

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?

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Abstract

Decisions taken in a national forum affect the interests of individuals who, as non-citizens, are excluded from the decision-making-process. In the contemporary world, individuals and social groups can be severely harmed as a result of decisions taken far away from the place where they live and often even without any direct intervention. The issue of the consideration of non-national interests within national decision-making-processes is thus becoming increasingly important. The contribution begins with a brief analysis of the concept of *solidarity*, as the legal obligation to take into account non-national interests has been labelled in the international law scholarship. In contemporary international law, *solidarity* is a principle to be interpreted and further developed, rather than a *right* articulated in firm rules. Yet, from the epistemological point of view the legal system is always based on extra-legal concepts and reasoning. Thus, the reference in legal principles to non-legal arguments should not be regarded as a disadvantage but as a precious contribution to the inescapable link between legal and extra-legal discourses. On the basis of this assumption, the article concentrates on the main extra-legal reasons that have been brought into the debate in order either to deny both the existence of a duty of *solidarity* within the *lex lata* as well as the necessity to introduce it *de lege ferenda*; or, on the contrary, to maintain the paramount importance of such a duty. The analysis will end with some considerations on how the political and juridical forum could be concretely opened up, through proper legal and institutional arrangements, to a deliberation that gives access to the arguments of the *others*.

A. Introduction

In several ways, decisions taken within the national scope affect both people who, as non-citizens, are excluded from the decision-making-process and their justified interests. These individuals, as well as social and national groups, are required to live with the consequences of choices made by other social groups without any chance of influencing the outcome of the pronouncement and, therefore, also their own destiny.¹ This fact, however, goes against our deepest

¹ “The human rights of individuals, groups and peoples are affected by and dependent on the extraterritorial acts and omissions of states. The advent of economic globalization, in particular, has meant that states and other global actors exert considerable influence on the realization of economic, social and cultural rights across the world.” See: O. De Schutter *et al.*, ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States

sense of justice as well as our commitment to a participatory and democratic understanding of human interactions. Nevertheless, precisely this attitude has characterized much of human history, and the focusing of attention within the decision-making-process exclusively on the self-centred interests of the national community is a correct description of what is still happening today – at least in the most cases and in spite of normative attempts heading to the opposite direction. Yet, this has not been the only view of things in the past two thousands years. The obligation – or, better, the moral duty – to take a universal and not merely an egoistic point of view in framing political decisions has been proclaimed by many thinkers and philosophers since Stoicism first introduced to the Western world the idea that the whole of human society can be seen as ruled by only one *nomos* and all human beings build a “cosmopolis”.² Yet, when it comes to the implementation of this obligation within the political and juridical praxis, historical examples are few and generally far from adequate: universalism was understood as based more on respect for the general principles of divine and rational law than on a forum in which a discursive recognition of the *reasons of the others* can be achieved.³

In the contemporary, ever more interconnected world we are confronted with the possibility of doing harm, as a consequence of national decisions, not only to neighbours but also to peoples living far away from the place where the decisions are taken.⁴ Unlike the damage inflicted during the era of colonialism,

in the Area of Economic, Social and Cultural Rights’, 34 *Human Rights Quarterly* (2012) 4, 1084-1085 (Preamble, para. 1).

² On Stoicism as the first attempt to conceive order as universal see: M. C. Nussbaum, ‘Kant and Stoic Cosmopolitanism’, 5 *The Journal of Political Philosophy* (1997) 1, 1, 12; A. von Bogdandy & S. Dellavalle, ‘The Paradigms of Universalism and Particularism in the Age of Globalisation: Western Perspectives on the Premises and Finality of International Law’, in The Xiamen Academy of International Law, *Collected Courses of the Xiamen Academy of International Law*, Vol. 2 (2009), 45, 53; S. Dellavalle, *Dalla comunità particolare all’ordine universal - I paradigmi storici dell’ordine*, Vol. I (2011).

³ A first – surely partial and ultimately self-interested – example of the consideration of non-national claims was the old Roman *ius fetiale*. On its praxis as well as on the limits of this approach see: A. Nussbaum, *A Concise History of the Law of Nations* (1950), 16. To some extent, the duty of Christian States to respect divine and rational law – and therefore also the justified interests of other Christian or even non-Christian peoples – under the supreme moral authority of the Roman Church can also be seen as such an early example. For a presentation of this theory, albeit without direct references to the recognition of non-national interests, see: F. Suárez, ‘Defensio fidei catholicae et apostolicae adversus anglicanae sectae errores’, in F. Suárez, *Selections from three Works*, Vol. III (1944), 667.

⁴ See, as an important reflection on one of the most discussed examples of transboundary negative effects of national decisions: R. M. Bratspies & R. A. Miller (eds), *Transboundary*

contemporary harms to non-citizens can even be indirect, for example through pollution or financial as well as economic policies, hitting foreign populations in a subtler way, but on a significantly wider scale. On the other hand, our world is characterized by media coverage which includes a large part of the global society and is capable of mobilising what has been called the *colère publique mondiale*.⁵ The globalization of the possibility of doing harm corresponds, therefore, to the globalization of sensitization to the worldwide violations of human rights. As a consequence, the issue of the consideration of non-national interests within the political decision-making-process and the jurisprudential praxis is urgently coming to the fore and has an unprecedented chance of achieving concrete results.

The legal obligation to take non-national interests into account has in the international law scholarship been labelled *solidarity*. Thus, I will begin my analysis with a brief presentation of how this concept has been elaborated within the *lex lata* (B.). Although strong arguments sustain the view that *solidarity* has already been established in positive law, the fact that the provisions on *solidarity* have mainly taken the form of legal principles has raised some concerns about their consistency as legal norms. In other words, it may be countered that the concretisation of the concept of *solidarity* in legal terms seems rather to have been built – at least hitherto – either on interpretations resorting to extra-legal considerations⁶ or on arguments *de lege ferenda*. The claim that legal norms are valid only if they are self-subsistent and, therefore, unrelated to any extra-legal discourse is grounded on the assumption that the legal system has to be – and can be – logically and epistemologically self-sufficient. In contrast, a short presentation of the inherent contradictions and conceptual difficulties in which even the most ambitious attempts to demonstrate the self-sufficiency of the legal system are trapped justifies the claim that the legal discourse has necessarily to

Harm in International Law: Lessons from the Trail Smelter Arbitration (2006).

⁵ A. Fischer-Lescano, 'Globalverfassung: Verfassung der Weltgesellschaft', 88 *Archiv für Rechts- und Sozialphilosophie* (2002) 3, 349, 359, who derives the concept from Émile Durkheim.

⁶ I understand *legal discourse*, in this context, as the discourse concerning directly legal norms and their application. By contrast, *extra-legal discourse* is, in principle, any kind of discourse that concerns fields other than the above-mentioned. Linking the former with the latter means, concretely, that interpretations or developments regarding any component of the legal system (rules, principles, etc.) always imply a reference to arguments elaborated in contexts other than the law, mainly in social (non-legal) and political interactions as well as in scientific discourses reflecting on them (such as sociology, political science, as well as moral, social and political philosophy).

be extended to – and integrated by – extra-legal concepts and reasoning (C.). Admitting, therefore, that a cautious extension of the legal discourse to extra-legal arguments is, from an epistemological point of view, not only acceptable but even inescapable, I will move on to describe the main extra-legal reasons that have been brought into the debate in order either to deny the interpretation of the existing law in the sense of a duty to *solidarity* as well as the need for a further development of the law in this direction (D.), or, on the contrary, to support the opening up of the national forum to the *others* (E.). The analysis will end with some tentative remarks on how the political and juridical forum could be concretely made accessible, by means of proper legal and institutional arrangements, to a deliberation that includes the arguments of the *others*, i.e. to non-national interests (F.).

B. Is There a Legal Obligation Concerning Solidarity?⁷

Taking non-national interests into consideration requires comprehension of two dimensions (*infra*, F.): the one concerning the legal and institutional response at the national level; the other consisting of international law provisions. While the first dimension, in general, is on the whole yet to be built, the second one – which may also have significant influence on national policies and on adjudication practice – has already been implemented, at least partially, through the provisions of international law regarding *solidarity*.⁸

According to the definition proposed by Rüdiger Wolfrum, *solidarity* in international law rests on the consideration that “States acting merely on an individual basis cannot provide satisfactorily for solutions which the interests of the community demand. Such demands require a common action.”⁹ Solidarity thus means “[...] that States in shaping their positions in international relations should not only take into consideration their own individual interests but also those of other States or the interests of the community of States or both.”¹⁰

⁷ I am grateful to Matthias Goldmann and Holger Hestermeyer for helpful conceptual and bibliographical suggestions on the topic of this section.

⁸ For a general overview on the concept of *solidarity* in international law, see: D. Campanelli, ‘Principle of Solidarity’, in R. Wolfrum (ed), *The Max Planck Encyclopaedia of Public International Law*, Vol. IX (2012), 288.

⁹ R. Wolfrum, ‘Solidarity amongst States: An Emerging Structural Principle of International Law’, in P.-M. Dupuy *et al.* (eds), *Völkerrecht als Wertordnung – Common Values in International Law: Festschrift für Christian Tomuschat* (2006), 1087 [Wolfrum, Solidarity amongst States].

¹⁰ *Ibid.*, 1087-1088.

Concretely, the implementation of solidarity implies a twofold task: on the one hand the requirement to cooperate in order to achieve shared interests,¹¹ on the other the amelioration of “[...] existing deficiencies or disparities [...]”.¹²

References to *solidarity* have been introduced into positive international law in several different legal regimes.

a) In the *international system on the protection of peace*, solidarity is implied, first, in the “[...] inherent right of ... collective self-defence [...]”, according to “[...] the underlying rationale of Art. 51 UN Charter [...]”,¹³ and, second, in the system of collective security (Chapter VII UN Charter) insofar as “[...] it obliges States to act in the interest and defence of a common value, namely the preservation of peace.”¹⁴

b) As regards *international environmental law*, Wolfrum refers in particular to the principles of sustainable development and of common but differentiated responsibility, as established in the *Rio Declaration* of 1992 as well as in documents and agreements such as the *Convention on Biological Diversity* and the *Framework Convention on Climate Change*.¹⁵

c) Considering the *world trade law regime*, “[...] [the] objectives referred to in the Preamble of the WTO Agreement define a common value, namely the enhancement of the economic development.”¹⁶ Moreover, we have here also the second aspect of solidarity, namely the commitment to “[...] the amelioration of existing deficiencies, and the need to further promote the economic development

¹¹ The need to implement *solidarity* can be thus a strong justification for *cooperation*. Nevertheless, *solidarity* has to be generally distinguished from *cooperation* since the former is an attitude – or rather a duty – based on a legal principle, the accomplishment of which does not imply necessarily the existence of mutual advantages. In this sense, *solidarity* may impose *unilateral* obligation on just one actor of the interaction. At the same time, it is *universalistic* in its essence insofar as the obligations are thought to be valid towards every human being who may be affected by the actor’s decisions. By contrast, *cooperation* always presupposes – even if it is inspired by an initial attitude of solidarity – *mutual* obligations concerning the parties to the treaty. Furthermore, it is *particularistic* because the obligations are imposed only on the signing parties. On the concept of *cooperation* in international law, see: R. Wolfrum, ‘International Law of Cooperation’, in R. Wolfrum (ed), *The Max Planck Encyclopaedia of Public International Law*, Vol. II, (2012), 783.

¹² Wolfrum, ‘Solidarity amongst States’, *supra* note 9, 1088.

¹³ *Ibid.*, 1090.

¹⁴ *Ibid.*, 1093.

¹⁵ *Ibid.*, 1093-1094.

¹⁶ *Ibid.*, 1097.

of developing countries.¹⁷ The liberalization of trade must be seen, therefore, in the light of those higher normative priorities.¹⁸

d) Lastly, in the field of *humanitarian assistance and intervention* solidarity has been implicitly invoked in the *Resolution on Humanitarian Assistance to Victims of Natural Disasters*, adopted by the General Assembly on 8 December 1988.¹⁹ Furthermore, the institutional powers of the Security Council under Chapter VII UN Charter, with the competence to take action to protect the peace or even to legitimize humanitarian interventions, are based upon the principle of solidarity.²⁰ It is particularly significant that solidarity is exercised, in the case of humanitarian intervention, not *among states* but by states *towards a population of another state*.²¹

e) Although within the four above-mentioned law regimes the taking into consideration of non-national interests is related, in a broad sense, to the issue of human rights protection, the question arises whether the reference to solidarity has made its entry into that *specific* law regime which is explicitly dedicated, at the global-international as well at the continental level, to the *safeguarding of human rights*.²² As a consequence, *solidarity* would be unambiguously qualified, in this case, as a right the fulfilment of which every human being (or, according to a more communitarian understanding, every social and political group) can demand from any other individual or group. Starting with the global-international level, the essential relationship between human rights and solidarity – whereby solidarity in itself is deemed to be a right, so that a *specific right to solidarity* should be introduced or regarded as already existing – has been proclaimed in particular by documents issued by the Human Rights Council (HRC) either directly (i.e. in form of a resolution of the HRC),²³ or through the special rapporteur appointed by the HRC to study this particular issue.²⁴

¹⁷ *Ibid.*, 1097.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, 1098.

²⁰ *Ibid.*, 1099.

²¹ *Ibid.* (emphasis added). For the justification of this *shift in the reasoning* from solidarity between States to solidarity with foreign citizens in their cosmopolitan quality see: *infra*, E. IV., F.

²² I am grateful to Christopher McCrudden for this suggestion.

²³ *Human Rights and International Solidarity*, UN Doc A/HRC/RES/15/13, 30 September 2010.

²⁴ Note by the United Nations High Commissioner for Human Rights on *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*. *Human Rights and International Solidarity*, UN Doc

The references made in these cases to existing international law norms address²⁵ provisions contained in the *Charter of the United Nations*,²⁶ in the *Universal Declaration of Human Rights*,²⁷ and in the *Covenant on Economic, Social and Cultural Rights*.²⁸ Despite some normative evidences, the positions taken by the HRC have been highly controversial, having met with strong resistance especially from Western countries.²⁹ Among the reasons behind the Western states' opposition to the introduction of an explicit *right to solidarity* along the lines laid down by the HRC and its special rapporteur might have been a narrow-minded fear of being made responsible for injustice and harms inflicted upon non-Western countries by colonialistic and imperialistic policies, as well as a general scepticism – conceptually highly contestable, but well-rooted especially in the legal tradition of the Anglophone countries – against the establishment of positive rights, i.e. of rights that, for their implementation, require pro-active intervention by the public powers. Furthermore, the Western world's opposition may also have been motivated by understandable concerns as regards the wording of the resolution and, in general, of the documents of the HRC, in which, although there are references not only to the “right of peoples” but also to the “right of individuals” to international solidarity,³⁰ the prevailing attitude appears to be in favour of an understanding of solidarity as a “third generation right”,³¹ namely a right that can be implemented only collectively. It is precisely this *collective* dimension that characterizes certain entitlements insofar as they

A/HRC/9/10, 15 August 2008; *Report of the Independent Expert on Human Rights and International Solidarity*, UN Doc A/HRC/15/32, 5 July 2010.

²⁵ See, in particular UN Doc A/HRC/9/10, *supra* note 24, paras 8 & 9.

²⁶ *Charter of the United Nations*, 26 June 1945, Art. 1, para. 3; Chapter IX, Arts 55 & 56, 1 UNTS XVI.

²⁷ *Universal Declaration of Human Rights*, GA Res. 217 A (III), UN Doc A/RES/810 at 71, 10 December 1948, Art. 28.

²⁸ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Art. 2; Art. 11, para. 2, 993 UNTS 3.

²⁹ The resolution of the HRC on *Human Rights and International Solidarity*, *supra* note 23, has been adopted by a recorded vote of 32 to 14. Among the states that voted against the resolution were all members of the European Union which were part of the HRC, along with the United States of America, Japan, South Korea, Norway, Switzerland, Moldova and Ukraine.

³⁰ UN Doc A/HRC/RES/15/13, *supra* note 23, Arts 10, 12 and 14; UN Doc A/HRC/9/10, *supra* note 24, paras 2, 5, 17, 25-26; UN Doc A/HRC/15/32, *supra* note 24, paras I. 3, II. C. 37, III. A. 40, IV. 60.

³¹ UN Doc A/HRC/RES/15/13, *supra* note 23, Art. 9; UN Doc A/HRC/9/10, *supra* note 24, para. 1, Annex: 3, 5, 7; UN Doc A/HRC/15/32, *supra* note 24, paras II. A. 11, Annex: 3, 4, 7.

are thought to belong to the *third generation* of rights and, however, clearly comes up against the *individualistic* rights conception which is predominant within the Western tradition.

If solidarity can hardly be seen as a recognized right at the global-international level, the situation is not essentially different as regards the continental, in this case European, level.³² Indeed, Art. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) states that “[the] High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”³³ With reference to the protection of non-citizens from harms³⁴ and the taking into consideration of their justified claims, the question is therefore how far this jurisdiction can reach. Yet, the interpretation by the European Commission of Human Rights (ECommHR) and the European Court of Human Rights (ECtHR) has been quite restrictive in its substance, insofar as they eventually opt, regardless of the cautious introduction of some elements of a “relational” approach to the question,³⁵ for a conception of *jurisdiction* as being identical to *territorial control*. This preference was expressed in particular by the Grand Chamber of the ECtHR in its decision of principle concerning the *Banković* Case.³⁶ However, while a “relational” interpretation of jurisdiction could cover all cases of transboundary harm inflicted on individuals by state powers or by private actors subjected to state power even if the state involved did not exercise effective control on the territory in which the individuals concerned lived, the identification of *jurisdiction* with *territorial control* limits the application of the provision to only a few cases, excluding many situations

³² N. Vennemann, ‘Application of International Human Rights Conventions to Transboundary State Acts’, in Bratspies & Miller (eds), *supra* note 4, 295.

³³ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Art. 1, 213 UNTS 221 [ECHR].

³⁴ The protection of non-citizens from harms, guaranteed – at least according to a progressive interpretation strategy, as we see below – by Art. 1 of the ECHR, defines the rather *negative* side of *solidarity*, i.e. of the general aim of taking into account the justified request by non-citizens not to suffer significant impairments as the result of decisions taken within national fora. The *positive* side, on the other hand, which also includes pro-active actions by state powers in order to overcome conditions of past and present injustice, characterizes the introduction of the solidarity principle into international law provisions – as described under a) (limited, here, to the system of collective security), b), c) and d), as well as the approach of the HRC considered under e).

³⁵ Vennemann, *supra* note 32, 297.

³⁶ *Banković and others v. Belgium and others*, ECtHR Application No. 52207/99, Decision of 12 December 2001.

that may result from “the increasingly transboundary or extraterritorial range of state action”.³⁷ Surely, Art. 1 of the ECHR does not, in principle, exclude a broader understanding of *jurisdiction*. Moreover, since “[the] reluctance to apply the international law of human rights to extraterritorial state acts is no longer tolerable”,³⁸ a dynamic interpretation of the legal instrument provided by Art. 1 ECHR would be much needed. Nevertheless, such an interpretation has, for the time being, to be seen as part of a discourse *de lege ferenda*, the concrete implementation of which is far from being certain.³⁹

Considering the lights and shadows of the normative situation,⁴⁰ two main criticisms have been formulated against the thesis that solidarity has already become part of positive international law: the first claims that provisions on solidarity are abstract and generic, and so an exercise of goodwill or a project *de lege ferenda*, rather than effective law;⁴¹ the second points to the partial and, in general, inadequate implementation of the provisions.⁴² As regards the first criticism, in spite of the perception by some actors in international relations⁴³ and of the efforts undertaken by the HRC, the idea of introducing *solidarity* as an individual or collective right or interpreting international law provisions in

³⁷ Vennemann, *supra* note 32, 307.

³⁸ *Ibid.*

³⁹ On the emerging principle of international law asserting, to the contrary, the disjunction of “acts and omissions” of States “that have effects on the enjoyment of human rights” from the condition of territorial jurisdiction, see: De Schutter *et al.*, *supra* note 1, 1101 (Art. 8 a).

⁴⁰ A further field could be taken into account as regards the introduction of solidarity as a legal principle, namely the law of the European Union. Indeed, solidarity is here more strongly asserted than within international law regimes, although it remains weaker than in national legal systems. Yet, the clearer affirmation of solidarity is due, in EU law, precisely to the fact that this legal system contains federalist elements which distinguish it from international law regimes in the proper sense of the word. See A. von Bogdandy, ‘Constitutional Principles’, in A. von Bogdandy & J. Bast (eds), *Principles of European Constitutional Law*, 2nd ed. (2010), 3, 11-12 [Bogdandy, Constitutional Principles]. As a result of the introduction of EU citizenship as well as of other provisions of EU law concerning the free movement of workers, solidarity has to be regarded in the Union as a duty towards fellow citizens and not towards foreigners. As a matter of fact, however, EU solidarity is proving – despite the federalist contents – to be more fragile than expected.

⁴¹ Y. Dinštein, ‘Discussion Following the Presentation by Philipp Dann’, in R. Wolfrum & C. Kojima (eds), *Solidarity: A Structural Principle of International Law* (2010), 79.

⁴² H. P. Hestermeyer, ‘Reality or Aspiration? – Solidarity in International Environmental and World Trade Law’, in D. König *et al.* (eds), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum*, Vol. I (2011), 45.

⁴³ UN Doc A/HRC/15/32, *supra* note 24, 3.

the sense of a pre-existing *right to solidarity* has met and still constantly meets – as briefly depicted *supra*, under e) – relevant challenges and resistance. Indeed, as a consequence of these difficulties, solidarity has not generally been seen as a *right* expressed by exactly defined *rules*, but rather as a “principle”⁴⁴ – and as such it has also been understood within the legal regimes described above (a – d). In doctrine, in particular, solidarity has been interpreted as a “structural principle of international law”,⁴⁵ or as a “[...] fundamental and fundamentally sound principle of international law [...]”,⁴⁶ or even as a “constitutional principle”.⁴⁷ Therefore, the standing of *solidarity* as a matter of international law is, at least for the time being, strictly dependent on the status of *principles* within the legal system.

In this regard, it has been argued⁴⁸ that the concept of *principle* can be used, in legal discourse, in three ways. First, principles can be firmly anchored legal norms – like the “legal principles” of national constitutional law and of EU law⁴⁹. Second, principles can have a predominantly philosophical meaning. Finally, *principle* may be used in a purely *colloquial* sense. In both the second and third usages, *principles* would, from the perspective of a formalistic legal approach, be a rather shaky basis for the legal discourse. These are, however, precisely the ways in which the reference to solidarity as a *principle* emerges in contemporary international law. Yet, this interpretation ignores the specific – and very special – role played by *principles* in legal systems. Indeed, *principles* are purposely distinct from *rules*,⁵⁰ in particular, they are explicitly thought to be weighted and to build, as “[...] optimization commands [...]”,⁵¹ the conceptual

⁴⁴ *Ibid.*

⁴⁵ Wolfrum, ‘Solidarity amongst States’, *supra* note 9; R. Wolfrum, ‘Solidarity amongst States: An Emerging Structural Principle of International Law’, 49 *Indian Journal of International Law* (2009) 1, 8.

⁴⁶ R. S. J. Macdonald, ‘Solidarity in the Practice and Discourse of Public International Law’, 8 *Pace International Law Review* (1996) 2, 259.

⁴⁷ K. Wellens, ‘Solidarity as a Constitutional Principle: Its Expanding Role and Inherent Limitations’, in R. S. John Macdonald & D. M. Johnston (eds), *Towards World Constitutionalism. Issues in the Legal Ordering of the World Community* (2005), 775; K. Wellens, ‘Revisiting Solidarity as a (Re-)Emerging Constitutional Principle: Some Further Reflections’, in Wolfrum & Kojima (eds), *supra* note 41, 3.

⁴⁸ Hestermeyer, *supra* note 42, 46.

⁴⁹ On “founding principles” within EU primary law see Bogdandy, ‘Constitutional Principles’, *supra* note 40, 12.

⁵⁰ R. Dworkin, *Taking Rights Seriously* (1977).

⁵¹ R. Alexy, ‘On the Structure of Legal Principles’, 13 *Ratio Juris* (2000) 3, 294; R. Alexy, *Theorie der Grundrechte*, 2nd ed. (1994), 75-76.

context in which rules are also embedded. In the dimension of legal principles – and, more specifically, in all meanings in which the concept of *principle* can be used – legal discourse meets moral, ethical, philosophical and, in general, extra-legal arguments,⁵² making interpretation of the law possible as well as paving the way for its further development.⁵³

“I love to sail forbidden seas, and land on barbarous coasts” – asserts Ishmael in Herman Melville’s *Moby Dick*.⁵⁴ The craft from within the legal system that helps us to reach unexplored coasts of jurisprudence is what we call *principles*. Solidarity’s status as a principle, therefore, is not a discredit. Instead, the skilful and courageous interpretation of principles based on ethical arguments or even on *colloquial* practices should be seen as an extremely useful and rational characteristic, belonging in general to all legal principles by reason of their position within the legal system. From this perspective the second supposed shortcoming of the solidarity principle – namely its alleged ineffectiveness – can also be viewed in a more positive light: law is not a static system; thus, in order to adapt to new situations and improve, it needs concepts and norms which accept the challenge of discovering a broader horizon and exploring unknown territories.⁵⁵

C. On the Relationship Between Legal and Extra-legal Discourses

My positive evaluation of the role of solidarity as a legal principle within the international law system – against the many critiques that have been raised against it – is lastly grounded on the epistemological premise that legal and extra-legal discourses are not impermeable but, instead, are open to each other in a kind of osmosis. Legal propositions are always connected to extra-legal concepts and assumptions, and on this connection is based the ability to

⁵² J. Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (1992), 552 [Habermas, Faktizität und Geltung].

⁵³ For a different understanding of *principles*, according to which their essential relationship with extra-legal discourses is not stressed, but rather their structural function *within* the legal system, see: A. von Bogdandy, ‘General Principles of International Public Authority: Sketching a Research Field’, 9 *German Law Journal* (2008) 11, 1909.

⁵⁴ H. Melville, *Moby Dick* (2008), 5.

⁵⁵ This consideration should not, however, lead us to the conclusion that legal norms on solidarity do not necessitate further clarification and better realization, but just to the conviction that this task can be accomplished only by opening the legal discourse to suggestions from outside.

interpret and further develop the law. I will support my assertion *ex negativo* by briefly analysing the claim to self-sufficiency of the legal system advanced by some strands of legal theory.

At the end of the 16th century, as political scientists and legal theorists fought to emancipate the law from the primacy of metaphysics and theology, Alberico Gentili – one of the most prominent and committed among those intellectuals – formulated the famous motto: “Silete, theologi, in munere alieno!”⁵⁶ The task of silencing theologians on non-religious questions, i.e. the task of building a legal system which had to be independent of the law of God and of its interpreters as well as of moral or ethical truth in general, would still take many centuries to achieve. The project of finding a legal science not based on extra-legal assumptions was not properly accomplished until the 20th century, as two significant theoretical attempts were started with the explicit aim of decoupling the legal system from extra-legal discourses, the first – Hans Kelsen’s *Reine Rechtslehre*⁵⁷ (a) – collocated in legal theory, the second – Niklas Luhmann’s systems theory of the law⁵⁸ (b) – in legal sociology.

a) In order to address whether the project of a self-sufficient legal doctrine is feasible and whether it is really capable of producing better results than a legal doctrine linked with extra-legal discourses, it may be useful to focus first on the criticism that Kelsen formulated against Kant – in his eyes the most important and ambitious exponent of the *old school*. Kelsen asserts that Kant actually based his concept of the positive law on the metaphysical foundation of natural law. For that reason, Kant as a political and legal philosopher would betray his own methodological premises as a theoretical philosopher: while Kant’s theory of knowledge overcomes metaphysics, his legal and political thought would yet presuppose an *objective* truth, therefore conflicting with that ethical plurality which is essential in contemporary society, and jeopardizing the possibility of conceiving the law as the formal mediation of different conceptions of the good.⁵⁹ In fact, Kant leaves no doubt about the link between the law and extra-legal discourses, in particular moral principles: indeed, both are interpreted as aiming at the realization of *autonomy* as the condition in which human beings – as both moral and political subjects – give themselves the rules that they

⁵⁶ A. Gentili, *De jure belli libri tres*, Vol. I (1933).

⁵⁷ H. Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (1934) [Kelsen, *Reine Rechtslehre*].

⁵⁸ N. Luhmann, *Das Recht der Gesellschaft* (1993) [Luhmann, *Recht der Gesellschaft*].

⁵⁹ H. Kelsen, *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* (1928).

ought to follow.⁶⁰ Nevertheless, Kant's morals can hardly be seen as *metaphysical* in the usual sense of the word, since morality does not in his conception resort to an *objective* truth rooted in God's will or in nature and situated beyond and above the critical reflexion of individuals. Rather, Kant's moral principles build a *transcendental* foundation for peaceful and cooperative human interaction: insofar as they express the fundamental rules that humans give themselves so as to live with each other in peace and solidarity, they are not objective but *subjective*, not substantial but *formal*.

Furthermore, in Kant's approach the connection between law and morals guarantees three essential functions: a) a criterion for the validity of the law (a law that violates the principle of autonomy can be effective and in force, but cannot claim to be endowed with full normative validity); b) a conceptual basis for criticism of the existing law, as a precondition for further development of the legal system (on the basis of the principle of autonomy it is justifiable to criticize a law that violates this principle and seek its amendment); c) a definition of the social function of the law (a law endowed with full normativity assumes the function of guaranteeing autonomy in social and political interactions). The question now arises whether a legal system that claims to deny any extra-legal reference may accomplish these functions. According to Kelsen's "Pure Theory of Law", the legal system is made up of hypothetical propositions – without any resorting to social realities or ethical principles⁶¹ – the validity of which is guaranteed exclusively by the fact that their production follows the rules established by a higher norm. Therefore, in the formal pyramid of legal positivism the validity of any proposition is founded on the validity of a norm situated at a hierarchically higher level. Yet, the logic of such a conception leads inescapably to a regression ad infinitum, so that Kelsen – in order to avoid this conceptual shortcoming that would undermine his whole construction – creates a borderline concept of legal theory, the *Grundnorm* (fundamental norm).⁶² When we reach

⁶⁰ I. Kant, 'Grundlegung zur Metaphysik der Sitten', in I. Kant, *Werkausgabe*, edited by W. Weischedel, Vol. VII (1977), 9, 65-66; I. Kant, 'Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis', in I. Kant, *Werkausgabe*, *supra* note 60, Vol. XI, 125, 150; I. Kant, 'Zum Ewigen Frieden: Ein philosophischer Entwurf', in I. Kant, *Werkausgabe*, *supra* note 60, Vol. XI, 191, 204 [Kant, Zum Ewigen Frieden]; I. Kant, 'Die Metaphysik der Sitten', in I. Kant, *Werkausgabe*, *supra* note 60, Vol. VIII, 306, 432, para. 46; I. Kant, 'Der Streit der Fakultäten', in I. Kant, *Werkausgabe*, *supra* note 60, Vol. XI, 264, 364.

⁶¹ Kelsen, *Reine Rechtslehre*, *supra* note 57, 21.

⁶² H. Kelsen, *General Theory of Law and State* (1945), 115-123 [Kelsen, General Theory]. For a recent analysis of the *Grundnorm* theory see A. Jakab, 'Probleme der Stufenbaulehre', 91

the top of the positivistic legal system's pyramid – i.e. the constitution within the national legal system and, at an even higher, global level, the essential norms of international law – we find, according to Kelsen, sets of positive norms on which all other norms are grounded. Nonetheless, these positive norms, so as to be valid, have also themselves to be based on another, even more essential norm. In order to interrupt the regression *ad infinitum*, Kelsen describes this most fundamental of all norms as non-positive, namely as a pre-positive principle which is the source of any validity of the law. The *Grundnorm* may actually assume any content: the only quality that is essential to the pre-positive principle of the whole legal system is its effectiveness.⁶³

Thus, considered in relation to his criticism of Kant, Kelsen's proposition does not in the end offer any convincing solution. First, the *Grundnorm* turns out to be no less extra-legal than Kant's morality – actually uncontroversial evidence that the epistemological content of the law cannot rest exclusively on the law itself. And, second, the content of Kelsen's extra-legal law reference is eventually less convincing than Kant's idea of morality: indeed, it guarantees far less than the latter an adequate standard for the normativity of the law, nor does it propose a rational criterion for its further development.

b) In more recent years a new attempt, based on systems theory, has been made to conceive of the law as a self-sufficient system. According to Niklas Luhmann's theory of systems, law is an independent social system the function of which consists in stabilizing the normative expectations deriving from other social subsystems.⁶⁴ According to the interpretation of society based on systems theory, every social subsystem produces expectations as a consequence of the achievement of its functions. In order to prevent the disruptive effects that could arise from the pretensions formulated by social actors, their expectations are expressed in the form of norms, and the claims appealing to these norms

Archiv für Rechts- und Sozialphilosophie (2005) 3, 333.

⁶³ Kelsen, *General Theory*, *supra* note 62, 120. H. L. A. Hart tried to avoid Kelsen's resorting to the pre-positive assumption of the *Grundnorm* by introducing the concept of the "rule of recognition" see *The Concept of Law*, (1994), 90-96. Thus, the foundation of the legal system in Hart's theory is itself a rule and not a pre-legal postulation. Nevertheless, the "rule of recognition" consists lastly in imposing a duty the acceptance of which is based on extra-legal conditions. As a result, Hart's revised positivism shares with Kelsen's conception the same flaws that seem to affect every positivist understanding of the legal system: first, the legal system cannot refrain from references to extra-legal circumstances; second, through the extra-legal conditions on which it is based legal positivism meets with an unreflected and normatively untamed social and political power. This way, the normativity of the law is largely – and dangerously – reduced to its effectiveness.

⁶⁴ Luhmann, *Recht der Gesellschaft*, *supra* note 58, 131.

are processed in formal procedures following the principles laid down by law. On these premises, systems theory elaborates a significantly better articulation of the social function of the law than Kelsen's *Grundnorm*.

Nevertheless, here the assertion of the self-subsistence of the legal subsystem is also problematic. Systems theory claims, in fact, that the legal subsystem – like any other social subsystem – only operationalizes communication that unfolds according to its specific internal binary code⁶⁵ which is based, for this particular subsystem, on the contraposition between lawful and unlawful.⁶⁶ This assumption may simply mean what is self-evident in a context of social differentiation, namely that inputs from outside can be operationalized within a system only if they are translated into its own language. Systems theory however – at least in Luhmann's interpretation – maintains more than just this, asserting that no extra-systemic actor can become part of the infra-systemic interaction if he does not give up his extra-systemic character, as well as that no external content can penetrate into the causal chain of the infra-systemic operations. Indeed, every subsystem not only has its own rationality but is also self-referential, i.e. its operational chain is impermeable to the environment.⁶⁷ Communications coming from outside are interpreted exclusively as *irritations* affecting the usual functioning of infra-systemic operations.⁶⁸ In fact, no extra- or supra-systemic reason – i.e., a rationality rooted in the *lifeworld*⁶⁹ – is thinkable in systems theory's conception of self-contained social subsystems. According to this postulation, the law is also understood as a self-referential subsystem characterized by a self-sufficient rationality: as in Kelsen's "Pure Theory of Law", albeit following very different conceptual premises, the law would therefore be based exclusively on itself.

Yet, the idea of an exclusively self-reliant rationality of the legal subsystem meets its limits when the epistemological question is raised whether the membrane between system and environment can really be seen as impenetrable and, as a consequence, whether the adaptations of the system's operations to the environment can adequately be explained merely by resorting to the concept of *irritation*. An alternative description of the relations between system and environment would consist in presupposing the intervention of external actors as

⁶⁵ N. Luhmann, *Die Gesellschaft der Gesellschaft*, Vol. I (1997) [Luhmann, *Gesellschaft der Gesellschaft*].

⁶⁶ Luhmann, *Recht der Gesellschaft*, *supra* note 58, 60-62.

⁶⁷ Luhmann, *Gesellschaft der Gesellschaft*, *supra* note 65, 95-96.

⁶⁸ *Ibid.*, 118.

⁶⁹ J. Habermas, *Theorie des kommunikativen Handelns*, Vol. II (1981) [Habermas, *Kommunikatives Handeln*].

well as the raising of non-system-immanent claims within the communication process of the legal subsystem. From this perspective, provided that the external actors' action and the non-system-immanent claims were translated into the language of the legal subsystem, it would be possible to explain how the system-immanent rationality can benefit from direct input from the lifeworld. Furthermore, it would not be necessary to assume – as in Luhmann's systems theory – an epistemologically and sociologically problematic double-blind coupling between different non-communicating systems.⁷⁰ The advantages of the approach that presupposes interaction with external actors as well as the existence of an extra- and supra-systemic rationality becomes evident when it comes to the analysis of extra- or supra-systemic phenomena like human rights protection and justice. The difficulties that systems theory meets in explaining these issues by maintaining the principle of systemic self-referentiality⁷¹ may offer sufficient evidence that the legal subsystem, even if relying on the conceptual organon of systems theory, can hardly be seen as self-sufficient: in order to understand some aspects of its functions the resort to forms of extra-legal rationality seems to be inevitable.

In conclusion, the most radical attempts to ground the system of the law exclusively in itself have substantially failed in their purposes: legal propositions are always connected to extra-legal concepts and assumptions, and on this connection is based the ability to interpret and further develop the law. From this perspective, the fact – outlined in the last section – that the norms on *solidarity* are always, as legal principles, related to non-legal arguments in order to specify their content should not be seen as disturbing; indeed, the legal propositions concerning *solidarity* share their epistemological status with all other legal propositions: in order to be understood, interpreted and developed, they have to be situated against a non-legal conceptual and social background. Insofar as legal norms – like the provisions on solidarity – are explicitly receptive for the discursive world outside, they should not be considered an underdeveloped element of the legal system. Rather, they have to be appreciated as precisely

⁷⁰ Luhmann, *Gesellschaft der Gesellschaft*, *supra* note 65, 100.

⁷¹ See, e.g. A. Fischer-Lescano, *Globalverfassung: Die Geltungsbegründung der Menschenrechte* (2005); Fischer-Lescano, 'Globalverfassung: Verfassung der Weltgesellschaft', *supra* note 5; M. Neves, 'Die symbolische Kraft der Menschenrechte', 91 *Archiv für Rechts- und Sozialphilosophie* (2005), 159; G. Teubner, 'Selbstsubversive Gerechtigkeit: Kontingenz- oder Transzendenzformel des Rechts?', 29 *Zeitschrift für Rechtssoziologie* (2008) 1, 9; G. Teubner, 'Die anonyme Matrix: Zu Menschenrechtsverletzungen durch „private“ transnationale Akteure', in W. Brügger, U. Neumann & S. Kirste (eds), *Rechtsphilosophie im 21. Jahrhundert* (2008), 440.

that component of the *corpus iuris* that, more than anything else, enables it to be deeply rooted in social interaction. The time has thus come to reformulate Gentili's motto by inviting lawyers to pay more attention to ideas coming from other disciplines: "animum attendite, jure consulti, ad notiones e munere alieno!"

D. Two Arguments Against Solidarity

Legal arguments have to be situated within the horizon of a broad understanding of practical reason so as not to lose their epistemological content as well as the social function of the law. This justifies an examination of the claims arising from extra-legal discourses that either support or undermine the case for *solidarity* as a guiding principle of law. In this overview, I will start with the latter strand, namely with the arguments that deny the existence of an obligation to take non-national interests into account within national fora. This approach is developed in two main variants: the first asserts that solidarity with non-nationals leads eventually to the destruction of the political community in the midst of the struggle for survival between peoples (D. I.); and the second claims that egoism is simply the most rational choice (D. II.).

I. Egoism as the Consequence of the Existential Struggle Between Political Communities

The most ancient – and, at least for a long time, the most powerful – conception that excludes non-national interests and arguments from internal decision-making-processes is based on the assumption that the interactions between political communities are essentially characterized by their existential struggle for survival. We find this idea throughout the whole history of Western political and legal thought: having been first elaborated by the Greek historian Thucydides⁷², it reappeared at the dawn of modernity in the works of Machiavelli⁷³ and Bodin.⁷⁴ Later, it became part of the nationalistic philosophy from the beginning of the 19th century⁷⁵ as well as of the neo-realistic theory of

⁷² Thucydides, *The Peloponnesian War* (2009), Book V, Chapter XVII, para. 84 ff.

⁷³ N. Machiavelli, *Il Principe* (1995); N. Machiavelli, *Discorsi sopra la prima deca di Tito Livio* (1997).

⁷⁴ J. Bodin, *Six livres de la république* (1579). Bodin's concept of sovereignty would mean "[...] the death of any international law [...]" as the law of coexistence and cooperation among states, see: H. Kipp, *Völkerordnung und Völkerrecht im Mittelalter* (1950), 124.

⁷⁵ A. Müller, *Die Elemente der Staatskunst* (1922); E. Lemberg, *Nationalismus* (1964); H. Kohn, *Die Idee des Nationalismus: Ursprung und Geschichte bis zur Französischen Revolution*

international relations from the middle of the 20th century.⁷⁶ Lastly, on the cusp of the second and third millennia, it has informed the influential theory of the “clash of civilizations”.⁷⁷

According to the core facets of the theoretical approach shared by all these authors, relations between political communities are largely comparable to a *state of nature*, in which no compelling legal norms situated at a level above the individual entities can be established. In this *status naturae* every social and political entity is largely homogeneous within its boundaries, although the fundamentals of this indispensable homogeneity may be quite different: from the mythical origins of the *polis* to the assumption of the polity as enlarged family,⁷⁸ as well as from the historical, linguistic, ethnic and even racial unity of the nation⁷⁹ to the rather religion-focussed concept of “civilisation”.⁸⁰ It is essential to this perspective only that the *other* is perceived as an essential and existential threat to one’s own community – as an *hostis* or a “foe”, as Carl Schmitt pointed out.⁸¹

In these terms, political and legal order is possible only within the boundaries of the single political community, by reason of its cohesion and homogeneity. Against any form of *universalism*, order – in the sense of a social condition in which legal norms guarantee a peaceful and cooperative interaction – cannot but be *particular*. Beyond the borders of the individual polities no real order can be established, but merely a precarious limitation of disorder, a *Hegung des Krieges* preventing severely destructive and eventually annihilating outcomes for one’s own community.⁸² Yet, if the rivalry that arises between communities – for

(1950); L. L. Snyder, *Varieties of Nationalism: A Comparative Study* (1976).

⁷⁶ H. J. Morgenthau, *Politics Among Nations. The Struggle for Power and Peace*, 2nd ed. (1954); S. Burchill *et al.* (eds), *Theories of International Relations* (2001) 70; A. Jacobs, ‘Realismus’, in S. Schieder & M. Spindler (eds), *Theorien der Internationalen Beziehungen* (2006), 39.

⁷⁷ S. P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (1996).

⁷⁸ The idea of the familistic origin of the polity reaches, over a period of two thousand years, from Aristotle, *Politics* (1967), I, 2, 1252a ff., to Bodin, *supra* note 74, 1, and R. Filmer, *Patriarcha, Or the Natural Power of Kings* (1680).

⁷⁹ A. D. Smith, *The Ethnic Origins of Nations* (1986).

⁸⁰ Huntington, *supra* note 77, 42.

⁸¹ C. Schmitt, *Der Begriff des Politischen: Text von 1932 mit einem Vorwort und drei Corollarien* (1963), 20, 26-28.

⁸² C. Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (1950), 111 ff. Arguments in favour of the limitation of the most destructive consequences of conflicts can also be found throughout the history of the particularistic strand of political thought, from Thucydides, *supra* note 72, Book III, Chapter 10, para. 59; Book IV,

instance, as a consequence of the scarcity of resources – cannot be settled through generally recognized procedures, the conflict may degenerate into a relentless struggle in which no interests of the counterpart are recognized as legitimate – except for the cases in which such interests coincide with those of the first party – nor can the arguments of the *other* be accepted as a truthful contribution to the solution of the problem. In the midst of a struggle for survival, where no independent perspective or procedure is established and no shared arguments can be developed, any claim is an instrument at the service of the particularistic self-affirmation of one conflicting party.

From the perspective of an existential struggle between particularistic social and political communities, egoism is justified not only because, as already mentioned, no supra-state normative and institutional level – i.e. no legal and political system, with functioning, inclusive and representative international organizations, as well as with an independent adjudication system – exists above the individual polities. A second cause – an epistemological one – may, in fact, be considered even more significant. Indeed, within the conceptual horizon of the *holistic* understanding of the political community, in which the *totality* of each polity (the *holon*) is collocated clearly above its members, namely above individuals with their rights and interests, reason is never *universal*, but always *situated*. In other words, reason cannot but be deeply rooted in the hermeneutic context of a specific culture, language and history.⁸³ We will, therefore, have *our* arguments, based on *our* reason, or arguments based on the reason of the *others*, but we will never have shared arguments arising from a common reason. The only rational approach that we all share is, from this point of view, the reason of expediency, so that the only claims of the counterpart that we can accept are those occasionally and casually coinciding with our egoistic priorities. Otherwise, the endorsement of the interests of the *others* always runs the risk of being seen as a betrayal.

Two main arguments can be developed against the extra-legal discourse that grounds the egoistic refusal of solidarity on the assumption of the relations between the polities as a *state of nature*. The first addresses the concept of reason. Indeed, if it may be difficult to reject the claim that reason always develops

Chapter XIV, para. 118, to Plato, *Republic* (1980), 469c ff., until the neo-realistic theorists of international relations (see Morgenthau, *supra* note 76, 205-209 & 505-517) and even among the prophets of the “clash of civilizations” (see Huntington, *supra* note 77, 308).

⁸³ On the contextualization of subjectivity and, therefore, of reason as one of its most important features see: M. Sandel, *Liberalism and the Limits of Justice* (1982); A. MacIntyre, *Whose Justice? Which Rationality?* (1988); R. Forst, *Kontexte der Gerechtigkeit: Politische Philosophie jenseits von Liberalismus und Kommunitarismus* (1994), 23, 306.

against the background of a social context, it would nevertheless be incorrect to overlook totally those elements of rational communication that supersede the specific contexts, encompassing a plurality of human societies and allowing interactions far beyond the individual communities. Even if there are no doubts about the massive presence of the use of instrumental – or strategic – reason in human interaction, no less convincing arguments speak in favour of the existence of something more and else in the realm of practical reason (see *infra*, E.).

The second criticism that may be raised against the justification of nation-centred egoism presented in this section has a rather teleological character. The question in this case is what kind of world we assume that we are living in, and whether this assumption may not presume a – perhaps unintended – perlocutionary dimension. In other words, if we deny solidarity because we understand the world as a *status naturae*, we make – precisely by assuming that and by acting, as a consequence, egoistically – a decisive contribution to shaping the world exactly that way, namely as a *state of nature*. And in the *status naturae* the life of the political communities, like the life of individuals before the contract that created the *commonwealth*, cannot but be “[...] solitary, poor, nasty, brutish, and short.”⁸⁴ Therefore, if a political community wants to have a wealthy, cultivated and long life, it should commit itself to leaving the state of nature: *exeundum est e statu naturae*.

II. The Egoistic Choice as Rational Choice

If we assume that rationality is not a universal quality with which every human is endowed but, on the contrary, that it is always embedded in social contexts and thus particularistic in its essence, it will not be surprising that the only rational perspective for action will consist in the egoistic defence of the interests of one’s own community. Nonetheless, a further approach has recently been developed in order to reject solidarity with the *others*, which is based on a universal understanding of rationality. In particular, Jack L. Goldsmith and Eric A. Posner resort in their analysis of the limits of international law to the *rational choice theory* so as to demonstrate the low normative level of the rules that should bring order to relations among states.⁸⁵

Beginning with the assumption that every rational actor will prefer the choice that promises to obtain the highest immediate payoffs, and arguing that

⁸⁴ T. Hobbes, *Leviathan, or the Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil* (1651), Chapt. XIII, 99.

⁸⁵ J. L. Goldsmith & E. A. Posner, *The Limits of International Law* (2005).

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 turns out to be unpredictable in the 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, really able to guarantee the stable proceduralization of conflict solution 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 first element that differentiates Goldsmith and Posner's justification of particularistic egoism from the *naturalistic* conception of the inescapable struggle for survival among peoples concerns the method that is applied here. Usually, the capacity for self-interested rational choice is thought to be shared by all humans, building a basis for an understanding beyond any predetermined individual or collective identity. In Hobbes' and Locke's contractualistic state theory self-interested rationality builds the strongest motivation to create the *societas civilis*. On the contrary, in Goldsmith and Posner's approach – and here is the first great novelty of their proposal – the preference for self-interested (or instrumental) rationality is the strongest argument for denying any chance to build a *societas civilis* among states. Second, the rejection of solidarity has usually been justified by pointing out the centrality of the pre-reflexive identity of the community. Once again in the face of the prevailing philosophical, political and legal tradition, Goldsmith and Posner base their argument on the principle of democratic participation, therefore on the most reflexive decision-making procedure. And while for many legal philosophers people's participation was the best guarantee of freedom and of a universalistic understanding of inter-state interaction,⁸⁶ they see in it the most powerful obstacle against such a hopeful perspective. For that reason, they claim that precisely the democratic states will be particularly reluctant – not least because of their democratic tradition and praxis – to comply with international law when this compliance runs counter to their own interests.⁸⁷

⁸⁶ Just to remind one of the most prominent example in the history of political thought see: Kant, 'Zum Ewigen Frieden', *supra* note 60, 204-208. For a recent upholding of the *democratic peace thesis* see R. J. Delahunty & J. Yoo, 'Kant, Habermas and Democratic Peace', 10 *Chicago Journal of International Law* (2009-2010) 2, 437.

⁸⁷ Goldsmith & Posner, *supra* note 85, 212.

The egoistical attitude against the *others* based on rational choice theory raises some methodological concerns as regards the theory understanding here displayed.

First, it is problematic to extend the rational choice approach, conceived in order to interpret the behaviour of individuals, to collective entities like states, which are themselves composed of a plurality of individuals and social groups with articulated and sometimes diverging interests.⁸⁸ The justification that the *billiard ball* approach, considering every single state as a unity, albeit “far from perfect”, would be simply “[...] parsimonious [...]”,⁸⁹ – in the sense that it would allow one usefully to reduce the number and complexity of the analysed phenomena in order to concentrate on the most significant among them – cannot really remove the sense of an epistemological shortcoming. Nor can the consideration that “[both] ordinary language and history suggest that States have agency and thus can be said to make decisions and act on the basis of identifiable goals” be convincing.⁹⁰ Such an understanding seems to be somehow old-fashioned in a world in which state agency is challenged both at the *infra*-state and at the *supra*-state level.

Second, Goldsmith and Posner’s definition of the elements the evaluation of which essentially contributes to making a choice rational may be considered short-sighted insofar as it excludes factors like “[...] reputation [...]” and “[...] reciprocity [...]”.⁹¹ Furthermore – and third – Goldsmith and Posner do not distinguish clearly between immediate payoffs and mid- as well as long-term interests.⁹²

⁸⁸ As regards the disaggregation of the *billiard ball* state into a differentiated structure comprehending different social components in the neo-liberal State and law theory see: A. Moravcsik, ‘Taking Preferences Seriously: A Liberal Theory of International Politics’, 51 *International Organization* (1997) 4, 513; A.-M. Slaughter, ‘International Law in a World of Liberal States’, 6 *European Journal of International Law* (1995) 4, 503; A.-M. Slaughter, ‘A Liberal Theory of International Law’, in P. B. Stephan & S. J. Bailly (eds), *Proceedings of the 94th Annual Meeting of the American Society of International Law* (2000), 240; A.-M. Slaughter, *International Law and International Relations*, in *Collected Courses of The Hague Academy of International Law*, Vol. 285 (2000), 9.

⁸⁹ Goldsmith & Posner, *supra* note 85, 6.

⁹⁰ *Ibid.*, 5.

⁹¹ A. T. Guzman, *How International Law Works: A Rational Choice Theory* (2008), 33.

⁹² The distinction between *utilitas praesens* and *utilitas maxima* is well-known in the history of political thought. To mention just two examples, see Hobbes, *supra* note 84, Chapt. XIII ff., and also the “Prolegomena” of Hugo Grotius, *De Jure Belli ac Pacis* (1995), No. 18.

Fourth, they presuppose that states interact exclusively *vis-à-vis* each other, i.e. that they are not embedded in a broader and multipolar context. Moreover, state interaction is always seen as an individual and unique event, excluding from the consideration any form of iteration. Yet, the application of instrumental rationality may lead to the conclusion that cooperation and solidarity are irrational and that egoism is the most rational choice only if we collocate the actors within an abstract horizon, quite different from that in which they usually act. Indeed, interactions – even those among international actors – happen normally within multilateral contexts and include iteration. From this perspective, the attitude of international actors will be significantly more prone to complying with international law and, generally, less hostile to cooperation since they would take into account possible remuneration or retaliation in the next rounds of interaction.⁹³ Besides, the actions of international actors are not *bipolar* but *multipolar*, constructing the framework of *collective actions* that help us to understand cooperation.⁹⁴ The contexts of multipolar iterative interactions have been described as *international regimes*.⁹⁵ Within these regimes, international law takes the role of the normative element that decisively contributes to shaping actors' interactions, making them predictable.

Fifth – and last – according to the understanding of rationality proposed by Goldsmith and Posner, actors have predefined preferences which do not change during interaction. Nonetheless, evidence shows that preferences shift in the course of interactions.⁹⁶ This fact may be explained still within the horizon of instrumental rationality, namely by admitting that the information exchange, albeit maintaining the priority of individual interests, nevertheless modifies the concrete contents of the original preferences. But it can also be seen as a clue to the effectiveness of a non-instrumental rationality.⁹⁷ We have three possible interpretations in this case: according to the first one, it has been claimed that resorting to communicative action in the context of international negotiations

⁹³ R. O. Keohane, *After Hegemony* (1984) 75-78.

⁹⁴ *Ibid.*, 76-78.

⁹⁵ *Ibid.*, 78-80, 85-109.

⁹⁶ N. Deitelhoff, 'Was vom Tage übrig blieb. Inseln der Überzeugung im vermachteten Alltagsgeschäft internationalen Regierens', in P. Niesen & B. Herborth (eds), *Anarchie der kommunikativen Freiheit* (2007), 26; T. Risse, 'Global Governance und kommunikatives Handeln', in Niesen & Herborth (eds), *supra* note 96, 57; H. Müller, 'Internationale Verhandlungen, Argumente und Verständigungshandeln' in Niesen & Herborth (eds), *supra* note 96, 199.

⁹⁷ On the deployment, in general, of non-instrumental rationality in international relations see the contributions in Niesen & Herborth (eds), *supra* note 96.

really shapes a shared setting of value-oriented preferences and motivations to action among the actors involved, eventually leading even the most egoistic interaction participants to non-egoistic preferences.⁹⁸ Following the second one, the shared background of values is not created, at first, by introducing communicative arguments and by performing communicative actions, but is always already present as a contextual precondition to any interaction.⁹⁹ The third interpretation – like the first – maintains the transcendental (and non-contextual) character of communicative reason, but does not follow its ambitious claim that communicative (i.e. non-strategic and, therefore, universalistic and non-egoistic) arguments really transform the preferences of egoistic actors into solidarity;¹⁰⁰ the supporters of this approach rather limit themselves to asserting that communicative reason creates a normative background that even the most egoistic participants in the interaction cannot dare to ignore.¹⁰¹

These considerations are sufficient to raise some doubts about the *rationality* of egoistic choice. However, if the exclusive focus on one's own interests is not as *rational* as its supporters claim, the question arises, now, which alternatives we have, i.e. the rationality standards of the extra-legal arguments for solidarity.

E. Four Reasons for Solidarity

Of the four main arguments that have been elaborated to justify solidarity as well as the opening up of the forum to the *others*, the first is based – like the second justification of egoism in international relations – on the instrumental conception of reason, yet collocated here in the context of a much broader understanding (E. I.). On the other hand, the further justifications of solidarity top the horizon of strategic thinking, albeit in quite different ways: in the first case through the quasi-metaphysical postulation of a community of human beings, made one by shared values and interests (E. II.); in the second case

⁹⁸ H. Müller, 'Internationale Beziehungen als kommunikatives Handeln', 1 *Zeitschrift für Internationale Beziehungen* (1994) 1, 15; T. Risse, "'Let's Argue!': Communicative Action in World Politics', 54 *International Organization* (2000) 1, 1. Recently, H. Müller has partially reoriented his position; see *infra* note 99.

⁹⁹ This second interpretation, which may be seen as a modification and a attenuation of the first one, can be traced back to some recent works of H. Müller; see, in particular Müller, *supra* note 98.

¹⁰⁰ While preference shifts during negotiations can be scientifically proved, the motivations of those shifts remain largely inscrutable to empirical inquiries.

¹⁰¹ J. Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik: eine Replik', in Niesen & Herborth (eds), *supra* note 96, 406, 439 [Habermas, Kommunikative Rationalität].

by resorting to a pre-reflexive attitude to empathy (E. III.); in the third case by relying on the normative dimension of the multilevel interaction between humans (E. IV.).

I. Enlightened Self-Interest

In an earlier section (D. II.) resort to instrumental rationality was analysed as a justification of egoism. However, it has also been said that, from a broader perspective, self-interest can also be considered as an argument in favour of solidarity. In this sense, the *utilitas praesens* does not coincide with the *utilitas maxima*.¹⁰² Indeed, even if egoism is thought to bring immediate payoffs, a more open attitude towards the *others* may turn out to be of greater advantage in the long run. Among the reasons for this kind of *enlightened self-interest* the most significant is probably the consideration that taking into account the interests of the counterparts reduces the risks of conflict, therefore also improving the chances of self-preservation and self-realization. Furthermore, the transfer of resources to *others* as well as the acceptance of some of their requests may, in some situations, induce secondary benefits for the solidaristic party – as, for instance, in the cases 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.

This approach – which has also been labelled, with a concept that verges on an oxymoron, as “self-centred solidarity”¹⁰³ – maintains, however, that a rational action must always aim at maximizing the gains of the individual actor, as well as that these gains, generally, must be clearly measurable in terms of concrete payoffs. Against this background, two situations can be singled out in which solidarity, even in the long run, would not be a rational, benefit-maximizing choice. The first occurs when an individual actor enjoys a significant economic, social, ideological and military predominance. In this context, the actor does not need to fear any harm, even in the long run, from the actions of its counterparts. The hegemonic state would control global interactions in such a way that there would no longer be any difference between *utilitas praesens* and *utilitas maxima*. As a consequence, short-term egoistic preferences, from the point of view of the maximization of individual gains, would be the most rational choice.

¹⁰² See *supra* note 92.

¹⁰³ Hestermeyer, *supra* note 42, 50.

If such an unrestrained hegemonic situation may be considered to be an exception – history teaches us that even the most powerful states have never been invulnerable as well as that their hegemony was always destined to come to an end – the second scenario, on the other hand, depicts the rather usual condition of interactions based on fundamentally egoistic rational choices. If rational choices always aim at maximizing individual payoffs, and if solidarity is justified only because of greater advantages in the mid- and long-term, the question remains unanswered how we could – from a factual as well as from an argumentative point of view – meet the attitude of the so-called *free-riders*. Free-riders are those interaction participants who comply with the rules of interaction – in our case: with the rules which guarantee an essential level of recognition for the arguments of the *others* – just as long as they see in this behaviour a gain for themselves. In other words, 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 doubts that the behaviour of the free-rider appears to be the most rational choice here. Yet, it is difficult to imagine under these conditions how social interaction can be stabilized. As regards the rational 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.¹⁰⁴ The same can be said with reference to the dispositional framework of international relations aiming to concretize peace, mutual recognition, the guarantee of fundamental rights and justice.

Overcoming short-sighted egotism in international relations cannot be considered, therefore, to be just a question of opportunity or of an enlightened expediency in the sense of a self-reflexive maximization of individual gains. Indeed, altruism and solidarity will always remain shaky if they are based on the instrumental use of reason. To be fully developed, they have necessarily to be derived from a universalistic-transcendental approach: only a non-egoistic use of reason can give us the conceptual elements to claim that opening minds – and hearts – to the arguments of the weak and powerless is an obligation. In order

¹⁰⁴ K.-O. Apel, *Diskurs und Verantwortung: Das Problem des Übergangs zur postkonventionellen Moral* (1990) 26-28, 55-63 [Apel, *Diskurs und Verantwortung*]; K.-O. 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?', in M. Brumlik & H. Brunkhorst (eds), *Gemeinschaft und Gerechtigkeit* (1993), 149, 152-162.

to make the forum accessible to the *others*, the quest for a non-instrumental concept of rationality seems therefore to be unavoidable: only a post-instrumental rationality, if anything, can lead us to the realization of solidarity.

II. The Moral Duty to Exercise Solidarity Within the International Community, Understood as a Community Sharing Universal Values and Interests

While the claim to an enlightened self-interest is grounded on the presumption of actors primarily pursuing their own interests, the second extra-legal justification supporting the principle of solidarity is based on precisely the opposite approach, namely on the assumption of a natural sociability of humans, a condition that would lead, in the end, to a universal community of humankind. This community would share fundamental values and interests, so that universal solidarity would be the evident and quasi-natural result of the basic anthropological condition of human beings.

The idea of a universal community of humankind is a frequent *topos* of political thought. Albeit traceable back as far as to the concept of *οικέωσις* of the Stoic philosophy, it is in early modernity that the concept became one of the core elements of the emerging theory of international law. Indeed, we find the reference to the *corpus universale* of humanity in such numerous and different authors as – to mention just some among the most important – Francisco Suarez,¹⁰⁵ Johannes Althusius,¹⁰⁶ Alberico Gentili,¹⁰⁷ Hugo Grotius,¹⁰⁸ Samuel Pufendorf,¹⁰⁹ and Christian Wolff.¹¹⁰ In the 20th century, it was introduced anew – after a time in which the idea of a universal humanity had fallen into eclipse – first by Viktor Cathrein¹¹¹ and then, with a significantly greater impact, by Alfred Verdross. In particular, it was the international lawyer and legal philosopher Verdross who

¹⁰⁵ F. Suárez, ‘De legibus, ac Deo legislatore’, in Suárez, *supra* note 3, Vol. II, Chapt. XIX, No. 9, 348.

¹⁰⁶ On Althusius’ concept of *corpus consociationis universalis* see J. Althusius, *Politica methodice digesta* (1932), Chapt. IX, No. 22, 92.

¹⁰⁷ A. Gentili, *De jure belli libri tres* (1933), Vol. I, Chapt. XV, 107.

¹⁰⁸ Grotius’ “Prolegomena”, *supra* note 92, No. 6, No. 16 & No. 17.

¹⁰⁹ S. Pufendorf, *De jure naturae et gentium libri octo* (1995), Book II, Chapter II, No. VII; Book II, Chapter III, No. XV; Book VIII, Chapter VI ff.; S. Pufendorf, *De officio hominis et civis libri duo* (1927) Book I, Chapt. VIII.

¹¹⁰ C. Wolff, *Institutiones juris naturae et gentium* (1750) Book IX, Chapter I, No. V.

¹¹¹ V. Cathrein, *Die Grundlage des Völkerrechts* (1918), 45; V. Cathrein, *Moralphilosophie*, 6th ed., Vol. I (1924), 111.

collocated the assumption of a *corpus universale* of humankind at the basis of a theory of international law as the *constitution of the international community*¹¹² – a theory which has remained influential until today.¹¹³

The starting point of Verdross' considerations lies in his criticism of some aspects of Kelsen's conception of the legal system. Although Verdross largely endorses Kelsen's monistic approach¹¹⁴ as well as the priority assigned to international law within the hierarchical legal system,¹¹⁵ he is sceptical about the content that Kelsen gives to the concept of *Grundnorm*. Verdross substantially accepts the idea of the *Grundnorm* as the basis of a unitary and hierarchically organized legal system,¹¹⁶ but rejects its formalistic interpretation as it has been elaborated by the doctrine of legal positivism: a merely formalistic principle can justify the formal validity of the legal norms as an *ought*, a *Sein-Sollendes*, but cannot give us any arguments about its *objective validity*. Indeed – as we have seen before¹¹⁷ – the positivistic *Grundnorm*, which is originally empty, is eventually filled with nothing more than the effectiveness of power. In order to avoid swinging between empty formalism and crude power, which can account for our factual respect for the law but not for the reasons why this respect should be seen as *just*, Verdross claims that the *Grundnorm* needs to be traced back to objective values.¹¹⁸ The *Grundnorm* should be identified, therefore, with an objective principle that pre-exists individuals as well as their political and legal institutions, i.e. with an idea of a cosmic order as it had been conceived by the legal philosophy of natural law.¹¹⁹

In Verdross' interpretation the reference to the *corpus universale* of humankind is rather an implicit corollary of a broader pantheistic conception of cosmic order as the basis of moral and legal norms – a conception originally inspired by Plato's¹²⁰ and Hegel's¹²¹ metaphysics. In the decades following the publication of Verdross' seminal work, the authors who have resorted to the

¹¹² A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926).

¹¹³ On the theory of the *international community* see: A. L. Paulus, *Die internationale Gemeinschaft im Völkerrecht: Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* (2001).

¹¹⁴ Verdross, *supra* note 112, 34-42.

¹¹⁵ *Ibid.*, 33-34.

¹¹⁶ *Ibid.*, 12.

¹¹⁷ See *supra*, at C., a).

¹¹⁸ Verdross, *supra* note 112, 23.

¹¹⁹ *Ibid.*, 22 & 32.

¹²⁰ *Ibid.*, 32.

¹²¹ *Ibid.*, 2-3.

natural law as the fundamental criterion for the objective validity of the law and as the justification of an international law aiming at cooperation and solidarity, have progressively refined their proposal from the pantheistic elements of Verdross' conception.¹²² As a consequence, the assumption of a universal community of humankind was left as the main – if not the only – pillar intended to support the entire legal system, with international law at its top, aiming at achieving a basic solidarity among all human beings. The international community is defined as “an ensemble of rules, procedures and mechanisms designed to protect collective interests of humankind, based on a perception of commonly shared values.”¹²³ Against this background, international law – or, at least, the most general part of it – is the legal expression of the activity of the international community and the most striking evidence of its existence. In other words, international law – as “[the] Common Law of Mankind”¹²⁴ – arises as the formalization of shared values as well as of the rules that guarantee the protection of common interests. Indeed,

“like a people which through the process of establishing its political constitution reaches agreement on a set of basic values which should determine the general course of the common journey into the future, the nations of the world, too, need a set of shared values in order for them to be classified as an international community”.¹²⁵

However, unlike the constitutional rules of individual states, the common values enshrined in international law are not essentially the result of deliberative and inclusive processes, but are, rather, already present *in re* as an objective fact of reason. The rational observer simply has to recognize them, international law has to assume and formalize them, and international adjudication has to make them effective. The international community, therefore, is not something to be built – as in the perspective of the communicative paradigm¹²⁶ – but is

¹²² See H. Mosler, *The International Society as a Legal Community* (1980); B. Simma, *From Bilateralism to Community Interest in International Law*, in *Collected Courses of The Hague Academy of International Law*, Vol. 250 (1994), 217; R. S. J. Macdonald, ‘The International Community as a Legal Community’, in Macdonald & Johnston, *supra* note 47, 853.

¹²³ C. Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, *Collected Courses of The Hague Academy of International Law*, Vol. 281 (1999), 88.

¹²⁴ C. W. Jenks, *The Common Law of Mankind* (1958).

¹²⁵ Tomuschat, *supra* note 123, 78.

¹²⁶ See *infra*, D. IV.

a previously existing ontological reality, characterized by common values and interests.¹²⁷ From this point of view, having assumed access to a kind of ontological truth, it is not surprising that the exponents of the theory of the international community dedicate little interest to deliberative processes due to determinate common rules as well as to the conditions of legitimacy of such rules, and prefer to concentrate on the role of international tribunals as the interpreters and executors of an objective principle of justice.

The idea of the “perfect community”, living in universal harmony, as the ultimate natural goal of all human persons and of all communities has also been explicitly claimed by contemporary natural law philosophy.¹²⁸ The close relationship between the justification for solidarity, within the conceptual horizon of international law theory, by resorting to the community of all humans and the noble and long intellectual tradition of natural law, from antiquity until the present time, does not, however, guarantee 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.” In assessing the epistemological quality of this proposition it has to be pointed out that the expression cannot correspond to any kind of *analytic judgement* because the assertions that such a community exists, as well as that any such community shares values and interests, are not originally contained in the subject of the proposition. Thus, the proposition must be a *synthetic judgement*, aimed at reaching some knowledge of the world. On this knowledge of the world – and not just on a formalistic derivation system, as is claimed by the theory of the self-sufficient legal system – is based the whole *corpus iuris*. Furthermore, the judgement is *a priori* because it aims at building assertions that are necessary and universally valid. Yet, from a post-metaphysical approach, a synthetic *a priori* judgement – i.e. a proposition that makes an assertion of necessary and universal validity and claims to improve our knowledge of the world – can be acceptable only if it is based on empirical evidence about phenomena. Furthermore the proposition, relying upon empirical evidence, must be falsifiable, i.e. it must be open to correction as a consequence of new empirical data about phenomena which may be incompatible with the previous assertion. Yet, the assertion that “a universal human community exists which shares fundamental interests and values” does not satisfy either of the above-mentioned consistency conditions. Indeed, empirical evidence of such a

¹²⁷ M. Payandeh, *Internationales Gemeinschaftsrecht* (2010).

¹²⁸ G. Grisez, J. Boyle & J. Finnis, ‘Practical Principles, Moral Truth, and Ultimate Ends’, in J. Finnis (ed), *Natural Law*, Vol. I (1991), 237, 269.

universal human community is rather controversial – the realistic assumption of a permanent struggle for survival between human communities reveals significant evidence to the contrary – and the assertion, not being based on empirical evidence, cannot be falsified either.

On these terms, the argument for the existence of a universal human community turns out to be the result of the quasi-metaphysical ontologization of a transcendental capacity with which all humans are endowed, namely the faculty to interact communicatively with each other. In other words, the theory of the international community seems to draw from the transcendental capacity to interact and to search for consensus in a communicative way a presumed ontological fact that nevertheless lacks proper evidence. From a post-metaphysical perspective, the universal human community is something to be built and a task to be accomplished, not a reality to be simply discovered. The existence of the transcendental capacity of universal communication gives us the hope necessary to succeed in the ambitious purpose of construing a universal community of all human beings; an ontological certainty is, nonetheless, out of our reach.

III. Solidarity as Empathy

While the theory of the universal human community grounds its claim for solidarity on an alleged ontological truth, the next strand of international lawyers defending the case for solidarity follows the opposite strategy to reach the same goal: where the former resorts to ontology, the latter denies any basis *in re* or even in a universal conception of reason. Within this strand, solidarity is not a deducible universal duty simply because no ontological foundation for universal rationality is presumed to exist. The rejection of universalism is philosophically justified by resorting to the postmodern critique of modern rationalism and subjectivity.

According to the main strand of modern philosophy – from Descartes¹²⁹ to Kant¹³⁰ – the claim for universal rationality was founded on the universal features of subjectivity. Universal subjectivity – understood as the abstraction and generalization of the higher intellectual faculties with which every individual is endowed – would guarantee the truth of theoretical knowledge as well as the general validity of moral and political principles. Lastly, if we share the same subjectivity – or, from an ontological point of view, if we are all part of a macroanthropic subjectivity – solidarity is due as a commandment of

¹²⁹ R. Descartes, *Meditationes de Prima Philosophia*, Vol. II (1642), 78, 82.

¹³⁰ I. Kant, 'Kritik der reinen Vernunft', in Kant, *supra* note 60, Vol. III-IV, 136 (B, 132).

reason. In recent decades, however, this construction has been heavily attacked by postmodern criticism. The direction of the attack has been twofold. First, it has been argued that subjectivity is not the bulwark of freedom, justice as well as of scientific, moral and social progress, but a construct conceived by the power holders in order to justify the unequal distribution of resources and, eventually, to oppress the powerless.¹³¹ Second, the concept of subjectivity itself has been deconstructed by showing that it is not as unitary as modern philosophy assumed, being a composite notion made of a plurality of discursive strategies: precisely in this plurality – and not in resorting to an allegedly superior universal and unitary subjectivity – lies the possibility to self-affirmation and self-realization for the concrete individuals.¹³²

Translated into the language of legal theory – and, in particular, of the theory of international law – postmodern criticism against unitary and universal subjectivism has assumed the form of the rejection of the unity of the legal system as a desirable aim (i.e. as the best guarantee of the normative quality of the law) and as a possible reality, regardless of whether already present or future. From this point of view, the project of the “constitutionalization of international law”¹³³ is neither feasible nor attractive, and the fragmentation of the law should not be seen as a threatening perspective.¹³⁴ Furthermore, according to the postmodern approach, 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 miss objectivity and, thus, universal validity.¹³⁵ The criticism of the universalistic claim of the international law discourse nevertheless does not lead to sheer nihilism. Indeed, the international law theorists influenced by postmodern thinking accept – as does in particular Martti Koskenniemi, as one of the most significant among them – the idea that some experiences may occur which are not characterized

¹³¹ M. Foucault, *L'ordre du discours* (1971); M. Foucault, *Histoire de la folie à l'âge classique* (1961); M. Foucault, *Les mots et les choses* (1966); M. Foucault, *Surveiller et punir* (1975); M. Foucault, *Histoire de la sexualité, I: La volonté de savoir* (1976); M. Foucault, ‘The Subject and Power’, in H. L. Dreyfus & P. Rabinow (eds), *Michel Foucault: Beyond Structuralism and Hermeneutics* (1982), 208.

¹³² M. Foucault, *L'archéologie du savoir* (1969).

¹³³ On the “constitutionalization of international law” see: B. Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (1998); S. Kadelbach & T. Kleinlein, ‘Überstaatliches Verfassungsrecht’, 44 *Archiv des Völkerrechts* (2006) 3, 235.

¹³⁴ M. Koskenniemi, ‘International Legislation Today: Limits and Possibilities’, 23 *Wisconsin International Law Journal* (2005) 1, 61, 78.

¹³⁵ M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989) [Koskenniemi, Utopia].

by mere contingency but, on the contrary, assume a kind of universal scope.¹³⁶ From the postmodern standpoint, however, this unassuming universality is not based on abstract ontological, moral or epistemological principles, but is derived from the continuity of the concrete experience of vulnerability among all individuals involved.

According to Koskenniemi, artistic expression is probably the most suitable way to give voice to the universal reach of a humanity made of concrete human beings.¹³⁷ But legal discourse can also play a role in accomplishing this task. In fact, due to its *formalism*,¹³⁸ the law makes it possible that, “[engaging] in legal discourse, persons recognize each other as carriers of rights and duties [...]”¹³⁹ which “belong to every member of the community *in that position*”.¹⁴⁰ Through the law – Koskenniemi adds – “[what] otherwise would be a mere private violation, a wrong done to *me*, a violation of *my interest*, is transformed [...] into a violation against *everyone in my position*, a matter of concern for the political community itself.”¹⁴¹ Following Koskenniemi’s interpretation, there is a non-ontological, non-moral and non-epistemological universalism that originates specifically from legal formalism. Yet, doubts arise whether this postmodern version of law’s universalism can really justify the claim for solidarity as an *obligation*. Indeed, if no epistemological argument aiming for the universality of international law is convincing, then the universal dimension of legal formalism is not an assertion either that every human being has to share. Koskenniemi recognizes the problem and switches from a universal obligation to protect the rights of the weak and the powerless to an individual commitment. Thus, taking the reasons of the *others* into account is not a duty the accomplishment of which can be demanded from every human being, but it is a task that committed people assume because of their specific sensibility – or *empathy* – towards the suffering of their fellow humans. As regards the profession of the lawyer, Koskenniemi’s approach leads explicitly to a pleading in favour of the role of legal advisers, who skilfully use the instruments put at their disposal by the formalism of the law

¹³⁶ M. Koskenniemi, ‘International Law in Europe between Tradition and Renewal’, 16 *European Journal of International Law* (2005) 1, 113, 119-21.

¹³⁷ *Ibid.*, 120.

¹³⁸ M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and fall of International Law 1870–1960* (2001), 500-505.

¹³⁹ M. Koskenniemi, ‘International Law and Hegemony: A Reconfiguration’, 17 *Cambridge Review of International Affairs* (2004) 2, 197, 214.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

in order to suggest solutions for the achievement of what they consider to be “a better society”.¹⁴²

As a political plan to improve the ethical stand of the legal profession, Koskenniemi’s idea is highly valuable. Nevertheless, it says little about the presumed *obligation* to take into account the interests of the *others*. And this substantial aphasia on the question is actually due to a substantial limitation. In fact, personal commitment based on empathy – regardless of how important empathy may be as a motivation of personal action¹⁴³ – 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 other hand, specifies the compelling rules that guarantee order in the interactions of an entire society – in the case of international law even of the world society. Moreover, it is almost impossible to justify the establishment of institutions with the task of fostering better consideration of the interests of the *others* by barely resorting to personal empathic attitudes. Therefore, solidarity may feed upon empathy as regards the mind-set of individuals, but it must rest on a psychologically neutral command of reason if it has to be seen as a general moral and legal duty and if it is to be adequately substantiated by rules and practices.

IV. The Protection of the Universal Interaction of Human Beings in a Multilevel Setting, According to the Communicative Paradigm

From the critique of the previous arguments in favour of solidarity the conclusion can be drawn that a consistent case for taking into account the interests of the *others* a) should be grounded on a non-instrumental use of practical reason, b) should refrain from resorting to metaphysical assumptions, and finally c) should rest on the commandments of a post-metaphysical universal reason and not just on individual mind-sets and attitudes. A convincing answer to these challenges can be articulated on the basis of the communicative paradigm of action.¹⁴⁴

From the point of view of the communicative paradigm, society is made not only by functional systems but also by a *lifeworld of intersubjective relations*,

¹⁴² Koskenniemi, *Utopia*, *supra* note 135, 495.

¹⁴³ On an understanding of solidarity based on empathy see: R. Rorty, *Contingency, Irony, and Solidarity* (1989).

¹⁴⁴ K.-O. Apel, *Transformation der Philosophie* (1973) [Apel, Transformation]; Apel, *Diskurs und Verantwortung*, *supra* note 104; Habermas, *Kommunikatives Handeln*, *supra* note, 69.

which is characterized by *different forms of interaction*. 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 – following the communicative interpretation of society – as *laws*. Thus, the task of the legal system consisting in stabilizing normative expectations – a view that has been outlined by systems theory – is not related here 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 relationship between lifeworld and functional subsystems. Lastly, the *corpus iuris* that regulates a frame of common concern is referred to as *public law*.

In his political writings and, in particular, in his philosophical essay on the conditions for a *Perpetual Peace* Kant introduces a visionary three-part division of public law, as the normative regulation of social interactions characterized by public relevance.¹⁴⁵ Jürgen Habermas, as the most influential exponent of the theory of communicative action, retrieves Kant's idea, adding however a further distinction at the third level of public law.

α) The first level consists of what Kant called the *ius civitatis*, namely the law “formed in accordance with the right of citizenship of the individuals who constitute a people.”¹⁴⁶ This level corresponds, according to Habermas, to the rules, based on representative and participative legitimation, that govern social and political relations within democratic states.¹⁴⁷

β) The second level is identified by Kant with the *ius gentium*, i.e. with the law, “the principle of which is international law which determines the relations of states.”¹⁴⁸ Following his predecessor, Habermas describes the *classic* international law as the *corpus iuris* in which national states regulate their converging or overlapping interests, yet without any attempt to establish these rules as characterized by universal validity.¹⁴⁹

γ) At the third level Kant collocates – for the first time in the history of political and legal thought – the *ius cosmopolitanicum* as the law “insofar as individuals and states, standing in an external and mutual relation, may be regarded as citizens of a universal state of humankind.”¹⁵⁰ Habermas distinguishes here, within the general context of the “constitutionalization of

¹⁴⁵ Kant, ‘Zum ewigen Frieden’, *supra* note 60, 203.

¹⁴⁶ *Ibid.* (translation by the author).

¹⁴⁷ Habermas, *Faktizität und Geltung*, *supra* note 52.

¹⁴⁸ Kant, ‘Zum ewigen Frieden’, *supra* note 60, 203 (translation by the author).

¹⁴⁹ J. Habermas, *Der gespaltene Westen* (2001), 117-122.

¹⁵⁰ Kant, ‘Zum ewigen Frieden’, *supra* note 60, 203 (translation by the author).

international law,” two different legal and institutional frameworks.¹⁵¹ γ^1) The first is what he calls the *transnational law*, which could also be described as a post-classic international law dealing with matters of global concern. It is created (either as treaty law or as interpretation of customary law) by national states in order to formulate and implement rules regarding fields of general interest, like energy, environment, trade, financial transfers and economy. This *global* international law differs from the mere inter-state treaty praxis of the *classic*, i.e. non-constitutional, international law as its rules and practices do not just affect the interests of the political communities involved but shape common concerns on a worldwide scale. γ^2) The second framework is constituted by supra-state – or *supranational* – law, characterized by institutions, essentially a reformed UN, endowed with normative authority as regards the protection of peace and essential human rights. This is the *cosmopolitan law* in the proper sense of the word which, unlike the still state-oriented *global* dimension of post-classic international law, is directly addressed to individuals as the *citizens of the world*.

Outside the borders of single states, individuals meet and interact with each other regardless of their belonging to a specific political community. The level γ) of public law consists precisely in those rules and principles that guarantee a peaceful and cooperative interaction between humans within this most general context, beyond the status of being citizens of an individual state. Such norms contain the fundamental recognition that we owe to every human being as the consequence of the universal capacity to communicate. In this sense, solidarity *is* a moral obligation and its essential principles and rules have to be laid down necessarily as a fundamental part of the most universal *corpus* of public law, in the sense either of an interpretation of the *lex lata*, or of a contribution to the *lex ferenda*. Basing the case for solidarity on the communicative paradigm, i.e. interpreting it as part of the normative protection towards that kind of communication that occurs when individuals interact within the most general horizon, helps to avoid the shortcomings of the above-mentioned approaches: a) solidarity is not regarded as a result of a farsighted expediency because communication is an expression of a post-instrumental use of practical reason;¹⁵²

¹⁵¹ Habermas, *Faktizität und Geltung*, *supra* note 52, 133-135; J. Habermas, ‘Eine politische Verfassung für die pluralistische Weltgesellschaft?’, 38 *Kritische Justiz* (2005) 3, 222, 228-232; Habermas, ‘Kommunikative Rationalität’, *supra* note 101; J. Habermas, ‘Konstitutionalisierung des Völkerrechts und die Legitimationsprobleme einer verfassten Weltgemeinschaft’, in Brugger, Neumann & Kirste (eds), *supra* note 71, 360, 368-373 [Habermas, Konstitutionalisierung]

¹⁵² According to the essential assets of the communicative paradigms, linguistic interaction can work only if the participants in the interaction assume that all those who are engaging

b) the claim for a non-egoistic approach avoids metaphysical assumptions insofar as the communicative capacity with which all humans are endowed has a merely transcendental – or better: linguistic-pragmatic – quality;¹⁵³ 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.

F. Some Considerations on the Principles of an Institutional Implementation of Inter-Peoples Solidarity

Summing up, the results of the inquiry can be synthesized into four main assertions: a) the establishment of solidarity as a legal principle – or even as a *right* determined by rules – is necessarily related to, and must be substantiated by, extra-legal arguments; b) the use of extra-legal arguments in order to interpret existing norms or, in general, further to develop the law is an admissible, and even unavoidable, procedure; c) the conceptions that deny the obligation to solidarity prove to be, on the whole, less theoretically well-founded than those that endorse it; and d) despite some conceptual problems and a general tendency to abstraction, we have enough convincing arguments – drawn in particular from the communicative paradigm – to claim that solidarity is a moral obligation that has to be properly transposed into legal form, and that one of the most important consequences of the obligation to solidarity consists in opening the forum to the *others*, specifically to those who have good reasons to claim solidarity.

This transposition has to involve both international and national public law, in forms that implicate equally the interpretation of the *lex lata* as well as the introduction of new norms. Starting with the ways to implement the obligation to solidarity within the framework of international law, future treaties should insert clearer references to solidarity between peoples, integrated with precise definitions of normative duties, as well as hitherto unusual obligations to open

in the exchange of arguments a) are expressing true propositions (i.e. assertions that they consider to be provable), b) are being truthful (i.e. they are not cheating), and c) are eventually pursuing a just goal (i.e. they are not considering just their concerns). See: J. Habermas, *Vorstudien und Ergänzungen zur Theorie des kommunikativen Handelns* (1984) 598.

¹⁵³ Apel, *Transformation*, *supra* note 144, Vol. II, 358; Apel, *Diskurs und Verantwortung*, *supra* note 104.

the internal fora to the presentation of arguments by non-national citizens.¹⁵⁴ Following such a possible and desirable evolution, *solidarity* would consolidate its present status as a principle by becoming at least a *right* defined by precisely formulated *rules* and capable of being claimed by individuals or groups.¹⁵⁵ While the first kind of measures, namely the introduction into international treaties of clearer references to solidarity, may be seen as the improvement of a nonetheless already existing normative situation at the inter-state and supra-state level, the second – the opening of the internal fora – would probably be confronted, due to its complete lack of precedent and to its intervention in the political and legal mechanisms of the single states, with even greater resistance. Indeed, the international law norms providing for an obligation to open national fora up to non-national claims should be skilfully and cautiously conceived, imposing well-balanced procedures and avoiding any risk of jeopardizing the principle of autonomy. Nevertheless, if we take the obligation to solidarity seriously, then opening the internal fora must be seen as necessary insofar as the national decision-making-process must also internalize the multilevel setting of social interaction. Moreover, even if we maintain the centrality of sovereignty, there are good reasons for re-conceiving sovereign states, in a globalised world, as “[...] trustees of humanity [...]”.¹⁵⁶ Therefore, arguments of non-nationals have to be taken into account – even within the framework of national legal systems – when these arguments refer to their role against the background of universal human interaction.¹⁵⁷ Furthermore, international courts should be committed to the application of the solidarity principle wherever the existing law gives them this chance; the commitment of the courts is justified by the above-mentioned legitimacy of resorting to extra-legal arguments so as to interpret the law, in particular when the norms leave a wide discretion open to judicial exegesis.

¹⁵⁴ Such an enhancement of the international law instruments, however, is not only a project for the future; rather, it is a development which is already under way. For a detailed analysis of the international law instruments that provide for an involvement on non-citizens in decision-making-processes of sovereign States, see E. Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’, 107 *The American Journal of International Law* (2013) 2, 295, 312 ff.

¹⁵⁵ Such an extension of the legal status of *solidarity* would nevertheless not do away with the need to interpret and further develop the rules concerning it by resorting – as is always the case within the legal discourse – to extra-legal arguments.

¹⁵⁶ Benvenisti, *supra* note 154.

¹⁵⁷ The principle of the protection of the fundamental rules of universal human interaction by national courts has already been applied, at least to some extent, by the doctrine of universal jurisdiction in international criminal law.

Nevertheless, the improvement of the solidarity principle as a legal obligation at the level of international law cannot be seen as exhaustive for at least two reasons. First, the inadequate democratic legitimation of international organizations and adjudication¹⁵⁸ justifies relevant concerns by democratic states as regards the establishment of international law norms explicitly providing for a supra-state implementation of the duty of solidarity, or for the opening up of internal democratic fora, insofar as these norms and proceedings could be used by autocracies for political manipulation. This problem can be properly addressed only by improving the democratic legitimacy of international political institutions and tribunals through both the spreading of democratic government at national level and the introduction of elements of what has been called “cosmopolitan democracy” into the institutional framework of international organization.¹⁵⁹ Although highly desirable, these progressive developments are out of reach, in their full range, for citizens of the single democratic nations. Moreover – and this is the second reason why the consolidation of the solidarity principle as a legal obligation within the international law horizon cannot be seen as sufficient – the principle of solidarity must find an adequate expression within national law and adjudication, too, since the fundamental norms of the most general human interaction, as a general obligation, have to be protected at all levels and should be anchored, therefore, in the national *corpora iuris*. The first national institutions called upon to act are the democratic parliaments, which have the task of passing clearly formulated norms – as open as possible, and as restrictive as necessary – containing precise regulations on the conditions under which the right to present claims before national institutions is granted to non-national citizens. The institutions involved by such norms are, first, the representative chambers themselves insofar as they admit that foreigners are included, under strict circumstances and excluding the right to participate in the voting process, in the law-making-procedures when it can be proved – on the basis of a public and well-motivated scrutiny regulated by law – that the bill being discussed is likely to affect their interests. A similar *right to be heard* can be applied – also in these cases after careful scrutiny – also, second, to administrative proceedings and, third, to the judiciary.

¹⁵⁸ On the democratic legitimacy of international courts see: A. von Bogdandy & I. Venzke (eds), *International Judicial Lawmaking* (2012); A. von Bogdandy & I. Venzke, *In Whose Name?* (2014).

¹⁵⁹ D. Archibugi, *The Global Commonwealth of Citizens: Toward Cosmopolitan Democracy* (2008); Habermas, *Kommunikative Rationalität*, *supra* note 101; Habermas, ‘Konstitutionalisierung’, *supra* note 151.

Admittedly, the perspectives drawn here may be situated far beyond the horizon of the immediate future. Nonetheless, they are not a chimera: if we do not want to leave our children a world that looks like a state of nature, we have to emphasize our institutional and intellectual fantasy – and finally acknowledge that only the universal recognition of rights and interests to all human beings can guarantee that our rights and interests are safe.