

Rüdiger Wolfrum · Chie Kojima (eds.)

Solidarity: A Structural Principle of International Law

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**Max-Planck-Institut für ausländisches
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Beiträge zum ausländischen öffentlichen Recht und Völkerrecht

Begründet von Viktor Bruns

Herausgegeben von
Armin von Bogdandy · Rüdiger Wolfrum

Band 213

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Heidelberg, August 2009

Rüdiger Wolfrum
Chie Kojima

List of Abbreviations

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

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

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

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

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

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* The articles by Tania Bolaños and Hanspeter Neuhold were submitted after the symposium.

Opening Address

Armin von Bogdandy

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

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

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

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

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

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

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

Karel Wellens*

Introduction

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

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

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

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

has to face important challenges (§ V), we can already recognise its impact on the changing structure of international law (§ VI).

I. The Main Features of the 2004 Contribution

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

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

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

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

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

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