Solidarity and the Law of Development Cooperation

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

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

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

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part will conclude by proposing a working definition for the further analysis. On this basis and through this lens, it will then analyse the law on development cooperation. To that end and in the second part of the paper, it will describe an ongoing process of international standard-setting with respect to development cooperation that gives an indication of where the international discussion stands today – and which seems to reflect the use of a surprisingly comprehensive notion of solidarity. Finally, the third part of this paper will analyse the law of specific development organisations (the World Bank and the European Community) which (in comparison to the general international declarations) seems to contain much less evidence of solidarity.

I. On the Concept of Solidarity

A. Historical and Conceptual Starting Point

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

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

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

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

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

[4] Metz, see note 2, 173.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Proposal for a Meaningful Notion of International Solidarity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Help Each Other to Achieve a Common Objective

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

B. Equality

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

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

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

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

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

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

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

C. Mutuality

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

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

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

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

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

[39] Ibid., para. 61.

[40] Ibid., para. 6.

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

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

[43] Ibid., paras 10-19.

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

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

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

III. Solidarity in the Law of Development Institutions

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

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

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

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

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

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

A. Help Each Other to Achieve a Common Objective

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

1. Obligation to Provide Funds?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Standards to Prevent Harm

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

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

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

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

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

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

B. Equality

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

1. Contractual Basis

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

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

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

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

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

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

2. Project Cycle

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

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

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

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

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

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

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

[66] Art. 57 III Cotonou Agreement.

3. Representation

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

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

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

C. Mutuality

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

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

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

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

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

1. Faithful Implementation

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

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

2. Conditionality?

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

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

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

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

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

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

IV. Conclusion

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

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

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

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

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

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

Discussion Following the Presentation by Philipp Dann

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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