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Editors

The Principle of Solidarity

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Chapter 2
In Search of Solidarity in International Law

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Contents

Abstract This chapter argues that international law as it currently stands is not a legal system based on solidarity, nor is there any evidence that such a system is emerging. To the contrary, it is asserted that manifestations of 'solidarity' in modern international law simply reflect a duty of co-operation—a duty which is transactional in nature, and thus akin to the bilateralist character of classic international law. The inadequate responses to modern challenges such as poverty and vaccination attest to the lack of solidarity in modern international law. Ultimately, the idea that international law embodies or aspires to a sense of solidarity is contingent upon the existence of an 'international community'. However, there is very little evidence to buttress the proposition that this 'international community' really exists. Therefore, it is incumbent on actors and international actors not to simply will solidarity into existence but to carefully promote the infusion of the principle of solidarity into the very fabric, methodology and raison d'être of the international legal system.

Keywords Solidarity · International law · Sovereignty · Co-operation · Self-interest · International community

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2.1 Introduction

The genesis of my thoughts on solidarity, oddly, is an article in the 2019 *Chinese Journal of International Law* about populism and international law.[1] That article, of course, was not about solidarity. In that article, I argued that international law and multilateralism were not, as the popular narrative suggested, under threat from populism. Rather, the article suggested, populism's "attack" on international law was made possible by the very nature of international law and was, in fact, a reflection of international law. The incidents often put forward to show the dangers of populism for international law were, in reality, simply a manifestation of the underlying character of international law under which, in the famous words of the Athenians: "The strong do what they can, and the weak suffer what they must."[2] While the paper was not about solidarity, it concluded that the lack of solidarity was the real threat to a value-laden international law, not populism.

These concluding thoughts made me wonder what solidarity in international law would look like. When the Vice-Chancellor of the University requested that I present an expert lecture during the pandemic, I decided to use that as an opportunity to develop my thoughts on solidarity.[3] I will pause to say that in that lecture, presented in September of 2020, I predicted that the united front premised on solidarity that we saw from world leaders at the beginning of the pandemic,[4] pledging that there would be no vaccine hoarding and that the poorest of the poor will have the same access to vaccines as the richest of the rich, would be quickly forgotten and thrown in the rubbish bin of academic ideas when vaccines were eventually developed. In that lecture, I expressed the view that when, after great collaboration, with many developing countries serving as sites for vaccine production and its populations serving as subjects for tests, when the vaccines were found, those that have the financial muscle would throw fancy words at us like "intellectual property rights", and "scientific research" and the poor of the world would be left holding the proverbial baby of vaccination, skyrocketing fatalities and tanking economies. The early days of vaccine distribution illustrate how solidarity was jettisoned in favour of the "me-first-approach".[5]

Shortly after that initial talk, the African Society of International Law invited me to deliver a keynote address on COVID and International Law. I chose, as the theme of the keynote, to develop further my thoughts on solidarity.

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[1] Tladi 2020a.

[2] Ibid., at p. 389, stating that those "with the influence, the power, will yield it—the word 'it' is purposefully used ambiguously to refer to either power or international law—for either good or bad".

[3] Tladi 2020b.

[4] See UN General Assembly (2019) UN General Assembly Resolution on Global Solidarity to Fight the Coronavirus Disease, UN Doc A/RES/74/270.

[5] See Oxfam Press (2020) Campaigners Warn that 9 out of 10 People in Poor Countries Are Set to Miss Out on COVID-19 Vaccine Next Year. https://www.oxfam.org/en/press-releases/campaigners-warn-9-out-10-people-poor-countries-are-set-miss-out-covid-19-vaccine. Accessed 8 November 2021.

I have shared this journey only to make the point that, prior to 2020, I had not explicitly thought about solidarity, but that once I started thinking about it, it became somewhat of an obsession. I have, of course, had the occasion to address solidarity-related issues in the past, sometimes even referring to solidarity conceptually. To take my work on the use of force as an example, the central idea of emphasising collective measures and shedding reliance on unilateral measures is inspired by the idea of solidarity, a sense of collective responsibility to stop the cycle of violence inherent in the expansive approach to self-defence.[6] In the last fourteen years I have written a significant amount on the law of the sea and if I reflect on those contributions,[7] I would suggest that what ties them all together is solidarity. The essence of my views on the ongoing discussions is best captured in the following quote, which is taken from a statement I made as a diplomat on behalf of South Africa at the UN General Assembly:

> The common heritage of mankind principle is not solely about benefit sharing. [it] is just as much about conservation and preservation. The principle is about solidarity: solidarity in the preservation and conservation of a good we all share and therefore should protect. But also solidarity in ensuring that this good, which we all share, is for all our benefit.[8]

A prime example of how solidarity has been a constant undertone of my work is my doctoral thesis on sustainable development, in which the word "solidarity" does not appear even once.[9] Yet the theory expounded in that book is absolutely one about solidarity. That book concludes with the following paragraph:

> The call made — for example in the Johannesburg Declaration on Sustainable Development — for a recognition that 'humans must be at the centre' of sustainable development is a call for a social well-being-centred variation of sustainable development. This call is consistent with the historical exposition of sustainable development from its early roots during the Stockholm process. It was the plight of the poorest and most vulnerable members of our human family that laid the seeds for the development of the concept. It should be the plight of the poorest and most vulnerable members of our human family that informs the understanding of this concept.[10]

The theme of the Conference this chapter is a result of was Solidarity in International and Regional Law. I will focus not on regional law, but on international law. Yet, I should recall that solidarity is an important concept for the region from which I come, Africa—whether as a concept of law or philosophy. We are known, as Africans, for our appeal to solidarity. For example, what makes the African Charter different from a typical international human rights instrument is the inclusion of group rights and duties, concepts born of a sense of solidarity.[11] Solidarity can of course be

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[6] See, e.g. Tladi 2013; 2019a; 2021.

[7] Tladi 2009; 2014; 2015; 2017; 2019b.

[8] Statement by South Africa to the UN General Assembly on Oceans and the Law of the Sea, 4 December 2009 (on file with author).

[9] Tladi 2007.

[10] Ibid., p. 250.

[11] See generally the African Charter on Human and Peoples Rights (1982) adopted 27 June 1981, entered into force 21 October 1986, 21 ILM 58, Articles 19–21. See generally Umozurike 1983 and Bondzie-Simpson 1988.

abused. We have seen, at times, African states showing solidarity by standing with, or behind, abuses of other African states.[12] This is not the type of solidarity I propose. Solidarity should conceptually be about improving the lives of the disadvantaged and marginalised and vulnerable people in our society.

In many ways, the eruption of the COVID-19 pandemic has highlighted the plight of the most vulnerable in our society and the cracks in the purported solidarity often declared in the international legal scholarship. The effects of the pandemic have made graphic the inequality and disparity that we all know exists. When the pandemic broke, world leaders churned out the mantra for successfully overcoming the pandemic—sanitise, social distance, wash your hands often, wear a face mask. Social distancing might be possible in the Hague or Geneva, but it is not possible in the townships of Gugulethu in South Africa or the slums of Dharavi in India. The average person in Europe or Sandton might have several bottles of hand sanitiser—a few for the house, a small bottle for the car, a bottle for the office and maybe one for the handbag. Yet many in Dhoker Jhara and Zomba District do not even have access to clean running water for washing their hands, let alone sanitiser. When the pandemic hit, and we were told to go into lockdown, Zoom, Facetime, Teams, Webex and other platforms aided many of us to continue our professional lives in the virtual world. But the poor do not have access to computers, internet connectivity and even electricity, leaving aside the fact that much of their work cannot be done online. These illustrations of inequality can, as well, be applied to the discrepancies in opportunities for education. These inequalities exist across the world and within different societies in the world.

If law, and in particular international law, is meant to address these inequalities and disparities, then surely it must embody a sense of solidarity.

2.2 The Emergence of an International Law Based on Solidarity

It is now well known that classical international law does not embody solidarity. International law is based on a network of bilateral relations in which State sovereignty and the consent of the State are supreme.[13] Because of its "sovereignty" and "consent" centred nature, international law in its classical model can be described as a legal order in which "States are nominally free" and "enjoy supreme authority over all subjects and objects within" their territories.[14] The resulting framework is one in which the individual interests of States drive the content and development of international law. The objective of this legal system, and the cooperation on which

[12] See, e.g., Bondzie-Simpson 1988, pp. 644–645.

[13] Simma 1994, pp. 229–233.

[14] Held 2003, p. 162; Tladi 2020a, pp. 373 *et seq.*

it is founded, is to enable each individual State to pursue and enhance their individually determined objectives and interests.[15] Under this system, where consent and sovereignty are king, the only real constraint on States is the ability to bargain, which in turn is dependent on the States' influence—influence itself is derived from military, economic and political power.

This system of international law, a system in which individual interests of States drive the content of law and in which the only real constraints on States flow from the ability to bargain, is not based on any normative objectives nor is directed at improving the lives of the marginalized. Such a system cannot be said to exhibit the virtue of solidarity.

Yet there has been a trend, at least in academic literature, suggesting that the classical, state sovereignty-centred international law is giving way to a more value-based system of international law and that the idea of international law as a network of bilateralism is being replaced by a system based on community values and solidarity.[16] German scholar and former Judge of the International Court of Justice, Bruno Simma described this shift in his now famous Hague Academy Lectures.[17] In those lectures, Simma observed that international law was "overcoming the legal and moral deficiencies of bilateralism" inherent in the State-centred classical international law and was "maturing into a much more socially conscious legal order".[18] The type of order that could address itself to the social issues; the type of order that could exhibit or at least approximate solidarity. In Judge Simma's view the legal system emerging to replace classical international law is one characterised by the "social responsibility and accountability" of its subjects.[19] Elsewhere, the emerging legal system has been described as one premised on "a brave new world" in which "State sovereignty is no longer a factor … in which the community of personkind is governed by the rule of law … in which peace and human rights are secure and in which the energy of personkind is addressed toward resolving poverty and inequality."[20] This new vision of international law is one that is characterised by a commitment to solidarity—that after all is the essence of community.

Can we really say that we have a system based on solidarity, or even that such a system is emerging? Of course, the principle of cooperation is deeply embedded in modern international law. But cooperation should not be confused with solidarity. Cooperation is transactional and is based on *quid pro quo*. States agree to cooperate in order to achieve mutually beneficial outcomes.[21] In a sense, cooperation is merely a reflection of classical international law and its core of bilateralism. As

[15] Allott 1990, p. 324.

[16] Dupuy 2005; Jouannet 2007.

[17] Simma 1994.

[18] Ibid., p. 234.

[19] Ibid.

[20] Dugard 2007, p. 731.

[21] See in this respect Delbrück 2012, at p. 4, explaining why cooperation in a context that does not constitute "an undue burden on States" is acceptable but a general duty to cooperate outside particular contexts is difficult to conceive.

Abdul Koroma, former judge of the International Court of Justice, notes, in contrast to cooperation, solidarity "represents more than a general notion of 'neighbourliness'".[22] For Koroma, solidarity "establishes concrete duties on States to carry out certain measures for the common good".[23] Seen in this light, it seems fair to say that this "brave new" international law based on solidarity does not exist. It is a figment of the imagination, a unicorn.

That international law does not embody this principle should not be taken to mean that international law is bad or evil. That is certainly not the point I wish to make. I do not even wish to make the point that international law is uncaring towards the poor. International law is none of those things. It is nothing more than a vehicle through which the outcomes of bargain are reflected. It is perhaps neutral, and even this may be challenged. It does *not seek to* harm the poor and the vulnerable (though it may). It, as a system, is simply indifferent. International law's indifference towards the needs of the marginalized and solidarity can be illustrated by reference to particular challenges and international law's response to them.

2.3 International Law's Responses to Current Challenges

2.3.1 International Law and Poverty[24]

There is no better reflection of the lack of solidarity in international law than international law's response to poverty—the very embodiment and cause of the inequality and disparity which is exacerbated by COVID and the thing that is both a cause and an effect of the marginalization of the poor and vulnerable. According to a recent World Bank report in 2015 the levels of "extreme poverty", which this report defines as persons living below 1 dollar 90 cents a day, stood at 736 million.[25] This figure may be seen as an improvement when compared to the nearly 2 billion people living below this threshold in 1990.[26]

Yet, the presentation of these figures as representing progress is, at best, an overstatement and at worst, a misleading statement. First, the threshold of 1 dollar 90 cents is a rather unambitious threshold for identifying poverty. It permits us to exclude from the portrait of the human family the multitudes of people living in poverty. Indeed, the World Bank's more complex measure of poverty, that goes beyond consumption levels, shows that "the number of people who are poor stood at 2.1 billion as of

[22] Koroma 2012, p. 103.

[23] Ibid. Compare with Delbrück's context-specific description of cooperation under international law. Delbrück 2012, p. 4.

[24] Tladi 2022.

[25] World Bank Group 2018, p. 1.

[26] Ibid., p. 1. The report states that "[d]espite the more sluggish global growth of recent years, the total count of people in extreme poverty declined by more than 68 million people between 2013 and 2015—a number roughly equivalent to the population of Thailand or the United Kingdom".

2015",[27] a figure that is three times that of persons living on less than USD 1.90 a day. Second, whatever the decrease in the rate of extreme poverty, if we accept the slogan "leave no one behind", then by these numbers the "international community" is failing at least 736 million times over. The true picture of the state of our world is that poverty remains unacceptably high.

This picture of poverty is one which *ought* to trouble the "international community" if such a community exists. It should be of concern to the international community that the number of hungry people is increasing while there is enough food to feed everyone in the world. The international community should be concerned, from an ethical and legal standpoint, that while a few have plenty, the vast majority are impoverished and live in squalor. International law, in particular the post-classical, value-based international law, as a vehicle through which the concerns of the international community are expressed, should be expected to incorporate rules designed to address poverty. In an international law based on solidarity, in which the international community seeks to address poverty, we might expect to find an obligation to eradicate poverty. Yet there is no obligation under general international law to act to eradicate poverty. There isn't even an obligation to cooperate to eradicate poverty: an obligation of conduct.

If there was any area of international law that could be said to, at least potentially, be directed at poverty it would be international human rights law. This should be self-evident: international human rights law, more than any other area of international law, is, at its core, about the human condition. Poverty is also about the human condition. Given that poverty and human rights are both, at their core, about the human condition, how international human rights law addresses poverty is an important question for assessing the role of solidarity in international law.

Socio-economic rights are the rights most closely associated with the fight against poverty. These rights are established precisely to ensure the protection of "the poor and otherwise marginalised" in society.[28] In this context, it has been noted that socio-economic rights "can serve as a powerful tool for reducing and eliminating poverty".[29] A survey of the catalogue of rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR), reveals that they concern, directly, the fight against poverty. The recognition of socio-economic rights in international law has the potential to play an important role in poverty eradication.

Yet, while socio-economic rights can potentially play an important role for the alleviation of poverty, this potential is limited in several ways. First, treaties in which socio-economic rights are found, apply only to states parties to the treaties.[30] For civil and political rights, this limitation is overcome because a strong argument can be made that the commonly recognised civil and political rights are also customary international law—an argument which will be more difficult to make for socio-economic

[27] Ibid., p. 7.

[28] See Brand 2005, p. 2. See generally Khoza 2004.

[29] Osuji and Obibuaku 2016, p. 331.

[30] See Article 34 of the Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331 (*VCLT*).

rights. Second, treaty provisions on socio-economic rights are generally couched not as immediately and absolutely enforceable rights, but rather as obligations on the state to progressively realise the right, and that such rights are subject to the resource constraints of each individual state.

There is a third, and in my view more crippling, constraint on the potential of socio-economic rights under international law to impact on poverty. Socio-economic rights in human rights treaties are couched as rights owed by a state to the population in its own territory.[31] While there has certainly been movement towards some sort of extra-territorial application, this has largely been limited to those instances where the state in question exercises some control or jurisdiction over activities or actors in a third state, where that actor or activity impacts on rights in a treaty.[32] The problem with this general construction of international law is that, in the context of socio-economic rights, it places the burden of dealing with the most serious cases of poverty—those in developing states—on precisely those states that, due to their economic situation and developmental state, are not in a position to allocate the necessary resources to effectively address poverty. This reveals either a lack of seriousness about dealing with poverty or, alternatively, an insane approach.

The legal framework of socio-economic rights described above makes sense from the perspective of international law, based on bilateralism, cooperation and state sovereignty. However, it undermines the idea of solidarity implied by the transition of international law from bilateralism to a system based on community interests. To truly enable socio-economic rights to play a meaningful role in the eradication of poverty, relevant human rights instruments should be interpreted to establish the idea that the international community as a whole is responsible for ensuring that such rights are enjoyed by all. Is that possible under the current international law, though?

2.3.2 Vaccines

I introduced this chapter by referring to vaccine hoarding. In August of this year, the *Institut de Droit* adopted a resolution containing draft articles on Epidemics, Pandemics and International Law.[33] The resolution has a number of provisions that appeal to a sense of solidarity and I would like to say a few things about them. The first preambular paragraph affirms that the protection of persons from epidemics "is

[31] See Askin 2019.

[32] Ibid. In regard to civil and political rights, see ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, 2004 I.C.J. Reports 136, at para 109; see also IACtHR, *State Obligations in Relation to the Environment in Relation in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 1(1) and 2 of the American Convention on Human Rights*, Advisory Opinion, 15 November 2017, OC-23/17, at paras 73 *et seq.*

[33] Institut de Droit International 2021.

a common concern of humankind".[34] The notion of common concern, denoting "we are all in this together", suggests a sense of solidarity. The third preambular paragraph for its part emphasises "the need for international solidarity and cooperation for the prevention of epidemics and in responding to the threats of epidemics". The choice of words and style of the third preambular paragraph is revealing. It states, as a matter of fact, that there is *a need* for international solidarity. But there is no claim in this preambular paragraph that international solidarity in responding to threats exists. More than that, the preambular paragraph does not make a claim that international law requires solidarity. It is also just a need. Just as the need for love does not mean an obligation to love, so the need for solidarity does not mean the obligation for solidarity.

Article 4, on Human Rights, provides for States to take all necessary measures to "ensure equitable access to medical services, vaccines and medicines to all". On its own, this provision is not about international solidarity. It is about the duties of States in respect of their own populations, territories and jurisdiction. Article 4 must be read with Article 6 which provides for the duty to cooperate. In particular, paragraph 3 of Article 6 provides that the duty to cooperate includes access to patents and technologies relating to vaccines and that such cooperation must take into account the needs of developing countries. More to the point, paragraph 4 states that cooperation also applies to equitable access to medical services, vaccines and medicines.

This all seems very promising for solidarity, until we remember that the principle of cooperation is not the same as solidarity. Unlike solidarity, cooperation is transactional and, like the bilateralist character of international law, cooperation is based on bargain. Many of us would have wanted the *Institut de Droit* to go further in stating that intellectual property rules that prevent the equitable access to medicines shall be inapplicable in times of pandemics. But the articles of the *Institut* probably go as far as the current state of the law permits—it may even be said that they go further than the current state of the law.

2.3.3 The International Community

At the heart of the idea that international law either embodies or aspires to a sense of solidarity is the notion that there exists an international community. To recall the sentiments of Judge Koroma, solidarity means more than good neighbourliness. It calls upon us to want to see each other's upliftment. There is a Zulu saying, which I am sure you are familiar with: "Umuntu ngumuntu ngabantu". This well-known saying calls on us to care for those around; it evokes a sense of belonging, a sense of community. And in many ways, that is precisely what solidarity is about: a sense that we all belong, and sense that we are a community. So the concept of an "international

[34] Ibid., p. 1 ("Affirming that protection of persons from epidemics without discrimination of any kind and regardless of the sources and cause of the disease is a common concern of humankind").

community", so ubiquitous in modern international law,[35] is an appeal to creating an environment of global belonging; an appeal to each and every one of us to care about the other, wherever the other may be, whatever the other might look like.

An appeal to an international community is made in a different context, and it is not possible in this chapter to describe the various ways that the concept is invoked. In the context of peremptory norms of general international law (*jus cogens*), the definition of *jus cogens* is based on the acceptance and recognition of peremptoriness by the international community,[36] the characteristics of *jus cogens* are based on the values of the international community,[37] and *jus cogens* norms give rise to obligations owed to the international community of States as a whole.[38] In relation to the responsibility to protect, it is the international community that has the duty to assist States and to intervene when States are unable or unwilling to protect their populations. The two main pillars of the responsibility to protect are placed on the shoulders of this mythical creation called the international community.[39]

The question, though, is whether this international community exists. Can we say that the international law of today creates conditions of belonging, of caring for one another regardless of where we may be, what we may look like, what we may believe in? Put differently, does international law, as a rule, contribute to the establishment of an international community and thus a sense of solidarity? It is easy to speak of an international community but it is not at all clear that an international community truly exists. There is, of course, a collection of States committed to particular objectives and willing to cooperate and coordinate to achieve these objectives. But how and which of these objectives are prioritised, how they are to be achieved and at what cost, are all products of bargain, of *quid pro quo* and of influence, which is itself dependent on power.

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[35] See Hakimi 2017.

[36] See Draft Conclusion 2 of the ILC (2019) Draft Conclusions on peremptory norms of general international law (*jus cogens*), UN Doc. A/74/10, pp. 141–208. https://legal.un.org/ilc/reports/2019/english/chp5.pdf. Accessed 6 September 2022 ("A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.").

[37] Ibid., Draft Conclusion 3 ("Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable.").

[38] Ibid., Draft Conclusion 17 ("Peremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (obligations *erga omnes*), in which all States have a legal interest.").

[39] See UN General Assembly (2005) Resolution on the 2005 World Summit Outcome, A/60/1, especially para 138 ("The international community should, as appropriate, encourage and help States to exercise this responsibility ..") and para 139 ("The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.").

2.4 Conclusion

It is easy to use solidarity as a sexy catchphrase. Yet, if international law is to move beyond its current bilateralist nature, solidarity has to be cultivated. Speaking it and dreaming it will not deliver an international law of solidarity. To nurture the development of caring international law reflecting a sense of community, a sense of caring, a sense of *ubuntu*, we need to promote the infusion of solidarity into the very fabric, methodology, *raison d'être* of the system.

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