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Corresponding Author	Family Name	**Jacur**
	Particle	
	Given Name	**Francesca Romanin**
	Prefix	
	Suffix	
	Role	
	Division	Faculty of Law
	Organization	Università degli Studi di Brescia
	Address	Brescia, Italy
	Email	Francesca.romaninjacur@unibs.it

Abstract	The pursuit of global challenges, like climate change and reactions to health emergencies, unveils the inherent contrast between individual interests and collective action. In front of these threats, States primarily act in their self-interest, but soon realize that an effective and long-lasting solution to the threat is achieved only through a coordinated common effort. Hence, cooperation, equity and solidarity are crucial to successfully address these major crises and find their roots in the wake of the compromise between self-interest and awareness of the necessity to act jointly. Are these ethical concepts vested only with a moral nature, or have they also acquired a legal dimension in the international legal order? And, if so, do they give rise to specific duties and obligations upon States? The purpose of this contribution is, firstly, to understand how solidarity and equity apply in the general context of public international law. Secondly, since climate change is deeply influenced by equity through the principle of common but differentiated responsibilities (CBDR), this contribution examines whether, and if so how, the differentiation of obligations across States Parties in the climate change regime reflects the principles of equity and solidarity.

Keywords (separated by '-')	Moral obligations - solidarity - equity - global challenges - climate change regime - Principle of common but differentiated responsibilities and respective capabilities (CBDR-RC)

Chapter 4
Solidarity and Differentiation: Moral and Legal Obligations of States in Addressing Global Challenges - The Case of Climate Change

Francesca Romanin Jacur

Contents

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F. ~~R.~~ Jacur (✉)
Faculty of Law, Università degli Studi di Brescia, Brescia, Italy
e-mail: Francesca.romaninjacur@unibs.it

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across States Parties in the climate change regime reflects the principles of equity and solidarity.

Keywords Moral obligations · solidarity · equity · global challenges · climate change regime · Principle of common but differentiated responsibilities and respective capabilities (CBDR-RC)

4.1 The Pursuit of Global Challenges and the Structural Inequalities of States

The world is facing very difficult times. Climate change and the health crisis are urgent global challenges that are menacing, manifestly or in a creeping way, the security of the planet. The short-sighted perspective in managing pandemics, despite the warnings of many experts, echoes the poor progress in facing another global threat: climate change. Now more than ever, it is the time for the international community to stick together and take decisive and effective actions towards a carbon-neutral economy and to seek the fastest and smoothest way out from the social and economic crisis triggered by the COVID-19 pandemic.[1]

International law is the normative order that is better suited, compared to the domestic ones, to address global threats and therefore should bear the primary responsibility to regulate on these matters.

When facing global threats, but also when pursuing ordinary common interest goals, two intertwined but divergent forces apply and raise global-scale cooperation problems.[2] On the one hand, who is facing the threat instinctively and primarily worries for their own self-interest. On the other hand, thinking about it thoroughly, one realizes that an effective and long-lasting solution to the threat is achieved only through a coordinated common effort, namely through cooperation and solidarity.[3] Thus, for instance, in response to COVID-19, States have raced to ensure an adequate amount of vaccines for their citizens, reflecting a clear attitude towards "vaccine nationalism".[4] These behaviours raise moral and legal questions regarding the duty

[1] The pandemic has unveiled the many weaknesses of our model of economic development, exposed the fragility of many domestic and supranational health systems and worsened the pre-existing inequalities across society.

[2] Specifically, with regard to the COVID-19 pandemic, see Benvenisti 2020, p. 589: "even if everybody knows what needs to be done, at least some have the incentive to "cheat"".

[3] IMF, Fiscal Monitor April 2021, Chapter 1, p. 13: "It is … imperative to ensure that health care systems everywhere are adequately resourced and that global cooperation on producing and distributing vaccines to all countries at affordable prices is reinforced, particularly because many low-income countries rely on external grants to finance their vaccination plans. Vaccines are a global public good. Efforts to increase funding for COVAX—the multilateral mechanism for equitable access to vaccines—must be scaled up. The sooner global vaccinations control the pandemic, the quicker economies can return to normal and will need less government support." See https://www.imf.org/en/Publications/FM/Issues/2021/03/29/fiscal-monitor-april-2021#Full%20Report.

[4] For example, Italy decided to halt the shipment of vaccines to Australia and was initially criticized for resorting to vaccine nationalism. However, very soon afterwards, even the Australian Minister

upon States to support other States in facing common threats: do States have a legal obligation to take solidarity actions to support other States and their people in the pursuit of common objectives? And if so, even before they have ensured the health safety of their own citizens?

Another factor that requires careful consideration when addressing global challenges is that States are formally equal but not substantially identical, and their diversities influence their respective attitudes towards cooperation. Structural inequalities exist and must be taken into account, both in terms of capabilities and responsibilities in bearing the burden of managing the problem and of sharing the benefits of joint action.

Thus, for example, in the climate change context the most vulnerable States, greatly exposed to adverse climate change impacts, are generally not the major greenhouse gases emitters.[5] Conversely, richer States with higher greenhouse gases emissions are less exposed and hence have weaker incentives to engage and cooperate in climate change mitigation. It is in these situations of striking injustice that equity and solidarity could play a crucial role: by making more 'powerful' States – independently from their own interest – take on the burden to act in pursuit of the common good, while the 'weaker' States share the benefits of such action.Thus, solidarity and equity function as tools that counterbalance structural inequalities.

Beyond the 'traditional' North-South dimension, other specific geographic, cultural, economic, and political characters lead to different inclinations to cooperate. Furthermore, depending on the challenge to be addressed, cooperation may require long-term and continuous coordination as, for instance, in climate change mitigation, or a sudden high-degree of interaction to face emergency situations of pandemic spread or in case of climate change disasters.

Climate change responses just as reactions to the health emergency unveil the inherent contrasts between individual interests and collective action.[6] Cooperation and solidarity find their roots in the wake of this fertile ground of compromise

recognized the reasonableness of the move, due to the more severe situation of Italy compared to Australia. Would there be a similar understanding if the shipment were headed to India where the COVID wave was hitting its citizens particularly hard?

[5] See IPCC 2018: Summary for Policymakers. In: Masson-Delmotte et al. forthcoming, para B.5.1.: "Populations at disproportionately higher risk of adverse consequences with global warming of 1.5°C and beyond include disadvantaged and vulnerable populations, some indigenous peoples, and local communities dependent on agricultural or coastal livelihoods (…). Regions at disproportionately higher risk include Arctic ecosystems, dryland regions, small-island developing states, and Least Developed Countries. Poverty and disadvantage are expected to increase in some populations as global warming increases; limiting global warming to 1.5°C, compared with 2°C, could reduce the number of people both exposed to climate-related risks and susceptible to poverty by up to several hundred million by 2050;".

[6] One may question, for instance, the continued existence of domestic subsidies to fossil fuels, while international cooperation on climate change is being pursued. In the case of pandemics, few private actors (the 'Big Pharma') might unilaterally bear the collective burden of solving the health crisis, by making vaccines accessible and affordable for all, as requested by WHO General Assembly Resolution and by The Independent Panel for Pandemic Preparedness & Response, May 2021, p. 55: "The Panel recommends… shifting from a model where innovation is left to the market to a model aimed at delivering global public goods (available at https://theindependentpanel.org/

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between self-interest and awareness of the necessity to act jointly. How can these two apparently mutually exclusive forces be combined? Are these concepts vested with a moral nature, or have they also acquired a legal dimension in the international legal order? And, if so, do they give rise to specific duties and obligations upon States?

To answer these questions, it is necessary to understand how solidarity and equity apply in the context of public international law.

The purpose of this contribution is not to engage in a deep and comprehensive inquiry on these ethical postulates, but rather to survey how they find expression in the context of inter-State relations, notably with regard to climate change matters. After observing the trend of 'moralization' of international law the study focuses, against this background, on solidarity and equity as ethical postulates (Sect. 4.2) and on their interaction with international law (Sect. 4.3). The following part clarifies conceptually the notions of 'solidarity' and 'equity' (Sect. 4.4). Since climate change, one of the greatest global challenges of our time, is deeply influenced by the principle of common but differentiated responsibilities (CBDR), the central part of the contribution (Sects. 4.5 and 4.6) examines differentiation in the climate change regime in the perspective of equity and solidarity. Final thoughts (Sect. 4.7) draw some conclusions on the qualification of solidarity and equity principles, as to their legal and moral nature, and considers other matters for further research.

4.2 The Interaction Between Morality and Law

The relationship between law and morals is a complex one and subject to continuous evolution: moral values inform not only moral, but also legal obligations; vice versa, laws reflect and influence the sense of justice of societies and often legal norms develop as a response to social needs. However, a distinction should be made between moral and legal obligations.[7] Far from being a formal etiquette, the moral or legal nature of an obligation has substantial implications in terms of normativity and relations with other international legal norms. Thus, for instance, if qualified

wp-content/uploads/2021/05/COVID-19-Make-it-the-Last-Pandemic_final.pdf). See also Seventy-Third World Health Assembly, Agenda item 3, COVID-19 response, 19 May 2020, WHA73.1, para 6: "Expressing optimism that the COVID-19 pandemic can be successfully controlled and overcome, and its impact mitigated, through leadership and sustained global cooperation, unity, and solidarity, (…) RECOGNIZES the role of extensive immunization against COVID-19 as a global public good for health in preventing, containing and stopping transmission in order to bring the pandemic to an end, once safe, quality, efficacious, effective, accessible and affordable vaccines are available".

[7] Encyclopaedia Britannica 1963, p. 758. Various religions have engaged in this distinction. For example, in Judaism the rabbinical teachings claim that legal obligations are justified by moral obligations and both find their basis in the principle of righteousness. Similar views are shared by Christians, but also by moral philosophy, notably Aristotelians. Democratic societies and their law-making are in principle more open to moral influence, while in authoritarian regimes the distinction between law and morals becomes more blurred.

as a 'legal obligation' it could give rise to entitlements and responsibilities; or, if considered as a 'moral obligation' it would suggest desirable behaviours and generic expectations.

Ethics or moral philosophy is the systematic study of the nature of value concepts, such as 'good', 'bad', 'right', and 'wrong' and of the general principles that justify their application.[8] Moral teachings endorsing universal values are found in religions such as Christianity, Buddhism and Confucianism. Ethics, religion and law are interwoven in many legal systems, including secularized ones, and together with other forces, like politics and public opinion, they contribute to shape normative development.

One major differentiation between moral and legal rules relates to the imperative nature of the norm: while both moral and legal norms recognize a value, the moral norm is founded on the inner, rational human nature and responds to an order originated from human conscience. On the other hand, legal norms find their basis in an external legal order, which generally, although not necessarily always, endows that legal norm with an enforcement tool (for example, sanctions) and envisages addressees, who enjoy a corresponding entitlement. As will be exposed in the next paragraphs, in my view, these are some of the distinguishing features in the definition of solidarity as a moral – rather than a legal – principle.

Another distinction to keep in mind relates to law as it exists (*lex lata*) and law as it ought to be (*lege ferenda*). Even though according to rational ethic, law should aim at ensuring a just distribution of the community's resources to all the States and their citizens to maximize the international society's well-being, reality – (*lex lata*) – often reflects a different *status quo* characterized by economic, political and social inequalities.

4.2.1 Philosophical Foundations for the Principles of Equity and Solidarity

Equity and solidarity are fundamental concepts to deal with the existing structural inequalities of international society. Equity could be considered as synonymous of fairness and natural justice. In its more specific meaning, equity refers to the principles and remedies, which courts could apply, using their discretionary power, to

[8] Encyclopaedia Britannica 1963, p. 752. G. Rensi argues that a common feature of morality is that it requires men to act contrary to their natural inclination. (Rensi 1934, p. 15).

decide individual cases in accordance with notions of natural justice.[9] It is hence an instrument that supplements or corrects the law.[10]

Philosophers and scholars in social sciences have engaged at length in the study of the different ways to reconcile and align individual and community interests.[11] The principle of solidarity stems from the moral and religious context and is then applied in other fields of social sciences.[12] Ideologies have a great importance in the definition of the concept of solidarity. A noteworthy historical example is found in the context of the Congress of Vienna (1815), where "solidarity" between the great powers of Europe, who joined forces in the aftermath of Napoleon's empire, referred to the common policies of the legitimate princes against revolutionary ideas and movements.[13] In this perspective, the notion of 'solidarity' is a synonymous of 'cooperation' in the pursuit of a shared interest by the participants of a certain group.

Around the beginning of the 1900s two doctrines on solidarity developed respectively in France and in Germany. Extremely relevant for present purposes is the French "solidarist school" and its most authoritative scholar: Léon-Victor Bourgeois (1851–1925), philosopher and first representative of France to the Society of Nations in 1919, who received the Noble Prize for peace in 1920 for his theory on solidarity as a fundamental element in the foundation of society.[14] In Bourgeois' theory, human beings undertake obligations towards their society, because they enjoy the benefits deriving from previous generations: in continuing with this process, humanity has an obligation to conserve and ameliorate the inheritance they received from the past. In Bourgeois' doctrine, solidarity applies also between different generations and, in this perspective, it anticipates the concept of intergenerational equity.[15] These theories

[9] On the historical origins of the use of ethics by English courts of chancery in the 13th century, see Encyclopaedia Britannica 1963, p. 665. Litigating parties, disappointed of the judgment and relief available before the common-law courts, would turn to the king with petitions for justice and effective remedies. This historic connection with the king caused a strong opposition to the development of equity judgments in the early history of the United States. Eventually States created courts of equity and later abolished the distinction between courts of law and of equity, by unifying the procedures in one civil action.

[10] Gaeta et al. 2020, p. 198.

[11] Noteworthy is the thought of Heinrich Pesch, economist and founder of Catholic social thought, whose theories have inspired the Encyclical Quadragesimo Anno of Pius XI (15 May 1931), available at http://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno.html. He assigns to the economy the duty to ensure the needs of the people with the view to achieve general wellbeing. (Pesch 1896–1900). See also Rawls' theories on equality and justice (Rawls 1971).

[12] For instance, with regard to Christianity, solidarity could be associated with the central idea of charity. This close connection has been highlighted also by the Human Rights Council. Cfr. Human Rights Council, Report of the independent expert on human rights and international solidarity, Rudi Muhammad Rizki, A/HRC/15/32, 5 July 2010, para 58.

[13] Garzanti 1972, p. 329.

[14] Bourgeois 1899.

[15] UNGA, Resolution adopted by the General Assembly on 27 July 2012, "The future we want", Doc. A/RES/66/288, para 50: "We stress the importance of the active participation of young people in decision-making processes, as the issues we are addressing have a deep impact on present and future generations and as the contribution of children and youth is vital to the achievement of

and with them the legal component of solidarity lost momentum and were forgotten with the deflagration of the World Wars in the 20th century. The moral dimension however survives as an inherent constitutive element of religion, as in Christianity, where solidarity is closely related with charity and love for *thy neighbour*.

4.2.2 Moral Values and International Law

The international legal order is undergoing a transition from a realistic, rather cynic body of law whose main attributes are effectiveness, the use of force and the protection of self-interests to a juridical realm more open to moral values that States consider worthy of special protection.[16] Also with regard to climate change, a moral dimension is inherent to many obligations States undertake to mitigate and adapt to climate change. In particular, equity in its inter- and intra-generational dimension plays a central role in the climate change regime, as will be further illustrated.

The traditional State-centred model maintains a fierce resistance to the continuous and perseverant trend of the modern model that increasingly broadens its boundaries and impacts. Authoritative scholars have described the former trends as the 'Grotian' and the latter as the 'Kantian'.[17] These two approaches see their fortunes alternate, and maybe the recent precipitation in gravity of the most worrying global challenges, like climate change and the COVID-19 pandemic, might force the system to re-unite in finding a common legal framework in which the strengths and best elements of both models are put at the service of the common interests of humankind. In this much desirable and needed scenario, moral values together with other meta-legal concepts calling for an extra-juridical assessment contribute to ripen international cooperation. These are, for example, solidarity, trust, fairness, inclusiveness, intra and intergenerational equity, common but differentiated responsibilities, good faith, fair and equitable treatment, legitimate expectations, ambition, non-regression. These concepts resonate more and more loudly with regard to many challenges that the international community is called to address in these days. Ethical values in international law have been extensively studied by scholars, who have elaborated comprehensive and authoritative theories to account for them.[18]

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sustainable development. We also recognize the need to promote intergenerational dialogue and solidarity by recognizing their views."

[16] Treves 2019, p. 294, at 300 warns that sometimes these values are referred to as "slogans" and while they all have an ideological content, they can be considered in two different ways: "The first is to consider that they have per se a normative content which can be invoked as a basis for deducting rules setting out rights and obligations, or for interpreting other rules. The second is to consider that these 'slogans' do not add anything to existing rules because they are simply synthetic formulations, labels, to address groups of rules that have a separate existence."

[17] Gaeta et al. 2020, p. 19. Consider, however, that Hugo Grotius, one of the founder of modern international law, is the first who saw the whole universe ruled by a rational law of nature (*ius gentium*), which included moral rules, notably that promises must be kept (*pacta sunt servanda*).

[18] Franck 1998, Wolfrum and Kojima 2010 and Peters et al. 2009.

These legal developments run in parallel with moral progress, which shows a trend towards universalization, whereby moral rules gain relevance and become potentially applicable more widely and comprehensively. This entails that morality engages with a broader range of needs and new values.[19]

In cases of coexistence and interaction of moral and legal obligations, to avoid misconceptions, it is important to specify whether concepts as 'duty', 'obligation', 'responsibility', are used in a narrow sense, in their legal meaning – or rather should be interpreted in a generic, less technical, sense. Similar situations are not new to international law. The Statute of the International Court of Justice (ICJ) envisages the possibility that States request the Court to take decisions *ex aequo et bono*, however this option has been never exercised.[20] Conversely, the ICJ resorted to equity in disputes concerning the delimitation of maritime boundaries and of the continental shelf in interpreting the principle of equidistance.[21] Focusing on the difference between legal and moral obligations, the ICJ, in the recent case *Obligation To Negotiate Access To The Pacific Ocean (Bolivia v. Chile)* held that: "legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation."[22]

Moreover, even when a principle is recognized as endowed with a legal nature, it remains to be seen whether – and, if so, how – the principle is declined in more specific norms and whether it reaches the 'power' to give rise to enforceable obligations. The next paragraphs will assess this 'transition' from general principle to specific legal obligations, in particular with regard to the notion of 'solidarity' and its relationship with the principle of common but differentiated responsibilities.

[19] Encyclopaedia Britannica 1963, p. 761: "Moral development does not proceed in a straight line, but suffers setbacks and retreats. Moreover, it goes on in many distinct centres each with its own tradition. Yet, in later phases, they often converge and interact. Peoples learn increasingly from each other and see that in essentials they are engaged in a common task – the unfolding and fulfilment of human faculty."

[20] Statute of International Court of Justice, Article 38.2. For a reflection on the reasons why this option has never been used, see Dothan 2018 and Skordas 2019.

[21] Cfr. the North Sea Continental Shelf cases: Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America).

[22] International Court of Justice, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile),* Judgment of 1 October 2018 (Merits), para 162.

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4.3 Solidarity Among States in International Doctrine and Legal Instruments

Prominent scholars maintain that solidarity is a principle of international law that can be traced back to Vattel, but often maintain rather cautious positions on the nature and content of the principle: some suggest that the principle does not create extra-legal obligations,[23] while others see solidarity as a meta-juridical notion or as a guiding principle for the future development of international law.[24] Under many accounts, solidarity is seen as very closely related or even equivalent to the notion of cooperation.

Looking at the considerable number of international instruments recognizing solidarity, the great majority is of a soft law nature. Following decolonization, there was a strong feeling among developed countries that they 'owed' the less developed ones. Nonetheless, despite this favourable political and economic context, a general legal obligation was never expressly acknowledged.[25]

Later, in the 1980s, a noteworthy contribution is provided by the Seoul Declaration of the International Law Association: "The principle of solidarity reflects the growing interdependence of economic development, the growing recognition that States have to be made responsible for the external effects of their economic policies and the growing awareness that underdevelopment or wrong development of national economies is also harmful to other nations and endangers the maintenance of peace. Without prejudice to more specific duties of cooperation, all States whose economic, monetary and financial policies have a substantial impact on other States *should* conduct their economic policies in a manner which *takes into account* the interests of other countries by appropriate procedures of consultation. In the legitimate exercise of their economic sovereignty, they *should seek to avoid* any measure which causes substantial injury to other states, in particular to the interests of developing States and their peoples (*italic added*)."[26]

The overall tone of these words resonates as a strong recommendation to developed countries to duly consider the interests of 'weaker' States, and suggest the carrying out of procedural obligations, such as the prior assessment of the effects of their policies or regulatory measures through the appropriate consultations with

[23] de Vattel 1758/1958. Cfr. Macdonald 1996, p. 261, noting that "Although [de] Vattel conceived of solidarity as functioning at the most essential level of international law, he considered the obligations it creates moral rather than legal, and therefore, difficult to enforce."

[24] Cot 2010, p. 82 "I believe solidarity is a guideline, a political concept and a useful political tool but not a legal principle in international law."

[25] See Macdonald 1996, p. 280: "The "one-sided" obligation of solidarity made it practically impossible for any developed state willingly to recognize a general obligation arising from it. (…) there has been no indication that any such debt can or ever will be paid, so long as the relevant obligation is perceived as belonging solely to the developed countries." For an early recognition of the need for solidarity, see the Declaration of 1 May 1974 Concerning the Establishment of a New International Economic Order, calling for the elimination of inequalities among States and the correction of injustice (G.A. Res. 3201, U.N. GAOR, 6th Spec. Sess., Supp. No. 1, U.N. Doc. A/9559 (1974)).

[26] ILA, Report of the Sixty-Second Conference, 24–30 August, 1986, p. 5.

the potentially affected countries, rather than a straight-forward obligation to refrain from such actions. Furthermore, an (emerging) due diligence obligation is also associated with these procedural obligations: to seek to refrain from adopting measures which would negatively impact other States.[27]

The UN General Assembly (UNGA) often restated throughout the years the important role of solidarity as a founding principle that should guide globalization and should inform the international legal order. Two UNGA resolutions of the early 2000s state that solidarity is: "a fundamental value, by virtue of which global challenges must be managed in a way that distributes costs and burdens fairly, in accordance with basic principles of equity and social justice, and ensures that those who suffer or benefit the least receive help from those who benefit the most".[28] In 2016, the General Assembly returned to address these global concerns, by affirming that "a democratic and equitable international order requires, inter alia, the realization of the following: (…) (e) The right to an international economic order based on equal participation in the decision-making process, interdependence, mutual interest, solidarity and cooperation among all States; (f) International solidarity, as a right of peoples and individuals".[29]

Moving closer towards sustainable development and environmental matters, at the beginning of the 1990s, major events in the North-South discourse on environmental matters are the Rio Declaration, which endorses the main principles of sustainable development, notably Principle 7 on common but differentiated responsibilities, and the environmental treaty regimes addressing for the first time in history global challenges, as the protection of the ozone layer, of biological diversity, desertification and climate change. Furthermore, particular consideration has been devoted to solidarity during the 2002 Johannesburg Summit calling for new partnerships and alliances between States and civil society in the pursuit of sustainable development. Here, the centrality of the role of States was reaffirmed: "(…) Renewed and stronger commitment to global solidarity must be grounded in the political will of Governments. A strong Plan of Implementation and partnership initiatives must be complementary".[30]

In this outlook, solidarity is conceived as a general notion of fair burden-sharing that aims at re-balancing inequalities across the world in the view of achieving distributive justice. A more cynical perspective might indicate that although increased interdependence is a character of todays' international society, this does not necessarily entail that it leads to greater solidarity.[31]

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[27] Cfr. Macdonald 1996, p. 266 suggesting that the preamble of the Seoul Declaration states that solidarity is still a "functional rather than a material principle containing rights and duties; it was simply an appeal to developed countries on behalf of the LDCs".

[28] UNGA Resolutions 56/151 of 19 December 2001 (para 3(f)) and 57/213 of 19 December 2002, both entitled "Promotion of a democratic and equitable international order".

[29] UNGA Resolution 71/190 of 19 December 2016, "Promotion of a democratic and equitable international order", para 6.

[30] Report of the World Summit on Sustainable Development, Doc. A/CONF.199/20, Chapter IV, p. 120.

[31] On the relationship between interdependence and solidarity, see Macdonald 1996, at p. 290: "Solidarity requires an understanding and acceptance by every member of the community that it

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In this scenario, an outstanding express legal duty of solidarity is foreseen in the European legal order in the context of energy matters.[32] EU Member States shall take decisions on energy matters with a view to the needs of other, especially most vulnerable States, even if not in their immediate interest. To strengthen this solidarity obligation, States in need have a vested interest to receive such assistance, and to make States accountable in this regard.[33] Thus, if a Member State has difficulties in accessing adequate levels of energy supplies, other States will step in and provide sufficient energy. This entails that Member States shall maintain adequate stocks of energy in storage to face similar emergency situations. This 'solidarity turn' occurred mainly as a lesson learned from the Russian and Ukraine crisis during the harsh winter of 2009.[34]

This overview of State practice shows the absence or pale appearance of solidarity from an inter-state perspective, except for the express duty of solidarity within the European Union legal order.

4.3.1 The Human Right Dimension of Solidarity

Beyond the inter-state dimension, a State, or a group of States, may provide assistance to the people of another State.[35] The obligation to provide assistance is subject to the consent of the beneficiary States: even where States are willing to exercise solidarity, their actions are barred by constraints deriving from the classic horizontal structure of international society.[36]

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consciously conceives of its own interests as being inextricable from the interests of the whole. No state may choose to exercise its power in a way that gravely threatens the integrity of the community."

[32] Treaty on the Functioning of the European Union, Articles 194(1) and 120(1).

[33] Röben 2018, p. 234: "solidarity underpins all energy goals: secure access to energy as much as sustainable energy". Cfr. again however, Röben, who notes that: "This solidarity is not in itself operational but needs to be concretised through further law-making at Member State and at EU levels". (p. 122)

[34] Cfr. REGULATION (EU) No 994/2010 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC, which aims at ensuring the continuous functioning of the internal market in natural gas. When a State market can no longer deliver the required gas supplies, other Member States and the Union can take exceptional measures "in a spirit of solidarity, for the coordination of planning for, and response to, an emergency at Member State, regional and Union levels." (Article 1).

[35] Cfr., for instance, ICESCR, Article 2.1: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

[36] For instance, the concept of 'Responsibility to protect entails the duty of 'active' solidarity upon States (and international organisations) to provide assistance to persons in need who are situated on the territory of another State. If characterized as a legal obligation, it would entail a right *erga*

In this human-right related context too, hence, State sovereignty tightly holds the control of solidarity coming from outside the borders: individuals are entitled with a human right to request and receive assistance from their territorial State, but not from other States. This *status quo* reaffirms the importance that State sovereignty be exercised for the benefit of the State's own citizens.

State sovereignty as such does not require to act in the best interest of third states or their citizens, but other rules of international human rights law might limit the exercise of sovereignty in this respect. Thus, human rights obligations, such as those protecting the right to life or the right to health entail that the State must, first, not deprive its own people access to resources necessary for the enjoyment of fundamental human rights. Further, the State is also obliged to cooperate at the international level in order to contribute and support other States by *all appropriate means*. Advancing in this direction, the Inter-American Court of Human Rights recognized that States bear responsibility for significant environmental damage they cause within and beyond their borders. In its 2018 landmark Advisory Opinion, the Court confirmed that States have duties to prevent that activities within their jurisdictions cause environmental damage and hence negatively affect human rights of people in other States.[37]

Hence, while there is no obligation of result or to provide access to third states and their people, especially when security concerns relating to the adequacy of supply of certain goods apply, there is nevertheless a due diligence obligation not to unduly delay the provision of support abroad.

A tragic no-show of the principle of solidarity appears blatantly with regard to the fight against hunger, malnutrition and food security. Despite decade-long

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omnes of victims to be assisted and a corresponding universal obligation *erga omnes* for States to provide assistance. However, at present, it falls short of constituting an autonomous obligation and remains conditioned by the request for assistance – or at least the consent – of the affected State. "Table ronde. Une responsabilité de protéger face aux pandémies? Le rôle des Etats, des organisations internationales et des acteurs non-étatiques", in Cot 2008: "The primary role of the affected State and the subsidiary role of other actors were also stressed within the ILC "as part of an overarching umbrella of international cooperation and solidarity". In a similar vein, with regard to the supposedly legal nature of the duty, Treves notes that: "The innovation is less decisive than it appears as the action envisaged must be taken "through the Security Council in accordance with the Charter" and this possibility would have been available even without invoking the notion of responsibility to protect." (Treves 2019, p. 295).

[37] The 2018 Advisory Opinion of the Inter-American Court of Human Rights (IACHR) held that human rights depend on the existence of a healthy environment, and that, as a consequence, states must take measures to prevent significant environmental harm to individuals inside—and outside—their territory. (The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights), Advisory Opinion OC-23/18, Inter-Am. Ct. H.R., (ser. A) No. 23 (Nov. 15, 2017), available at http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf). In favour of human rights extraterritorial obligations of States, see Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Principle 3: "All States have obligations to respect, protect and fulfil human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially." These Principles claim to reflect existing law. (available at https://www.ciel.org/wp-content/uploads/2015/05/Maastricht_ETO_Principles_21Oct11.pdf).

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programmes, statements and good intentions manifested by many and diffused across public and private governance, the progress in achieving Sustainable Development Goal 2 is far from satisfactory. Where is solidarity in supporting territorial States that are unable to guarantee the right to food of their citizens?[38]

While tempted to embrace the progressive and optimistic arguments raised by scholars advocating for the existence of a legal principle of solidarity in the international legal order, it seems to me that such a claim, finds itself at odds with reality where the principle of effectiveness is still solidly ruling the institutions and body of rules of the international legal order.[39] Indeed, from the above-sketched survey of international instruments referring to 'solidarity', no clear picture emerges with regard to its specific legal nature. What emerges from this analysis is that, considering the poor record of State practice and of *opinio iuris*, no customary norm according to which States have a duty to act in solidarity towards other States or their citizens can be identified. On the contrary, it seems to me that solidarity is a fundamental moral principle that informs a growing number of international obligations, but it has not (yet) achieved the status of customary law or of general principle of law. To support this position, in the following part, firstly, I will briefly describe the defining characters of the concept of solidarity. Secondly, I will focus on the equity-based principle of CBDR in the climate change treaty regime, arguing that such differentiation does not reflect the solidarity principle, but rather originates from autonomous legal obligations.

4.4 A Critical Account of the Notion of Solidarity

When looking for a definition of solidarity, different conceptions are found. I hereby introduce a two-fold definition that reflects two facets in which solidarity operates. Thus, I refer to 'active solidarity' as a special form of cooperation that requires no particular self-interest or return on behalf of the State providing help to another State to achieve a shared goal. This kind of solidarity, for example, may be triggered when States - that are not themselves directly injured - react to a breach of a common interest obligation, instead or in the name of the directly injured State(s). Active solidarity is closely related to moral values. The second relevant angle to consider is 'passive solidarity', namely, whether there is a solidarity link among a plurality of potentially responsible States. This latter perspective is inspired by the notions of joint and several responsibilities, existing in many national legal orders.

[38] For a passionate and cynic synopsis of how international law and its institutions failed to adequately deal with the challenge of the right to food, see Gradoni 2015, p. 237.

[39] Gaeta et al. 2020, pp. 12 and 16.

4.4.1 'Active' Solidarity

First, looking at the subjects involved in the solidarity relationship, they are equals, peers, even though they might find themselves in different and asymmetric positions. One character common to the various notions of solidarity is the interdependence between the members of a community, who share the risks and the benefits of participating to that society. In the international legal order, for instance, States are equal, even though they are not identical in terms of economic wealth, social development, or other contingent criteria.[40]

Secondly, let us analyse the objective element: the nature of the relevant conduct. Solidarity is based on the concept of support in recovering from a critical situation, or of sharing a burden with another subject with the intention to assist the latter in achieving an objective, which represents a shared value of the community to which both subjects are members. Some authors characterize this form of help as an obligation, other maintain a rather general interpretation.[41] A distinctive element of solidarity is that it applies in a unilateral way and hence gives rise to non-reciprocal obligations. This aspect differentiates solidarity from cooperation. Nevertheless, solidarity does require a certain degree of active participation by the beneficiary of the support, whose mutual effort is required to contribute and benefit from the shared objective.[42] As Dann points out: "Mutuality does not mean that the partners owe the same amount of help to each other or should contribute equally. It is less demanding. But it underlines that the achievement of the common objective is a common task and not a one-sided effort."[43] This distinction determines the difference between mutuality and reciprocity.

Thirdly, considering the purpose that inspires and moves the solidarity action: the ultimate goal that triggers the intervention must be a superior value, a common objective that is shared by the community, where the subjects belong.[44] Hence, in this conception no solidarity exists if the conduct pursues self-interest or seeks some

[40] For present purposes, the definition of 'active solidarity' is limited to the inter-State dimension. For the human right solidarity, namely States obligations towards citizens of other States, see *supra*, Sect. 4.3.1.

[41] Dann 2010, p. 61 (and references therein) who refers to solidarity as an 'obligation', but without specifying whether it has a legal or moral nature.

[42] If the contribution by the recipient subject only pleases the donor but does not help to achieve the common goal would, this would not meet the idea of solidarity. Dann 2010, p. 84 provides for an intuitive example of lack of the 'mutuality' requirement in the context of development cooperation: the case of "tied aid". This kind of aid is provided conditioned upon the obligation on behalf of the recipient to spend that aid according to the donor's conditions. "Tied aid used to be a very important element of development aid – and I would say a detrimental one. The objective was not the common objective of poverty eradication but the donor's desire to support its labour market."

[43] On this point, see Dann 2010, p. 57.

[44] Dann 2010, p. 61: "The element of a "common objective" (…) refers to the recognition of a common bond between those helping each other which is often formed on the basis of shared values. It also implies that solidarity exceeds a mere obligation to cooperate."

kind of return that is different from the general and indirect benefit of having actively contributed to achieve the common goal.

Solidarity is based on the idea to assist others in discharging their own responsibilities and hence may also be conceived as complementary to responsibility for common obligations. This concept finds a particular fertile ground in situations of different capacities of States in achieving common interest objectives. Secondly, they have an *erga omnes* nature, in the sense that they are owed to all the States of the international community or of a multilateral agreement. A decisive difference between these two categories is, in my view, that while the breach of community obligations entails a correspondent right by each and every State to react to such a breach, solidarity – with its unilateral and non-reciprocal nature – is not accompanied by a corresponding right of other States (or individuals) to require the effective implementation of that 'duty'.[45]

In sum, solidarity, in my understanding, calls for a particular form of cooperation that requires no particular self-interest or return on behalf of the State that is providing help. On the recipient's side, the State who benefits from a solidarity action is not vested with a legal right to receive it, so here too there is no self-interest, because the beneficiary State is a 'tool' - in the Macchiavelli sense - to achieve the ultimate common interest. It follows that the State who acts in solidarity cannot be held 'responsible' *strictu sensu* for a legal obligation. In parallel, the beneficiary State has no legal right to receive solidarity, at best, he enjoys a legitimate expectation.[46]

4.4.2 'Passive' Solidarity

Moving to the other side of the barricade, and looking whether there is a 'solidarity' link among the plurality of potentially responsible States, international law is rather straightforward in recognizing that the general principle is that each State is separately responsible for a conduct attributable to it.[47] With regard to the objective element of such responsibility, two situations may be distinguished: a first situation of a plurality

[45] This character resembles to the notion of 'obbligazione naturale' in Italian civil law (Codice Civile, Article 2034: "Non è ammessa la ripetizione di quanto è stato spontaneamente prestato in esecuzione di doveri morali o sociali, salvo che la prestazione sia stata eseguita da un incapace. I doveri indicati dal comma precedente, e ogni altro per cui la legge non accorda azione ma esclude la ripetizione di ciò che è stato spontaneamente pagato, non producono altri effetti." This kind of obligation does not equal to a full legal obligation, but if complied with, cannot be asked back because it is considered owed to the recipient.

[46] This approach reflects the previously mentioned words of the ICJ. See *supra* note 23.

[47] This approach is confirmed by the International Law Commission (ILC) in the Draft Articles on State Responsibility for internationally wrongful Acts, Article 47. Plurality of responsible States "1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act. 2. Paragraph 1: (…) (b) is without prejudice to any right of recourse against the other responsible States."

of responsible States in relation to the same wrongful act,[48] and a second one where several States, acting through separate conducts, contribute to the same damage.[49]

The ILC Commission issues a warning: "Terms such as "joint", "joint and several" and "solidary" responsibility exist in different domestic legal orders, however, they cannot be transplanted into international law and analogies must be applied with care."[50] Scholars too recognize that in the realm of States and international organizations' responsibility a narrow conception of solidarity applies.[51]

The issue of attribution of responsibility is distinct from the issue of reparation due, if responsibility is ascertained. In this regard, nonetheless, similar principles apply: while every State is responsible for its conduct, that State cannot be asked to provide for full reparation of the damage caused by the conduct put in place by a plurality of States. This aspect further confirms that there is no solidarity as a general rule in international law requiring that, without specific agreement between the States, one State shall pay the whole reparation, also on behalf of the other wrongdoers, and not only its share.[52]

These general principles on State responsibility and "passive solidarity" will be further examined in the context of the climate change regime and in light of the principle of common but differentiated responsibilities.[53]

[48] See also Besson 2018, pp. 121–159, 137: "Les conditions et principes de mise en oeuvre de la responsabilité solidaire en droit international de la responsabilité sont très stricts (…). Tout d'abord, la condition d'application de la responsabilité solidaire est que le préjudice causé par les États et/ou OI responsables l'ait été par un meme fait illicite (…). Il doit s'agir d'un seul et même fait conjoint, et non pas d'une série de faits distincts mais identiques. (…) En somme, la solidarité limitée en matière de responsabilité international des États et/ou OI reflète l'état des relations internationales, et notamment le peu d'institutionnalisation qui les caractérise actuellement. Ensuite, même lorsqu'il est applicable, le principe de responsabilité solidaire n'est que rarement mis en oeuvre en pratique.

[49] The emission of greenhouse gases by States would fall in this latter category: in such cases, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations. This case will be later examined in light of the climate change regime obligations and their interpretation provided in the Urgenda case. See *infra* Sect. 4.6.

[50] In this regard, the ILC in its Commentary to Article 47 of the Draft Articles on State Responsibility for wrongful acts, reminds that: "It is important not to assume that internal law concepts and rules in this field can be applied directly to international law."

[51] Koskenniemi 2001, pp. 337–356.

[52] ILC, Draft Articles, cit., Article 47.2.(b) "Paragraph 1 (…) is without prejudice to any right of recourse against the other responsible States." See also Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240, pp. 258–259, para 48.

[53] See *infra*, Sect. 4.6.

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4.5 Equity and Differentiation in the Climate Change Regime

The climate change challenge in its global dimension requires a response from the international community as a whole. Equity has been one of the core principles inspiring the climate change regime from its early days.[54] Intra-generational equity is the general principle from which the CBDR principle and its legal obligations derive as they aim at addressing the real imbalances and disparities existing among States by setting differentiated standards of treatment and obligations and thereby redistribute wealth in a more just and fair way. Differentiation appeared necessary to adequately reflect States' contributions in terms of emissions of greenhouse gases, as well as to take into account their different capacities to respond to the climate challenges of mitigation and adaptation. This ethical dimension endows differentiation with a particular authority and legitimacy, if it is perceived as well calibrated, which in turn favours the endorsement of the treaty by a great number of Parties by encouraging a sense of community and ownership.[55] However, since the very beginning of multilateral climate negotiations, the need to differentiate among countries emerged as an unavoidable legal and policy challenge.

The CBDR principle evolved in the CBDR-RC (and respective capabilities) principle and despite being the cornerstone of the Climate Change regime, at the same time, it remains still today its more contentious dimension. These uncertainties surrounding core elements of the principle are reflected in the reluctance of scholars to take a clear-cut position on its legal status.[56]

And indeed, the CBDR-RC principle reflects in its 'constructive ambiguity' many, also conflicting, conceptions of how the burden to address climate change should be equitably shared among States. The principle builds upon two dimensions: responsibilities and capabilities. The former element – responsibilities – is characterized as "common", inasmuch as climate change is a global challenge for the international community as a whole and requires action by all States. A solidarity dimension may be envisaged in this regard. However, this action may be "differentiated" – without further specification – across States, in light of several criteria. With regard to States' contribution to climate change, relevant criteria are, for instance, historical greenhouse gases emissions, pro capita greenhouse gases emissions or greenhouse gases emissions linked to national GDP; carbon footprint of the national energy mix. Hence, responsibilities of States are common and, in this context, they are "akin to

[54] See UNFCCC, preamble (third paragraph) and Article 3.1.

[55] Rajamani 2006, p. 6: "Differential treatment, in so far as it furthers equality rather than entrenches inequality, has the potential to counterbalance some of the inequities inherent in globalization, and since decisions of the community of sovereign states are increasingly tested against the touchstone of civil society opinion, those decisions based on differential treatment may well be more equitable and therefore defensible in certain situations."

[56] On the uncertain legal nature of the CBDR-RC principle, see Rajamani 2020, p. 195 and reference therein. As candidly recognized by authoritative scholars: "Although there is universal support for the principle of CBDRRC, there is very little agreement on its rationale, core content, and application in particular situations". (Cfr. Bodansky et al. 2017, p. 27).

a moral duty", *but* differentiated in that they derive "from causal agency in creating the problem".[57]

As for the second parameter – the 'respective capabilities' dimension – other indicators are relevant, such as vulnerability, economic development and the specific needs of developing countries. This perspective is also centred on equity and solidarity, considering the importance of the expected support that these countries should receive to be better empowered to face climate change impacts.

If – when interpreting the principle – major consideration is given to the differentiated responsibilities aspect, intended *strictu sensu*, as pointing to a legal duty to act due to the objective contribution to climate change, the principle can be interpreted as creating legal obligations upon developed countries, which may vary in intensity depending on the different national circumstances, but which nonetheless requires them to act. The Urgenda case provides, as we will see later on, for an illuminating case in this direction.

4.5.1 Binary Differentiation in the UNFCCC and in the Kyoto Protocol

The long-lasting classification of Parties to the UNFCCC between Annex I, Annex II and non-Annex I is found in Article 4. This provision extensively sets the commitments required by each of these groups with regard to mitigation, adaptation, financial and technological assistance, and capacity building.

Financial mechanisms of many Multilateral Environmental Agreements (MEAs), including the climate change regime, are deeply inspired by the CBDR principle. In fact, through them, developed country Parties transfer financial aid that covers the incremental costs of environment-friendly projects in developing countries that have global benefits.[58] Not all transfers of finance fall into the category of solidarity aid, but it depends on the type of public or private intervention used and on the attached conditions.[59] So, for example – after a lengthy and painstaking negotiating process - Parties agreed that transfer of finance take place through the financial mechanism, governed by the Global Environment Facility (GEF). This fund is a new model in the family of financial institutions, whose most noteworthy feature is that – probably for the first time in history – donor and beneficiary countries sit on an equal footing in the

[57] For an analytical word-by-word analysis of the principle of common but differentiated responsibilities, see Rajamani 2020, p. 182.

[58] UNFCCC, Article 11.

[59] For instance: grant, concessional loan, non-concessional loan, equity, guarantee, insurance, policy intervention, capacity-building, technology development and transfer, technical assistance.

governing body of the fund.[60] Choosing the restructured GEF as the financial mechanism, was controversial and became acceptable for developing countries only after its restructuring.[61] This model of financial assistance does not fit anymore in the donor-beneficiary one, nor can be characterized as 'solidarity', but rather indicates that these financial transfers from developed to developing countries are made in the implementation of legal requirements deriving from the CBDR principle. Furthermore, the effectiveness of these obligations is strengthened by the provision that compliance of developing States with their obligations under the climate convention is conditional upon adequate transfer of funds.[62] In this regard, scholars like Macdonald and Schütz have expressed different views maintaining that these financial obligations would fall within the notion of solidarity.[63]

After exhausting and never-ending negotiations, the Kyoto Protocol eventually further deepened the clear-cut differentiation approach between developed and developing countries. First and foremost, under the Protocol's first commitment period (2008–2012), only Annex I countries "shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide emissions (…)" do not exceed quantified limits and must reduce their overall emissions by at least 5%.[64] Hence, according to the Protocol, Annex I Parties have quantified and legally binding mitigation commitments, while other countries may undertake voluntary mitigation actions.[65]

[60] In the GEF decisions are adopted with a double-weighted majority of 60% of the total number of participating States and 60% majority of States accounting for the total amount of contributions. See Instrument for the Establishment of the Restructured GEF, Article 25(c).

[61] On the establishment and restructuring of the GEF and the many legal challenges related to the principle of CBDR applied in the context of financial mechanisms, see Werksman 1995, p. 27. The author highlights that the first 'version' of the GEF, which was based on a donor-beneficiary approach, was strongly rejected by the majority of developing countries.

[62] UNFCCC, Article 4.7. Boisson de Chazournes 2012, p. 947, at p. 971 "Linking developing states' compliance with MEAs to the provision of financial and technical assistance by developed countries is a clear manifestation of the principle of common but differentiated responsibilities. This principle … functions as a defence in case developing countries are unable to comply with the treaty in question."

[63] Macdonald 1996, p. 289: "It is apparent, then, that technology transfer and contributions to the funds are not to be thought of as donations; the industrialized states by such measures fulfill their obligations under the principle of solidarity. Developing states have a corresponding obligation under the same principle to cooperate and participate in the common efforts to protect the environment." Raimund Schütz has devoted a thorough study to the concept of solidarity: after carefully analysing the practice of States and international organisations, he reaches the conclusion that solidarity obligations exist in the context of relationships between States characterized by commitments on both sides, that are directed to achieve a long-term shared objective. As examples, he cites: "the duty of developing countries to supply natural resources, to use financial assistance efficiently and to realize specific development projects". In Schütz 1994 the relationship is understood in a broader sense of displaying a balance of long-term interests between developed countries, who give assistance, and developing countries, who receive it**.** Now, even though the obligations of States are not the same, in my view, there is a dimension of self-interest on both sides of these relationships that prevents them to be characterized as solidarity.

[64] Kyoto Protocol, Article 3.1.

[65] An element that considerably softens the rigour of these mitigation commitments, is the fact that they are not based on objective assessments of each country's contribution to climate change, but

From a solidarity perspective, the Kyoto Protocol also sketches a regime of 'passive' solidarity, namely of joint responsibility of 'Annex I Parties' in reaching the 5% global reductions of greenhouse gases.[66] For instance, changes in the number of participating States shall not affect the joint commitment undertaken. Nevertheless, it also expressly envisages that in the event of non-compliance with the overall shared target, each Party shall be responsible for its own level of emissions.[67] Thus, even if States can act jointly, they remain individually responsible in case of failure to achieve the common target. The provisions of the Kyoto Protocol are without prejudice to other arrangements or obligations that may apply pursuant to other agreements between the Parties, for instance, deriving from EU law.[68]

To facilitate compliance for developed countries with regard to their legally binding emission reductions obligations, the Kyoto Protocol creates three flexibility mechanisms. These instruments should allow developed countries to ease their burden, by achieving greenhouse gases emission reductions in cost-effective ways. For this reason, the flexibility mechanisms were defined and reflect the same clear-cut differentiation: developed countries are the only protagonists of the carbon market,[69] and under the CDM only developed countries can obtain credits from the implementation of low-carbon projects in developing countries.[70]

Do the flexibility mechanisms reflect solidarity? In my view, according to the previous definition of solidarity, they fall short of meeting certain requirements. First, developed States have a specific economic return because they lower their compliance costs. Second, on a rather cynical note, even though the CDM is intended to contribute to the sustainable development of developing countries, this beneficial impact – which reflects the solidarity dimension of this flexibility mechanism – turned out to be one of the weak aspects of its overall performance.[71] The only authentic solidarity aspect of the CDM is that it envisages a "solidarity tax", by requiring that a share of proceeds from CDM projects be used to assist developing countries that are particularly vulnerable to cover adaptation costs.[72]

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reflect in great part a political compromise. This solution proved unavoidable during negotiations, but it weakens the legitimacy and equity of the differentiation among Annex I countries. Bodansky et al. 2017, p. 160.

[66] Kyoto Protocol, Article 4 envisages the conditions that the 'solidarity' agreement to fulfil their commitments jointly should respect.

[67] This *lex specialis* reflects the narrow conception of the general rule of State responsibility. Cfr. *supra*, Sect. 4.4.2.

[68] Cfr. Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework; Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (text with EEA relevance).

[69] Kyoto Protocol, Article 17 and subsequent implementing decisions.

[70] Kyoto Protocol, Article 12 and subsequent implementing decisions.

[71] Romanin Jacur 2009, pp. 69–78.

[72] Kyoto Protocol, Article 12.8.

Another dimension of the Kyoto Protocol which is strongly inspired by differentiation among countries is its compliance mechanism and procedures. With regard to the institutional aspect, the mechanism is divided in an Enforcement Branch in charge of ensuring compliance of developed countries; and a Facilitative Branch, which is entrusted with assisting developing countries facing compliance issues. Noteworthy is the institutional design and the composition of the Enforcement Branch: even though its mandate is limited to ensure 'Annex I Parties' compliance, it is composed by individuals serving in their personal capacities who are nominated also by developing countries.[73] This independent and balanced composition strengthens the obligations upon 'Annex I Parties', which besides being legally binding also undergo an effective and unbiased compliance control. These institutional characters reflect how the CBDR principle may translate not only into substantive quantified legally binding commitments on behalf of 'Annex I Parties' in the pursuit of the global goal of mitigating climate change, but also in the institutional design of treaty bodies in charge of ensuring their implementation. Also when looking at the procedures and at the tools at the disposal of the two Branches, a clear-cut differentiation emerges between 'sticks' that are available to the Enforcement Branch, and the 'carrots' to be applied by the Facilitative Branch.[74]

Already during the negotiations of the Kyoto Protocol, this binary differentiation was criticized for its rigidity. There were no in-built adjustments systems that could allow the treaty to account for the steep increase of greenhouse gases emissions in emerging economies, which remained 'labelled' as developing countries under the Protocol's system. This lack of elasticity in adapting to major changing circumstances raised crucial competitiveness concerns of some industrialized countries and signed the mark that would lead to the lengthy decline (and later 'death') of the Kyoto Protocol and of its top-down, strongly differentiated approach to climate change mitigation.

From a legitimacy and equity perspective, the Protocol should be praised for its straightforward ambition, even though this ambition and its rigidity were major reasons why the Kyoto Protocol failed to gain the support of some crucial players, such as the United States and later Canada, Japan and Russia. Furthermore, in the long-term it posed a great obstacle to the normative process under the climate change regime, because it has proven extremely difficult to reform it in a way that better combines the often-conflicting demands of all countries.[75]

[73] Both Branches are composed by: one member from each of the five regional groups of the United Nations; one member from the small island developing States, two members from 'Annex I Parties' and two members from 'non-Annex I Parties'.

[74] On the practice of the compliance mechanism, see Romanin Jacur 2016, pp. 239–250.

[75] The lack of support for the Doha Amendment and the fragmentation of international climate governance can be read in this sense. On 28 October 2020, 147 Parties deposited their instrument of acceptance, therefore the threshold of 144 instruments of acceptance for entry into force of the Doha Amendment was achieved. The amendment entered into force on 31 December 2020. See van Asselt et al. 2008, 423. Faced with the plain inability of the climate change regime to provide for the much-needed effective responses to the continued climate change problem, a variety of different

The overall assessment of the Kyoto Protocol and of its approach to differentiation tells a story of mixed success: on the bright side, the treaty obligations have scored a high level of compliance, both with regard to emissions reduction commitments and reporting obligations.[76] The far less successful achievement relates to the effectiveness of the climate change regime as a whole to solve the climate change problem: by weakening the legitimacy and crippling the law-making process almost a decade has passed without meaningful advancements in addressing climate change.

4.5.2 *Self-differentiation in the Paris Agreement*

From this divisive legacy and in a climate of political mistrust across States who found themselves free but also lost, not being grouped anymore into the clear though obsolete categories of the Kyoto Protocol, here the Paris Agreement finds its origins.[77] The agreement is the long awaited and desired outcome that takes the scene away from the binary and highly contested North-South approach of the Kyoto Protocol, proposing instead a new picture, which reflects for every State a different shade of colour. The Agreement sets the foundations for a long-term strengthened international cooperation which combines, on the one hand, the flexibility necessary to accommodate the great variety of different national circumstances with, on the other hand, the necessity to rely on uniform and commonly accepted rules.

In Paris, States clearly wanted to distance themselves from the previous narrative and to build a new 'contract' which has its foundations in a renewed conception of CDBR that should strengthen the multilateral effort and provide for an effective, just and long-term response to one of the greatest challenges of our time.[78]

In order to rebuild a globally shared path towards a low-carbon future, the Paris Agreement distances itself from the Protocol approach in many – maybe even all possible – ways. First, with regard to effectiveness, the new treaty pursues a climate target that is scientifically based and represents the threshold that cannot be passed if the international community is not to face catastrophic adverse climate impacts. The 1.5–2°C degree limit is expressly recognized as the ultimate long-term objective that Parties must meet.[79]

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initiatives have been developing starting from the early 2000s. For instance, climate change litigation is growing at the domestic, regional and international level.

[76] Updated information ~~are~~ available at https://unfccc.int/process/the-kyoto-protocol/compliance-under-the-kyoto-protocol.

[77] The ~~turn~~ from the 'top-down' approach of the Kyoto Protocol to the 'bottom-up' model of the Paris Agreement can be traced back to the Copenhagen Accord in 2009. On the (re)evolutions of climate negotiations, see Rajamani 2020, p. 94.

[78] Article 2.2 of the Paris Agreement reads: "This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, *in the light of different national circumstances.* (emphasis added)"

[79] Paris Agreement, Article 2.1(a).

Second, States committed to adopt at the national level mitigation measures according to their respective priorities and capacities (NDCs). Thanks to this bottom-up approach which leaves discretion to States in deciding the kind of climate measures that suits them better, 189 States become Parties, covering 95% of global greenhouse gases emissions. However, at present the aggregate amount of these measures is far from what is scientifically required to keep the temperature rise within the 2 or 1.5 degrees Celsius limit. Parties agreed to periodically review every five years and scale up their mitigation commitments.[80] Another crucial element of the Paris Agreement is the concept of 'ambition' that must also be read in the perspective of the CBDR principle, as evidenced by Article 4.3, which reads: "Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

Do NDCs reflect the principle of solidarity? Substantive emission reduction objectives and commitments are voluntary and hence not legally binding, at least at the international level.[81] As they are currently designed, the answer is no. However, hypothetically, if they were unilateral legally binding commitments, reflecting authentic ambition on behalf of each State in tackling climate change, they could be considered as "active solidarity" commitments. Indeed, States would undertake obligations in pursuit of a common goal, without asking specific corresponding commitments on behalf of other States in return, although the underlying assumption is that every State is expected to do its part, and all others rely on it. Thus, there would be no reciprocity, strictly speaking, but mutual interest in common action. As for 'passive solidarity' this would still not be met, as each State would respond for its own action and no shared responsibility could be envisaged.

The good old binary differentiation pops up nevertheless in some commitments of the Paris Agreement that are only envisaged for developed countries. With regard to financial and technology transfer, for instance, the Paris Agreement envisages reinforced financial commitments of developed countries for mitigation and adaptation initiatives to promote the transition to low-carbon economies in developing States and emerging countries.[82] In order to enhance the transparency, the credibility and the comparability of the action taken, besides communicating every five years on their mitigation measures, developed States parties shall provide on a biennial basis qualitative and quantitative information on the financial resources transferred.[83] Information provided by States on the mitigation, adaptation and financial measures

[80] Paris Agreement, Articles 4.3 and 4.9.

[81] Cfr. Paris Agreement, Article 4.2, second sentence: "Parties shall pursue domestic mitigation measures, *with the aim of achieving the objective of such contributions*". Conversely, obligations to periodically prepare, communicate and adjourn the NDCs are legally binding. Cfr. Paris Agreement, Article 4.2, first sentence: "Each Party *shall prepare, communicate and maintain* successive nationally determined contributions that it intends to achieve".

[82] Paris Agreement, Articles 9.3 and 9.9.

[83] Paris Agreement, Article 13.9.

they undertake both at the domestic and international level shall be clear and scientifically based. The quality of the information they have about the performance of other parties is one of the factors that incentivize States to cooperate. The Paris Agreement repeatedly makes reference to the need to build trust, mutual accountability across all the countries through the creation of a solid transparency framework. The latter certainly echoes the idea of solidarity. Starting from 2023, every five years, the Meeting of the Parties will review the effective implementation of the commitments in order to evaluate the collective progress made in the achievement of the 1.5–2 degrees target.[84]

Overall, the climate regime largely endorses equity, but falls short with regard to solidarity. Lack of authentic solidarity emerges, for instance, from the tense negotiations that aim at building a solid partnership by enhancing transparency, trust and equity but still struggles in reaching a satisfactory and effective package of pledges and commitments under the Paris Agreement. Telling is also the fact that in the climate change regime the issues relating to adaptation and the Warsaw Mechanism on loss and damage deriving from climate change, which are more closely connected with solidarity are always lying behind compared to the more financially attractive mitigation actions. One of the main obstacles to the recognition of loss and damage within the international climate regime is the long-lasting resistance of developed countries to any sort of acknowledgment that climate change damages suffered mainly by developing countries and their peoples are connected to a finding of responsibility on behalf of developed countries and consequently may give legal standing to claims for compensation against them.[85] Hence, in this context too, no passive solidarity can be envisaged.

4.6 Strengthening Domestic Climate Mitigation Commitments Through Domestic Courts' Judgments: The Urgenda Case

NDCs, ambition and the CBDR principle have been endowed with a significant strength in the interpretation provided by the Dutch Supreme Court in the Urgenda case. This judgment contributes to strengthen and clarify these concepts also in thier equity and solidarity dimensions.

[84] Paris Agreement, Article 14 and related Decision "*Recalls*, as provided in Article 14, para 1, of the Paris Agreement, that the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement shall periodically take stock of the implementation of the Paris Agreement to assess the collective progress towards achieving the purpose of the Agreement and its long-term goals, and that it shall do so in a comprehensive and facilitative manner, considering mitigation, adaptation and the means of implementation and support, and in the light of equity and the best available science; 2. *Decides* that equity and the best available science will be considered in a Party-driven and cross-cutting manner, throughout the global stocktake".

[85] Decision 1/CP.21 explicitly states that Article 8 of the Paris Agreement does not provide a basis for any liability or compensation for climate change loss or damage.

According to the claimant, the Urgenda Foundation, the Netherlands had a specific legal obligation of result to reduce greenhouse gases emissions by 25% in 2020, compared to 1990 levels. This ground-breaking claim raises many questions relating to the evaluation of the ambition of States in their climate policies: what criteria should be used in determining whether NDCs are sufficiently ambitious? Should ambition be measured in light of the specific situation of the State? In other words, is the applicable due diligence standard to be measured in light of the CBDR(RC) principle? According to the Court, States have to do what is necessary to fight climate change according to intergenerational equity, CBDR and the precautionary principle. But then again, how do we determine what is necessary? According to which criteria or standard?

The Supreme Court found that on the basis of Articles 2 and 8 of the European Convention on Human Rights (ECHR), the Netherlands has a positive obligation to take measures for the prevention of climate change and has to reduce its greenhouse gas emissions at least by 25% by the end of 2020, compared to 1990 levels.[86]

The Court reasoning is based on the combined reading of the UN climate change regime treaty provisions, decisions of the Conference of Parties and reports of the IPCC, as well relevant EU legislation, with the human rights obligations to protect the right to life under the ECHR.[87] Firstly, the Court, relying on a precautionary approach, considers that risks caused by climate change are sufficiently real and immediate to bring them within the scope of Articles 2 and 8.[88] Once it has established this connection, the Court engages in determining the standard of due diligence and in translating the NDC into a quantitative target of emissions reductions. Considering the seriousness and urgency of the threat, the Court held that the Netherlands should undertake necessary actions. To determine what these are in practice, the Court relies on the UN climate change regime standards, considering them as generally accepted both at the international and at the European level.The Court calculates the individual target applicable to the Netherlands, by desuming it from the global collective target of developed countries: considering that the Netherlands has one of the highest per capita GHG emissions in the world, the Court finds that the 25% collective target of developed countries applies.[89] This far-fetched step of the Court's reasoning expresses an innovative interpretation of the relationship between CBDR and States individual obligations.

Looking at the *Urgenda* case from the perspective of the principle of CBDR, it is noteworthy that the Court does not hesitate to determine the specific target of its

[86] Judgment of 20 December 2019.

[87] The conception of climate change as a human rights issue is upheld by the UN Special Rapporteur on Human Rights and the Environment and the Human Rights Council. Cfr. Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, January 15, 2009, UN Doc. A/HRC/10/61; Human Rights Council, Resolution 35, entitled "Human rights and climate change," adopted on June ~~19,~~ 2017, UN Doc. A/HRC/35/L.32.

[88] The fact that these risks would only become apparent in a few decades does not preclude Articles 2 and 8 ECHR to offer protection against this threat (§5.6.2).

[89] Supreme Court, Judgment of 20 December 2019, para 7.3.4.

Country, relying on the three dimensions of the CBDR principle: responsibilities, capabilities and special vulnerabilities. Accordingly, the Court reasoning takes into account respectively the actual contribution to climate change of the Netherlands as one of the highest per capita emitters of greenhouse gases, its developed country status and, presumably, its special circumstances of being a low-lying State. The Court interprets the principle of CBDR under the climate regime, iuncto with Articles 2 and 8 ECHR, as creating partial obligations, which in turn originate partial responsibility to fight global climate change.[90]

The Paris Agreement focuses and is strongly prone towards recognizing States' obligations to the extent that their national capacities enable them to commit, and is "tainted" by the necessities of political compromise. Indeed, under the Paris Agreement States are definitely not legally bound to achieve their NDCs, and supranational judicial bodies or other States would hardly dear to change this approach. Conversely, a domestic Court can use the same provisions – still of a non-legally binding character – to interpret due diligence obligations that States owe to their citizens pursuant to human rights treaties: in the Urgenda case the Supreme Court – enjoying broader discretionary powers, because it is not bound by the constraints of international negotiations – can be more demanding on its own State in terms of the ambition and the due diligence standard required in climate change mitigation actions.[91] By so doing, the Court stresses the responsibility aspects related to CBDR, and takes a bold stand in interpreting internationally agreed rules and standards of behaviour. This attitude picks up the suggestion of the International Court of Justice in the context of sustainable development that "new norms and standards … set forth in a great number of instruments … have to be taken into consideration and such standards given proper weight …".[92]

This apparent contrast between the Paris Agreement and the Supreme Court judgment may lead to constructive and progressive developments. Even though clearly the two interpretations are not aligned, they are the outcome of different contexts

[90] The Court emphasises that each State bears an individual responsibility which depends from its contribution to climate change as a whole: "The State is therefore obliged to reduce greenhouse gas emissions from its territory in proportion to its share of the responsibility." The extent of responsibility for the inadequate fulfilment of their obligation of conduct to undertake ambitious mitigation policies is measured against the due diligence standard as indicated in the climate regime's rules adopted on the basis of the scientific inputs of the IPCC, and therefore vested with authority and legitimacy.

[91] The *Urgenda* judgment shows how non-legally binding instruments when read in combination with positive obligation of the ECHR, can transform into binding law. On the risks of this 'mutation', see Nollkaemper and Burgers 2020.

[92] ICJ, Gabčikovo Nagymaros Project (Hungaria v. Slovakia), Judgment, ICJ Reports 1997, p. 7, at p. 78, para 140.

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and might end up being complementary.[93] Furthermore they might well contribute to the much-needed effectiveness of the Paris Agreement at the domestic level.

A less progressive picture might be drawn if looking at the human rights dimension of solidarity. It seems that the Supreme Court is mainly, if not exclusively, considering the duty owed by the Netherlands to protect the interests of its inhabitants and does not take an explicit position on whether the jurisdictional scope of the ECHR would have allowed it to consider also interests *outside* the Netherlands.[94]

4.7 Conclusions

International law has often developed in the aftermath of grave events that have unveiled the loopholes and inadequateness of its legal instruments.[95] The recovery from COVID 19 together with the fight against climate change should be combined in a sustainable and solidary development model that minimizes the ecological pressure on ecosystems and the carbon footprint of society, while at the same time, creating new job opportunities and tackling social inequalities.[96]

In this crucial mission, the role of the State – of all States – acting at the international as well as at the domestic level will be crucial. State action should be carried out

[93] While welcoming the boldness of this interpretation, it must be acknowledged that according to the rules on treaty interpretation, the provisions of a treaty should be read in the light of their legal order. This would require to interpret NDCs in light of the Paris Agreement, and hence, providing them with legally binding force would arguably go beyond mere interpretation and constitute an exercise of 'proactive lawmaking' by the Supreme Court.

[94] The Supreme Court thus neither rejected nor supported the conclusion of the IACHR relating to jurisdiction, in its 2018 advisory opinion on human rights and the environment. The IACHR had concluded that when transboundary harm or damage occurs, a person is under the jurisdiction of the State of origin if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory. Note that in first instance, the District Court had accepted Urgenda's standing on behalf of people outside the Netherlands and on behalf of future generations.

[95] Many are the examples that come to mind: from the conventional and customary rules protecting human rights that came to existence after the atrocities of World War II, to the adoption of marine environmental protection treaties following extremely pernicious accidents at sea causing vast oil spills. The COVID-19 pandemic is but another of these crises that has caused unimaginable pain across the whole planet that will hopefully prompt a decisive normative development towards a more effective prevention of pandemics and protection of global health.

[96] In the aftermath of the COVID-19 pandemic, the IMF, who is generally known to set strict conditionalities on States in exchange of financial support, has adopted an unprecedented approach that appears profoundly inspired by solidarity. The IMF encouraged States to spend, invited Central Banks to take concerted actions and granted concessional finance to weaker countries in a fast-track procedure. Kristalina Georgieva (Managing Director at the IMF), A Global Crisis Like No Other Needs a Global Response Like No Other, IMFblog "This is a moment that tests our humanity. It must be met with solidarity." (available at https://blogs.imf.org/2020/04/20/a-global-crisis-like-no-other-needs-a-global-response-like-no-other/).

with diligence and respect the highest standards of behaviour, such as those agreed at the international level with regard to human rights and climate change.[97]

Moral values, like solidarity and equity, when incorporated into international law, could enable it to effectively tackle structural inequalities and better achieve common goals. This analysis shows that, while solidarity remains so far not fully conceptualized in the international legal discourse, equity, through the CBDR(RC) principle, is transposed in legal obligations under the climate change regime.

It may well be that 'solidarity' is declined in different ways and takes different forms depending on the specific context in which it applies: hence, it constitutes a legal obligation at EU level with regard to cooperation on matters of energy security, while it is a moral duty in the context of global health with regard to the distribution of vaccines or other medical equipment. In our understanding solidarity obligations should be distinguished from situations where one State or a group of States owe other States obligations according to another legal source. Thus, for example, solidarity should be distinguished from the legal obligations arising from the CBDR principle under the climate change regime. The latter finds its rationale and stems from – at least in part – the historical responsibilities of industrialized countries, and, as time goes by, of other major emitters of greenhouse gases. Furthermore, differentiation derives from their more advanced capabilities, and favourable national circumstances (the assumption being that these latter favourable situations have been achieved by taking advantage of economic progress, achieved by emitting greenhouse gases). Hence, solidarity – which according to the above definition requires that action is intended to benefit only the common objective – cannot be considered the main or the only legal basis for these obligations. Rather, these obligations represent a form of 'reward', or 'compensation' for previous behaviours that turned out to have negative impacts in the long term.[98]

In the actual inter-reign where no substantive solidarity (yet) exists, a viable alternative path could be the resort to procedural solidarity. For instance, States could be required to take into account other States' interests, exchange information and consult with other States, before taking regulatory measures that may have a – positive or negative – impact on them. This approach has already been envisaged back in 1986 in the Seoul Declaration of the International Law Association and would well reflect todays' trend of the 'proceduralisation' of international law in general, and of the Paris Agreement on climate change in particular. Such an approach would allow to progress in addressing the structural inequalities across States, situations of

[97] On the concept of the diligent exercise of State sovereignty, see Besson 2020, p. 202: "la notion de souveraineté diligente qui pourrait desormais nous permettre de developer une conception plus solidaire et respectueuse de la souveraineté des Etats en tant que membres égaux de l'ordre institutionnel international."

[98] A parallel reasoning could be advanced with regard to the principles of access and benefit sharing (ABS) under the Convention on Biological Diversity (CBD). Here, the duty to provide benefits to developing countries is a form of reward for their contribution as stewards protecting biodiversity and genetic resources. Cfr. Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, 29 Oct. 2010, UNEP/CBD/COP/DEC/X/1, available at: www.cbd.int/abs/text/.

injustice and would contribute to the progressive achievement of human rights and of common threats, such as climate change.

Beside States, non-state actors must step up and contribute to the achievement of common objectives.Indeed, they are increasingly active and necessary protagonists, in tackling global challenges and in achieving public goods.Private actors, and in particular companies and investors find themselves in situations that recall the CBDR principle and the structural imbalances just seen across States: they have taken advantage and gained economic power by contributing to climate change and are now in key positions to influence the transition to a carbon-neutral economic model. Already the Kyoto Protocol, mainly through the CDM, recognizes the importance of their contribution in achieving substantive GHG emission reductions and expressly envisages their participation in international climate change governance. Following on this path, the Paris Agreement adopts an inclusive attitude by acknowledging the importance of engaging "all levels of government" and other non-state actors in addressing climate change.[99]

Cooperation between States and private actors is becoming more formalized and takes the form of public-private partnerships (PPPs). Pressing questions relate to the nature, functions and correspondent obligations of these new actors in the international arena, for instance, whether – and if so, to what extent – they also bear some kind of solidary and equity-based obligations or responsibilities, or if States remain the sole subjects that can be held responsible for achieving common interest objectives, or missing to do so.

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Francesca Romanin Jacur is a Senior Researcher in International Law, Università degli Studi di Brescia, Brescia, Italy. In writing this chapter, the author has greatly benefitted from mind-opening discussions on moral and philosophical matters with Francesco Oniga-Farra, and is very grateful for the readings he suggested and provided on these aspects.