

## Solidarity and Human Rights

### *A difficult marriage with great potential*

Carl Jauslin\*

Swiss Federal Office of Justice; University of Basel



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The relationship between solidarity and human rights may be described as a difficult marriage with a great potential. The two concepts derive from different philosophical traditions and have a different normative structure. However, despite certain contradictions and tensions, there is huge potential to be found in reconciling the two concepts. On the one hand, taking a human rights approach to solidarity prevents an illiberal and totalitarian understanding that risks legitimizing almost anything in

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\* [Carl Jauslin](#), Legal Officer at the Swiss Federal Office of Justice, Public Law Division, (former Legal Officer at the Swiss Federal Department of Foreign Affairs, Directorate of International Law) and PhD student at the University of Basel (Switzerland)

the name of community interests. On the other hand, a human rights conception that is informed by the principle of solidarity will take structural and institutional obstacles seriously.

In 2005, the United Nations Commission on Human Rights, the predecessor of the Human Rights Council, created the mandate of the Independent Expert on human rights and international solidarity (2005/55).<sup>1</sup> Since then, the Human Rights Council has extended the mandate. In 2017, the Independent Expert presented the draft declaration on the right to international solidarity to the Human Rights Council (A/HRC/35/35).<sup>2</sup> This draft declaration was revised in 2023 (A/HRC/53/32)<sup>3</sup> and the Independent Expert called for its adoption through an intergovernmental process in October 2023.<sup>4</sup> According to the UN Independent Expert on human rights and international solidarity, international solidarity is a "central principle in contemporary international law".<sup>5</sup> The right to international solidarity stated in the Declaration entitles individuals and peoples "to participate meaningfully in, contribute to and enjoy a social and international order in which all human rights and fundamental freedoms can be realized"(art. 4 (1)).<sup>6</sup>

By explaining the different ideological origins of the concepts of solidarity and human rights in the first part of this Reflection, it should become clearer why it is so difficult for some to accept the qualification of the proposed right to international solidarity as a human right.<sup>7</sup> In the second part, I will show how we can reconcile solidarity with human rights, before concluding in the third part with remarks on international solidarity as a mechanism to achieve human rights globally.

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<sup>1</sup> United Nations Commission on Human Rights, Resolution 2005/55, Human rights and international solidarity, 20/04/2005, E/CN.4/RES/2005/55.

<sup>2</sup> Human Rights Council, Report of the Independent Expert on human rights and international solidarity, 25 April 2017, A/HRC/35/35, Annex, Draft declaration on the right to international solidarity.

<sup>3</sup> Human Rights Council, Revised draft declaration on human rights and international solidarity, 2 May 2023, A/HRC/53/32.

<sup>4</sup> UN expert calls for declaration on the right to international solidarity, Press Release, Special Procedures, 23 October 2023.

<sup>5</sup> Art. 1 Abs. 3 of the Revised Draft Declaration on the right to international solidarity, Annex of report A/HRC/53/32 by the Independent Expert on human rights and international solidarity; see also: Anne Peters, Against a Deconstitutionalisation of International Law in Times of Populism, Pandemic and War, Max Planck Institute for Comparative Public Law & International Law (MPIL), Research Paper No. 22, 25 October 2022, p. 16.

<sup>6</sup> Human Rights Council, Revised draft declaration on human rights and international solidarity, 2 May 2023, A/HRC/53/32.

<sup>7</sup> Human Rights Council, Revised draft declaration on human rights and international solidarity, 2 May 2023, A/HRC/53/32, para. 14-15, citing Paolo Carozza/Luigi Crema, "On solidarity in international law", Caritas in Veritate Foundation, 2014, p. 10-11 as an example.

## I. Why Solidarity and Human Rights are Different

In situations of crisis, solidarity and human rights are often invoked together.<sup>8</sup> Solidarity is used in multiple ways and is instrumentalized for different purposes, which can lead to terminological confusion.<sup>9</sup> In order to operationalize solidarity, we must extract the core elements of the philosophical concept of solidarity<sup>10</sup> and draw the contours for the legal discourse as it relates to the concept.

Solidarity refers to a reciprocal relationship between the members of a group<sup>11</sup>, and as such cannot exist without community. Solidarity requires a community of solidarity, at least in a normative sense, and it prioritizes community interests. Human rights on the other hand have been described as trumps. Their main purpose is to protect the individual against state policies carried out in the name of the public good. This is why it is questionable whether communal goods can and should be human rights.<sup>12</sup> Certain fundamental human rights like the prohibition of torture and slavery qualify as *ius cogens* norms; no public interest can justify restrictions of these rights. The principle of reciprocity recognized in international law is furthermore not valid in the same way for human rights obligations: non-compliance of one state does not justify non-compliance of other state parties to a multilateral human rights treaty. Human rights are first and foremost individual rights constituting the individual as a subject of international law. *However*, although human rights are mainly individual rights, they also take into account that individuals are social beings embedded in communities. Human rights therefore are regularly exercised collectively - especially when we think of the rights to freedom of thought, conscience and religion. According to article 18 of the International Covenant of Civil and Political Rights this right shall include the "freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching". The collective component of individual rights is very evident also when it comes to other classical rights such as the right of peaceful assembly (art. 21 ICCPR) and the right to freedom of association with others (art. 22 ICCPR).

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<sup>8</sup> UN, Shared responsibility, global solidarity: responding to the socioeconomic impacts of COVID-19, 19 March 2020.

<sup>9</sup> Koldo Casla/Marion Sandner, Solidarity as Foundation for Economic, Social and Cultural Rights, Human Rights Law Review, Volume 24, Issue 2, June 2024.

<sup>10</sup> Andrea Sangiovanni/Juri Viehoff, Solidarity in Social and Political Philosophy", The Stanford Encyclopedia of Philosophy (Summer 2023 Edition), Edward N. Zalta & Uri Nodelman (eds.).

<sup>11</sup> Kurt Bayertz, Begriff und Problem der Solidarität, in: Kurt Bayertz (Hrsg.), Solidarität. Begriff und Problem. Frankfurt 1998, 11.

<sup>12</sup> Jeremy Waldron, Can communal goods be human rights? European Journal of Sociology, Vol. 28, No. 2, 1987, pp. 296-322.

Solidarity is based on membership; as such, it discriminates between members and non-members of a community. Legally speaking, members of a community have obligations towards their fellow members that they do not owe to non-members. In this sense, solidarity is exclusive; membership matters. Human rights on the other hand are meant to be applied universally in a non-discriminatory and impartial manner. An individual's status of belonging within a certain community is irrelevant to the question of whether they are entitled to human rights protection. International human rights law is therefore *inclusive* and does not distinguish between members of different communities. Impartiality, objectivity and neutrality lie at the center of human rights protection. *However*: although human rights are universal, "national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind".<sup>13</sup> The idea of universal human rights is concretized and implemented most effectively on the national and local level (principle of subsidiarity). And although human rights are applied in a non-discriminatory manner, they take into account special vulnerabilities of individuals (e.g. rights of the child or rights of person with disabilities) and groups (e.g. minority rights).

Duties of solidarity require *proactive* action that goes beyond mere non-interference. Mutual assistance is the core obligation among the members of a community of solidarity. Human rights on the other hand were originally limited to negative rights of non-interference. States are obliged to refrain from infringing upon the legally protected interests of the individual. *However*, it is recognized that states not only have duties to respect, but also to protect and fulfill their human rights obligations. The progressive realization of human rights is a resource-intensive task and must be mainstreamed through all public policy tasks. Only by perceiving human rights obligations in this threefold way (respect, protect and fulfill) can states exercise their legitimizing role vis-a-vis state power.

Solidarity describes a *horizontal* relationship between members of a community; an individual member's emergency triggers the other members' duties of assistance and in principle, any member may find themselves in a position of needing help from others. Human rights law on the other hand, by default regulates the vertical relationship between the state as a duty bearer and the individual as the right holder. Solidarity among members of a community (the horizontal relationship) is mediated by the welfare state (the vertical relationship) acting on behalf of the community as a whole. *However*, human rights obligations of non-state actors have become an emerging topic due to the rise of transnational companies (see UN Guiding Principle on Business and Human Rights) and big tech.

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<sup>13</sup> World Conference on Human Rights in Vienna, Vienna Declaration and Programme of Action, 25 June 1993, I.5.

Political philosophy circles around two pillars: freedom and equality. Solidarity is closely linked to calls for more equality while human rights are originally associated with freedom and autonomy. This is why solidarity is sometimes seen as a concept belonging to the socialist tradition while human rights are regularly seen as a foundation of political liberalism. *However*, fundamental human rights violations infringe freedom and equality at the same time. A slave is unfree and unequal; the degradation makes him unequal and the captivity makes him unfree. The liberalist and socialist traditions should therefore not compete but rather complement each other and overcome the liberalist-socialist-divide. Attempts to prioritize civil and political rights over economic, social and cultural rights go against the conviction that all human rights are indivisible, interdependent and interrelated.

Finally, a community of solidarity unites to achieve a common goal. As such, solidarity is a consequentialist concept that aims at promoting common interests. Human rights on the other hand take a different approach: they are anti-consequentialist in nature. The duty to comply with human rights obligations does not depend on a beneficial output for the larger community. In fact, human rights apply irrespective of the consequences they have on the promotion of the public good. *However*, human rights are closely interconnected with public good ideas such as democracy and the rule of law (pillars of the Council of Europe) and with peace & international security, and development (pillars of the United Nations). A favorable human rights situation is therefore very beneficial for conflict prevention, a strong civil society and sustainable development. Although human rights and the sustainable development goals (SDGs) are very different with respect to their normative quality (legally binding and not) and structure (rights-based and goal-oriented) there are many overlaps regarding their content – for example the right to an adequate standard of living, including adequate food, clothing and housing (art. 11 International Covenant on Economic, Social and Cultural Rights, ICESCR) on the one side and goal 1 "no poverty" and goal 2 "zero hunger" of the SDGs on the other side. Especially in the context of the ICESCR we can speak of a goal-oriented achievement of these rights. These human rights qualify also as collective goals (see art 2 para 1 ICESCR).<sup>14</sup>

This juxtaposition of solidarity and human rights enables an adequate mapping of the various existing and possible critiques regarding the recognition of solidarity in international human rights law. Comparing the two concepts in such a binary and dialectical way thus shows us not only their differences but also highlights that there is more solidarity in human rights and more human rights in

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<sup>14</sup> See Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant), 14 December 1990.

solidarity than initially assumed. By adopting this dialectical method, we pave the way for their wedding, knowing that their marriage will be difficult.

## II. How to Reconcile Solidarity with Human Rights

Solidarity and human rights can inform and complement each other: human rights can build the foundation of solidarity (human rights-based solidarity) and solidarity can form the understanding of human rights (solidarity rights).

### 1. Human Rights-Based Solidarity

Solidarity understood as mutual assistance is value-neutral. Cooperation is neither good nor bad in itself, it depends moreover on the final objective the members of the community of solidarity pursue together. The common goal the community pursues determines if the members qualify as a community of benefactors or perpetrators. A human rights-based approach can help to define the concept of solidarity and steer the community in a certain direction. It prevents an understanding of solidarity that is illiberal and totalitarian and avoids that solidarity is merely used to legitimize the enslavement of the individual in the name of the common good. In order to ensure such a human rights-based approach, solidarity must be *inclusive* with regard to its *scope* and *liberal* with regard to its *objective*.

#### a) Inclusive Solidarity

Communities of solidarity differ from each other especially regarding their in- and exclusiveness. Conservative policies often use solidarity in an exclusive manner and with an orientation toward the past (e.g. referring to common roots and history). Progressive policies on the other hand use the term in a more inclusive manner in order to involve people that traditionally have been excluded. Inclusive solidarity involves marginalized and vulnerable groups that generally lack protection. This progressive understanding is future-oriented (e.g. referring to joint action<sup>15</sup> and a shared goal) and points at the increasing interdependence among members to show the necessity to work together.

However, the very nature of solidarity remains exclusive in the sense that solidarity is necessarily linked to the concepts of community and membership. Calling for an ever wider and broader community is without doubt necessary, but it is not by any means sufficient. Expanding the solidarity of a family to the solidarity of a tribe, a nation, a continent or even the whole globe is not only unrealistic

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<sup>15</sup> Andrea Sangiovanni, Solidarity as Joint Action, in: Journal of Applied Philosophy, Vol. 32, No. 4, 2015, p. 340-359.

but also undesirable. The quality of solidarity differs significantly depending on the scope of the community. The ideal shouldn't be to replace the smaller communities at the expense of an unstructured and homogeneous global community. This perverts the cosmopolitan utopia and leads to the abolition of pluralism and the principle of subsidiarity. The principle of subsidiarity aims to ensure that decisions are taken at the closest possible level to the citizen. Linking solidarity with subsidiarity results in multilevel solidarity. *Multilevel solidarity* takes an integrated view on the different communities of solidarity (national, regional, global). The communities of solidarity should stay separate and have an independent existence but should also complement and not compete with each other. The communities in this multilevel architecture provide various possible levels of action. Certain challenges are better solved on the national, European or the global level. However, while solidarity among families, nations, and continents (in a horizontal way) may somehow always remain in tension, the relationship between the different levels (in a vertical way) should be complimentary. National solidarity should not diminish, but rather should give an example for European solidarity, as in turn European solidarity should aim at promoting and not preventing global solidarity.<sup>16</sup> However, this implies that communities not only show solidarity among themselves but also with external actors.

*External solidarity* is about solidarity towards non-members. The extent to which the community shows solidarity towards non-members is in principle completely left to its own discretion.<sup>17</sup> However, the respective community can be part of a broader community (multilevel solidarity). In this case the smaller community is bound - due to its membership in the bigger community - to respect its corresponding obligations. In the absence of this multilevel solidarity, the community may self-impose certain obligations vis-à-vis non-members. An example for this latter case is Art. 21 of the Treaty of the European Union (TEU), which states that "the Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world". Among these principles, Art. 21(1) mentions the universality and indivisibility of human rights and fundamental freedoms, as well as the principle of solidarity. Although there is no necessity, communities that are based on the principle of solidarity could be more inclined to behave in a solidaristic way in their external relations.

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<sup>16</sup> Carl Jauslin, Is there an obligation to do more than the fair share? European inter-state solidarity and global human rights-based solidarity, EUI AEL, 2022/03, European Society of International Law (ESIL) Papers.

<sup>17</sup> Carl Jauslin, Der Grundsatz der Energiesolidarität im EU-Recht und seine Folgen für die Schweiz, in: *ex/ante*, 2023(2), pp. 37-46, p. 43 f.

## *b) Liberal Solidarity*

From a liberal perspective, obligations of solidarity are seen as limiting individual freedom and autonomy. This is due to their character as positive obligations, which require an action, as opposed to a mere omission, and are therefore more demanding of the duty bearer. Focusing on liberal solidarity, however, means understanding how solidarity can increase individual autonomy. Solidarity can function as a collective capacity building instrument for promoting and realizing individual freedom and autonomy. Liberal solidarity can therefore be described as *cooperative autonomy*. Increasing individual autonomy by collective means is the main objective of liberal solidarity. However, human rights are not only the foundation of liberal solidarity; they also limit an extensive interpretation of solidarity that infringes on individual liberties. Burdens of solidarity must always be proportionate with respect to the specific interests of solidarity at stake. In connection with the Covid-19-pandemic, the European Court of Human Rights (ECHR) had to examine in the case of *Vavříčka and Others v. the Czech Republic* (8 April 2021)<sup>18</sup> whether social solidarity towards the most vulnerable required the rest of the population to assume a minimum risk in the form of vaccination. In the case at hand, the applicant acknowledged that vaccination involved issues of general interest, social solidarity and shared responsibility. However, it questioned the proportionality of the measures.<sup>19</sup> The Court held in its ruling of 8 April 2021 that "it cannot be regarded as disproportionate for a state to require those for whom vaccination represents a remote risk to health to accept this universally practiced protective measure, as a matter of legal duty and in the name of social solidarity, for the sake of the small number of vulnerable children who are unable to benefit from vaccination".<sup>20</sup> In this case before the Court human rights were invoked to limit the extent of obligations of solidarity. Human rights therefore played a crucial role in defining the boundaries of solidarity. This said, vice versa, the concept of solidarity also had a valuable impact on the development of human rights.

## *2. Solidarity Rights*

The first generation of human rights - civil and political rights - reflects the tradition of *liberté*, the second-generation rights - economic social and cultural rights - align with the tradition of *égalité*, whereas the third-generation rights concern *fraternité* (brotherhood), the forerunner of solidarity. These solidarity rights developed as demands because early "generations" of human rights were deemed insufficiently dynamic and flexible to respond to current challenges.<sup>21</sup> However, speaking of

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<sup>18</sup> ECHR, *Vavříčka and Others v. the Czech Republic* (8 April 2021).

<sup>19</sup> *Ibid* 185.

<sup>20</sup> *Ibid* 306.

<sup>21</sup> Philip Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?* in: *Netherlands International Law Review*, Vol. 29, No. 3, 1982, pp. 307-322.



"generations" of human rights is misleading, because in fact these rights developed concurrently. Dividing human rights into different categories furthermore bears the risk of violating the principle of indivisibility of human rights. However, from a conceptual standpoint it can be useful to categorise human rights according to the fundamental pillars of political philosophy - freedom, equality and solidarity. Karel Vasak initially cited the "right to a healthy environment" and the "right to clean water and clean air" as examples of such third-generation solidarity rights. Over time, he specified and supplemented this aggregate of new rights and assigned them the "right to development", the "right to peace", the "right to share in the common heritage of mankind" and the "right to communication". The nature of these rights is unclear. However, they implicitly refer to the idea behind article 28 of the Universal Declaration of Human Rights, which states that everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realized. All third-generation rights are ultimately aimed at this basic idea that human rights can only be realized if the institutional framework conditions are in place. Third-generation solidarity rights are therefore characterized in particular by the following aspects: first, they have a *collective component*, whether this refers to collective rights, or the requirement that different states cooperate to achieve a right. Second, they are rights that have an *institutional dimension*, meaning they are not concerned with the guarantee of freedoms, protection or a specific service, but demand a certain nature from the international order. Third-generation rights are thus concerned with the institutional framework of the international political system. Third, they take the form of *realization rights* - rights that demand the practical achievement of human rights and are not satisfied with mere formal guarantees. To this end, they call for institutional framework conditions to be guaranteed, which can only be established cooperatively by the international community as a whole.

According to the Vienna Declaration and Programme of Action adopted on 25 June 1993 by the World Conference on Human Rights in Vienna "it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms".<sup>22</sup> Human rights obligations should therefore not prescribe a certain form of government. The choice of the political system lies at the full discretion of each state alone - as long as their political, economic and cultural system is capable of adhering to their human rights obligations. However, compliance with human rights and the choice of the institutional order at the national and international level cannot be fully separated. According to the Vienna Declaration and Programme of Action, "democracy,

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<sup>22</sup> World Conference on Human Rights in Vienna, Vienna Declaration and Programme of Action, 25 June 1993, I.5.

development and respect for human rights [...] are interdependent and mutually reinforcing".<sup>23</sup> Human rights addressing state authorities as duty holders have undoubtedly transformative effects at the institutional level. While a predominant and exclusionary focus on civil and political rights as negative rights leads to a liberal state, economic, social and cultural rights as positive rights express calls for and articulate a welfare state.<sup>24</sup> It is therefore difficult to establish a strict distinction between human rights issues and the choice of political system as *domaine réservé*. Although it is left almost entirely up to the states *how* they want to implement their human rights obligations, it cannot be doubted that human rights touch upon institutional matters. This is especially true for solidarity rights that call for an international order in which all human rights can be fully realized. They refer to the inherent potential for institutional transformation, which is grounded in the concept of solidarity. As such, solidarity rights link the sphere of subjective rights with questions of governance in a way the first two generations of human rights did not.<sup>25</sup>

### **III. Towards International Solidarity as a Mechanism to Realize Human Rights Globally**

Dividing and reconciling solidarity and human rights in a dialectical way allows a better understanding of the couple. Only by first considering solidarity and human rights separately, and then identifying how they interact and are connected does their inextricable relationship become evident.

Most of today's challenges cannot be tackled by one state alone. The same is true for the human rights challenge. In an interdependent world, human rights violations occur through the actions or omissions of multiple actors. Solidarity within this context is first and foremost a principle of cooperation, a capacity building instrument to enhance the problem-solving capacity of a community by burden sharing mechanisms.<sup>26</sup> Solidarity therefore is not a goal in and of itself, but rather an instrument to realize each entity's respective human rights. In other words: International solidarity is about the duty to cooperate to achieve human rights globally.<sup>27</sup>

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<sup>23</sup> Ibid, I. 8.

<sup>24</sup> Nehal Bhuta, Recovering Social Rights, IILJ Working Paper 2023/1 (History and Theory of International Law Series).

<sup>25</sup> HRC Res. 21/9 "Promotion of a democratic and equitable international order" adopted on 11 October 2012 and UNGA Res. 77/281 "Promoting the social and solidarity economy for sustainable development" of 18 April 2023.

<sup>26</sup> Carl Jauslin, The Principle of Solidarity in International Economic Law, in: Elgar Encyclopedia of International Economic Law, 2024 (forthcoming).

<sup>27</sup> Art. 55 and 56 UN Charter.

Solidarity is not merely a moral imperative or a political goal but a term that is part of the legal discourse.<sup>28</sup> This idea of solidarity is referred to in the Global Compact for Safe, Orderly and Regular Migration adopted by the UN General Assembly on 19 December 2018 (A/RES/73/195) and in the proposal for negotiating text of the WHO Pandemic Agreement issued on 30 October 2023 (A/INB/7/3). The emergence of solidarity as a principle of international law and as a human right on the political scene highlights the normative concepts international law must develop to adequately react to the challenges in a globalized world. Operationalizing solidarity requires us to pave the way for the recognition of positive obligations, general duties to cooperate, common but differentiated responsibilities, as well as *erga omnes* human rights, going beyond a society of nations towards an international community of mankind. Understanding that solidarity shares responsibility for human rights and taking solidarity rights seriously demonstrates that the marriage of solidarity and human rights has a great potential. Only by making philosophical sense of the aim and aspiration of solidarity can we unfold its full potential as a cooperative instrument enhancing the problem-solving capacity of the international community and therefore making it more resilient to future crises.

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<sup>28</sup> Rüdiger Wolfrum, *Solidarity and Community Interests: Driving Forces for the Interpretation and Development of International Law*, Collected Courses of the Hague Academy of International Law, Vol. 416, 2019; Leonardo Pasquali (ed.), *Solidarity in International Law, Challenges, Opportunities and The Role of Regional Organizations*, 2023; Eva Kassoti, Narin Idriz (ed), *The Principle of Solidarity : International and EU Law Perspectives*, 2023; Guido Alpa, *Solidarity: A Normative Principle*, Alphen aan Rijn: Kluwer, 2023; Cecilia Bailliet (ed.), *Research Handbook on International Solidarity and the Law*, 2024.