'principle' solidarity is, considering that we use the concept of legal principles very differently depending on the context (section 2). I try to show why it is essential to differentiate between principles which are legally normative, and those which, though essential for law, are not. In section 3, I discuss the function of legality and why moral and political principles require legal pre-emption. This allows me to discuss how solidarity grounds, together with similar moral and political concepts, the normative authority of international law. My ultimate aim is to show that solidarity is not and should not be considered a principle of international law in order to perform the normative function it has.

1. Solidarity and International Law: A Path from Fact to Principle

Without doubt, solidarity is one of the most important normative ideas driving the development of today's international law. The spirit of solidarity pierces many regimes of international law and leaves its marks in many international legal instruments; it inspires international legal regulation and is used to argue further developments in international law. The aim of this section is to trace, in a rather sketchy manner, that intellectual history of solidarity which made it such an influential idea. By doing so, I want to investigate those conceptual foundations that underlie the popular concept that solidarity is a principle of international law.

Since the peak of its popularity in social, political, and legal philosophy in the first decades of the 20th century, solidarity has become one of the most influential of concepts. 'There exists a social solidarity which comes from a certain number of states of conscience which are common to all the members of the same society,'[1] wrote Émile Durkheim, laying the groundworks of solidarism. The great sociologist believed that the more complex society becomes, 'the more, consequently, social cohesion derives completely from this source [i.e. solidarity] and bears its mark.'[2] Léon Duguit, who was probably the most renowned legal solidarist of his generation, shared this view, but also believed that social solidarity has a normative aspect, too. This normative side of solidarity translates into the most important social rule (which he called 'objective law') that 'impl[ies] that everyone has the social obligation to fulfil a certain mission and the power to perform the acts required for the accomplishment of this mission.'[3]

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1 Émile Durkheim, *The Division of Labour in Society*, trans. George Simpson (New York: Macmillan Company, 1933), 109. First published in 1893, this book inspired most political and legal studies on solidarity.

2 Durkheim, *Division of Labour in Society*, 109.

3 '*droit objectif*, impliquant pour chacun l'obligation social de remplir une certaine mission et le pouvoir de faire les actes qu'exige l'accomplication de cette mission'. Léon Duguit, *Le droit social, le droit individuel et la trasformation de l'état* (Paris: Librairie Félix Alcan, 1908), 12. Unless indicated otherwise, translations from French are mine.

Georges Scelle, another influential solidarist, supposed that the factual bounds between people form 'a factual solidarity, constituted by an interest or a bulk of interests common to the members of the group, interests which are often vital and which can only be satisfied by the existence of the group.'[4] That there exist common interests and interdependencies between people suggests a normative proposition that they should act out of solidarity with each other. This normative manifestation of solidarity, according to Scelle, is most apparent when it is converted into specific rules and becomes the law of a society. As a result, positive law is a mere translation of social solidarity: 'the normative aspect of the legal order is for us just a formulation of the social fact or of the phenomenon of inherent solidarity.'[5]

This peculiar factual/normative dualism of solidarity has also marked its use in international legal scholarship. Solidarity acquired the status of one of the critical intellectual 'building blocks' of international legal theory since Alejandro Alvarez's works in the early 20th century. International law, according to Alvarez, is nothing else but a 'regime of solidarity' constructed through international relations, codification of international law, and other forms of legal cooperation.[6] Moreover, 'this notion of solidarity', wrote Alvarez, '[…] is of paramount importance for international law. It must guide its future orientation, at the same time as providing objective elements for its interpretation; well understood it will give it the prestige it deserves.'[7] Alvarez believed that solidarity is the new factual state of international affairs which should replace the outdated factual state of complete sovereign independence,[8] and at the same time it is the fundamental normative drive of such a replacement, a drive towards internationalism.[9]

This line of reasoning, that international solidarity is something coming to replace the old factual structure of international relations and thereby altering international law as well, determined the influence of this idea in international legal scholarship. For instance, Bruno Simma stresses that community interests, which caused the booming institutionalisation of international law in the post-World War II era, 'go far beyond interests held by States as such; rather, they correspond to the needs, hopes and fears of all human beings, and attempt to cope with problems the solution of which may be decisive for the survival of entire humankind.'[10] Community interests, Simma believes, reshape the traditional structure of international law as a thin legal order comprising primarily bilateral relations, which resonates with Alvarez's view on solidarity as a driver of further development of international law. Karel Wellens takes this idea a step further by distinguishing three paradigms of international law, which he calls 'the law of coexistence', 'the law of cooperation', and 'the law of solidarity'. International law, Wellens believes, has gradually moved from embodying the mere coexistence of states to providing grounds for their cooperation. The next step for international

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4 '[…] une solidarité de fait , constituée par un intérêt ou un faisceau d'intérêts communs aux membres du groupe , intérêts souvent vitaux et qui ne peuvent être satisfaits que par l'existence du groupement'. Georges Scelle, 'Théorie du gouvernement international', *Annuaire de l'institute international de droit public*, 1935, 42.

5 'La partie normative de l'ordre juridique n'est pour nous que la formulation du fait social ou du phénomène de solidarité originaire'. Scelle, 'Théorie du gouvernement international', 45.

6 Alejandro Alvarez, *La codification du droit international: ses tendances; ses bases* (Paris: Éditions internationales, 1912), 59–62.

7 'Cette notion de solidarité est […] d'une importance capitale pour le droit international. Elle doit guider son orientation future , en même temps que fournir des éléments objectifs d'interprétation ; bien comprise elle lui donnera le prestige qui lui revient'. Alvarez, *La codification du droit international*, 128.

8 'La notion de solidarité a […] remplacé l'ancienne conception de l'indépendance et de la souveraineté absolue'. Alvarez, *La codification du droit international*, 30.

9 '[…] internationalisme , s'il est conduit de façon à ne pas étouffer le sentiment national patriotique , peut être une cause de rénovation du monde'. Alvarez, *La codification du droit international*, 32.

10 Bruno Simma, 'From Bilateralism to Community Interest in International Law', in *Recueil des Cours: Collected Courses of the Hague Academy of International Law*, vol. 250 (The Hague: Martinus Nijhoff Publishers, 1994), 244.

law should then be solidarity, and 'the law of solidarity will influence the respective and combined role and impact of the two pre-existing approaches to international law.'[11]
Solidarity, then, has the feature of being both factual and normative, reflecting social interdependencies and at the same time embodying the basic social rule. Remarkably, most contemporary reflections on solidarity in (international) legal scholarship and social philosophy tend to focus more on its normative side. More importantly, when solidarity is taken normatively, it is sometimes pictured as a *legal* concept, not just generally a social or moral one. When Léon Duguit wrote that solidarity embodies the most important social rule, he also insisted that this rule is a *legal* one:

> this social rule of conduct is not a moral rule, *but a rule of law*. It only applies to external manifestations of human will; it does not impose itself on the inner man; it is the rule of his external acts, and not that of his thoughts and his desires, which on the contrary must be any moral rule.[12]

That solidarity has been seen as having such a genealogy is owed to the idea that it is 'the legal-political form for the emotionally loaded but somewhat disreputable revolutionary idea of "fraternity".'[13] Where fraternity has an explicit moral and even passionate flavour to it, solidarity has been pictured as a more rational and, very importantly, legally embedded concept.[14] Solidarity is thus intellectually shaped as an intrinsically legal and political idea, as something *born within law*, rather than brought into it from the moral domain.
This has had its impact on the international legal conceptualisations of solidarity, too. Today's international law and scholarship fully embrace the idea that solidarity is a powerful legitimising ideal lying in the foundation of modern international law. It is also almost never questioned that solidarity is amongst the most important principles generally speaking. The growing interdependence between states gives the idea of solidarity probably an even more forceful spin than the 19th century's industrialisation, which brought it to life in the first place. This makes co-operation one of the central tasks which states ought to perform.[15] But the principle of solidarity, as many scholars believe, and to whom I now turn, forms the basis for such

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[11] Karel Wellens, 'Solidarity as a Constitutional Principle: Its Expanding Role and Inherent Limitations', in *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, ed. Ronald St J. Macdonald and Douglas M. Johnston (Leiden: Martinus Nijhoff Publishers, 2005), 804.

[12] 'Cette règle social de conduite n'est point une règle de morale, *mais bien une règle de droit*. Elle ne s'applique qu'aux manifestations extérieures de la volonté humaine ; elle ne s'impose point à l'homme intérieur ; elle est la règle de ses actes extérieurs, et non pas celle de ses pensées et de ses désirs, ce que doit être au contraire toute règle de morale'. Duguit, *Le droit social*, 9 (emphasis added).

[13] See Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge: Cambridge University Press, 2002), 288–301. Jack Hayward writes: 'In the late nineteenth and early twentieth century, for the abstract principles of liberty, equality and fraternity was substituted the eclectic notion of solidarity,' which was deemed as 'more scientific'. Jack E. S. Hayward, 'The Official Social Philosophy of the French Third Republic: Léon Bourgeois and Solidarism', *International Review of Social History* 6, no. 1 (1961): 20, 27.

[14] Which might seem plausible, since originally, solidarity was an exclusively legal concept that related to obligations on collective debts and could be traced back to the Roman law, where 'each member of [a family] was held responsible for the payment of the whole of the debt contracted by any member, and had the right to receive payment of debts owed to the collectivity.' Jack E. S. Hayward, 'Solidarity: The Social History of an Idea in Nineteenth Century France', *International Review of Social History* 4, no. 2 (1959): 270.

[15] 'States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.' *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, UNGA Res 2625 (XXV) (24 Oct 1970).

cooperation and makes it possible for states to engage in coordinating global action to begin with. However, it is far more than just that; solidarity is sometimes pictured not just as any principle, but as a *principle of international law*.

To begin with, Rüdiger Wolfrum—one of the leading authorities on the issue of solidarity in international law—claims that solidarity belongs to the 'principles having their origin directly in international *legal* relations', and this shapes its status as a 'structural *principle of international law.*'[16] He also states that solidarity has a threefold function in international law: 'the achievement of common objectives through common actions of States, the achievement of common objectives through differentiated obligations of States and actions to benefit particular States.'[17]

Ronald Macdonald shares a similar sentiment towards solidarity. In his influential article, he stresses that solidarity is a special mode of cooperation, an ideological glue that brings together efforts to achieving a common good. He emphasises that solidarity is not merely *relevant* for international law, but has *an explicit legal normative role* to play:

> Solidarity is first and foremost a principle of cooperation which identifies as the goal of joint and separate state action an outcome that benefits all states or at least does not gravely interfere with the interests of other states. Solidarity, ***as a principle of international law***, creates a context for meaningful cooperation that goes beyond the concept of a global welfare state; *on the legal plane it reflects and reinforces the broader idea of a word community of interdependent states*.[18]

The UN High Commissioner for Human Rights grounds the legal nature of solidarity in its customary status:

> Instruments of law and policy encompassing international solidarity and cooperation are practically implemented by numerous acts of international cooperation that constitute evidence of State practice in line with belief, or *opinio juris*. States participate collectively within the framework of numerous global, regional and subregional organizations with multilateral and bilateral arrangements, again demonstrating solidarity in principle and practice. Further, there is a preponderance of practices of other stakeholders that together with State practice, constitute a formidable body of actual practice, consonant with conviction, of an implicit or explicit recognition of international solidarity as a principle of international law.[19]

This is an interesting perspective of the legality of solidarity, for, as I will show later in the paper, it is not enough to show that states and other actors endorse a particular moral reason or principle and act for it to say that it therefore has the characteristic features of law.

Abdul Koroma writes not only that solidarity grounds international law structurally, but is also capable of generating obligations for states:

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[16] Rüdiger Wolfrum, 'Solidarity Amongst States: An Emerging Structural Principle of International Law', *Indian Journal of International Law* 49, no. 1 (2009): 9 (emphasis added).

[17] Wolfrum, 8.

[18] Ronald St. J. Macdonald, 'Solidarity in the Practice and Discourse of Public International Law', *Pace International Law Review* 8, no. 2 (1996): 259–60 (emphasis added).

[19] UNHRC, Twelfth session, 'Human rights and international solidarity: Note by the United Nations High Commissioner for Human Rights' (22 July 2009) UN Doc A/HRC/12/27, para 13.

> solidarity in current international law represents […] an emerging structural principle which in many cases creates negative obligations on States not to engage in certain activities, and in an increasing number of contexts establishes concrete duties on States to carry out certain measures for the common good.[20]

Markus Kotzur shares a similar position when investigating the idea of solidarity in EU law: 'solidarity as a *legal principle* has to be distinguished in a *negative* and a *positive* component. Negative solidarity is seen as mere response to certain dangers or events, whereas positive solidarity creates, consequent upon previous negative notion, joint rights and obligations.'[21]
Rüdiger Wolfrum, however, believes that solidarity might not have enough of a normative impact to generate positive obligations for states, but it may be said to create negative obligations: 'states that refrain from acceding to regimes which are meant to protect the interests of the international community, are under an obligation not to undermine such efforts.'[22]
The idea that solidarity is an emerging (or) structural principle of international law is often demonstrated by references to particular legal regimes. Scholars trace solidarity in international economic law and international environmental law;[23] add to this the international legal regime of collective security,[24] international law on climate change,[25] international humanitarian law and international law on human rights,[26] international refugee law, international law on disaster relief, and the law of state responsibility.[27] Solidarity is also often discussed in the context of the doctrine of responsibility to protect,[28] and sometimes even in relation to international criminal law.[29] These different manifestations of solidarity arguably show that solidarity is not only a principle of international law, but even that it has constitutional status within the international legal order. This latter claim is most visible in Karel Wellens statement that:

> 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

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[20] Abdul G. Koroma, 'Solidarity: Evidence of an Emerging International Legal Principle', in *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum*, ed. Holger P. Hestermeyer and Rüdiger Wolfrum (Leiden: Nijhoff, 2012), 103.

[21] Markus Kotzur, 'Solidarity as a Legal Concept', in *Solidarity in the European Union: A Fundamental Value in Crisis*, ed. Andreas Grimmel and Susanne My Giang (New York: Springer, 2017), 40 (emphasis in the original).

[22] Rüdiger Wolfrum, 'Solidarity', in *The Oxford Handbook of International Human Rights Law*, ed. Dinah Shelton (Oxford: Oxford University Press, 2013), 417.

[23] MacDonald, 'Solidarity in the Practice', 263–90].

[24] Anne-Marie Slaughter, 'Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform', *American Journal of International Law* 99, no. 3 (2005): 619–31.

[25] Angela Williams, 'Solidarity, Justice and Climate Change Law', *Melbourne Journal of International Law* 10, no. 2 (2009): 493–508.

[26] Vicente Marotta Rangel, 'The Solidarity Principle, Francisco De Vitoria and the Protection of Indigenous Peoples', in *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum*, ed. Holger P. Hestermeyer and Rüdiger Wolfrum (Leiden: Nijhoff, 2012), 103–29; Carl Wellman, 'Solidarity, the Individual and Human Rights', *Human Rights Quarterly* 22, no. 3 (2000): 639–57; Wolfrum, 'Solidarity'.

[27] Martti Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order?', *British Yearbook of International Law* 72, no. 1 (2002): 337–56.

[28] Koroma, 'Solidarity', 119–23; Themistoklis Tzimas, 'Solidarity as a Principle of International Law: Its Application in Consensual Intervention', *Groningen Journal of International Law* 6, no. 2 (2019): 333–59; Wolfrum, 'Solidarity Amongst States', 17–19.

[29] Carly Nyst, 'Solidarity in a Disaggregated World. Universal Jurisdiction and the Evolution of Sovereignty', *Journal of International Law and International Relations* 8 (2012): 36–61.

> maintenance of international peace and security, because it is increasingly ensuring the cohesion and consistency of international legal order across various branches and because it operates with regard to both primary and secondary rules.[30]

Solidarity, then, is often seen as being a principle of international law, and its relevance and status are shown through a variety of manifestations in different legal regimes and branches of international law. At the same time, the principle of solidarity is conceptualised as a normative construct that has a direct or indirect impact on states' rights and obligations. Solidarity, then, 'imposes joint obligations on States to address international problems,'[31] and in this role it also informs how states must cooperate 'for the purposes of development to increase the social welfare of the world community'.[32] From this perspective, solidarity relates not only to relations between states, but also to relations *within* states, when it becomes one of the leading motives for taking actions in respect to gross violations of human rights. States, then, are not the only subjects to whom the principle of solidarity applies, and their engagement with it is but one facet of how solidarity manifests globally, as one of the bonds between different communities of people.[33]

There are, however, other views on solidarity in international law. Many international lawyers label solidarity merely as an aspirational concept, or as a tool for a moral legitimation of international law. It can therefore be said that there is no consensus on whether solidarity can be characterised as one of the structural principles of international law, or whether it has become a legal principle in international law.[34] Thus, Jost Delbrück insists that solidarity does not generate any *legal* obligation to cooperate,[35] whereas Theo van Boven expresses a similar concern in respect of the right to peace as being generated from solidarity.[36] Danio Campanelli even writes that

> It would be hardly sustainable that solidarity is today a fully acknowledged legal principle governing international law and from which it would be possible to draw a clear set of duties and obligations for international subjects. On the other hand, the

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30 Karel Wellens, 'Revisiting Solidarity as a (Re-)Emerging Constitutional Principle: Some Further Reflections', in *Solidarity: A Structural Principle of International Law*, ed. Rüdiger Wolfrum and Chie Kojima (Heidelberg: Springer, 2010), 36 (emphasis added).

31 Koroma, 'Solidarity', 109.

32 Rüdiger Wolfrum, 'International Law of Cooperation', in Max Planck Encyclopedia of Public International Law, April 2010, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1427?rskey=14ZFXl&result=1&prd=MPIL.

33 As stressed by the Human Rights Council, 'there is an overwhelming manifestation of solidarity by States, individually and collectively, by civil society, by global social movements and by countless people of goodwill reaching out to others, and that this solidarity is commonly practised at the national, regional and international levels.' UN HRC Forty-seventh session 21 June–14 July 2021 'Human rights and international solidarity' (12 July 2021) UN Doc A/HRC/RES/47/10, para 6.

34 See, e.g., Chie Kojima and Kazimir Menzel, 'Symposium on Solidarity as a Structural Principle of International Law, Max Planck Institute for Comparative Public Law and International Law, 29 October 2008', *Verfassung in Recht Und Übersee* 42, no. 4 (2009): 585–88.

35 Jost Delbrück, 'The International Obligation to Cooperate—An Empty Shell or a Hard Law Principle of International Law?—A Critical Look at a Much Debated Paradigm of Modern International Law', in *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum*, ed. Holger P. Hestermeyer and Rüdiger Wolfrum (Leiden: Nijhoff, 2012), 15–16.

36 Theo van Boven, 'The Right to Peace as an Emerging Solidarity Right', in *Evolving Principles of International Law: Studies in Honour of Karel C. Wellens*, ed. Eva Rieter and Henri Waele (Boston: Martinus Nijhoff Publishers, 2011), 137–47.

> concept of solidarity […] permeates certain legal discourses in the international law sphere, where it appears to be something more than mere cooperation or reciprocity.[37]

Even more so, Rüdiger Wolfrum—one of the main advocates of solidarity as a principle of international law—wrote that the principle of solidarity is not a kind of legal principle from which concrete rights and obligations are deduced, but which can serve as a tool for interpreting certain regimes of international law as well as an instrument for its progressive development.[38] And Karel Wellens, while defending the constitutional status of solidarity in international law, at the very same time stated that he 'did not actually say […] that the principle of solidarity is a legally binding principle.'[39]

We are confronted with an intriguing question, then. Regardless of whether solidarity is legally binding or not, is it reasonable to call it a principle of international law? Is it necessary or desirable that solidarity, by having a normative role in international law, must qualify as a legal principle in order to perform this role? We have traced the evolution of the normative side of solidarity up to these questions, and what follows will be devoted to answering them.

2. Solidarity as a Matter of Principle

Is solidarity a principle of international law? Should it be or will it become one in the future? If it is a (structural) principle of international law, what kind of obligations does it generate? These debates which surround the concept of solidarity in international legal scholarship reflect one of the most important jurisprudential problems. This problem, which to a significant degree shaped contemporary legal philosophy, pertains to the issue of principles and their function in law. What I mean here is not the question which is often discussed in international legal scholarship in relation to 'the general principles of law recognized by civilized nations,' that is, whether or not general principles belong to sources of international law,[40] and if so, how they can be identified. This particular theoretical puzzle is of little relevance for the inquiry undertaken here. Instead, the focus of this section is on what place principles such as solidarity

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[37] Danio Campanelli, 'Principle of Solidarity', in *Max Planck Encyclopedia of Public International Law*, March 2011, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2072?rskey=mUxydQ&result=1&prd=MPIL.

[38] Rüdiger Wolfrum, 'Concluding Remarks', in *Solidarity: A Structural Principle of International Law*, ed. Rüdiger Wolfrum and Chie Kojima (Heidelberg: Springer, 2010), 225–28.

[39] Rüdiger Wolfrum and Chie Kojima, eds., *Solidarity: A Structural Principle of International Law* (Heidelberg: Springer, 2010), 93 (quote from the comments section of the book).

[40] See, generally, Ian Brownlie, *Principles of Public International Law*, 7th ed (Oxford: Oxford University Press, 2008); Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 2006); Giorgio Gaja, 'General Principles of Law', in *Max Planck Encyclopedia of Public International Law*, May 2013, https://opil-ouplaw-com.proxy-ub.rug.nl/view/10.1093/law:epil/9780199231690/law-9780199231690-e1410?prd=MPIL#; Hugh Thirlway, *The Sources of International Law*, 2nd ed. (Oxford: Oxford University Press, 2019).

have within international legal normativity. This focus is indeed very much anchored in the jurisprudential debates around principles and their role in law,[41] but goes beyond them.[42]
One of the main problems with the concepts 'legal principles', 'principles of law', or 'general principles of law' is that we use them to label very distinct phenomena, not all of which are even legal, and this often creates confusion. For this reason, not everything that looks like a *principle of international law* is, in fact, a *principle* of international law or a principle of *international law*. That is, not everything that can be labelled as a legal principle has in fact a normative function in international law or even beyond it. It is essential, therefore, to clarify what kind of 'principle of international law' solidarity is, considering that the use of this concept is not at all uniform. If we were to summarise all the different kinds of phenomena we call 'legal principles' or 'principles of law'[43] in international law, this is more or less what we would get:[44]

1. 'legal principles' that are, in fact, ordinary legal rules, to which we attach more argumentative weight by labelling them as principles;
2. 'legal principles' that establish legal standards of behaviour but, however, do not stipulate any specific actions to be taken by those to whom they apply;
3. 'legal principles' that, though relevant for law, are not, in fact, legal principles through the function they perform; rather, they represent certain political or moral norms or ideals which legitimise international law;
4. 'legal principles' that are not norms generally speaking, but moral values which the law is supposed to appreciate and protect.

Some caveats before I proceed. First, I do not imply that there is always a clear-cut distinction between these categories, and sometimes, depending on the context, 'principles' may migrate between them. This, however, as far as I can tell, does not challenge the analytical accuracy of the distinction. Second, as I will elaborate further, there are several other dividing lines here. For instance, I believe that the first two categories of 'principles' are legal, whereas the latter two are not and should not be. I will discuss this issue in the next section. Finally, these distinctions between various 'types' of legal principles have more to do with jurisprudential concerns than with those having a doctrinal nature. This is why the analysis that follows by and large does not overlap with (and so also does not challenge) the ILC's codification efforts

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41 I mean, of course, the Hart-Dworkin debate, which sparked an important discussion within analytical jurisprudence about what kind of function legal principles perform. See, generally, Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), 29–64; Ronald Dworkin, *Law's Empire* (Cambridge, MA: Belknap Press, 1986); Herbert L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994), 238–76; Joseph Raz, 'Legal Principles and the Limits of Law', *Yale Law Journal* 81, no. 5 (1972): 823–54; Scott J. Shapiro, 'On Hart's Way Out', *Legal Theory* 4, no. 4 (1998): 469–507; Scott J. Shapiro, 'The "Hart–Dworkin" Debate: A Short Guide for the Perplexed', in *Ronald Dworkin*, ed. Arthur Ripstein (Cambridge: Cambridge University Press, 2007), 22–55.

42 Thus, I am not discussing one of the core issues pertaining to the conundrum of principles, that is the status of judicial discretion. This debate is of a less relevance for international law, where the judiciary has a far more limited impact on law than in domestic legal systems.

43 I use quote marks here and further to differentiate between the concept of a legal principle (no quote marks) and its use in different contexts (with quote marks). I do this, as will be clear later, because not all 'legal principles' are in fact legal principles.

44 In the discussion that follows, I am limiting myself only to the instance of a normative use of the concept of principle. That is, I am not discussing other possible connotations of the term, like, for instance, when it is used descriptively to refer to some body of rules without specifying the exact content of those rules (for instance, 'principles of international trade law, or 'principles of international criminal law'). As nicely put by Joseph Raz, such a use of the concept of principle is very similar to how we use acronyms, that is, as shortcuts that refer to some phenomena, but which do not have any meaning of their own. Raz, 'Legal Principles', 828–29.

led by Marcelo Vázquez-Bermúdez, the Special Rapporteur of general principles of law.[45] At the same time, the categories identified above reflect the multifaceted nature of legal principle as also stressed in the First report by the Special Rapporteur:

> general principles of law, in addition to serving as a direct source of rights and obligations, may serve as a means to interpret other rules of international law or as a tool to reinforce legal reasoning. A more abstract role is sometimes attributed to them, such as that they inform or underlie the international legal system, or that they serve to reinforce its systemic nature.[46]

Returning to the four categories of 'principles of international law' outlined above, to which of them may the principle of solidarity belong? Let us investigate them one by one. The *first category* is a tricky one. It is common to speak, for instance, of the principle of the prohibition of genocide,[47] or the principle of non-intervention,[48] or the principle of non-use of force in international relations.[49] What unites all of these is that they are not principles at all, but ordinary legal rules; perhaps some of the most important and vital for the international community, but still regular legal rules. This distinction is one of the critical ones, famously conceptualised by Ronald Dworkin: rules that govern behaviour act in an all-or-nothing fashion (e.g., if there is a prohibition of some action, it is either prohibited or not, no in-betweens), whereas principles have a dimension of weight and because of this do not stipulate a concrete outcome when applied.[50] As Joseph Raz phrases this distinction, 'rules prescribe relatively specific acts; principles prescribe highly unspecific action.'[51] There is nothing unspecific or not stipulating a concrete outcome in the given examples. States are under very definite and rather specific obligations not to intervene in the internal affairs of other states, not to commit genocide, and not to use force in international relations. That these may be subjects of fierce debate as to what counts as genocide, or what counts as an intervention, or what counts as a use of force, does not infringe upon the fact that these are very specific acts. There is nothing in these legal obligations that indicate that they are logically different from any other customary

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45 See ILC, 'Report of the International Law Commission on the work of its seventy-first session', (29 April–7 June and 8 July–9 August 2019) UN Doc A/74/10, paras. 202–262.

46 ILC', First report on general principles of law of the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez', UN Doc A/CN.4/732, para. 26 (footnotes omitted).

47 'The principles underlying the Convention [on the Prevention and Punishment of the Crime of Genocide] are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.' *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) (1951) ICJ Rep 15, p. 23. As the UN Office on Genocide Prevention and the Responsibility to Protect puts it, '[States] are all bound as a matter of law by the principle that genocide is a crime prohibited under international law.' 'Genocide', UN Office on Genocide Prevention and the Responsibility to Protect, accessed February 20, 2020, https://www.un.org/en/genocideprevention/genocide.shtml

48 'The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference.' *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*) (Merits) (1986) ICJ Rep 14, para 202. See also Maziar Jamnejad and Michael Wood, 'The Principle of Non-Intervention', *Leiden Journal of International Law* 22, no. 2 (2009): 345–81.

49 In the *Armed Activities*, the ICJ established that 'the Republic of Uganda […] violated the principle of non-use of force in international relations'. *Case Concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v. *Uganda*) (Merits) (2005) ICJ Rep 168, para 345(1). See also Clause Kreß, 'The International Court of Justice and the "Principle of Non-Use of Force"', in T*he Oxford Handbook of the Use of Force in International Law*, ed. M. Weller, Alexia Solomou, and Jake William Rylatt (Oxford: Oxford University Press, 2015), 561–96.

50 Dworkin, Taking Rights Seriously.

51 Raz, 'Legal Principles', 838.

or conventional legal obligation states have. So here the concept of 'principle' is used in a rhetorical manner rather than in any other.

It is not difficult to see that the principle of solidarity does not quite fit here. To begin with, solidarity does not actually prescribe any specific normative standard for states' actions. It is exactly why scholars are having such difficulty trying to elaborate on what exactly the principle of solidarity requires states to do. From this perspective, there is very little in common between the principle of solidarity and, for instance, the principle of non-use of force, apart from both being often called 'principles of international law'. Whereas the latter renders a specific mandatory prohibitive legal rule, the former is but an inspirational ideal, or as Robert Alexy calls it, 'optimization command' that 'something be realized to the highest degree that is actually and legally possible.'[52]

The *second category*, which comprises 'legal principles' that typically prescribe highly unspecific legal standards of behaviour, but which are nevertheless legally binding, includes principles like, for instance, the principle of the freedom of the high seas,[53] the principle of the freedom of maritime communication,[54] the principle of proportionality,[55] the principle of due diligence,[56] and many others. These principles do not direct states to perform any specific actions, rather, they provide for a normative standard from which legal obligations may be deduced in specific circumstances. In other words, even though such principles are in themselves highly unspecific in the character of the actions they prescribe, they are nevertheless legally binding. What also unites these principles is that they have other normative functions in law, apart from guiding the actions of states and other subjects. Principles such as these are often used for the purposes of interpretation of legal rules by offering the justificatory reasons or *ratio legalis* underlying legal rules; they may also provide grounds for modifying existing rules and establishing particular exceptions from legal rules or allow to avoid *non liquet* situations by providing in such a way the ground for new rules.[57]

Does solidarity fit this category? As we saw in the previous section, it is not at all obvious that solidarity is a legally binding principle. Even most dedicated advocates of solidarity as a principle of international law tend to agree that it does not directly generate legal obligations. And this makes all the difference here, for the principles in this category *are* legally binding. Not acting on the basis of solidarity in, say, disaster relief, and not acting on the basis of proportionality, for instance, in the context of applying countermeasures, may have drastically different legal qualifications and consequences. When violating the principle of proportionality may in itself lead to qualification of an act as legally wrongful,[58] there can hardly be any legal consequences for violating the principle of solidarity.

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52 Robert Alexy, 'On the Structure of Legal Principles', *Ratio Juris* 13, no. 3 (2000): 300.

53 See, e.g., Leo J. Bouchez, 'The Freedom of the High Seas: A Reappraisal', in *The Future of the Law of the Sea*, ed. Leo J. Bouchez and L. Kaijen (Dordrecht: Springer, 1973), 21–50.

54 *Corfu Channel Case* (*UK* v *Albania*) (Merits) (1949) ICJ Rep 4, p. 22.

55 See, generally, Thomas Cottier et al., 'The Principle of Proportionality in International Law: Foundations and Variations', *Journal of World Investment & Trade* 18, no. 4 (2017): 628–72.

56 See, e.g., Robert Barnidge, 'The Due Diligence Principle Under International Law', *International Community Law Review* 8, no. 1 (2006): 81–121.

57 As Jean d'Aspremont argues, this latter function of legal principles is the original one when it comes to international law. Moreover, that principles perform this function makes it incoherent to treat them as a source of international law. Jean d'Aspremont, 'What Was Not Meant to Be: General Principles of Law as a Source of International Law', in *Global Justice, Human Rights and the Modernization of International Law*, ed. Riccardo Pisillo Mazzeschi and Pasquale De Sena (Cham: Springer, 2018), 163–84. See also, on the function of legal principles in international law: Cherif Bassiouni, 'A Functional Approach to "General Principles of International Law"', *Michigan Journal of International Law* 11, no. 3 (1990): 768–818.

58 As indicated by the ILC in the commentary to art. 51 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 'Proportionality provides a measure of assurance inasmuch as disproportionate countermeasures could give rise to responsibility on the part of the State taking such measures.' ILC, 'Draft

We are now left with the last two categories. As already mentioned, unlike the previous two categories, these two comprise 'legal principles' which are not necessarily $legal$, and this may cause much confusion as to where to draw a line between law and non-law. This was essentially the main claim by Ronald Dworkin, who brought the issue of principles into the core of jurisprudence: since we often apply moral or political principles to justify a legal position, positivists' insistence on a clear-cut separation between law and non-law does not hold.[59] In the context of my investigation here, things are complicated by the unclear normative status of solidarity. Let us take a general look at both categories before returning to solidarity.

The *third category*—'principles of international law' which are in fact not *legal* principles at all—hides some pitfalls. It is common, in international law as well, to encounter principles that create no direct legal normative implications, that is, no legal duties can be deduced from them. They neither prescribe a certain line of behaviour, nor establish anything that can even weakly be called a legal obligation. Rather than *prescribing*, they are *describing* a normative order to which they belong and outline its essential features. Jeremy Waldron calls them 'characterising principles', for they 'tell us what a legal system is like, not how to work within it.'[60] These are principles such as federalism, popular sovereignty, limited government, separation of powers, etc., to give examples, following Waldron, from the constitutional law of the US. In international law, there are also such characterising principles, for instance, the principle of sovereign equality, or the principle of self-determination of peoples, or the principle of good faith.

These principles are very much different from those which we analysed before. Normative principles, such as proportionality or due diligence, guide actions by establishing a legal standard of behaviour (no matter how abstractly or vaguely). Characterising principles certainly perform a normative function politically or morally, for they guide the construction of normative orders and legitimise them by reference to political and moral considerations. The trouble begins when we try to establish whether they have any normative function *legally*, i.e. whether we can say that they have a normative impact on the legal arguments being used within an existing normative system. Jeremy Waldron argues that they do not.[61] Rather, they shape constitutional systems by reflecting certain political and philosophical designs, but they are no more normative for legal issues than the bearing walls of a building are for the choice of room decorations. To say that a constitutional system is based on the principle of the separation of powers is to describe certain aspects of this system by pointing out a particular feature of its institutional design. It is quite difficult to specify legal obligations that stem from this principle and legally bind some or all of the subjects of this legal order.[62]

Articles on Responsibility of States for Internationally Wrongful Acts', *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 134. Notably, the ILC speaks of proportionality as of a rule, rather than as of a principle. This is another indication of how much uncertainty exists around this concept.

59 Dworkin, Taking Rights Seriously.

60 Jeremy Waldron, 'Non-Normative Principles', *NYU School of Law, Public Law Research Paper No. 19-36*, 2019.

61 'It is only legal normativity that is the problem. That a CP [characterising principles] may be politically and philosophically normative is something we can take for granted'. Waldron, 'Non-normative principles', 27.

62 The same goes, for instance, for the principle of good faith, which, according to the ICJ, is 'one of the basic principles governing the creation and performance of legal obligations, [but which] is not in itself a source of obligation where none would otherwise exist.' *Border and Transborder Armed Actions* (*Nicaragua* v. *Honduras*), (Jurisdiction and Admissibility, Judgment) 69 ICJ Rep 1988, para 94. Equally, when speaking, for instance, of the principle of sovereign equality, it is not hard to see its political, rather than legal nature. Although it shapes the political underpinnings of the international legal order, it requires translation into pre-emptive legal norms that provide a basis for the specific legal rights and obligations that stem from it, such as, for instance, norms pertaining to jurisdictional immunities. That the principle of sovereign equality is not *per se* a normative legal principle may sound, to an international lawyer's ear, a heresy. Yet it is important to keep in mind that this is by no means a unique feature of international law or for that matter any law: characterising principles such as sovereign equality do give rise to specific legal norms that outline what sovereign equality actually means, normatively, but they do not in themselves have a legal nature. I elaborate on this in the next section.

The final *fourth category* of phenomena which we at times call 'legal principles' or 'principles of law' comprises certain moral values that law embodies or is supposed to protect. Here, many examples can be given. In *Corfu Channel*, the ICJ referred to the general principle of 'elementary considerations of humanity',[63] which definitely reflects moral values international law protects. In international human rights law, it is not at all atypical to speak of the principle of (respect for) human dignity,[64] whereas in international humanitarian law, the principle of humanity is considered to be one of the most fundamental.[65] In international environmental law, it is common to speak about the principle of intergenerational equity,[66] while in the international law of development equity in general is treated as 'the basic principle of international development law' because 'it serves to resolve the contradictions between simultaneous demands for economic independence and for organized mutual aid, for equality in preferential treatment, for common benefit and the renunciation of reciprocity on the part of developing countries.'[67] All these concepts—humanity, dignity, equity, etc.—represent moral values which international law must protect. It is common to speak of values as principles when we turn them into practical reasons: 'the word "principle" is sometimes used to assert an ultimate value or to assert that such a value is a reason for action.'[68]

If we go back to solidarity now, it might be tempting to say that solidarity is a principle because it has the same sort of intrinsic moral value as human dignity, equity, humanity, etc. Acting out of solidarity, from this point of view, is already fulfilling a moral duty which is an end in itself. As Adam Cureton puts it, 'the social moral rules that hold us in solidarity are often valuable for their own sake […], more precisely, they are *non-derivatively valuable in virtue of being a constitutive part of a relationship that is valuable as an end.*'[69] This idea comes very close to one of the first formulations of solidarity in international law, when Emer de Vattel wrote:

> The offices of humanity are those succours, those duties, to which men are reciprocally obliged as men, that is, as social beings which necessarily stand in

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63 *Corfu Channel Case* (*UK* v. *Albania*) (Merits) (1949) ICJ Rep 4, 22.

64 E.g., Jean-Paul Costa, 'Human Dignity in the Jurisprudence of the European Court of Human Rights', in *Understanding Human Dignity*, ed. Christopher McCrudden (Oxford: Oxford University Press, 2013), 393–402; Marcus Düwell, 'Human Dignity: Concepts, Discussions, Philosophical Perspectives', in *The Cambridge Handbook of Human Dignity*, ed. Marcus Duwell et al. (Cambridge: Cambridge University Press, 2014), 23–50; Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', *European Journal of International Law* 19, no. 4 (2008): 655–724. See, however, a critique of 'legal expropriation' of human dignity in Stephen Riley, 'Human Dignity as a *Sui Generis* Principle', *Ratio Juris* 32, no. 4 (2019): 439–54.

65 See, for a general overview: Kjetil Mujezinovic Larsen, Camilla Guldahl Cooper, and Gro Nystuen, eds., *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge: Cambridge University Press, 2012).

66 Lynda M. Collins, 'Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance', *Dalhousie Law Journal* 30, no. 1 (Spring 2007): 79–140; Lothar Gundling, 'Our Responsibility to Future Generations', *American Journal of International Law* 84, no. 1 (1990): 207–12; Edith Brown Weiss, 'Our Rights and Obligations to Future Generations for the Environment', *American Journal of International Law* 84, no. 1 (1990): 198–207.

67 Milan Bulajić, *Principles of International Development Law: Progressive Development of the Principles of International Law Relating to the New International Economic Order*, 2nd rev. ed (Dordrecht: Martinus Nijhoff, 1993), 50.

68 Joseph Raz, *Practical Reason and Norms*, 2nd ed. (New York: Oxford University Press, 1999), 49.

69 Adam Cureton, 'Solidarity and Social Moral Rules', *Ethical Theory and Moral Practice* 15, no. 5 (November 2012): 692 (emphasis in the original).

> need of a mutual assistance for their preservation, for their happiness, and for living in a manner conformable to their nature.[70]

This concept, that we owe duties to each other by the mere fact that we live in a society, reflects, according to de Vattel, 'the general principle' and 'the eternal and immutable law of nature' which reads that: 'One state owes to another state whatever it owes to itself, as far as this other stands in real need of its assistance, and the latter can grant it without neglecting the duties it owes to itself.'[71]

Without a doubt, people are under a moral obligation to show solidarity, in a sense that it is a valid moral demand to require someone to do something out of solidarity, and it is therefore morally permissible to hold someone accountable for not showing solidarity.[72] Without going into details pertaining to the moral status of solidarity, it suffices to say that I do not deny that solidarity may, for some people, be a strong non-instrumental moral reason to do something. Yet from how the idea of solidarity is typically constructed, especially in international legal scholarship and practice, it seems that it usually makes sense and is valuable when used as a practical reason in order to secure more fundamental reasons, such as humanity, human dignity, or social cohesion. This brings it closer to a moral principle, rather than to a moral value, although, as already mentioned, the line between the two can be very much blurry.[73] This is also in line with the framework suggested by the drafting group on human rights and international solidarity of the Human Rights Council Advisory Committee which stresses that '[s]olidarity stems from the shared value of all human beings by expressing mutual concern for the well-being of others',[74] that is, it is not so much a goal in itself but rather a vehicle to achieve some more fundamental values.

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[70] 'Les *Offices d'humanité* ſont ces ſécours , ces devoirs , auxquels les hommes ſont obligés les uns envers les autres en qualité d'hommes , c'eſt-à-dire en qualité d'êtres faits pour vivre en ſociété , qui ont néceſſairement beſoin d'une aſſiſtance mutuelle , pour ſe conſerver , pour être heuruex & pour vivre d'une manière convenable à leur nature', Emer de Vattel, *Le droit de gens, ou principes de la loi naturelle: Appliqués à la conduit et aux affairs des Nations et des Souverains*, vol 1, (Londres, 1758), p. 257. The English translation is given by: Emer de Vattel, *The Law of Nations; or, Principles of the Law of Nature: Applied to the Conduct and Affairs of Nations and Sovereigns*, vol. 1 (London, 1759).

[71] de Vattel, *Le droit de gens*, 258–59: 'Une Etat doit à tout autre Etat ce qu'il ſe doit à ſoi-même, autant que cet autre a un véritable beſoin de ſon ſécours, & qu'il peut le lui accorder ſans négliger ſes devoirs envers ſoi-même'.

[72] I am following the structure of moral obligation and moral reason as offered by Stephen Darwall. Stephen L. Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Cambridge, MA: Harvard University Press, 2006).

[73] On a separate note, I do believe it is more consistent to argue that solidarity is not deontologically normative, as, for instance, human dignity. This point is convincingly elaborated by Kurt Bayertz: it is quite difficult to justify solidarity as a moral obligation because it calls for a positive action, whereas moral obligations are typically grounded in the paradigm of warding off dangers occurring in social co-existence and because of this they are generally negative or at least restrictive. As a consequence, 'manifestations of solidarity may be morally commendable, but they cannot be made [morally] *binding.*' Besides, whereas moral obligations are universal in a sense that they cannot contain any references to contingent characteristics, this is typically what solidarity assumes. If we try to claim that solidarity does not discriminate and we must therefore show solidarity with all the people in the world, it is unclear how it would then differ from the categorical imperative or other similar moral norm. See, Kurt Bayertz, 'Four Uses of "Solidarity"', in *Solidarity*, ed. Kurt Bayertz (Dordrecht: Kluwer Academic Publishers, 1999), 3–28.

[74] UNHRC, Twenty-first session, 'Final paper on human rights and international solidarity: Prepared by Chen Shiqiu on behalf of the drafting group on human rights and international solidarity of the Human Rights Council Advisory Committee' (16 August 2012) UN Doc A/HRC/21/66, para. 16. Note, however, that the drafting group advances the perspective that international solidarity is a right, and not only a principle, without, however, clearly differentiating between these two aspects of solidarity, which makes its normative status even more confusing. See UNGA 'Report of the Independent Expert on human rights and international solidarity' (23 July 2013) UN Doc A/68/176, paras 10–11.

The third category of 'legal principles' looks most promising, then. Solidarity, it seems, is a labelled as a 'principle of international law' in the sense that it provides for some critical moral and political normative foundations for the international legal order. This group of principles, however, is the most theoretically challenging, for it unites principles which are fundamentally important for international law in a normative way, but which, at the same time, are not normative in a *legal* sense. This ascertainment brings us back to the initial jurisprudential problem that surrounds the legal normative implications of such principles as solidarity, sustainable development, and, to a large extent more 'traditional' ideas of the Rule of Law, democracy, and human rights, which Anne Peters qualifies as 'value-driven organizing principles of constitutional government'.[75] It is remarkable that Anne Peters uses this particular language for these principles, which resonates with Rüdiger Wolfrum's characteristic of solidarity as a 'structural' principle of international law. Even though in international legal scholarship we may routinely attribute a legal status to these principles, the language used when we talk about them suggests that they perform their normative function at a different, non-legal level.

In order to see what kind of relations bind solidarity and similar 'structural' or 'organising' principles of international law and international legal normativity, we must investigate what actually makes normativity legal and what functions legality performs in regard to these and other non-legal principles and values. If solidarity is such a non-legally normative principle, how can we account for its status in law?

3. Solidarity, Legality and the Authority of International Law

In the previous section, I argued that we need to differentiate between different uses of the concept 'legal principle' or 'principle of law'. I have also claimed that solidarity belongs to the kind of principles that, although relevant for international law and possibly with a normative function, are not *legally* normative. This reflects the general disposition towards solidarity in international legal scholarship, which we saw in the first section: it is a legal concept and a legally relevant principle, but one which, nevertheless, cannot be undoubtedly said to generate legal obligations, that is, it is hardly legally binding. How can we then solve this conundrum of solidarity? Is there a way to account for such principles, which are, on the one hand, critically important for law, but on the other hand are not in themselves legal, without necessarily ruining the distinction between law and non-law?

It is important to stress that when we speak about the legality of some norm or principle, this typically entails that we trace it back to some source(s) of (international) law. We may label this view 'source-based legality'. In this view, legality is tantamount to legal validity, that is, law is something that we can identify by using formal criteria of origin.[76] What is important, however, is not everything which is legally valid is law. It is possible to have a legally valid norm, i.e. a norm which relevant actors are bound to apply when solving legal cases, that does not belong to the legal order in question. In other words, what courts and other officials are bound to apply because law authorises them to do so, is not tantamount to the law of the particular legal order in general.[77] A classic example in this regard is that courts in domestic legal systems are often bound to apply the law of another country. The law of another country,

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[75] Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', *Leiden Journal of International Law* 19, no. 3 (2006): 601

[76] See, generally, on the application of this conception of legality to international law: Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford: Oxford University Press, 2011).

[77] See Shapiro, 'On Hart's Way Out', 505–7. For the difference between legal validity and legality, see also Raz, *Practical Reasons and Norms*, 127–29; Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2nd ed. (New York: Oxford University Press, 2009), 146–59.

in this situation, is legally valid in a sense that courts are bound to apply it, but it is not a part of the legal order in which it is applied. In the same way, for instance, the International Criminal Court, in certain circumstances, is bound to apply domestic criminal law when solving cases,[78] but this does not make it a part of international criminal law. The same goes for moral standards: courts may be obligated by the law to apply moral standards (e.g., reasonableness, fairness, etc.), which makes these moral standards legally valid, but does not make them into the law.[79]

However, for many moral standards, to which we may find direct or indirect references in law, it is not at all given that they are even legally valid, let alone that they are legal. I mean of course those moral or political values and principles which inspire certain legal documents and get mentioned in preambles or figure in *travaux préparatoires*. Such moral or political principles and values, though recognised by law as relevant for, e.g., interpretation of legal provisions, are not necessarily legally valid in themselves, that is, courts and other relevant actors are not legally bound to apply them *per se*. These are precisely the third and the fourth categories of 'principles' mentioned in the previous section. Solidarity is one of such principles, since it is beyond doubt that it serves an inspirational ideal for many international legal regimes, but at the same time it creates no direct legal obligations for states. It creates a very peculiar theoretical puzzle, for it is unclear how such principles correlate with international legal normativity.

Since, as we just saw, legal validity is not a sufficient criterion to qualify some norm or principle as legal, it is possible to suggest that legality should also be approached functionally. In this view, something is legal not necessarily (or only) because it comes from a valid source, but because it performs a specific function. We have law because it secures benefits that would not be possible without it. Most importantly, law offers a special normative technique which is not available for other normative systems such as, for instance, morality or politics. Law, by establishing general standards of conduct irrespective of individual preferences and moral beliefs, allows us *to bypass the moral and political disagreements that people have*. This is precisely why, if we accept that a moral standard is a part of law (like saying that solidarity is a legal principle) we make it impossible for law to make a practical difference in performing its function. If we have the law because it allows us to bypass moral disagreements by establishing general rules of conduct, it is detrimental for the very function of the law to apply *as legal* those moral standards which cause the disagreements we wanted to prevent by having the law in the first place.[80]

Thus, we may say that solidarity is a valid moral principle which makes it morally commendable to assist those who suffer from need or require our assistance, that is, to refer back to de Vattel, when we owe to another whatever we owe to ourselves. Or, even more so, we may say that solidarity requires us to contribute to the communal interests by performing actions in favour of the community even when this goes against our individual interests. However, it is not difficult to see that even though we may recognise the validity of this moral principle, it does not necessarily mean that everyone does. That we may believe that contributing to communal interests is the morally right thing to do, does not mean that our neighbour thinks so. He may believe, as probably many people do, that it is far more important to secure individual liberty and prosperity, which in themselves ground valid moral principles. We are, then, in disagreement. It may be practically impossible to overcome this disagreement by simply trying to convince our neighbour to act out of solidarity (he is quite stubborn and frankly has the right to have a moral position of his own). This may become even more difficult when solidarity is

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78 Rome Statute of the International Criminal Court (adopted 17 July 1998) 2187 UNTS 3, art 21(1)(c).

79 E.g., if the ICJ will ever be called upon to solve a dispute in accordance with art. 38(2) of its Statute, that is, *ex aequo et bono*, this would not mean that the moral standards applied by the Court in such a context become legal, even though the Court is legally authorised (by its Statute) to apply them.

80 This argument is very much influenced by Scott Shapiro's view on the function of legality: Scott Shapiro, *Legality* (Cambridge, MA: Harvard University Press, 2011), 214.

treated as a practical reason at the level of a society at large, or even more so the global level. Should a state assist the population of another state suffering from a civil war, or should it instead stick to a neutral position? Should a state admit a large number of refugees, or should it keep its borders closed to prevent political volatility? Should a state introduce measures that would limit atmospheric pollution, or should it strive for maximising economic growth? All these kinds of dilemma are in essence examples of complex practical deliberations, when relevant actors must adequately weigh all appropriate reasons, solidarity being one of these. And what is essential for such dilemmas is that they necessarily involve disagreement. Exactly because we have disagreements such as these, there is need for a special normative technique that allows us to create rules of conduct which enable us to achieve the aims we have without necessarily resolving this disagreement.

Law, then, makes it possible to obligate everyone to do something even if this action is not morally justified or required by our personal or collective moral beliefs, or, as Scott Shapiro phrases it:

> By settling matters in favor of the directed action, law cuts down on deliberation and bargaining costs and compensates for cognitive incapacities and informational asymmetries, thereby enabling community members to achieve goals and realize values that would otherwise be beyond their grasp.[81]

That is, the value of having law is precisely that it enables us to simply point at a binding legal rule instead of convincing someone to act in a certain way because of the moral or political merits of such an action. This entails the pre-emptive force of law as a matter of practical deliberations:

> the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.[82]

This idea that law by claiming practical authority pre-empts reasons for action allows us to see that such moral and political values and principles like solidarity, sustainable development, rule of law, democracy, and so on, are relevant for law and determine its content as long as the law pre-empts them. Pre-emption means that law replaces the moral and political reasons for action on which we may disagree with a shared normative standard. This by no means entails that, once we have this standard, we no longer disagree. We do, and it is an essential part of political life to debate social issues even when, or one might say, exactly because, they are legally regulated.

The mechanism of normative pre-emption entails the introduction of legal rules which legally obligate us to perform some actions (or to abstain from performing actions), regardless of whether these actions are independently justified by moral or political considerations. As a result, it is these legal rules that become reasons for a desirable action, and not necessarily the underlying considerations, which may be shared by some people, but not shared by others. For example, it may be morally and politically desirable if members of a certain community contributed some part of their wealth to solving general problems the community may be faced with. Some members of this community may feel deontologically obligated to do so, as they believe it is the right thing to do. But it cannot be taken for granted that all members of our hypothetical community share the same high moral standard (remember our neighbour?). The simplest solution would be to introduce a taxation system—historically the first system of

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81 Shapiro, *Legality*, 247.

82 Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 46.

solidarity. What practical difference does it make? Because paying taxes is now a legal obligation, it no longer depends on moral deliberations, and even if one disagrees on whether an existing taxation system is fair or what activities the money collected is spent on, it does not change the fact that one must pay one's taxes. Consequently, even though the motivation of solidarity may lie in the background of tax law, it is not because of solidarity that we pay taxes, it is because law obligates us to do so. We no longer *morally ought to* financially contribute to our community, we *legally must* do so.

It is essential to observe that law's pre-emptive force may come in degrees. Law may be more or less successful in replacing moral or political reasons for action, and this also applies to international law. 'Law's legitimate authority is not necessarily as general as the law claims it is,'[83] which necessarily entails that when law lacks authority in some domains where it claims to have it, it is all but natural for subjects to fall back on the underlying reasons.[84] In international law, where practical authority is typically not mediated by formal institutions, it may take time to achieve the degree of pre-emptive force which replaces underlying reasons in practical deliberations.[85]

Thus, even though international law may claim to provide for legal rules and procedures which obligate states to act in a way they would have acted anyway were they acting out of sheer solidarity, this may not necessarily be the case. It is often claimed, for instance, that the system of collective security established after World War II is a manifestation of international solidarity.[86] And yet, the proponents of humanitarian intervention or the doctrine of the responsibility to protect, which enjoy a doubtful legal status, often justify them by considerations of solidarity.[87] This kind of debate shows that when (international) law claims to pre-empt certain reasons but fails to do so at least in some concrete circumstances, these underlying reasons become essential for practical deliberations. To put it in different terms, *in an international legal order that truly appreciates the principle of solidarity, one does not have to justify one's legal position by referring to solidarity, for one has pre-emptive legal rules to invoke*.

This is why Lorenzo Casini is correct in his statement that 'solidarity can acquire the status of legal principle only when it loses its "altruistic" character: if [so], then States may use this principle in order to establish mutual obligations aimed at reducing risks and uncertainty.'[88]

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83 Samantha Besson, 'The Authority of International Law – Lifting the State Veil', *Sydney Law Review* 31 (2008): 354.

84 But this also has another implication. It is possible that law does not claim authority in domains where it probably should, and this is precisely what enables the interpretative power of principles in avoiding *non liquet* situations. The use of principles for filling up normative gaps is essentially a reconstruction of the pre-emptive reasoning of one domain in another domain, based on the assumption that these two domains share the same moral/political reasons which are to be legally pre-empted.

85 A good illustration to this claim is the slow shift of paradigm regarding the use of force in international law initiated by the Kellogg-Briand pact of 1928. It took almost 20 years for the new legal norm of prohibition of aggressive war to pre-empt the political and moral reasons existing at that time. See, on the history of the pact and its growing pre-emptive force: Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (New York: Simon & Schuster, 2017).

86 Koroma, 'Solidarity', 104–05; Slaughter, 'Security, Solidarity, and Sovereignty', 622–27; Wolfrum, 'Solidarity Amongst States', 11–14.

87 Nancy D. Arnison, 'International Law and Non-Intervention: When Do Humanitarian Concerns Supersede Sovereignty?', *Fletcher Forum of World Affairs* 17, no. 2 (1993): 199–2012; Laurence Boisson de Chazournes, 'Responsibility to Protect: Reflecting Solidarity?', in *Solidarity: A Structural Principle of International Law*, ed. Rüdiger Wolfrum and Chie Kojima (Heidelberg: Springer, 2010), 93–110; Wolfrum, Solidarity Amongst States', 17–19.

88 Lorenzo Casini, 'Solidarity between States in the Global Legal Space', *European Review of Public Law* 26, no. 1 (2014): 108. A very similar argument is advanced by Andrea Sangiovanni in his analysis of solidarity under EU law: Andrea Sangiovanni, 'Solidarity in the European Union', *Oxford Journal of Legal Studies* 33, no. 2 (2013): 213–41.

Indeed so, solidarity only makes sense legally if its moral core is pre-empted by legal rules. The only thing is that, if this happens, solidarity *does not need to be* a legal principle, for its legal representation will be boiled down to specific rules of obligation. Solidarity is only relevant for law as long as legal rules mediate its moral implications.[89]

From all this follows that, paradoxically, the central argument used to qualify solidarity as a principle of international law, namely that the idea of solidarity is reflected in many different regimes of international law, is essentially the main reason why it is *not* a principle of international law. That states account for considerations of solidarity in international environmental law, international human rights law, international law on the use of force, international trade law, international law of development, and so on, shows that solidarity requires legal pre-emption in order to legally bind states.[90] For this reason, solidarity will never (and in fact does not have to) become a legally binding principle of international law, because its role in international legal normativity is drastically different. Together with other moral and political principles, solidarity grounds the legitimacy of the international legal order, which is essential for the practical authority of international law. When law fails to account for relevant moral and political reasons and does not, in such a way, perform its function of bypassing the disagreements we may have about these reasons, its authority may vanish very quickly. The principle of solidarity, therefore, is amongst those ideas that ground international law's authority by legitimising its rules, procedures, and institutions. Hence, it is essential that international law keeps embracing the principle of solidarity by strengthening the pre-emptive veil of legal rules.

Conclusions

'Solidarity is not discovered by reflection but created,' wrote Richard Rorty.[91] It seems that contemporary international law and international legal scholarship fully embrace this view. Solidarity is something states, international organisations, and ordinary people may and should shape by their actions. This means, at the very least, that solidarity is a practical reason, not just a fact, and as a reason it exhibits some fundamental moral values which must also underlie international law. This intrinsic normativity of solidarity makes it tempting to treat it as more than just a moral principle, but as a principle of international law.

Such a perspective on solidarity, however altruistic it may be, unfortunately, misses the point about the function of (international) law and the way it connects to its moral and political underpinnings. I attempted to show that solidarity is not a principle of international law in any legal sense, but, most importantly, it does not have and should not have characteristics of legality. Solidarity, being a political and moral principle, relates to law in a way very similar to other principles of such a kind, like democracy, the rule of law, or fairness. International law is supposed to normatively pre-empt these principles by replacing them, as a matter of legal reasoning, with legal rules. In such a way, international law performs the central function of legality, which is bypassing the moral and political disagreements people may have. By

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89 Jürgen Habermas skilfully used this argument in his advocacy for a European constitution, a project that, however, never came to be. He claims that one of the central tasks of any constitution is to create, through democratic citizenship, 'legally mediated solidarity between strangers'. Jürgen Habermas, 'Why Europe Needs a Constitution', *New Left Review* 11 (2001): 16.

90 See, e.g., Final paper on human rights and international solidarity Prepared by Chen Shiqiu on behalf of the drafting group on human rights and international solidarity of the Human Rights Council Advisory Committee, in which experts transcribe, in paras 23–24, the legal normative standing of solidarity not on its own, but through other, more specific legal obligations, many of which already exist independently of the recognition of solidarity as a principle of international law.

91 Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989), xvi.

establishing general rules of conduct which are binding irrespective of individual or even collective moral beliefs, international law legally obligates states to act in a way that is justified by motives of solidarity. As a result, it is the rules of international law which become reasons for actions, rather than solidarity as such.

Such a relation between solidarity, and other similar principles, and international legal normativity highlights the nature of international legal authority. On the one hand, international law's authority is legitimised as long as it accounts for such fundamental moral principles, and for this reason it is essential that considerations of solidarity keep penetrating into larger numbers of international legal regimes and branches. On the other hand, normative authority always comes in degrees, and in the case of international law it may take a long time for the underlying moral and political principles to get effectively pre-empted by legal rules. Moreover, when international law fails to account for solidarity in the areas where it is expected or needed, it is all but natural to fall back on solidarity as a practical reason if it is not (effectively) pre-empted. In such a way, in a strongly authoritative international legal order one would not need to resort to moral and political reasons such as solidarity. International law must strive for normative authority which would make the appeal to these reasons redundant.