# On Sovereignty, Legitimacy, and Solidarity
# Or: How Can a Solidaristic Idea of Legitimate Sovereignty Be Justified?

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*The traditional concept of sovereignty is largely independent of democratic legitimacy and completely indifferent to any obligation towards non-national citizens. But can this traditional concept meet the normative expectations of a post-traditional understanding of political authority as well as the challenges of an ever more interconnected world? In order to respond to this question, the Article analyzes the conceptual presuppositions that lie at the basis of the notion of "sovereignty," first regarding its sources, and second regarding the ideas of rationality that are applied when sovereign actors operate. As far as the sources of sovereignty are concerned, it is argued that both of them — the "ascending" and the "descending" — although decisive for determining the quality of the legitimacy of political power, have little influence on a positive attitude of sovereigns towards aliens' interests. To clarify the conditions for an opening of sovereign powers to solidarity, an assessment of the rationalities which are implemented when a sovereign puts actions into effect is therefore required. Yet most rationality concepts — or uses of practical reason — prove to be negative or at least useless when it comes to the question of supporting solidarity: the gamut ranges from*

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*open hostility towards the idea of taking the interests of aliens into account, through substantial indifference, to a positive approach which presupposes, however, non-provable metaphysical assumptions or an individual mindset with no pretension of issuing norms of general validity. Only the communicative conception of reason meets the criteria for a convincing justification of solidarity towards aliens as an obligation. The author therefore concludes that only an "ascending" sovereignty based on a communicative understanding of rationality can be considered fully legitimate insofar as the sovereign power, in this case, first originates from the will of the citizens and, second, is morally, politically and legally obliged to a solidaristic attitude towards the justified interests of non-citizens.*

## Introduction

Sovereigns are generally thought to have obligations — mainly, if not exclusively — towards themselves. Indeed, the assumption that actors — in this case, states — do not accept any moral, political or juridical authority above and beyond themselves may imply that they reject any obligation of solidarity towards their fellow humans which could be drawn from such an authority. However, outlining the rejection of obligations that are not only external but can also be universal in their scope is just one way to define "sovereignty." In fact, we have at least one alternative definition according to which "sovereignty" consists of the legitimate exercise of public power over a particular population, regarding a certain kind of social interaction, and generally but not necessarily with reference to a specific territory. If we adopt this second definition, sovereignty would no longer be in contradiction to responsibility for others or solidarity with non-citizens. Rather, responsibility and solidarity could be seen as two of the conditions that concur to make the exercise of public power — and, therefore, also sovereignty — legitimate. The transition from the traditional concept of "sovereignty" to its alternative understanding corresponds, furthermore, to the passage from its exclusive, hierarchical and authority-based conception to a rather inclusive, network-oriented and dialogical view.

Given these premises, this Article will analyze the conceptual presuppositions that lie at the basis of both the traditional view of "sovereignty" and its alternative. In doing so, I will concentrate on two essential elements for the definition of "sovereignty": first, the question regarding its sources; and, second, the conceptions of rationality that are implemented when sovereign authority is put into effect. As regards the fundaments of sovereignty — which will be

addressed in Part I of the Article — they are essentially of two kinds, depending primarily on the assumption about where the legitimation of public power is thought to come from. Following a first and more ancient understanding, the legitimation of public power has a "descending" character. Legitimate sovereignty is here "descending" in a twofold meaning: first, because the holder of the public power draws it from above, namely from natural or divine law; and second, because sovereign authority descends from the holder of public power to the governed. In any case, legitimate sovereignty is assumed to derive, as stated by the supporters of this conception, from an authority situated above the individuals, so that the holders of public power are vested with it without resorting to any investiture coming up from the governed. According to a second definition, to the contrary, legitimate sovereignty can only be established in an "ascending" way, namely — at least implicitly — by a free act of individuals willing to create a political community and the institutions that shall govern them. Here, then, the original basis for sovereignty lies in the autonomy of the free individuals. By building a political community and by establishing public power the individuals — now joined together to build a *societas civilis*, or a "commonwealth" — transfer a part or the whole of their autonomy to the hereby constituted public authority, conferring upon it sovereignty by this act.[1]

This distinction between different sources of sovereignty is essential in order to qualify a first and more usual dimension of its legitimacy; the question is whether sovereign authority meets the normative expectations of a post-traditional understanding of political power by rejecting metaphysical, religious or, in general, ontological assumptions — presently often reformulated in technocratic guise — and by relying only on the unavoidable epistemic fundament created by the will of the governed. Yet in an ever more interconnected

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1 We could add a possible third source of sovereignty, namely the brute fact of a power that does not resort to any reason to justify its existence. If we consider the question more closely, however, we cannot but notice that even Machiavelli, as the master of *Realpolitik*, tends to justify power with reasons that go beyond the brute exercise of force. Indeed, the *Discourses on Livy* are mainly dedicated to the reasons for a strong and free republic. And even *The Prince* ends with an appeal for the freedom of Italy that has little to do with a sheer exaltation of brute power. Unjustified sovereignty seems not to have — at least in political philosophy — many supporters. *See* Niccolò Machiavelli, Il Principe (Einaudi 1995) (1513) (translated to English in Niccolò Machiavelli, The Prince (Rufus Goodwin trans., The Modern Library 2007)); Niccolò Machiavelli, Discorsi sopra la prima deca di Tito Livio (Einaudi 1997) (1513-1519) (translated to English in Niccolò Machiavelli, Discourses on Livy (Harvey C. Mansfield & Nathan Tarcov trans., Penguin Books 1998)).

world, legitimacy cannot be accomplished by just this content: since sovereign powers can do harm — in particular to non-citizens — to a much broader extent, the legitimacy of sovereignty cannot be referred only to the exclusive involvement of the members of the single political community. Rather, the idea of legitimate sovereignty has to be updated and integrated with a further aspect, namely a solidaristic attitude towards aliens' interests.

The inquiry into the sources of sovereignty, however, does not shed much light on this second — more future-oriented — aspect of the legitimacy of sovereignty. Indeed, the preference for a legitimation of sovereignty either coming from "above" or, to the contrary, its "bottom-up" conception has few consequences, if any, with regard to the existence of an obligation, for the sovereign power, of solidarity towards non-citizens. A sovereign power with a "descending" legitimacy, in fact, can be open to the needs and arguments of aliens, or it can be exclusively self-referential — and an "ascending" public power can be either as well. Therefore, if we want to take into account the reasons for or against solidarity towards non-citizens, we have to shift the focus of the analysis from the sources of sovereign public power to the conceptions of rationality that are applied when sovereign authority is put into action. The starting point here is the assumption that exercising sovereignty always implies the use of practical reason and, as a consequence, the application of a certain kind of rationality.

In the second Part of the Article I will therefore analyze six different conceptions of rationality that stand behind the idea of sovereignty, always concentrating in particular on the question whether they can support solidarity towards non-citizens or rather reject it. Of the six approaches to the practical use of reason, only the last conception — namely communicative rationality — can provide a coherent rationale for justifying not just the traditional idea of legitimate sovereignty, implying the democratic consent of the citizens, but *also* its no less fundamental updating and semantic extension due to the challenges of the post-national constellation, i.e., the taking into account of the interests of non-citizens involved by national decisions.

In the third and last Part I will then try to bring together the results of both strands of analysis, drawing the outlines of a concept of "sovereignty" which is, at the same time, bottom-up, inclusive and open to the "others."

## I. The Sources of Sovereignty

By considering the sources of sovereignty as the first theoretical presupposition of the concept, I address essentially four questions. First, where is sovereignty thought to derive from? Second, how does this derivation affect the legitimacy

of sovereign power? Third, which kind of source of sovereignty may be considered suitable for a society in which no given and uncontested authorities — be they based on religion, metaphysical assumptions or technocratic knowledge — can be accepted? And fourth, are the sources of sovereignty of any relevance to the opening of sovereign powers to the interests and arguments of non-citizens?

As anticipated in the Introduction, sovereignty originates in two different ways: through a "descending," or through an "ascending" movement. Starting from the history of Western political ideas, I will dedicate the following two Sections (A and B) to "setting the scene" by focusing on the first two abovementioned questions: the foundations from which sovereignty can be drawn, and their implications for the legitimation of sovereign power. On the basis of these considerations, I will then move on — in Section C — to the third and fourth questions and, therefore, to some provisional conclusions as regards the reshaping of the concept of sovereignty. Roughly summarized, only the "ascending" source of sovereignty will prove to be acceptable in a liberal and democratic society, which does not mean, however, that it should also lead, in principle, to more solidarity with aliens.

## A. The "Descending" Concept of Sovereignty

The alleged higher truth, from which — following some strands of Western political thought — sovereignty is alleged to be derived, can be of two kinds: natural law, or divine law. The best example of the idea of sovereignty as derived from natural law is provided by Jean Bodin. In his *Six livres de la République* he asserts that "sovereignty is that absolute and perpetual power vested in a commonwealth."[2] Therefore, a sovereign prince is not bound by laws (*legibus solutus*), and the civil norms promulgated by him, "even when founded on truth and right reason, proceed simply from his own free will."[3] To justify sovereignty, Bodin resorts to the old Aristotelian theory of the familistic origin of the polity. Following this conception, the "commonwealth may be defined as the rightly ordered government of a number of families, and of those things which are their common concern, by a sovereign power."[4] The premises are thus twofold: first, according to natural law the absolute power within the family belongs — or, we should rather say, belonged in Bodin's

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2 Jean Bodin, Six livres de la république 85 (Imprimerie de Jean de Tournes 1579) (translated to English in Jean Bodin, Six Books of the Commonwealth bk. I, ch. VIII (M.J. Tooley trans., 1955)).

3 *Id.* at 92 (English: bk. I, ch. VIII).

4 *Id.* at 1 (English: bk. I, ch. I).

time — to its head and should not be challenged by any family member; and, second, the political community is nothing but an enlarged family. The result is that the same power deriving from the order of natural law, when it comes to that big family that is the political community, is rightfully put in the hands of the holder of public power and should not be contested by the subjects.

In today's political thought and praxis, Bodin's idea may find its continuation — or revival — in the technocratic assumption of an allegedly superior knowledge and expertise, with which the holders of public authority are thought to be vested. An excellent example of the renewal of paternalism in technocratic guise has been recently provided by the measures taken by the European Union in order to meet the debt crisis.[5] Surely, technocratic paternalism is far from absolute, so that technocratic sovereignty — provided that we can apply the concept of "sovereignty" in these cases — is of a quite different kind than in Bodin's conception. Nevertheless, the idea that an authority should derive the legitimacy to take decisions from a supposed natural supremacy — be this rooted in tradition or in knowledge — shows the continuity and liveliness of the "descending" conception of public power.

For a second strand of political thought, the reference to natural law is just the first step on the way to an even higher truth, namely the law of God. In other words, sovereignty is here derived from God as the only true holder of sovereign power. The way in which sovereignty then descends from God to the temporal powers was articulated in different forms during the golden age of Christian — and then Christian-Catholic — political theology, between the Middle Ages and early Modern Ages. According to the earlier and most radical interpretation, sovereignty was transferred from God to the Church and then, only in a second step, to the secular rulers.[6] A later — already more secular — conception still derived the power of mundane sovereigns from God, but directly and not through papal mediation.[7] The most modern strand of Catholic theologians of the School of Salamanca went even a step further, asserting that the transition of legitimate power from God to the worldly rulers had to pass through popular sovereignty, although the people, after

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5 Jürgen Habermas, Im Sog der Technokratie [In the Riptide of Technocracy] 82 et seq. (2013); Fritz W. Scharpf, *Die Finanzkrise als Krise der ökonomischen und rechtlichen Überintegration* [*The Financial Crisis as Result of Economic and Legal Overintegration*], *in* Grenzen der europäischen Integration [The Limits of European Integration] 51 (Claudio Franzius, Franz C. Mayer & Jürgen Neyer eds., 2014).

6 Henry Hostiensis, Summa Aurea (Servanius 1556) (1250-1261).

7 Francisco de Vitoria, Relectio de potestate civili [On Civil Power] 58 (Akademie Verlag 1992) (1528) (translated to English in Francisco de Vitoria, Political Writings (Anthony Pagden & Jeremy Lawrance eds., 1991)).

having transferred the power to the rulers, remained actually devoid of the real possibility of influencing the political outcomes.[8]

All these conceptions can be regarded as belonging to the past. Nevertheless, the idea that sovereign authority is only legitimate when it respects the higher laws of God has somehow survived up to the present time under the guise of the principle of dignity.[9] Indeed, if political power has to protect human dignity in order to obtain legitimacy, and the Catholic Church claims for itself the right to define what human dignity is, then the consequence cannot but be that the Church still maintains the pretension — albeit indirectly — of possessing the key to sovereign power and that the interpretation of the law of God should still influence the secular political and juridical order.

### B. The "Ascending" Understanding of Sovereignty

The "ascending" idea of sovereignty arose as a consequence of the transition from the holistic to the individualistic paradigm of social order and was introduced by Thomas Hobbes in the middle of the seventeenth century. Hobbes overturned for the first time in history the traditional hierarchy between individual and community, collocating the individuals, as the holders of fundamental rights and the source of any legitimation of authority, at the center of political life. The starting point of his political philosophy was, therefore, no longer the society as a *factum brutum*, a "brute fact" based on the natural sociability of humans and organized in an organic hierarchical structure,[10] but the individual endowed with inherent rights, interests and reason.[11] In this original state of nature — a fictional condition, presented by Hobbes in order to focus attention not on the historic beginning of society, but on the ontological foundation as well as on the conceptual preconditions of a just

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8 Francisco Suarez, *De legibus, ac Deo legislatore* [*On Laws and God the Lawgiver*], *in* Selections from Three Works of Francisco Suarez 3, bk. III, chs. III, IV, at 377 (James Brown Scott ed., Clarendon Press 1944) (1612) [hereinafter Suarez, *De legibus*]; Francisco Suarez, *Defensio fidei catholicae et apostolicae adversus Anglicanae sectae errores* [*Defence of the Catholic and Apostolic Faith*], *in* Selections from Three Works of Francisco Suarez, *supra*, at 647, bk. VI, ch. IV, bk. III, chs. III, IV, at 718.

9 On the laical and religious definition of dignity, see Understanding Human Dignity (Christopher McCrudden ed., 2013); Pope Benedict XVI's Legal Thought: A Dialogue on the Foundation of Law (Marta Cartabia & Andrea Simoncini eds., 2015).

10 Thomas Hobbes, De Cive, bk. I, chs. I, II (Royston 1651) (1642) [hereinafter Hobbes, De Cive].

11 *Id.* bk. I, ch. I.

order — individuals are free and equal.[12] However, they are also constantly in danger of being assaulted and harmed by fellow humans in search — as every individual in the state of nature always is — of more resources in order to improve their life conditions.[13] Therefore, natural reason commands to leave the state of nature and build a society (*societas civilis*), in which life, security and property are safeguarded.[14]

In Hobbes's view the Commonwealth is thus not the original and axiologically highest entity in the ethical world, but rather a tool that humans give to themselves in order to achieve social stability. In Hobbes's understanding, sovereignty is ascending insofar as it is no longer seen as a feature that the given political authority draws from the laws of God or from its alleged natural superiority. Rather, it arises from the original freedom and self-reliance of the individuals who create a sovereign authority through an act of free will, by means of the transferal of rights to the public power, and in order to guarantee, on the basis of a legitimacy coming from the bottom up, an adequate protection of the subjective entitlements. Therefore, sovereignty is legitimate only if it aims at safeguarding fundamental rights and is grounded on a freely and explicitly expressed people's consent — in the strand of political thought initiated by Hobbes, in particular, by means of a contract (*pactum unionis*).

In contractualism, then, the sovereignty of public power is always rooted in the rights, interests and reason of the individuals. Yet differences emerge between scholars when it comes to the extent of competences that the sovereign public power is vested with. This depends on how many rights the individuals who are willing to create a polity are supposed to have transferred to the sovereign authority through the founding contract. In the cases in which these rights are just few — as in Locke's liberal theory of state[15] — the sovereign power has only the competence of making sure that the interactions between citizens can unfold peacefully by guaranteeing law and order. As a result, the citizens maintain all their original entitlements except for the right to take the law into their own hands, and the danger of an excessive concentration of competences is prevented by the separation of powers and by a strong parliament.

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12 *Id.* bk. I, ch. III.

13 *Id.* bk. I, chs. I, X; Thomas Hobbes, Leviathan, or the Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil ch. XIII (Crooke 1651) [hereinafter Hobbes, Leviathan].

14 Hobbes, Leviathan, *supra* note 13, ch. XIV; Hobbes, De Cive, *supra* note 10, bk. I, ch. II.

15 John Locke, Two Treatises of Government bk. II, ch. 7, § 90 (Awnsham-Churchill 1698) (1690); *id.* bk. II, ch. 11, § 134; *id.* bk. II, ch. 12, § 143; *id.* bk. II, ch. 13, § 150.

Contrarily, from Hobbes's pessimistic perspective social order can be safeguarded only if the individuals give up all their rights, excluding the right to life protection and — very partially — the right to negative liberty as the freedom to pursue economic activities in order to achieve "happiness," yet only insofar as this does not jeopardize the guarantee of social peace and order.[16] As a consequence, Hobbes's contractualism is characterized by the passage from the condition of free individuals to that of subjects almost devoid of any rights — a theoretically rather contradictory self-chosen annihilation of liberty that vests sovereign power with an almost unlimited amount of competences.

A further alternative is represented by Jean-Jacques Rousseau's radical-democratic theory of the "social contract." Here too sovereignty is created by means of an alienation of rights — an alienation which is, at least at first glance, even more intransigent than in Hobbes's view. Rousseau's social contract provides for an alienation of *all* natural rights, without exception.[17] The difference, which characterizes the more citizen-friendly attitude of the French philosopher, is made by the fact that, whereas in Hobbes's construction citizens alienate their rights to a monarch, turning their status into that of subjects, in Rousseau the citizens alienate their rights to themselves, now constituted as a sovereign political community, as a *volonté générale*, or a "general will."[18] This way, the preferences and interests of the concrete individuals are transubstantiated into a rather abstract, if not obscure, concept of an allegedly "true" will of the political community. The sovereign authority of the *volonté générale* is, in fact, so unrestrained that, also due to an insufficient internal articulation of powers,[19] it is not obliged to give any guarantee to its "subjects," who may even be "forced to be free."[20] As a consequence, Rousseau's idea of democracy always runs the risk of falling into authoritarianism.

### C. Legitimacy and Solidarity

A first — rather usual — definition of legitimacy concerns primarily the question of how sovereign power can be justified before the members of the polity, i.e., before those who have to obey the norms issued by the sovereign.

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16 Hobbes, Leviathan, *supra* note 13, ch. XVII; Hobbes, De Cive, *supra* note 10, bk. II, chs. II, XIII.

17 Jean-Jacques Rousseau, Du contract social, ou principes du droit politique 51 (Garnier-Flammarion 1966) (1762) (translated to English in Jean-Jacques Rousseau, The Social Contract (Maurice Cranston trans., Penguin Books 1968)).

18 *Id.*

19 *Id.* at 52.

20 *Id.* at 54.

From this perspective, the distinction between the "descending" and the "ascending" understanding of sovereignty is clear-cut and the criterion for a normative evaluation of the two conceptions is unambiguous. Indeed, within a post-metaphysical ideological and political context, two assumptions have to be regarded as self-evident. First, no supposedly higher truth of natural or divine origin — and, we might add, of scientific or economic or, in a word, of technocratic origin either — can be legitimately imposed on the whole political community. Second, as a consequence of the first assumption, sovereign authority is legitimate and has the justifiable competence of issuing decisions that bind the whole society only if it is created from the bottom up. Therefore, only the "ascending" conception of sovereignty can found its legitimacy.

The question is much more complicated, however, as regards a second aspect, which is a necessary consequence of increased interconnections in the globalized world, namely the idea of legitimate sovereignty as implying openness of sovereign powers to solidarity towards aliens. In fact, both understandings of the sources of sovereignty are compatible with either option: egoism *and* unselfishness.[21] The ambiguity of the approach becomes already clear by analyzing the conception of Bodin, the first and probably most radical supporter of the absoluteness of sovereignty. Bodin concedes that the power of the sovereign should be limited by divine and natural law, and therefore by a law which — at least implicitly — binds beyond the borders of the single *république*.[22] Nonetheless, this limitation is marginal since the sovereign, being the secular *imago* of the almighty God, has the right to interpret the suprapositive norms freely, i.e., without any secular or ecclesiastic control. Eventually, in Bodin's work sovereign self-reliance thus gains the upper hand. Yet even from the perspective of one of the most uncompromising advocates of sovereignty in the history of political thought, the broader horizon of humanity is not radically ignored.

Although doomed in Bodin's conception to award priority to selfishness, the cosmopolitan perspective is, on the contrary, central to the idea of a sovereignty

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21 I use "egoism" and "unselfishness" with reference to the actions of both individual and collective agents. The non-distinction between individual and collective attitudes is based on the assumption of a continuity between the rationality displayed in individual actions and that applied by collective agents. In this sense, states cannot be regarded as "billiard balls," but represent in their actions the same approach to the interests of "others" that is prevalent in the society from which they emerge. As regards the critique of the "billiard balls" theory, see Anne-Marie Slaughter, International Law and International Relations 507 (2000); and Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 Int'l Org. 513 (1997).

22 Bodin, *supra* note 2, at 91.

based on the law of God. Although in the passage from the Middle Ages to the early Modern Ages Christian and Christian-Catholic political theology increasingly accepted the principle of the distinct identities of the political and juridical orders of the single states, nevertheless these orders were always regarded as legitimate only insofar as they respected the higher commands of divine law.[23] And when, as a result of the principles of the Reformation, the Protestant theologians dismissed the idea that reason can help to discover the divine law, the reference to the cosmopolitan community of humankind and to the *jus gentium* as its common law substituted for the commands of God in guaranteeing a universalistic horizon to sovereignty.[24]

As regards the technocratic variant of the idea of a sovereignty derived from above — in this case, from the assumption of a higher competence which leads eventually to an output-oriented legitimacy — it is precisely that kind of international authorities, in which legitimacy is identified with knowledge-based expertise, that fervently advocates overcoming the traditional, state-centered and selfish concept of sovereignty.[25] However, the way in which these international authorities go about overcoming traditional sovereignty can hardly be associated with inclusive solidarity.

Similar contradictions can be found also among the scholars who support the "ascending" interpretation of sovereignty. The political philosophy of contractualism, on which the "ascending" conception of sovereignty was initially based, was conceived as a theoretical way to re-found legitimacy within the scope of the single polity. For that reason, the most important exponents of contractualism, for one and a half centuries after its first formulation, showed little interest in the question of order beyond national borders. Insofar as the problem was addressed, the relations between states were considered not in terms of solidarity, but rather — as in the state of nature — of competition.[26]

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23 See the definition of the *leges civiles* in Suarez, *De legibus*, *supra* note 8, bk. III, at 361.

24 Hugo Grotius, De Jure Belli ac Pacis (William S. Hein & Co. 1995) (1646).

25 The Exercise of Public Authority by International Institutions (Armin von Bogdandy et al. eds., 2010).

26 Hobbes, Leviathan, *supra* note 13, ch. XXX; Locke, *supra* note 15, bk. II, ch. 2, § 14, bk. II, ch. 12, § 145, bk. II, ch. 16 § 183; Baruch de Spinoza, *Tractatus Politicus* [*Political Treatise*], *in* 3 Opera ch. III (Carl Gebhardt ed., Winters 1924) (1670) (translated to English in Baruch de Spinoza, Complete Works 676 (Michael L. Morgan ed., Samuel Shirley trans., Hackett 2002)); Baruch de Spinoza, *Tractatus Theologico-Politicus* [*Theological-Political Treatise*], *in* 3 Opera, *supra*, ch. XVI (translated to English in Spinoza, Complete Works, *supra*, at 383).

The turnabout — i.e., the formulation, for the first time, of a theory that bound "ascending" sovereignty with an explicitly universalistic understanding of humanity — came with Immanuel Kant. One of his most relevant merits consists, indeed, of the introduction of a three-level construction of public law — domestic, international and cosmopolitan law[27] — which explicitly comprehends, at its third level, a *corpus juris* addressed to the specification of rights belonging to all human beings beyond their affiliation as citizens and regardless of it. In other words, while the domestic public law defines the rules of interaction within the single polity and the international law gives order to the relations between states, the cosmopolitan law — which has to be, in Kant's view, *positive* and not only *natural* law — specifies entitlements of every human being *vis-à-vis* any state of which he is not a citizen, or *vis-à-vis* any other human who is not a citizen of the same polity. The novelty introduced by Kant did not, however, remain unchallenged. Indeed, the connection between the idea of a bottom-up legitimation and a solidaristic attitude towards "others" has always been — and still is[28] —opposed by those who believe that precisely those governments that are accountable to their citizens tend to refrain from taking into account the interests of aliens.

In conclusion, no direct relationship can be ascertained between the sources of sovereignty — "ascending" or "descending" — and the possible obligation of solidarity towards "others": solidarity can come with a bottom-up legitimation or with one from above, and the same goes for selfishness as well. Thus, if we consider sovereignty from the perspective of its origin, it seems that we cannot collect any evidence that may help us to understand whether sovereignty also implies duties towards non-citizens and why, if this is true, solidarity should be owed to them. If we want to ascertain the possible reasons for sovereignty to be opened to arguments and interests of the "others," we have to change the focus of analysis and concentrate on the forms of rationality implemented by sovereign acts.

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27 Immanuel Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf*, *in* XI Werkausgabe 203 (Suhrkamp 1977) (1795) (translated to English in Immanuel Kant, Towards Perpetual Peace and Other Writings on Politics, Peace, and History 67 (Pauline Kleingeld ed., David L. Colclasure trans., Yale Univ. Press 2006)).

28 Examples range from nation-centered democracy theories, *see infra* Section II.A., to communitarianism, *see* Alasdair MacIntyre, Is Patriotism a Virtue?, Lecture at Univ. of Kansas, Dept. of Phil. (The Lindley Lecture) (Mar. 26, 1984), *available at* https://kuscholarworks.ku.edu/bitstream/handle/1808/12398/Is%20Patriotism%20a%20Virtue-1984.pdf, to rational choice approaches, *see* Jack L. Goldsmith & Eric A. Posner, The Limits of International Law 212 (2005).

## II. Rationality and Solidarity

When a sovereign actor carries out an action, it necessarily makes use of its practical reason, i.e., it employs a certain understanding of how it should reasonably act in the world. In other words, it applies justifiable criteria for its action, where the justification may be implicit or explicit and the criteria can take different forms, each of them characterizing a specific rationality of action. Insofar as the actor puts its action into full effect, the rationality that is here applied can be regarded as implemented. I assume here, furthermore, that collective actors — in particular states — employ in their actions in the international arena the same rationality that is predominant within the societies respectively represented by them.[29] In other words, the state is not seen as an autonomous "subject" with its own rationality; rather, its executive institutions operating in the international context are assumed to display the rationality of the society on which these institutions are based. Therefore, if an obligation of solidarity towards aliens should be rationally proved, this rational "ought" is regarded as binding, first, upon the individual human beings, and then, only derivatively, due to the fact that these individuals build a society, upon the institutions of this society as well. The mediation between individuals and states within the process of implementation of rationality is generally assumed by organizations of the civil society, such as political parties or NGOs.

Given these premises, I will examine in the following the most relevant kinds of rationality which are employed when sovereignty is put into effect. Before going into the detailed analysis, however, a clarification has yet to be made. Solidarity is understood, here, primarily as solidarity *towards "others,"* i.e., towards aliens or non-citizens. Therefore, the different uses of practical reason will be scrutinized mainly from the perspective of their capacity to justify solidaristic attitudes towards those who cannot be regarded as fellow citizens, i.e., as citizens of the same polity. Beyond this specification, however, it need be remarked that in most cases the application of a certain kind or rationality leads to the same results as regards solidarity towards citizens and aliens. When rationality is indifferent towards solidarity — as in its functional variant — indifference extends from citizens to aliens, and when it can be used to justify both egoism and solidarity, as in the case of strategic rationality, both results can be applied indifferently to fellow citizens or to the "others." Analogously, if rationality grounds solidarity — as proposed, albeit with quite different arguments, by the supporters of its holistic, deconstructed or communicative understanding — no substantial distinction, and certainly no exclusion, is made between "in" and "out." Just one conception of rationality

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29 *See supra* note 21.

represents an exception: here, solidarity can be supported, but just in favor of the members of the same polity. This is the case as regards the understanding of rationality with which I will begin the analysis.

## A. Particularistic Rationality

The first conception of rationality that has to be taken into consideration is what we can call a *particularistic* understanding of reason. We can find its best expression in the idea of sovereignty realized in the tradition of national constitutionalism. According to this approach, developed in particular by prestigious German constitutionalists like Josef Isensee, Paul Kirchhof and Dieter Grimm, only the sovereign national state, based on the primacy of the national constitutions, can guarantee the rule of law and a high standard of legitimacy, both of which would be lost in the context of a cosmopolitan turn of constitutionalism.[30] More concretely, the unity of the law[31] is based on the unity of public power[32] — and this, for its part, cannot but be the result of the national unity of the people (*Volk*).[33] Isensee identifies the reasons for the constitutional unity of the people with "geographic and geopolitical situation, historic origin and experience, cultural specificity, economic necessities of the people, natural and political conditions."[34] None of these elements can be regarded as the consequence of free decisions taken by the members of the political community. To the contrary, all of them are expressions of a pre-political state of facts, of a quasi-natural condition of the *Volk*, on which political and legal institutions are built. They thus constitute the *Volk*, as a "community of destiny,"[35] before and beyond any individual decision or preference.[36]

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30 Dieter Grimm, *The Constitution in the Process of Denationalization*, 12 Constellations 447 (2005).

31 Josef Isensee, *Staat und Verfassung* [*State and Constitution*], *in* Handbuch des Staatsrechts der Bundesrepublik Deutschland, Band I: Grundlagen von Staat und Verfassung [Handbook of the State Law of the Federal Republic of Germany, Vol. I: Fundamental Elements of State and Constitution] 591, 619 (Josef Isensee & Paul Kirchhof eds., 1987).

32 *Id.* at 620.

33 *Id.* at 634.

34 *Id.*

35 *Id.*

36 Paul Kirchhof, *Der deutsche Staat im Prozess der europäischen Integration* [*The German State Within the Process of European Integration*], *in* Handbuch des Staatsrechts der Bundesrepublik Deutschland, Band I, *supra* note 31, at 855, 869.

While in Isensee's and Kirchhof's interpretations the sovereign unity of the *Volk* has a generally ethnic character, where ethnic identity is understood as comprehending a large number of mostly pre-communicative elements, Dieter Grimm locates it rather in the common language spoken by all members of the people.[37] Only the existence of a shared language — following Grimm — enables the members of the political community to legitimate the institutions of public power as well as their decisions.[38] Here lies the key to a better understanding of the concept of rationality generally adopted by the supporters of the nation-based strand of constitutionalism. Correctly, law is identified as fundamentally linked to linguistic communication. Linguistic communication, however, is not defined on principles of transcendental pragmatics,[39] but rather depends on the specific identity of national languages. For that reason, language can never be universal; rather, we have — according to this approach — a plurality of languages, each of them specific to a particular cultural community, i.e., a nation. Moreover, if rationality is necessarily embedded in language, and language is no less necessarily the language of a nation, rationality itself will be deeply linked to the "spirit" of a nation. In other words, if we do not admit any universal language on which rationality is grounded, we will not have any universal rationality either.

According to the particularistic understanding of reason, then, rationality is never situated beyond the limits of a particular society, since it is essentially embedded in the language, history and traditions of a specific group of individuals, or of a "people." We thus have many rationalities, each of them specific to an individual society, but we do not have any "universalistic" reason that may lead the members of the single polity beyond the borders of their original belonging, transcending their selfishness and connecting them to every human being. Being exclusively and sometimes obsessively centered on the vital interests of the single political community, this conception of rationality may sustain a solidaristic attitude towards fellow citizens insofar as solidarity is regarded as an instrument for consolidating the cohesion of the particularistic social group. It is, however, completely inadequate to support solidarity towards non-citizens and represents, rather, one of the most frequent arguments brought by the counterpart into the debate.[40]

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37 Dieter Grimm, *Braucht Europa eine Verfasssung?* [*Does Europe Need a Constitution?*], 50 JuristenZeitung 581 (1995).

38 *Id.* at 588.

39 Karl-Otto Apel, Transformation der Philosophie [The Transformation of Philosophy] (1973).

40 This does not mean that particularistic rationality denies any kind of solidarity, but just that, if solidarity under certain circumstances should take place, it would

### B. Functional Rationality

Systems theory reduces rationality to its *functional* dimension.[41] It does so by eschewing any reference to an overarching rationality that, starting from the transcendental capacities of individuals, encompasses all forms of social interaction. No universal reason — subjective or intersubjective — is here envisaged, at either the descriptive or prescriptive level. To the contrary, systems theory — in particular, Niklas Luhmann as one of its most important exponents — claims that many rationalities can be observed by the social scientist, each of them characterizing the way one specific social subsystem functions. In other words, while we cannot detect — according to Luhmann's systems theory — any extra-systemic rationality, we do observe the implementation of different rational processes. These guarantee that the manifold functional subsystems of society deliver the performances for which they have developed and that are necessary for the continuity and further improvement — in the sense of higher efficiency — of the whole society.

The rationality of systems theory is transnational in essence. Indeed, functional rationality does not stop at the borders of nation-states. In particular, it has two important features for the development of its transnational vocation. First, every social subsystem is characterized by self-referentiality[42] and "operative closeness."[43] Second, functional rationality has a tendency to enhance the efficiency of the social system.[44] The first feature stems from the fact that society as a whole differentiates itself into specialized social subsystems each with its own function and rationality already within every single nation-state — or at least in those where society is not oppressed by a ubiquitous public power. And, provided that social subsystems tend to develop according to the criterion of the highest efficiency by accomplishing their

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be in the form of arbitrary *compassion*, not of a moral or political *obligation*.

41 *See* Niklas Luhmann, Das Recht der Gesellschaft (1993) (translated to English in Niklas Luhmann, Law as a Social System (Fatima Kastner et al. eds., Klaus A. Zeigert trans., Oxford Univ. Press 2004)) [hereinafter Luhmann, Das Recht der Gesellschaft]; Niklas Luhmann, Die Gesellschaft der Gesellschaft (1997) (translated to English in Niklas Luhmann, Theory of Society (Rhodes Barrett trans., Stanford Univ. Press 2012)) [hereinafter Luhmann, Die Gesellschaft der Gesellschaft]; Niklas Luhmann, Soziale Systeme: Grundriss einer allgemeinen Theorie (1984) (translated to English in Niklas Luhmann, Social Systems (John Bednarz, Jr. trans., Stanford Univ. Press 1995)).

42 Luhmann, Die Gesellschaft der Gesellschaft, *supra* note 41, at 65, 92.

43 Luhmann, Das Recht der Gesellschaft, *supra* note 41, at 44.

44 Luhmann, Die Gesellschaft der Gesellschaft, *supra* note 41, at 145; Luhmann, Das Recht der Gesellschaft, *supra* note 41, at 572.

functional tasks — which is the second feature of systemic rationality — homologous subsystems from different countries have a propensity to merge, since larger social structures guarantee better operational conditions. The consequence is the establishment of transnational social and legal subsystems[45] — a phenomenon which has been analyzed in particular with reference to the contemporary *lex mercatoria*, i.e., the private law subsystem autonomously created by economic actors in order to regulate their transactions beyond the borders of the nation-states.[46]

However, transnationality does not mean solidarity — nor does it imply it.[47] Indeed, authors who interpret society using systems theory have tried to conceptualize the defense of human rights as a transnational political and legal subsystem itself, or in other words as a "universal law" (*Weltrecht*) or a "global-constitution" (*Globalverfassung*), formal expressions of a comprehensive *lex humana* centered around the protection of fundamental rights.[48] Others have addressed the question of justice with the instruments of the functional epistemology of systems theory by transferring social conflict from the contradiction between different forms of rationality — in particular between the communicative rationality of the lifeworld and the strategic rationality which dominates the individual approach to functional systems[49] — to the

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45 Andreas Fischer-Lescano & Gunther Teubner, *Fragmentierung des Weltrechts: Vernetzung globaler Regimes statt etatistischer Rechtseinheit* [*Fragmentation of the Global Legal System*], *in* Weltstaat und Weltstaatlichkeit. Beobachtungen globaler politischer Strukturbildung [World State and World State-hood] 37 (Mathias Albert & Rudolf Stichweh eds., 2007).

46 Gunther Teubner, *"Global Bukowina": Legal Pluralism in the World Society*, *in* Global Law Without a State 3 (Gunther Teubner ed., 1997).

47 From the private law perspective, however, it has been claimed that private interactions beyond the borders of the single polities can account precisely for that kind of cosmopolitan mutual recognition that is often missing in the public dimension. *See* Hanoch Dagan & Avihay Dorfman, *Just Relationships* (Working Paper, 2014), *available at* http://ssrn.com/abstract=2463537. In my view, yet, solidarity should not be just left to personal priorities, but should be "constitutionalized" — and therefore be seen as a concern of public law — not only within the borders of the individual political communities but also in the legal context of the international community.

48 Andreas Fischer-Lescano, Globalverfassung: Die Geltungsbegründung der Menschenrechte [Global Constitution: On the Foundation of the Validity of Human Rights] (2005); Andreas Fischer-Lescano, *Globalverfassung: Verfassung der Weltgesellschaft* [*The Constitution of the World Society*], 88 Archiv für Rechts- und Sozialphilosophie [Archives Legal & Soc. Phil.] 349 (2002).

49 On strategic and communicative rationality see, respectively, *infra* Sections II.C, II.F.

interior of the single social subsystem.[50] Following this explanatory strategy, social conflict is reduced to a tension between different answers to the question regarding which policies should be applied in order to guarantee the best accomplishment of the subsystem's functional tasks. But solidarity with the powerless — and, among these, with aliens — may go far beyond the search for the best way to accomplish functions. And in some cases, it may even run against this principle. Therefore, why should we owe solidarity, nonetheless, to the excluded and neglected? Systemic rationality does not explicitly rule out this obligation; yet it does not give us any argument in favor of it either.

### C. Strategic Rationality

A third conception conceives of rationality exclusively in its *strategic* dimension. In this sense, reason is the instrument that enables us to maximize our payoffs. Jack L. Goldsmith and Eric A. Posner have argued that this kind of perspective justifies the egoistic behavior of states.[51] Beginning with the assumption that every rational actor will prefer the choice that promises to obtain the highest immediate benefits, and arguing that states, in international relations, always face the possibility of being trapped in a situation comparable to that of the prisoner's dilemma, Goldsmith and Posner maintain that every rationally acting state, given the fact that the behavior of its counterparts will be unpredictable in most cases, cannot but pursue its own egoistic interest. Neither customary international law nor treaty law can build a reliable normative framework of shared and effective rules, which is really able to guarantee the stable proceduralization of conflict resolution as well as, in the most favorable cases, cooperation. States thus comply with international law only insofar as this compliance coincides with their immediate and egoistic interests, so that the legal framework of relations among political communities is left with a very modest normative consistency.

The concept of strategic rationality applied by Goldsmith and Posner is, however, affected by some deficits — even if we adopt the rational choice perspective. First, they presuppose that states interact exclusively *vis-à-vis* each other, while it is rather reasonable to assume that they are generally embedded in a broader and multipolar context, i.e., in so-called "international

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50 Gunther Teubner, *Selbstsubversive Gerechtigkeit: Kontingenz- oder Transzendenzformel des Rechts*? [*Self-Overcoming Justice: Formula of Legal Contingency or of Transcendence?*], 29 Zeitschrift für Rechtssoziologie [Legal Soc.] 9 (2008).

51 Goldsmith & Posner, *supra* note 28.

regimes."[52] Second, according to the understanding of rationality proposed by Goldsmith and Posner, actors — in this case, states — have predefined preferences which do not change during interaction. Contrarily, evidence shows that preferences shift in the course of interactions.[53] Third, the definition of the elements the evaluation of which essentially contributes to making a choice rational may be considered shortsighted insofar as it excludes factors like "reputation" and "reciprocity."[54] Furthermore — and fourth — Goldsmith and Posner do not distinguish clearly between immediate payoffs and mid- as well as long-term interests.

Precisely the difference between *utilitas praesens* and *utilitas maxima* — i.e., between immediate or highest payoffs — is central to strategic rationality's approach to the question of the denial or support of solidarity. Indeed, while the strategic rationality of self-interest, regarded from the perspective of immediate payoffs, may be seen as a strong argument *against* solidarity, from a broader perspective, self-interest can also be considered as a claim *in favor* of it. Even if egoism is thought to bring immediate benefits, a more open attitude towards "others" may turn out to be of greater advantage in the long run. For example, taking into account the interests of the counterpart may reduce the risk of conflict, thereby also improving the chances of self-preservation and self-realization. In addition, the transfer of resources to "others" may induce secondary benefits for the solidaristic party - as, for instance, in the case of greater economic growth due to the increased economic and financial solidity of the counterpart, or of a reduction in environmental impact as a consequence of the introduction of environmental technologies or of easier access to financial resources. The strategic approach always maintains, however, that a rational

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52 Robert O. Keohane, After Hegemony: Cooperation and Discord in the World Political Economy 75, 85 (1984).

53 Nicole Deitelhoff, *Was vom Tage übrig blieb. Inseln der Überzeugung im vermachteten Alltagsgeschäft internationalen Regierens* [*Communicative Interaction in Power-Related International Governance*], *in* Anarchie der kommunikativen Freiheit: Jürgen Habermas und die Theorie der Internationalen Politik [The Anarchy of Communicative Freedom: Jürgen Habermas and the Theory of International Politics] 26 (Peter Niesen & Benjamin Herborth eds., 2007); Harald Müller, *Internationale Verhandlungen, Argumente und Verständigungshandeln* [*International Negotiations, Arguments and Consensus-Oriented Action*], *in* Anarchie der kommunikativen Freiheit, *supra*, at 199; Thomas Risse, *Global Governance und kommunikatives Handeln* [*Global Governance and Communicative Action*], *in* Anarchie der kommunikativen Freiheit, *supra*, at 57.

54 Andrew T. Guzman, How International Law Works: A Rational Choice Theory 33 (2008).

action must aim at maximizing the gains of the individual actor, and that these gains, generally, must be clearly measurable in terms of concrete advantages.

On these terms, the question regarding how we should meet the attitude of the so-called "free-riders" remains unanswered. Free-riders comply with the rules of interaction — in our case, the rules which guarantee an essential level of recognition for the arguments of "others"—only as long as they see in this behavior a gain for themselves. Therefore, they are always prone to breaking the rules as soon as they see a greater advantage to them from such a breach: under the premises of the definition of rationality as the maximization of individual gains, there can be no doubt that the behavior of the free-rider appears to be, here, the most rational choice. Yet it is difficult to imagine how social interaction can be stabilized under these conditions. As regards the preconditions for a functioning democracy, it has been argued that instrumental rationality cannot build the dispositional foundation that is indispensable for a society of citizens committed to achieving freedom and justice.[55] The same can be said with reference to the dispositional framework of international relations that is aimed at concretizing peace, mutual recognition, the guarantee of fundamental rights and justice.

Therefore, even if we overcome the shortsighted point of view that privileges immediate advantages of the individual actors in order to adopt a position that pays more attention to long-term benefits, strategic reason cannot really explain why the strongest and the wealthiest should owe solidarity to the weakest and the poorest, namely to those from the enhancement of whose life conditions they will not draw any profit, either immediately or in the foreseeable future.

### D. Holistic Rationality

A fourth approach considers rationality in a *holistic* sense. According to this, solidarity is owed to every human being for the simple fact that he/she is thought to be a member of universal humanity, considered to share fundamental values and interests. The "whole" of universal humanity is regarded as a fact,

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55 *See* Karl-Otto Apel, Diskurs und Verantwortung: Das Problem des Übergangs zur postkonventionellen Moral [Discourse and Responsibility: The Problem of the Transition to Post-Conventional Morals] 26, 55 (1990); Karl-Otto Apel, *Das Anliegen des anglo-amerikanischen "Kommunitarismus" in der Sicht der Diskursethik. Worin liegen die "kommunitären" Bedingungen der Möglichkeit einer post-konventionellen Identität der Vernunftperson?* [*The Concern of Anglo-American Communitarianism from the Perspective of Discourse Ethics*], *in* Gemeinschaft und Gerechtigkeit [Community and Society] 149, 152 (Micha Brumlik & Hauke Brunkhorst eds., 1993).

grounded on the essential ontological features of our species, in particular on the assumption of a natural sociability of humans.[56]

The idea of a universal community of humankind is a frequent *topos* of political and legal philosophy.[57] The common values enshrined in international law, in this understanding, are not essentially the result of deliberative and inclusive processes, but are rather already present *in re* as an objective fact of reason that the rational observer simply has to recognize, international law to take over and formalize, and international adjudication to bring into effectiveness. More precisely, international law — or, at least, the most general part of it — has to be interpreted, against this background, as the legal expression of the activity of the international community and the most striking evidence of its existence: as the "common law of mankind,"[58] it arises as the formalization of shared values as well as of the rules that guarantee the protection of common interests.[59]

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56 On the imperialistic use of the assumption of a universal human fellowship, see Andrew Fitzmaurice, *Sovereign Trusteeship and Empire*, 16 Theoretical Inquiries L. 447 (2015).

57 Johannes Althusius, Politica ch. IX, No. 22, at 92 (Harvard Univ. Press 1932) (1614); Viktor Cathrein, Die Grundlage des Völkerrechts [The Foundation of International Law] 45 (1918); 1 Viktor Cathrein, Moralphilosophie [Moral Philosophy] 111 (Vier Quellen Verlag, 6th ed. 1924); Alfred Verdross, Die Verfassung der Völkerrechtsgemeinschaft [The Constitution of the International Community] (1926); Alberico Gentili, De jure belli libri tres [On the Law of War] bk. I, ch. XV, at 107 (Clarendon Press 1933) (1588); Grotius, *supra* note 24, Prolegomena 6, 16, 17; Samuel Pufendorf, De jure naturae et gentium libriocto [On the Laws of Nature and Peoples] bk. II, chs. II, III, VII, XV, bk. VIII, ch. VI (Hein 1995) (1672); Samuel Pufendorf, De officio hominis et civis libri duo [On the Duty of Man and Citizen] bk. I, ch. VIII (Oxford Univ. Press 1927) (1673); Christian Wolff, Institutiones juris naturae et gentium [Institutions of the Law of Nature and Peoples] bk. IX, chs. I, V (Halle 1750); Suarez, *De legibus*, *supra* note 8, bk. II, ch. XIX, No. 9, at 348.

58 C. Wilfred Jenks, *The Common Law of Mankind*, 59 Colum. L. Rev. 533 (1959).

59 Hermann Mosler, The International Society as a Legal Community (1980); Andreas L. Paulus, Die internationale Gemeinschaft im Völkerrecht: Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung [The International Community in International Law] (2001); Mehrdad Payandeh, Internationales Gemeinschaftsrecht [The Law of the International Community] (2010); Bruno Simma, From Bilateralism to Community Interest in International Law 217 (1994); Christian Tomuschat, International Law: Ensuring the Survival of Mankind on the Eve of a New Century (1999); Ronald St. John Macdonald, *The International Community*

The close relationship between the justification of solidarity by resorting to the community of all humans and the noble and longstanding intellectual tradition of natural law, from antiquity until the present time, does not guarantee, however, the epistemological quality of the claim. Indeed, the case for solidarity depends here on the epistemological status of the proposition that "a universal human community exists which shares fundamental interests and values." Trying to assess briefly the epistemological quality of this proposition, it has to be pointed out, first, that the expression cannot correspond to any kind of *analytic judgment*, since the assertions that such a community exists as well as that it shares values and interests are not originally contained in the subject of the proposition. Thus, the proposition must be a *synthetic judgment*, aiming at reaching some knowledge of the world. Furthermore, the judgment is *a priori* because it aims at building assertions which are necessary and universally valid. However, under a post-metaphysical approach a synthetic a priori judgment — i.e., a proposition that makes an assertion of necessary and universal validity and claims to improve our knowledge of the world — can only be acceptable if it is based on empirical evidence about the phenomenon. But, alas, the assertion that "a universal human community exists which shares fundamental interests and values" does not satisfy such a consistency condition, since empirical evidence of such a universal human community is rather controversial: indeed, there is no less evidence for the realistic assumption of a permanent struggle for survival between human communities.[60]

Therefore, the judgment claiming the existence of a universal human community turns out to be, rather, the result of the quasi-metaphysical ontologization of a transcendental capacity with which all humans are endowed, namely the faculty to interact and communicate with each other. In other words, the theory of the international community seems to draw upon the transcendental capacity to interact and to search for consensus in a communicative way, a presumed ontological matter of fact for which proper evidence is lacking. Yet, if the truth content of this claim were to prove to be uncertain, there would be no reason why we should regard our fellow humans as deserving our solidarity. Indeed, the content of the assertion — as any realistic analysis of the relations between states and individuals could easily demonstrate — is far

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*as a Legal Community*, *in* Towards World Constitutionalism: Issues in the Legal Ordering of the World Community 853 (Ronald St. John Macdonald & Douglas M. Johnston eds., 2005).

60 The long history of "realism" — from Thucydides to Kenneth Waltz and beyond, even if its assumptions are not fully shared — teaches us with some good reasons not to be too optimistic as regards the attitudes of fellow humans.

from self-evident: humans can be no less prone to selfishness than to altruism. Thus, the pre-reflexive assumption of an ontologically sociable humanity is no more than a circular argument — and, therefore, rather wishful thinking — when it comes to proving the duty of solidarity.

### E. Deconstructed Rationality

If the theory of the universal human community grounds its claim for solidarity on an alleged ontological truth, an additional approach defends the case for solidarity following the contrary strategy: while the first resorts to ontology, this latter denies any basis *in re* or even in a universal conception of reason. Here, solidarity is not a deducible universal duty, simply because no ontological fundament for universal rationality is presumed to be given. This conclusion is reached by resorting to the postmodern critique of modern rationalism and subjectivity.

Translated into the language of legal theory — in particular, the theory of international law — postmodern criticism of unitary and universal subjectivism maintains that international law is not the legal expression of an ontological, moral or epistemological universal truth: swinging necessarily between apology and utopia, its norms and practices are lacking objectivity and, thus, universal validity.[61] Nonetheless, the critique of the universalistic claim of the international law discourse does not lead to sheer nihilism. Indeed, the international law theorists influenced by postmodern thinking accept the idea that some experiences may occur which are not characterized by mere contingency but take up, on the contrary, a kind of universal scope.[62] From the postmodern standpoint, however, this unassuming universality is not based on abstract ontological, moral or epistemological principles, but is derived from the concrete experience of vulnerability among all involved individuals. Artistic expression is probably the most suitable way to give a voice of universal reach to a humanity made of concrete human beings. But the law, too, due to its *formalism*,[63] can play a role in order to accomplish this task. Indeed, through the formal means of the law rights and duties are recognized with regard to all members of the community who hold the same position. As a consequence, the violation of my interests — which, without

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61 Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument, Reissue with a New Epilogue (2005).

62 Martti Koskenniemi, *International Law in Europe Between Tradition and Renewal*, 16 Eur. J. Int'l L. 113, 119 (2005).

63 Martti Koskenniemi, The Gentle Civilizer of Nation: The Rise and Fall of International Law 1870-1960, at 500 (2001).

the mediation of the law and without its formal character, would have a merely *private* character — is transformed "into a violation against *everyone in my position*" and, thus, into "a matter of concern for the political community itself."[64]

Following this interpretation, there is a non-ontological, non-moral and non-epistemological universalism that originates specifically from a *deconstructed* idea of rationality. Reason, according to this understanding, does not help us to recognize objective and universal values, nor is it necessarily the means for the achievement of egoistic payoffs. Rather, every concrete individual applies practical reason to achieve his or her priorities, some individuals pursuing selfish interests, others concretizing altruistic attitudes. As a result, solidarity is not an obligation, but a choice that some actors — individuals or states — make following a sentiment of *empathy* towards the suffering of fellow humans. Rationality thus becomes a vehicle for the realization of the context-related preferences of the single individuals: insofar as we — alone or acting together — feel empathic towards the "fellow sufferers,"[65] we may use the instruments that the deconstruction of rationality puts at our ethically unprejudiced disposal to ease their pain. Among these tools, a preeminent role should be played by the law, precisely because of its formal character that discharges it from the pretension of possessing an objective truth and makes it particularly suitable for different applications — in many cases, unfortunately, against the interests of the oppressed, but sometimes also in favor of them.

However, doubts arise as to whether this postmodern version of the universalism of the law can really justify the claim for solidarity as an *obligation*. Indeed, if no epistemological argument thought to substantiate the universality of international law is convincing, then neither is the universal dimension of legal formalism an assertion that every human being has to share. But the personal commitment based on empathy — regardless of how important empathy may be as a motivation of personal action — cannot offer a solid basis for a legal system necessarily related to the essential quality of the law as an "ought." Empathy is fundamental but personal; the law, on the contrary, specifies the compelling rules which guarantee order in the interactions of an entire society — in the case of international law, even of the world society.[66]

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64 Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 Cambridge Rev. Int'l Affairs 197, 214 (2004).

65 Richard Rorty, Contingency, Irony, and Solidarity, at xv (1989).

66 Herewith, I do not want to play down the role that emotions have within the legal discourse. See, on this topic, Kathryn Abrams, *Emotions in the Mobilization of Rights*, 46 Harv. C.R.-C.L. L. Rev. 551 (2011); and Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 Minn. L. Rev. 1997 (2009-

From the perspective of a deconstructed rationality, then, solidarity is merely optional, not a moral duty that, because of its universality, can and should be translated into legal norms. Moreover, it is almost impossible to justify the establishment of institutions with the task of fostering a better consideration of the interests of "others" by resorting to personal empathic attitudes. Solidarity may resort to empathy as regards the mindset of individuals, but it must rest on a psychologically neutral commandment of reason if it is to be seen as a general moral and legal duty and if it should be adequately substantiated by rules and practices.

### F. Communicative Rationality

According to the communicative paradigm of social order, society is made up not only of functional systems, but also a *lifeworld of intersubjective relations*, which is characterized by *different forms of interaction*.[67] In order to be well-ordered, which means peaceful, cooperative and effective, *social interaction needs rules*. When rules are positive and compelling, they are defined as *laws*, while the *corpus juris* that regulates a frame of common concern is referred to as *public law*. Therefore, the task of the legal system, which consists of stabilizing the normative expectations, is not related only or even just primarily to the performances of the functional subsystems, but refers rather to intersubjective interactions, or to the tension- and conflict-filled relation between lifeworld and functional subsystems. Furthermore, each form of interaction is characterized by a specific aim that decisively influences its discursive contents.

Yet, although the aim of the social interaction is essential to determine the contents of the discourse, the rationality embodied in the communication — mainly, but not only, at the linguistic level — is, from the perspective of the communicative paradigm, not exclusively and even not primarily functional. Rather, the communicative rationality — as follows from the understanding of

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2010). However, saying that law regulates interactions in which not only rational considerations but also emotions are involved is not the same as asserting that legal instruments should be seen as being at the disposal of individual priorities which do not need or even allow intersubjective justification — be it rational or emotional.

67 Apel, *supra* note 39; Apel, *supra* note 55; Apel, *supra* note 55; Jürgen Habermas, Theorie des kommunikativen Handelns (1981) (translated to English in Jürgen Habermas, Theory of Communicative Action (Thomas A. McCarthy trans., Beacon press 1984/1987)).

communication here presupposed — always has a normative core.[68] Precisely this normative essence, based on the general principle of mutual recognition, is what makes communicative rationality universal — thus different from the purely systemic rationalities and connected, from its very theoretical conception, to the tenet of solidarity towards "others."

Jürgen Habermas — as the exponent of the communicative paradigm of order who transformed the epistemological premises of the communicative rationality into a comprehensive theory of public law[69] — resumes Kant's path-

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68 The normative core of communicative rationality consists of the assumption that discursive communication can achieve its goal only if all those involved mutually presuppose that: a) from an *objective* perspective, the assertions are *true* (in the sense that the propositions refer to real situations or facts); b) from a *subjective* perspective, the speakers act *truthfully* (in the sense that they are committed to fair-minded purposes and are sincerely persuaded that their assertions meet the conditions for truth); and c) from an *intersubjective* perspective, the speakers interact according to the principles of *rightness* (in the sense that they accept that their assertions have to meet the criteria for a general and mutual acknowledgement by all participants in the communication). *See* Jürgen Habermas, Nachmetaphysisches Denken 73, 105, 123 (1988) (translated to English in Jürgen Habermas, Postmetaphysical Thinking (William Mark Hohengarten trans., Polity Press 1992)); Jürgen Habermas, Vorstudien und Ergänzungen zur Theorie des kommunikativen Handelns 598 (1984) (translated to English in Jürgen Habermas, On the Pragmatics of Social Interaction (Barbara Fultner trans., MIT Press 2001)); Jürgen Habermas, Wahrheit und Rechtfertigung 110 (1999) (translated to English in Jürgen Habermas, Truth and Justification (Barbara Fultner trans., Polity Press 2003)).

69 Jürgen Habermas, Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats (1992) (translated to English in Jürgen Habermas, Between Facts and Norms (William Rehg trans. MIT Press 1996)); Jürgen Habermas, Der gespaltene Westen (2001) (translated to English in Jürgen Habermas, The Divided West (Ciaran Cronin trans., Polity Press 2006)); Jürgen Habermas, *Eine politische Verfassung für die pluralistische Weltgesellschaft?* [*A Political Constitution for the Pluralistic World Society?*], 38 Kritische Justiz 222, 228 (2005); Jürgen Habermas, *Kommunikative Rationalität und grenzüberschreitende Politik: eine Replik* [*Communicative Rationality and Transboundary Politics*], *in* Anarchie der kommunikativen Freiheit, *supra* note 53, at 439; Jürgen Habermas, *Konstitutionalisierung des Völkerrechts und die Legitimationsprobleme einer verfassten Weltgemeinschaft* [*The Constitutionization of International Law and the Legitimacy Problems of a Constitutionalized World Society*], *in* Rechtsphilosophie im 21. Jahrhundert [Legal Philosophy in the 21st Century] 368 (Winfried Brugger, Ulfried Neumann & Stephan Kirste eds., 2008).

breaking tripartite division of public law.[70] From the intersubjective perspective of the communicative rationality, each level of public law corresponds to the legal regulation of a specific kind of social interaction. At the first level, domestic public law regulates the interactions between citizens of each single political community as well as between these citizens and the institutions of the same polity. The use of communicative reason and the application of its normative prerequisites guarantee, here, that decisions are taken through deliberative processes based on the reflexive involvement of the citizens. Thus, legitimate sovereignty — according to the communicative paradigm — cannot but be "bottom-up." At the second level, international public law addresses the relations between citizens of different states insofar as they are primarily regarded as citizens of the state; therefore, the relations between individuals which are here the object of regulation are processed through the form of relations between states. Lastly, at the third level, the cosmopolitan law is regarded as the public law that regulates the direct interactions between individuals from different states as well as between individuals and the states of which they are not citizens.

This third level is necessary given the fact that individuals meet and interact with each other, outside the borders of single states, regardless of their belonging to a specific political community. "Cosmopolitan law" consists, therefore, precisely of those principles and rules that guarantee a peaceful and cooperative interaction between humans within this most general context of interaction, namely beyond the condition of belonging to an individual state. Embedded in these rules is the fundamental recognition that we owe to every human being as the consequence of the universal capacity to communicate. In this sense, solidarity *is* an obligation and its essential principles and norms have necessarily to be laid down as a fundamental part of the most universal *corpus* of public law.

Summing up, the case for the obligation of solidarity is based, from the perspective of the communicative rationality, on the following considerations — which are regarded by its supporters as descriptive as well as prescriptive assertions.[71] First, we are — increasingly — exposed to interaction with

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70 *See* KANT, *supra* note 27.

71 Following a well-established tradition that runs, at least, from Plato to Hegel and beyond, the exponents of the communicative paradigm of rationality assume, in the analysis of social phenomena, that the descriptive dimension cannot be clearly distinguished from the prescriptive (or normative) level. This merging of the two dimensions is due to a twofold circumstance that characterizes social interaction: first, the fact that social communication, in order to work, always contains a normative nucleus, *see supra* note 68; and, second, the fact that social discourse constantly aims at a normative definition of the identity of the social

fellow humans, who do not belong to our individual social group. Second, we share with them the same rationality which contains a normative core of mutual recognition. Third, this interaction — like any other kind of human interaction — needs to be protected in order to guarantee its peaceful and, from the most favorable perspective, also cooperative unfolding. Fourth, from this necessity arise obligations which are moral (for the individual) as well as political and legal (for the whole society). Fifth, these obligations are "thinner" at the global than at the national or local level, due to the less intense interaction that occurs in the first case; as a result, the global obligations are limited to the guarantee of peace and of the most fundamental human rights. Sixth, insofar as actions by a sovereign power affect the most fundamental rights of aliens, the latter are entitled to demand that their justified rights be adequately taken into account; from the opposite point of view, i.e., from the standpoint of the sovereign power, this right corresponds to an obligation of solidarity. Seventh, the obligation of solidarity involves the taking into account, by the sovereign power, of the protection of all essential human rights of aliens — including civil, political, social and economic rights as well as even, to a certain extent, the third-generation rights — that are considered indispensable for a dignified human interaction and may be endangered by actions of the sovereign power.

Founding the case for solidarity on the communicative paradigm, i.e., interpreting it as part of the normative protection for that kind of communication which occurs when individuals interact within the most general horizon, the shortcomings can be avoided that affected the abovementioned kinds of rationality: namely, a) solidarity is not regarded as the result of a farsighted expediency, since communication is the expression of a non-strategic use of practical reason; b) the claim for a non-egoistic approach refrains from metaphysical assumptions insofar as the communicative capacity with which all humans are endowed has a merely transcendental — or better, linguistic-pragmatic — quality; and c) solidarity does not depend on individual preferences or personal commitment, but is a normative duty, necessary in order to guarantee the basic conditions for human interaction at the most general level, which has to be translated into an adequate ethical and legal framework.[72]

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group, thus going beyond the mere elaboration of empirical data. As regards this second aspect, see Jürgen Habermas, Erkenntnis und Interesse 221 (1973) (translated to English in Jürgen Habermas, Knowledge and Human Interests (Jeremy J. Shapiro trans., Polity Press 1987)).

72 From this perspective, the duties that we have towards our fellow humans are prima facie of a *moral* nature since they bind us as individuals who are capable of acting reasonably and are intersubjectively expected to give generally shareable

## III. Conclusion: Towards a New Concept of Sovereignty

In order to meet the challenges of the post-national constellation, which has been generated by ever deeper worldwide interconnections, the concept of sovereignty has to be reshaped. In particular, sovereignty should no longer be understood as the condition in which an authority does not recognize any higher power above itself, but rather as the situation in which public power is legitimately exercised. In other words, in the contemporary context only legitimate power should be seen as sovereign power.

The first implication of this tenet touches upon the sources of sovereignty. Given the centrality of legitimacy, on the one hand, and the assumption that, from a post-metaphysical standpoint, only the democratic process fulfils the criteria for at least the possibility of a reflexive legitimation of authority, the consequence is that the only acceptable source for sovereignty is the one that comes bottom-up, i.e., ascending from the free will of the governed.[73] However, if the legitimacy of sovereignty were limited just to this tenet, nothing would be achieved as regards solidarity towards "others," or openness to their needs and arguments: a public power may be legitimated from below, and nevertheless selfish.

Indeed, the idea of a solidaristic sovereignty needs more than just a bottom-up legitimacy: it requires also a specific concept of rationality, which should itself be better adapted to the conditions of an increasingly interconnected world. Different conceptions of rationality have been scrutinized in the

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justifications for their actions. But they are *political* duties too, insofar as they have to be implemented by an international community made up of political actors, such as states, structures of international governance and organizations of the cosmopolitan civil society.

73 The question here is what should be done with regard to states that are sovereign in the traditional meaning (in the sense that they exercise power over a population within a delimited territory), but are not democratically legitimate. Surely, my argument should not be interpreted as a plea for their exclusion from the international law discourse. International law is inclusive — and should remain so. Yet a two-level approach may be here useful to meet the problem. At a first level, democratic states should always include non-democratic — and therefore, in a normative sense, not properly sovereign — states in international law agreements. Nevertheless, at the second level, the final goal of democratic states in pursuing these agreements and complying with them has to be, without exception, the restoration of conditions of full democratic and popular sovereignty in all political communities. In other words, even if it is often necessary to talk with tyrants, the ultimate purpose of these talks should always be the overcoming of tyranny.

former Part, with attention paid specifically to their respective implications for the justification and the implementation of solidarity.[74] One of these conceptions — particularistic rationality — has proven to reject solidarity as a necessary consequence of its core theoretical assumptions. A second — functional rationality — albeit substantially indifferent to the question, does not deliver any argument in favor of a more-than-system-oriented approach to the interests of aliens. A third — strategic rationality — can be used for both purposes, in favor or against solidarity, but its case for the openness to needs and arguments of aliens proves to be actually rather shaky. The last three conceptions of rationality are altogether explicitly *for* solidarity; however, the holistic and the postmodern approaches are affected by argumentative deficits that make them to a certain extent unconvincing as well.

Thus, as a result of the analyses presented above, it can be maintained that sovereign actors have an *obligation* of solidarity only if they deploy, in their actions, a practical use of reason, i.e., a rationality that is *non-particularistic* (meaning *universalistic*), *non-functional* as well as *non-strategic* (or *consent-oriented*), *non-holistic* (i.e., it avoids any metaphysical or ontological presuppositions), and *non-deconstructed* (meaning *deontological*). In other words, universalism, consent-orientation, as well as a post-metaphysical and deontological attitude are the inescapable conditions under which the use of reason by a sovereign actor can lead to the determination of solidarity as an obligation and as a compelling legal norm. Communicative rationality meets these requisites, paving the way, therefore, for an understanding of sovereignty which is, at the same time, legitimated by the individuals who are subject to the sovereign power as well as open to "others."

From the communicative perspective, every individual is always involved in different forms of interactions: as a citizen with the other citizens of his/her political community, and as a human being with all other fellow humans inside as well as outside his/her community. As a result, the legitimacy of a sovereign public power is guaranteed only if it comes from the governed not only in their role as citizens of the polity, but also in their no less important

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74 On this point, it should be briefly added that the different uses of reason transversally cross the sources of sovereignty. This means that each source of sovereignty can come along with more than one use of reason, as well as that some conceptions of rationality can combine with just one source of sovereignty, while other are compatible with both kinds. More concretely, particularistic rationality can sustain both a democratic and an autocratic sovereign. The same goes for the strategic and holistic rationalities, while systemic reason seems to be rather indifferent to democratic legitimacy. Only the deconstructed and the communicative rationalities are exclusively compatible with "bottom-up" legitimacy, although the results are eventually quite different.

position as citizens of the "cosmopolis," or simply as human beings.[75] If we take this point of view, the legitimacy of sovereignty has a two-level structure, domestic and cosmopolitan. Thus, a sovereign power will be legitimate only if it takes into account, along with the rights and interests of the citizens of its own polity, also the justified claims of the international community.

Seen this way, sovereignty takes a quite unusual form, maybe even disturbing for those who still think in traditional patterns of law and politics. However, even if we do not refrain from the conceptual challenge, there is still a long way to go: new ideas may show the direction, but the edifice then needs to be built with materials made of legal instruments and political agreements. In particular, it is essential to address the question of how the moral obligation of solidarity that decisively contributes to the redefinition of sovereignty can be translated into legal norms. So far, rather marginal anticipations of institutional ways of opening the internal fora to justified interests of non-citizens can be found in international, supranational and national legal instruments.[76] Furthermore, "solidarity" remains a highly contested concept in international law.[77] To highlight the uncertain status of solidarity within the international law discourse, two cases may be recalled. First, the debate on solidarity within the Human Rights Council has met strong skepticism from

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75 From this perspective, every single individual has to accomplish two different roles: on the one hand the role as a citizen of a particular polity with its specific interests, and on the other the role of a "citizen of the world" who is committed to the defense of universal values. Provided that the first belonging is much "thicker" than the second, in the sense that more duties are generated from it — in particular as regards the redistribution of resources — and that these duties may imply a much larger constraint on individual interests, the question arises on the dilemmas that can grow from the distinction between the two roles. In order to prevent that these inescapable dilemmas degenerate into unsolvable contradictions, a criterion may be regarded as essential: no action that may arise from the status as a citizen of a specific political community can violate the duties derived from the more general cosmopolitan condition. In other words, we are allowed to do for our fellow citizens (in a particularistic sense) more than what we would to for aliens, but nothing of this can run against the basic rights and interests of our fellow humans.

76 *See* Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 Am. J. Int'l L. 295, 314, 319 (2013).

77 *See* Sergio Dellavalle, *Opening the Forum to the "Others": Is There an Obligation to Take Non-National Interests into Account Within National Political and Juridical Decision-Making-Processes?*, 6 Göttinger J. Int'l L. (forthcoming 2014).

many, in particular Western, countries.[78] Second, although the recently issued *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* undoubtedly represent a significant step forward on the way to the recognition of a not only *moral* but also *legal* obligation of solidarity, it is quite unclear, to this day, what effect they will concretely have.[79]

In conclusion, the successful implementation of a new concept of sovereignty through legal instruments and political practices is anything but guaranteed. Yet in a context of inescapable existential uncertainty, it would be already a great accomplishment if we could reasonably believe that we know which future of sovereignty we are working toward.

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78 Consider, for example, the controversial adoption of the Human Rights Council Res. 15/13 on Human Rights and Solidarity, U.N. Doc. A/HRC/RES/15/13 (Sept. 30, 2010).

79 *See* O. De Schutter et al., *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 34 Hum. Rts. Q. 4 (2012).