

# Solidarity as Foundation for Economic, Social and Cultural Rights

Koldo Casla\*  and Marion Sandner\*\* 

## ABSTRACT

The potential of the principle of solidarity as an interpretative guide for the realisation of ESCR has, to date, been largely overlooked. Solidarity mediates between the individual and the community, and it has a collective dimension in relation to both burden- and benefit-sharing. The recognition of ESCR creates not only positive legal obligations on the state but also civic responsibilities on individuals to contribute, within their means, to the progressive realisation of ESCR. While the state is ultimately accountable for making progress on ESCR, taking these rights seriously will have implications for individual rights and responsibilities. We argue in this article that the principle of solidarity *within society* underpins ESCR as a whole and is essential for achieving sustainable progress on ESCR. This is because their progressive realisation requires not only that states' legal obligations are fulfilled but also that individual and collective contributions are made for the common good.

**KEYWORDS:** economic, social and cultural rights (ESCR), international human rights law, international relations, responsibility, solidarity

## 1. INTRODUCTION

What do we owe each other?<sup>1</sup> What does society owe us? And what do we owe it in return? These questions have inspired social contract theorists for centuries. This paper will address them from the starting point of the economic, social and cultural rights (ESCR) recognised in international human rights law (IHRL). It will decode the meaning and significance of solidarity, with the corresponding obligations for the state and responsibilities for individuals.<sup>2</sup>

\* Senior Lecturer, Law School, University of Essex, UK. Email: [koldo.casla@essex.ac.uk](mailto:koldo.casla@essex.ac.uk)

\*\* Doctoral Researcher, Hasselt University and University of Antwerp, Belgium. Email: [marion.sandner@uhasselt.be](mailto:marion.sandner@uhasselt.be)

<sup>1</sup> Scanlon, *What We Owe to Each Other* (2000).

<sup>2</sup> Unless stated otherwise, in this paper, we distinguish between 'duties' as legal obligations, and 'responsibilities' as moral or civic obligations, a distinction we will return to in [Subsection 3.B](#). We acknowledge that the distinction between the two concepts, responsibilities and duties, is not straightforward in international law. Article 29 of the Universal Declaration of Human Rights refers to individual 'duties to the community'. (Universal Declaration of Human Rights 1948, GA Res 217A (III), A/810 at 71 (1948)). However, in Resolution 1845(2011), the Parliamentary Assembly of the Council of Europe draws a line between duties, defined as legal obligations, and responsibilities, defined as moral ones. (Council of Europe Parliamentary Assembly, Recommendation 1845 (2011), Fundamental rights and responsibilities). Similarly, the 2011 UN Guiding Principles on Business and Human Rights distinguish between State duties and corporate responsibilities. (Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, 2011, A/HRC/17/31). At the same time, the 1998 Declaration on the Right and

Received: October 5, 2023. Revised: February 9, 2024. Accepted: April 10, 2024

© The Author(s) [2024]. Published by Oxford University Press.

This is an Open Access article distributed under the terms of the Creative Commons Attribution License (<https://creativecommons.org/licenses/by/4.0/>), which permits unrestricted reuse, distribution, and reproduction in any medium, provided the original work is properly cited.

The word solidarity is no stranger to the legal and political discourse surrounding human rights, and it is present in multiple IHRL references, as we will see later in Section 2. However, solidarity is also a polysemic and inherently contentious word. While many scholars and most international and regional human rights bodies claim that solidarity can be considered an underlying principle in IHRL, there is much less agreement as to the implications, including the concrete rights, duties and responsibilities, flowing from solidarity, as well as the legal, political or moral nature of those rights, duties and responsibilities.<sup>3</sup> This has particular implications for ESCR. The UN Committee on ESCR (CESCR) has traditionally adopted an agnostic approach, claiming that the International Covenant on ESCR (ICESCR) ‘neither requires nor precludes any particular form of government or economic system’.<sup>4</sup> Yet, it is becoming ever more urgent to examine whether ESCR, as recognised in IHRL and in domestic legal systems, are well equipped to deal with the multiple challenges of the so-called polycrisis of our times: climate change, public health risks, austerity, rising cost of living, political polarisation and mistrust of the authorities, etc.<sup>5</sup> The idea of solidarity as a foundational principle and a crucial interpretive tool of ESCR has significant implications because solidarity entails a web of support, of give and take, which is based not only on the state but also on the individuals and other private actors in a given society. While the state is the ultimate guarantor of ESCR implementation, individuals and private actors have a role to play in contributing to the systems to guarantee ESCR—social security, public healthcare or pension system, for example. Without such systems in place, societies are less resilient and more prone to severe, lasting harms amid the crises described above. There is a conceptual and an empirical association between solidarity, on the one hand, and levels of inequality, general wellbeing and the state of the social fabric, on the other.<sup>6</sup> In other words, societies with deeply entrenched solidarity ties tend to fare better in terms of lower inequality, a higher degree of human development and stronger social bonds. Approaching the notion of solidarity from a distinct ESCR lens helps to get a better grasp of the scope and content of these rights, as well as of solidarity itself as a principle.

There is a close bond between solidarity, on the one hand, and responsibilities and duties, on the other. This is so because solidarity calls for duties/responsibilities applicable to the units belonging to a certain political community, understood as a group of people in a defined territory bound by certain values and shared institutions.<sup>7</sup> The Oxford English Dictionary defines solidarity as ‘the fact or quality, on the part of communities, etc., of being perfectly united or at one in some respect, esp. in interests, sympathies, or aspirations’.<sup>8</sup> The concept of solidarity entails that the units that form a collective, in addition to their individual values and goals, share an interest in the wellbeing and destination of the group, and potentially care about the wellbeing

Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (known as the Declaration on Human Rights Defenders) does not make a clear distinction between the two terms, with a general reference to ‘duties’ borrowing the language of the Universal Declaration of 1948, and a programmatic proclamation of individuals’ ‘important role to play and a responsibility’ to safeguard and promote human rights. (GA Res 53/144, 9 December 1998, Article 18).

<sup>3</sup> Campanelli, ‘Principle of Solidarity’ in Peters and Wolfrum (eds), *Max Planck Institute for Comparative Public Law and International Law* (2011) at para 21; Cook, ‘Solidarity as a Basis for Human Rights: Part One: Legal Principle or Mere Aspiration’ (2012) 5 *European Human Rights Law Review* 504; Brandes, ‘Solidarity as a Constitutional Value’ (2021) 27 *Buffalo Human Rights Law Review* 59; Pribytikova, ‘Are There Global Obligations to Assist in the Realization of Socio-Economic Rights?’ (2021) 54 *N.Y.U. Journal of International Law & Politics* 379.

<sup>4</sup> UN Committee on Economic, Social, and Cultural Rights, General Comment No. 3: The Nature of State Obligations’ (Committee on Economic, Social and Cultural Rights, fifth session 1990) E/1991/23 at para 8.

<sup>5</sup> Tooze, ‘Welcome to the world of the polycrisis’, *Financial Times*, 28 October 2022.

<sup>6</sup> Wilkinson and Pickett, *The Spirit Level: Why More Equal Societies Almost Always Do Better* (2009); Wilkinson and Pickett, *The Inner Level: How More Equal Societies Reduce Stress, Restore Sanity and Improve Everyone’s Well-being* (2018); Sandel, *The Tyranny of Merit: What’s Become of the Common Good?* (2020).

<sup>7</sup> Brandes supra n 3 at 61; Foqué, ‘Human Rights and Human Responsibilities. Setting the Ethical and the Conceptual Scene’ in Parmentier, Werdmolder and Merrigan (eds), *Between Rights and Responsibilities: A Fundamental Debate* (2016) 13 at 17.

<sup>8</sup> Oxford English Dictionary, available at <https://www.oed.com/> [last accessed 14 September 2023].

and destination of other units within the group. While we do not argue that the concept of solidarity, for the purposes of our analysis from an IHRL angle, necessarily presupposes unity in interests, sympathies or aspirations, we do hold that it requires individual contributions to, and a sense of ownership in, the broader common good of a collective, community or society. This does not necessarily imply that such contributions must be of entirely voluntary nature. It is possible that a system of solidarity, to which individual units of a collective have subscribed, will ultimately call for acts of solidarity by way of enforcement of the rules that govern the system of solidarity—for example, in relation to taxation (as explored in Subsection 4.A).

It is important to clarify *what we do not mean* by the word *solidarity*. We understand solidarity in the etymological sense of the word, in line with the definition above, as the individual identity with, interest in and responsibility for the general wellbeing of the collective. We use the term solidarity as an interpretive tool to strengthen and to shed light on IHRL provisions. We do not deny that individuals may feel personally committed to the cause of universal solidarity—with all human beings, including potentially future generations—across borders. We also acknowledge that the labour movement and other progressive campaigns have historically pursued horizontal internationalist advocacy (workers of the world, unite!). Yet, the ambition of this paper is more modest. We use the word solidarity in the dual sense recognised in IHRL, as developed in Sections 2 and 3, meaning solidarity between states and solidarity between individuals within a state.

The analysis will proceed as follows. Section 2 shows that different legal sources lead to a range of possible interpretations of the role and weight of international solidarity (between states or societies) in IHRL: While treaties and foundational documents clearly stress the global dimension of solidarity, the Universal Periodic Review and voting patterns at the UN Human Rights Council reveal a dividing line between different groups of states as to their attitudes towards international solidarity. The normative content and the empirical manifestation of international solidarity as a principle in international law seems debatable. On the other hand, solidarity could have greater potential as an interpretative guide for the realisation of ESCR domestically; yet, such potential has to date been largely overlooked. Section 3 explores the meaning of internal solidarity (within states) under IHRL, expanding on the conceptual association between solidarity, responsibilities, duties and ESCR. Solidarity mediates between the individual and the community, and it has a collective dimension in relation to both burden- and benefit-sharing. ESCR give rise not only to positive obligations on the state but also to civic responsibilities on individuals to contribute meaningfully, within their means, to the progressive realisation of ESCR. This has important implications for two policy areas of major significance for the fulfilment of ESCR, taxation and property, as developed in Section 4.

Since our legal reference is IHRL, the analysis in Sections 2 and 3 is limited to the core international UN human rights instruments directly concerning ESCR,<sup>9</sup> as well as relevant regional treaties in Africa, the Americas and Europe. Other instruments including those relating to refugee protection, the environment or pandemic preparedness, are out of the scope of this paper due to their less direct relationship with core human rights standards applied by UN Treaty Bodies, Special Procedures and regional human rights bodies.

## 2. INTERNATIONAL SOLIDARITY AND INTERNATIONAL HUMAN RIGHTS LAW ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Following roughly Article 38(1) of the Statute of the International Court of Justice concerning the sources of international law,<sup>10</sup> Section 2 takes human rights treaty law and foundational

<sup>9</sup> As listed on OHCHR website, available at: <https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies> [last accessed 14 September 2023].

<sup>10</sup> Statute of the International Court of Justice, 18 April 1946, 33 UNTS 993.

documents as the starting point for the analysis, followed by soft law, including authoritative interpretations of treaty provisions by human rights monitoring bodies, and lastly turn to national constitutions, jurisprudence and state practice through diplomatic positions expressed in the UN Human Rights Council. In Section 2, we investigate how international solidarity is referenced in IHRL, with a particular focus on the role of solidarity in the implementation of ESCR. In Section 3, we will do the same in relation to internal or intra-societal solidarity.

While not a treaty, it is pertinent to begin with the 1948 Universal Declaration of Human Rights. Article 28 UDHR proclaims that '[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized', a desideratum for a world based on solidarity between nations. The Draft Declaration on Human Rights and International Solidarity, to which we will return later in this section, finds in Article 28 evidence that international solidarity somehow inspired the UDHR.<sup>11</sup> As observed by both Morsink and Gibney, Article 28 was not one of the most controversial provisions of the Universal Declaration.<sup>12</sup> States seemed willing to accept its inclusion in a text with declaratory intentions.

The 1966 ICESCR, the principal treaty on ESCR, stipulates in Article 2 that state parties are to take steps 'individually and through international assistance and co-operation, especially economic and technical, to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights [...]'.<sup>13</sup> International solidarity and international assistance and cooperation are not synonymous. However, the *travaux préparatoires* show that solidarity was indeed an important part of the diplomatic discourse to advocate for the explicit inclusion of international assistance and cooperation in the ICESCR.<sup>14</sup> For example, the Mexican representative expressed in 1950 that 'if there were an equality of social, economic and financial conditions throughout the world, there would be no need for the covenant'.<sup>15</sup> Taking a cue from ICESCR, more recent international human rights treaties, notably the 1989 Convention on the Rights of the Child and the 2006 Convention on the Rights of Persons with Disabilities, require 'international cooperation' between state parties.<sup>16</sup> At the regional level, the 1981 African Charter on Human and Peoples' Rights mandates state parties to 'individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African Unity and solidarity'.<sup>17</sup> By calling on state parties to jointly work towards the realisation of the respective rights, these various treaty provisions on cooperation between states de facto create programmatic expectations of international solidarity as a means for advancing the enjoyment of rights, albeit without specifying mechanisms for accountability in catering to those expectations.<sup>18</sup>

<sup>11</sup> Independent Expert on Human Rights and International Solidarity, Revised Draft Declaration on the Right to International Solidarity, A/HRC/53/32 (UN Human Rights Council 2023) Preamble.

<sup>12</sup> Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (1999) 231–2; Gibney, 'Establishing a Social and International Order for the Realization of Human Rights' in Minkler (ed.), *The State of Economic and Social Human Rights* (2013) at 251.

<sup>13</sup> International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UNTS 993.

<sup>14</sup> For example, Uruguay in UNGA Third Committee, A/C.3/SR.573 (3 November 1954) at para 15, Guatemala in UNGA Third Committee, A/C.3/SR.673 (28 November 1955) at para 28, Japan in UNGA Third Committee, A/C.3/SR.740 (24 January 1957) at para 25, Chile in UNGA Third Committee, A/C.3/SR.742 (25 January 1957) at para 24, Mexico in UNGA Third Committee, A/C.3/SR.1204 (6 December 1962) at para 21, France in UNGA Third Committee, A/C.3/SR.1405 (27 October 1966) at para 32 (Saul (ed.) *The International Covenant on Economic, Social and Cultural Rights: Travaux Préparatoires, Volume II* (2016) at 1519, 1669, 1913, 1920, 2200 and 2406).

<sup>15</sup> 307<sup>th</sup> Meeting, Draft Resolution Submitted by Brazil, Turkey and the USA (A/C.3/L.76), A/C.3/SR.307, 8 November 1950, at para 21; Saul (ed.), *The International Covenant on Economic, Social and Cultural Rights: Travaux Préparatoires, Volume I* (2016) at 210.

<sup>16</sup> Articles 23(4) and 28(3) of Convention on the Rights of the Child, 20 November 1989, UNTS 1577; Articles 4(2) and 32 of Convention on the Rights of Persons with Disabilities, 24 January 2007, A/RES/61/106.

<sup>17</sup> Article 21(4) of African Charter on Human and Peoples' Rights, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

<sup>18</sup> Courtis and Sepúlveda Carmona, 'Are Extra-Territorial Obligations Reviewable under the Optional Protocol to the ICESCR?' (2009) 27 *Nordic Journal of Human Rights* 54; Wellman, 'Solidarity, the Individual and Human Rights' (2000) 22 *Human Rights Quarterly* 639.

A closer look at the requirement of international cooperation and its implicit call for interstate solidarity is due. The CESCR has made it clear in its authoritative interpretations of treaty provisions that the obligations of state parties under ICESCR extend beyond their own territorial borders.<sup>19</sup> The Committee further elaborates that ‘international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all states [...] particularly incumbent upon those States which are in a position to assist others in this regard’.<sup>20</sup> In other words, certain states are understood to be under an obligation to seek, while others may be in a position to offer cooperation and assistance.<sup>21</sup> This would apply across all cross-border matters with rights implications, such as climate change, security, migration, finance, investment and trade.<sup>22</sup> Borrowing the language from environmental law, scholars and the CESCR itself have talked of states having ‘common but differentiated responsibilities’ to advance the enjoyment of rights in societies across the world.<sup>23</sup>

The Maastricht Principles on Extraterritorial Obligations of States in the area of ESCR (2011), drafted by an international group of experts, further refine the content of states’ extraterritorial obligations flowing from ESCR.<sup>24</sup> The Principles recognise a positive obligation of states to ‘take action, separately, and jointly through international cooperation, to fulfil economic, social and cultural rights of persons within their territories and extraterritorially’, and to provide and seek international assistance and cooperation.<sup>25</sup> They add that states must refrain from any conduct that impairs the ability of another state to comply with its human rights commitments.<sup>26</sup> This extends to states’ decisions as members of international organisations, for example, when it comes to conditions on loans that can be harmful to the enjoyment of human rights in the recipient state.<sup>27</sup> The more recent Maastricht Principles on the Human Rights of Future Generations (2023) view international solidarity as a precondition for the creation of an international and social order where the rights of future generations can be realised.<sup>28</sup> These new Maastricht Principles also declare that everyone has ‘responsibilities and duties to themselves, their community and society, and to humanity as a whole’.<sup>29</sup> Just like the CESCR and ICESCR, the Maastricht Principles of 2011 and of 2023 do not go as far as spelling out a specific right, duty or principle of solidarity as such.<sup>30</sup>

The UN General Assembly’s 2030 Agenda speaks of states’ cooperation duties to achieve the Sustainable Development Goals, and calls for a ‘Global Partnership’ as ‘means of implementation’, emphasising the need for solidarity with those living in poverty and vulnerable

<sup>19</sup> UN Committee on Economic, Social and Cultural Rights supra n 4 at para 13.

<sup>20</sup> Ibid. at para 14.

<sup>21</sup> Special Rapporteur on Extreme Poverty and Human Rights, Final Draft of the Guiding Principles on Extreme Poverty and Human Rights, A/HRC/21/39 (UN Human Rights Council, twenty-first session, 2012) at para 94.

<sup>22</sup> Further details in terms of the application of extraterritorial obligations in various thematic areas can be found in Gibney and others, *The Routledge Handbook on Extraterritorial Human Rights Obligations* (2021).

<sup>23</sup> Vandenhole, ‘De-Growth and Sustainable Development: Rethinking Human Rights Law and Poverty Alleviation’ (2018) 11 *Law and Development Review* 647 at 662; Salomon, *Global Responsibility for Human Rights* (2007) 193; Gibney and others supra n 22 at 467; UN Committee on Economic, Social and Cultural Rights, ‘Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural Rights (Committee on Economic, Social and Cultural Rights 2020) E/C.12/2020/1 at para 20.

<sup>24</sup> Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011) 29 *Netherlands Quarterly of Human Rights* 578.

<sup>25</sup> Ibid. at paras 28, 33 and 34; De Schutter, Eide, Khalfan, Orellana, Salomon and Seiderman, ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’ (2012) 34 *Human Rights Quarterly* 1084.

<sup>26</sup> Maastricht Principles supra n 24 Principles 20, 21.

<sup>27</sup> Ibid. Principle 15.

<sup>28</sup> Maastricht Principles on the Human Rights of Future Generations (July 2023), Principle 10, available at: <https://www.rightsoffuturegenerations.org/> [last accessed 14 September 2023].

<sup>29</sup> Ibid. Principle 27.a.

<sup>30</sup> Vandenhole, ‘Beyond Territoriality: The Maastricht Principles on Extra-Territorial Obligations in the Area of Economic, Social and Cultural Rights’ (2011) 29 *Netherlands Quarterly of Human Rights* 429.

situations.<sup>31</sup> At the same time, the Agenda's central promise of 'leaving no one behind' implicates that efforts are needed towards community-building and reinforcing solidarity ties within society.<sup>32</sup> In target 1.A of the Goals, states made a commitment to ensure a significant mobilisation of resources, including through enhanced development cooperation, in order to end poverty.

The former UN Commission on Human Rights created the mandate of the UN Independent Expert on human rights and international solidarity in 2005. Then Independent Expert Virginia Dandan widely consulted on a Draft Declaration on the Right to International Solidarity, which was presented to the UN Human Rights Council in 2017,<sup>33</sup> and revised by her successor Obiora Chinedu Okafor in 2023.<sup>34</sup> The Revised Draft Declaration stipulates a right to international solidarity and a corresponding duty of states to realise it.<sup>35</sup> However, the text does not shed light on how solidarity is to be translated into a right with specific content, obligations, rights-holders and duty-bearers. Solidarity was defined in the 2017 Draft as 'the expression of a spirit of unity among individuals, peoples, States and international organizations, encompassing the union of interests, purposes and actions and the recognition of different needs and rights to achieve common goals'.<sup>36</sup> The 2023 Revised Draft amends the text slightly to say that solidarity is 'an expression of unity by which peoples and individuals enjoy the benefits of a peaceful, just and equitable international order, secure their human rights and ensure sustainable development'.<sup>37</sup> It thereby shifts the focus further towards the international (as opposed to internal, domestic) dimension of solidarity. It also underscores the duty of global solidarity, which goes hand in hand with a proposed right to global solidarity.<sup>38</sup>

A previous holder of the UN mandate of Independent Expert on human rights and international solidarity, Rudi Muhammad Rizki, attempted to lay the foundation of the legal nature of international solidarity in customary law, which requires both state practice and *opinio juris*: 'States participate collectively within the framework of numerous global, regional and sub-regional organizations with multilateral and bilateral arrangements, again demonstrating solidarity in principle and practice, [ . . . ] consonant with conviction, of an implicit or explicit recognition of international solidarity as a principle of international law'.<sup>39</sup> However, this statement appears to be more an expression of an ideological desideratum than an observation of state action carried out as a legal obligation. A drafting group on human rights and international solidarity of the Human Rights Council Advisory Committee supported the view that international solidarity is a right, and not only a principle.<sup>40</sup> Yet, the drafting group did not provide detail about the differences between solidarity as a right and solidarity as a principle, and failed to elucidate the legal status, let alone the meaning itself, of international solidarity.

In sum, the CESCR, the authors of the Maastricht Principles of 2011 and 2023 and wide scholarship sustain the view that international cooperation is a legal obligation in IHRL. This, in turn, would mean that states are supposed to work towards a common goal, in this case (broadly

<sup>31</sup> UN General Assembly, Transforming Our World: The 2030 Agenda for Sustainable Development, A/RES/70/1 (2015) at para 39.

<sup>32</sup> *Ibid.* Preamble at para 2 and paras 4, 26, 48 and 72.

<sup>33</sup> Independent Expert on Human Rights and International Solidarity, Draft Declaration on the Right to International Solidarity, A/HRC/35/35 (UN Human Rights Council 2017).

<sup>34</sup> Independent Expert on Human Rights and International Solidarity *supra* n 11.

<sup>35</sup> *Ibid.* Articles 4(1) and 6(1).

<sup>36</sup> Article 1(1) Independent Expert on Human Rights and International Solidarity *supra* n 33.

<sup>37</sup> Article 1(1) Independent Expert on Human Rights and International Solidarity *supra* n 11.

<sup>38</sup> *Ibid.* Part II.

<sup>39</sup> Independent Expert on Human Rights and International Solidarity, Human Rights and International Solidarity, A/HRC/12/27 (UN Human Rights Council 2009) at para 13.

<sup>40</sup> Human Rights Council, Twenty-first session, Final paper on human rights and international solidarity: Prepared by Chen Shiqiu on behalf of the drafting group on human rights and international solidarity of the Human Rights Council Advisory Committee (16 August 2012) A/HRC/21/66.

speaking) the realisation of ESCR—and to support each other in doing so. Although a specific right and duty to solidarity as such, as put forward by the mandate of the Independent Expert, seems rather unlikely to be upheld based on the international ESCR framework, one might be tempted to conclude that there is a legitimate and legally enshrined claim to global solidarity in the form of international assistance and cooperation. However, as we are about to see, the political reality of state practice points in a different direction. It remains contentious, to say the least, whether states recognise a legal positive duty of solidarity to assist other societies in realising their ESCR.

Following Schachter, an *opinio juris* can be expressed *first* as a declaration and *secondly* as state practice, but state practice is required for *opinio juris* to become law.<sup>41</sup> Hurd's three ideal tests of norm authority are useful in this regard: compliance, justification and automaticity, this third one being the highest threshold, reached when the norm 'has entered into the decision-making calculus of states'.<sup>42</sup> In order to assess *opinio juris* regarding global solidarity against the normative framework laid out above, we have looked at state recommendations, both issued and received, within the framework of the UN Human Rights Council's Universal Periodic Review (UPR) and voting records of Human Rights Council resolutions.

The UPR provides an opportunity to identify the human rights themes that states deem worth focusing on in a public diplomatic forum. Up to February 2024, most (34 out of 58) recommendations issued during the UPR featuring the word 'solidarity' concerned global solidarity and international cooperation.<sup>43</sup> In other instances, the word is used in relation to fostering intercommunity dialogue, to urge the promotion of peace in international relations or to advocate for the acceptance of more asylum applications. These recommendations have almost entirely been made by states from the Global South, referring to solidarity as a value or as a right, with Venezuela (14 times), Cuba and Sudan (4 times) and Madagascar and Nicaragua (3 times) topping the list. Among receiving states' responses are many supportive ones (mainly, again, by Global South states), but also two non-supportive ones ('noted'), both by Global North states: Luxembourg from Ecuador in 2013,<sup>44</sup> and USA from Cuba in 2020.<sup>45</sup> With regard to international cooperation and extraterritorial obligations, states' responses to recommendations concerning an increase of overseas development assistance to 0.7 per cent of the GDP indicate a similar pattern: 16 out of a total of 76 such recommendations were 'noted' by the respective state under review, primarily by Australia, USA, Canada and France. Heupel's analysis of states' views in relation to extraterritorial obligations in UPR recommendations concludes that extraterritorial obligations are loosely recognised but perceived as negative obligations only.<sup>46</sup>

Overall, the vast majority of all international cooperation and solidarity-related Human Rights Council resolutions between 2006 and late 2023 (23 out of 25) were tabled by Global South states and/or the Russian Federation, with Global North states often voting against.<sup>47</sup>

<sup>41</sup> Schachter, 'New Custom: Power, *Opinio Juris* and Contrary Practice', in Makarczyk (ed.), *Theory of International Law and the Threshold of the 21<sup>st</sup> Century* (1996) 531 at 532.

<sup>42</sup> Hurd, 'Theories and tests of international authority', in Cronin and Hurd (eds), *The UN Security Council and the Politics of International Authority* (2008) 23 at 35.

<sup>43</sup> UPR-Info, available at: [<sup>44</sup> Ecuador recommending to '\[c\]onsider the possibility of increasing the rate of accepted asylum applications, \[...\] and also consider increasing the acceptance of applications for solidarity resettlement of refugees' \(A/HRC/23/10, at para 118.75\).](https://upr-info-database.uwazi.io/library/?q=(allAggregations:!f, filters:(), from:30, includeUnpublished:!f, limit:30, order:desc, searchTerm:%27solidarity%27, sort:creationDate, unpublished:!f), all review cycles considered [last accessed 9 February 2024].</a></p>
</div>
<div data-bbox=)

<sup>45</sup> Cuba recommending to '[r]ecognize and respect the human rights to peace, development and international solidarity through the renunciation of aggression, interference and unilateral coercive measures' (A/HRC/46/15, at para 26.158).

<sup>46</sup> Heupel, 'How Do States Perceive Extraterritorial Human Rights Obligations? Insights from the Universal Periodic Review' (2018) 40 *Human Rights Quarterly* 521.

<sup>47</sup> Universal Rights Group, UN Human Rights Resolutions Portal, available at: <https://www.universal-rights.org/human-rights/human-rights-resolutions-portal/> [last accessed 14 September 2023].

Relevant to this point, the failed Declaration on Human Social Responsibilities, drafted in 2003 at the request of the then UN Commission on Human Rights, drew an explicit connection between ‘individual responsibilities’ and ‘human solidarity towards all other human beings’.<sup>48</sup> However, the special rapporteur Miguel Alonso Martínez reported a clear North–South divide, where Global North states opposed the draft while Global South states generally endorsed it.<sup>49</sup> In sum, it is reasonable to conclude from the UPR and the Human Rights Council in general that the notion of global solidarity as a legal principle and (related) positive extraterritorial obligations under IHRL are not accepted by Global North states (at least not as positive obligations). Instead, global solidarity tends to be labelled by these states merely as a ‘moral and political commitment’, outside the legal framework.<sup>50</sup> This conclusion is in line with recent scholarship in International Relations, which observes radical changes in contemporary global politics,<sup>51</sup> changes that should make us reconsider the so-called ‘solidarist consciousness’ of the late 1980s and 1990s, which supposedly had opened the door to a new understanding of international legitimacy inclusive of human rights.<sup>52</sup>

Skogly holds that ‘[t]he fact that states, particularly in the last 20 years, have been reluctant to expressly accept global human rights obligations does not remove the obligations based on international law. [ . . . ] Legal obligations entered into by ratifying treaties are not altered by states taking different views in different political realities’.<sup>53</sup> Yet, while the legally binding nature of the obligation of international cooperation and assistance has indeed been recognised by the CESCR,<sup>54</sup> the Committee has failed to spell out its concrete content, its rights-holders and duty-bearers.<sup>55</sup> In reality, states’ approaches, especially in the face of crises, are often isolationist rather than collaborative.<sup>56</sup> States tend to favour a territorial approach to IHRL, according to which their obligations extend only to their jurisdiction.<sup>57</sup> States’ responses to the Covid-19 pandemic illustrate this quite clearly in relation to the development, production and global distribution of vaccines: Excess vaccines were concentrated in the Global North, while many Global South states found themselves in a situation where vaccines were unavailable, unaffordable and heavily

<sup>48</sup> Human rights and human responsibilities Final report of the Special Rapporteur, Miguel Alfonso Martínez, on the Study requested by the Commission in its resolution 2000/63, and submitted pursuant to Economic and Social Council decision 2002/277, E/CN.4/2003/105, 17 March 2003, Article 3.

<sup>49</sup> *Ibid.* p 2.

<sup>50</sup> See, for example, the statement of the European Union in response to report presented by the Independent Expert on human rights and international solidarity (A/HRC/44/44) at the 44<sup>th</sup> Regular Human Rights Council Session, in 2020. Available at: <https://media.un.org/en/asset/k13/k13ofblfd9> [last accessed 14 September 2023].

<sup>51</sup> Kupchan, *No One's World: The West: The Rising Rest, and the Coming Global Turn* (2012); Acharya, *The End of American World Order* (2014); Buzan and Lawson, *The Global Transformation: History, Modernity and the Making of International Relations* (2015); Acharya and Buzan, *The Making of Global International Relations: Origins and Evolution of IR at its Centenary* (2019).

<sup>52</sup> Hurrell, ‘Order and Justice in International Relations: What Is at Stake’, in Foot, Gaddis and Hurrell (eds), *Order and Justice in International Relations* (2003) 24; Vincent, *Human Rights and International Relations* (1987).

<sup>53</sup> Skogly, ‘Global Human Rights Obligations’ in Mark and others (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (2021) 25 at 29.

<sup>54</sup> For example, in the context of the Covid-19 pandemic: Bueno de Mesquita and others, ‘Lodestar in the Time of Coronavirus? Interpreting International Obligations to Realise the Right to Health During the COVID-19 Pandemic’ (2023) 23 *Human Rights Law Review* 1; UN Committee on Economic, Social and Cultural Rights supra n 23 at para 20; UN Committee on Economic, Social and Cultural Rights, ‘Statement on Universal Affordable Vaccination against Coronavirus Disease (COVID-19), International Cooperation and Intellectual Property’ (Committee on Economic, Social and Cultural Rights 2021) E/C.12/2021/1 at para 3.

<sup>55</sup> Wewerinke-Singh, ‘Pandemics, Planetary Health and Human Rights: Rethinking the Duty to Cooperate in the Face of Compound Global Crises’ in de Wet, Kathrin Maria Scherr and Rudiger Wolfrum (eds), *Max Planck Yearbook of United Nations Law Online* (2021).

<sup>56</sup> For example, in relation to the Covid-19 pandemic: Meier, Bueno de Mesquita and Williams, ‘Global Obligations to Ensure the Right to Health: Strengthening Global Health Governance to Realise Human Rights in Global Health’ (2022) 3 *Yearbook of International Disaster Law Online* 3.

<sup>57</sup> Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Report on Mission to Sweden (Human Rights Council, fourth session, 2007) A/HRC/4/28/Add.2 at paras 113–114.



delayed.<sup>58</sup> As a result of the state practice outlined above, we argue that solidarity in its global dimension cannot be characterised as a *legal* principle in IHRL.

In short, in accordance with Article 2 ICESCR, international assistance and cooperation is a way to contribute to fulfil ESCR beyond borders.<sup>59</sup> However, such treaty recognition is not sufficient to conclude that global solidarity has reached the threshold of a legal principle governing inter-state relations. The treaty provisions, interpretations and political commitments on global solidarity hardly translate into state recognition and practice, while new realities in global politics seem less than propitious for cosmopolitan agendas. The current political context is indeed very different from the one in which the international human rights regime emerged and evolved in the second half of the twentieth century.

### 3. INTERNAL SOLIDARITY AND INTERNATIONAL HUMAN RIGHTS LAW ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

#### A. Internal Solidarity and Individual Duties in International Human Rights Law and National Constitutions

In Section 3, we move on from international solidarity, understood as inter-state solidarity, to internal or intra-societal solidarity, meaning among individuals within a state, nation or political community. As stated in the introduction, the analysis of solidarity cannot be disconnected from that of duties and responsibilities. Article 29(1) UDHR proclaims that ‘everyone has duties to the community in which alone the free and full development of his personality is possible’.<sup>60</sup> The idea of responsibility and duty was relatively more prominent, beyond this one article, in earlier drafts of the UDHR, but was taken out along the negotiation process.<sup>61</sup> While states—public authorities at all levels—are the main duty-bearers in IHRL, key foundational documents also allude to individuals’ responsibility to contribute to the common good, an indication of intra-societal solidarity. Among the earliest references in international human rights instruments, the 1948 American Declaration of the Rights and Duties of Man, adopted a few months before the UDHR, states in its Preamble that the fulfilment of individual duties is a prerequisite for the realisation of human rights for everyone.<sup>62</sup> Among other issues particularly relevant for ESCR, every person has the duty to work, to pay taxes to support public service and to ‘cooperate with the state and the community with respect to social security and welfare, in accordance with his ability and with existing circumstances’.<sup>63</sup>

Individual duties and responsibilities for the benefit of the community or society at large are also referred to in other key international human rights treaties, most notably the African Charter on Human and Peoples’ Rights,<sup>64</sup> the 1969 American Convention on Human Rights (ACHR),<sup>65</sup> the International Covenant on ESCR<sup>66</sup> and the Convention on the Rights of Persons with Disabilities.<sup>67</sup> The Convention on the Rights of the Child is based on the recognition of the ‘primary responsibility’ of parents for the upbringing and development of their children, including the primary responsibility to secure an adequate standard of living for them.<sup>68</sup> Not a

<sup>58</sup> Independent Expert on Human Rights and International Solidarity, Obiora Chinedu Okafor: Global Vaccine Solidarity and Human Rights in the Context of the Coronavirus Disease (COVID-19) Pandemic, A/77/173 (UN Human Rights Council 2022) at para 12.

<sup>59</sup> ICESCR supra n 13.

<sup>60</sup> UDHR supra n 2.

<sup>61</sup> Berdión del Valle and Sikkink, ‘(Re)discovering Duties: Individual Responsibility in the Age of Rights’ (2017) 26 *Minnesota Journal of International Law* 189 at 220–26; Sikkink, *The Hidden Face of Rights: Toward a Politics of Responsibilities* (2020) 28.

<sup>62</sup> Preamble of the American Declaration of the Rights and Duties of Man, 2 May 1948.

<sup>63</sup> *Ibid.* Articles 35, 36 and 37.

<sup>64</sup> Preambular at para 6 and Articles 27(1) and 29 of the African Charter supra n 17.

<sup>65</sup> Article 32(1) of the American Convention on Human Rights, ‘Pact of San Jose’, Costa Rica, 22 November 1969.

<sup>66</sup> Preambular at para 4 of ICESCR supra n 13.

<sup>67</sup> Preambular at para w of the Convention on the Rights of Persons with Disabilities supra n 16.

<sup>68</sup> Articles 18 and 27 of the Convention on the Rights of the Child supra n 16.

matter of ESCR as such, but Article 10 of the European Convention on Human Rights (ECHR) speaks of individuals' 'duties and responsibilities' in the exercise of freedom of expression, a freedom that can be limited when proportionate, prescribed by law and necessary in a democratic society.<sup>69</sup> In accordance with Article 4(3) ECHR, work required when in detention, military or alternative services, service necessary in a situation of emergency or 'any work or service which forms part of normal civic obligations' need not be considered 'forced or compulsory labour'.<sup>70</sup> Thereby, the ECHR opens the door to exceptions in the forms of duties, responsibilities or civic obligations that states *can* impose on their citizens, but the Convention does not indicate what specific responsibilities citizens *should* have in addition to their rights.

The African Charter on Human and Peoples' Rights is the most revealing and concrete treaty when it comes to individual duties in the interest of intra-societal solidarity. Its focus on solidarity is linked to the strong collective dimension of human rights in the African cultural context.<sup>71</sup> In Article 29, the Charter lists a number of concrete duties of individuals, including the duty to preserve and strengthen social and national solidarity, as well as the duty to work and pay taxes. However, to date, Article 29 has not been afforded any noteworthy attention either by the African Commission or the African Court on Human and Peoples' Rights.<sup>72</sup> Furthermore, under 'measures of safeguard' (Part II), the African Charter speaks only of the protection of rights, with no mention of the enforcement or promotion of duties.<sup>73</sup> This could indicate that they were originally conceived to be of moral nature only.<sup>74</sup> It could also mean that the enforcement of these provisions is implicitly delegated to domestic authorities.

Individual duties and responsibilities have been perceived by international human rights scholars as rather contentious because of concerns that states might abuse them—in other words, concerns that duties and responsibilities undermine rights.<sup>75</sup> However, as argued by Berdión del Valle and Sikkink, duties and responsibilities are not by definition at odds with IHRL and its general focus on the (vertical) relationship between the state and the people.<sup>76</sup> Having said that, with the exception of the African Charter, the notion of duties has been generally omitted in international human rights treaties, and the African Charter does not spell out clearly how rights and duties ought to be balanced. In most ESCR-related treaties, individual duties are only indirectly accounted for through the provision of limitations: One's rights end where somebody else's rights begin, not where one's duties begin.<sup>77</sup> Limitations of ESCR are required to satisfy the criteria of legality, proportionality and necessity to promote 'the general welfare in a democratic society'.<sup>78</sup>

Turning to national constitutions, a comparative study of written national constitutions worldwide reveals that nearly half of them include explicit references to solidarity or fraternity in an intra-societal sense.<sup>79</sup> The notion of solidarity is mainly referred to in the preambles alongside

<sup>69</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14, 4 November 1950, ETS 5.

<sup>70</sup> *Ibid.*

<sup>71</sup> Malila, 'Individuals' Duties in the African Human Rights Protection System. Challenges and Prospects' in Parmentier, Werdmolder and Merrigan (eds), *Between Rights and Responsibilities* (2016) 187.

<sup>72</sup> Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (2019) 579.

<sup>73</sup> African Charter supra n 17.

<sup>74</sup> Murray supra n 12 at 580; Sikkink supra n 61 at 30; Berdion Del Valle and Sikkink supra n 61 at 227.

<sup>75</sup> Malila supra n 71 at 219; Donnelly and Howard-Hassmann, *International Handbook of Human Rights* (1987) 25.

<sup>76</sup> Berdion Del Valle and Sikkink supra n 61 at 242, 244.

<sup>77</sup> Vandenhole, 'Human Rights in a Globalising Economy—Is the Right to Social Protection Qualified by a Duty to Work?' in Parmentier, Werdmolder and Merrigan (eds), *Between Rights and Responsibilities* (2016) 85 at 87.

<sup>78</sup> Article 4 ICESCR supra n 13.

<sup>79</sup> Constitute's database coded 93 constitutions (out of a total of 193) as including references to solidarity or fraternity, available at: [https://constituteproject.org/constitutions?lang=en&key=solid&status=in\\_force](https://constituteproject.org/constitutions?lang=en&key=solid&status=in_force) [last accessed 14 September 2023]. This database provides a systematic coding of codified constitutional provisions for the entire world (Beck, Meyer, Hosoki and Drori, 'Constitutions in World Society: A New Measure of Human Rights,' in Shaffer, Ginsburg and Halliday (eds), *Constitution-Making and Transnational Legal Order* 2019) 91.

other constitutional values. As such, these references may not shed much light on what the notion essentially entails, but they do affirm that constitutional rights build on solidarity and that solidarity must therefore be entrenched in society. To give one example, Article 2 of the Italian Constitution of 1947 provides: ‘The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled.’<sup>80</sup> The idea that individuals, as members of a given society, have both rights and duties, for example, to protect the environment, to pay taxes or to respect the rights of others, is widely reflected in constitutions.<sup>81</sup> These rights and duties govern and shape the place and the relationship of the individual with(in) the society around them. This reciprocal relationship directly links back to ESCR and the indirect individual duties and responsibilities that are associated with them.

While state practice does not provide support to the idea of global solidarity as a principle in IHRL, as shown in Section 2, the conclusion is different when it comes to the notion of solidarity *within* society. This is also reflected in several cases from regional and national courts. For example, the Colombian Constitutional Court’s interpretation of the minimum core of rights (*‘mínimo vital’*) is derived from the constitutional principles of, amongst others, welfare state, rule of law, human dignity and solidarity.<sup>82</sup> The Colombian Constitution of 1991 provides that: ‘Public health and environmental protection are public services for which the State is responsible [ . . . ] in accordance with the principles of efficiency, universality and solidarity’ and stipulates the individual duty to ‘contribute to the financing of the State’s expenditures and investments within the principles of justice and equity’.<sup>83</sup> The Latvian Constitutional Court, on a case concerning pensions of civil servants, emphasises that ‘under conditions of economic crisis, social solidarity means that every citizen assumes a proportional responsibility for eliminating the harsh consequences of the crisis’.<sup>84</sup> In Italy, in the context of the vaccination requirements amid the Covid-19 pandemic, it was highlighted that the ‘solidarity pact’ between the individual and the community is the basis of any vaccination.<sup>85</sup>

At the regional level, the European Committee of Social Rights has stated that ‘one of the underlying purposes of the social rights protected by the [European Social] Charter is to strengthen solidarity’.<sup>86</sup> The European Court of Human Rights has recognised the principle of solidarity on multiple occasions. For example, the Court has recognised that contributory old-age pension schemes and mandatory basic health insurances are expressions of social or collective solidarity.<sup>87</sup> The Court applied the principle of ‘social solidarity’ to justify preventing an inmate from attending a religious service outside the penitentiary due to the risk of Covid-19 contagion for other prisoners.<sup>88</sup> In relation to vaccines (but not for Covid-19), the general

<sup>80</sup> Italy’s Constitution of 1947 with amendments through 2012, as translated by Constitute Project.

<sup>81</sup> For example, a total of 143 constitutions include a citizen duty to pay taxes. Source: Constitute Project supra n 79.

<sup>82</sup> Colombian Constitutional Court, Judgment T-426, 24 June 1992; Judgment C-776, 9 September 2003.

<sup>83</sup> Articles 49 and 95(9) of the Colombian constitution, as translated by Max Planck Institute, with updates by the Comparative Constitutions Project (2015).

<sup>84</sup> Latvian Constitutional Court, Judgment of 18 January 2010 in the case no. 2009-11-02, at para 3, as translated by the Court in the English summary of its decision.

<sup>85</sup> Italy, Regional Administrative Tribunal of Lazio, 21 April 2022, No. 4914, at para 7, as translated by Covid-19 Litigation project, available at: <https://www.covid19litigation.org/case-index/italy-regional-administrative-tribunal-lazio-no-4914-2022-04-21> [last accessed 14 September 2023].

<sup>86</sup> European Committee of Social Rights, *European Roma Rights Centre (ERRC) v Portugal*, Collective Complaint No. 61/2010, 30 June 2011, para 18; European Committee of Social Rights, *International Federation of Human Rights (FIDH) v Belgium*, Collective Complaint No. 75/2011, 18 March 2013, at para 206.

<sup>87</sup> *Fábián v Hungary*, [GC] Application no. 78117/13, Judgment of 5 September 2017, at para 70; *De Kok v The Netherlands*, Application no. 1443/19, Decision on admissibility of 26 April 2022, at para 13.

<sup>88</sup> *Constantin-Lucian Spînu v Romania*, Application no. 29443/20, Judgment of 11 October 2022, at para 68.

principle was established in *Vavříčka and Others v The Czech Republic* (2021), when the Grand Chamber said that:

[I]t cannot be regarded as disproportionate for a State to require those for whom vaccination represents a remote risk to health to accept this universally practised protective measure, as a matter of legal duty and in the name of social solidarity, for the sake of the small number of vulnerable children who are unable to benefit from vaccination.<sup>89</sup>

Concurring with the majority, Judge Lemmens helpfully outlined the connection between social solidarity and individual duties:

While everyone enjoys fundamental rights in a given society, a fact which must be respected by the State, individuals do not live in isolation. By the nature of things, they are members of that society. Life in society ('living together') requires respect by each member of society for certain minimum requirements [ . . . ]. One of these requirements is respect for the human rights of the other members of society. [ . . . ] As such, the judgment sends the message that apart from fundamental rights, there are also fundamental duties and responsibilities.<sup>90</sup>

## B. Internal Solidarity as Foundation for Economic, Social and Cultural Rights: Social Citizenship

Durkheim coined the expression 'organic solidarity', on the basis of which members of modern societies come together, not because their individual identity is subsumed under the collective one (that would be 'mechanical solidarity'), but because individuals fulfil diverse functions that make people dependent on each other.<sup>91</sup> In the Durkheimian sense, solidarity would be an attempt to reconcile individualism and collectivism in modern society,<sup>92</sup> based on appeals to unity and universality, and an emphasis on responsibility and togetherness.<sup>93</sup> Solidarity is, as Brandes puts it, 'the basis of the mutual commitments that exist in a political community'.<sup>94</sup> Belonging to a political community does not necessarily create highly demanding legal duties for individuals vis-à-vis any and all members of that community. For example, in July 2018, in a case concerning French nationals providing support to migrants crossing the country's borders, the French constitutional council conceptualised fraternity (or solidarity) as an individual *freedom* to help, but not a duty, at least not a *legal duty*.<sup>95</sup> Solidarity is, nonetheless, an expression of a political commitment, an expression of citizenship. For the purposes of this paper, we do not use the word citizenship as nationality. We do not intend to leave foreigners out of this category. We characterise citizenship by the condition of membership of a political community and by the individual contribution to the collective, a contribution that both nationals and migrants are capable of. Solidarity and the corresponding individual contribution can be conceptualised

<sup>89</sup> *Vavříčka and Others v The Czech Republic*, Application nos. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15, 43883/15, [GC] Judgment of 8 April 2021, at para 306.

<sup>90</sup> *Ibid.*, partly concurring and partly dissenting opinion of Judge Lemmens, at para 2.

<sup>91</sup> Durkheim, *The Division of Labour in Society* (2013[1893]); Mechtraud, 'Durkheim's Concept of Solidarity' (1955) 3 *Philippine Sociological Review* 23; Kohn, 'Radical republicanism and solidarity' (2022) 21 *European Journal of Political Theory* 25.

<sup>92</sup> Hayward, 'Solidarity: The social history of an idea in nineteenth century France' (1959) 4 *International Review of Social History* 4.

<sup>93</sup> Wilde, 'The Concept of Solidarity: Emerging from the Theoretical Shadows?' (2007) 9 *British Journal of Politics and International Relations* 171 at 173.

<sup>94</sup> Brandes *supra* n 3 at 61.

<sup>95</sup> *Décision n° 2018-717/718 QPC* (Conseil constitutionnel (France)); see also The New York Times, "'Fraternité' brings immunity for migrant advocate in France", 6 July 2018, available at: <https://www.nytimes.com/2018/07/06/world/europe/france-migrants-farmer-fraternity.html> [last accessed 14 September 2023].

as a *civic responsibility* to do what one possibly can so others in the same political community can enjoy their rights. Arendt famously observed that a political community is a precondition to make rights concrete, real and meaningful.<sup>96</sup> Understood as a civic responsibility, not a legal duty, responsibility would derive from one's participation in a political community, irrespective of one's migration status. Responsibility can complement rights and can in fact help make them real; hence, both notions—rights and responsibilities—can reinforce one another.<sup>97</sup>

A broad understanding of citizenship can be helpful in making sense of the difference between a legal duty and a civic responsibility.<sup>98</sup> As an individual, one is legally entitled to a bill of rights and obliged to respect the rule of law, also when the law limits one's rights because it is necessary and proportionate to do so. Nobody is legally obliged to be a virtuous citizen. However, above and beyond the realm of individual legal duties, there is room for the dimension of a civic responsibility, interpreted as a meaningful contribution so other members of the political community can enjoy their rights to the fullest extent possible. This civic republican approach echoes Marshall's notion of 'social citizenship'.<sup>99</sup> T.H. Marshall understood social rights as essential ingredients of citizenship and advocated an egalitarian form of welfare that requires reciprocal duties between members of society in a precise historical and cultural context.<sup>100</sup> That is why, in this paper, we talk about civic responsibilities, not moral responsibilities: because we claim the duties derive from social citizenship, not ethical virtue. In other words, civic responsibilities come from a non-nativist and inclusive notion of belonging to a political community, not from predetermined and pre-political ideas of what is right and wrong behaviour.

The degree of solidarity within a political community or society and the civic responsibilities it carries along have implications for the realisation of ESCR. As a matter of international law, Article 2(1) ICESCR requires an adequate mobilisation, allocation and spending of resources on the part of the state to advance ESCR.<sup>101</sup> Yet, while the state is the ultimate guarantor of such adequate resourcing, the social rights to essential public services, such as healthcare, education, housing or social security, build on national, statutory social insurance and assistance schemes that are based—at least to some extent—on direct or indirect individual contributions.<sup>102</sup> These are the same sort of contributions that recent case-law from the European Court of Human Rights rightly categorises under the frame of social or collective solidarity (see cases cited in [Subsection 3.A](#)). It is noteworthy that, with the exception of education and property, most ESCR contained in the European Union Charter of Fundamental Rights are listed in Chapter IV: Solidarity.<sup>103</sup>

Public policy matters concerning intra-societal coexistence, such as redistribution through taxation or wearing masks during a pandemic, require members of society to make concessions for the wellbeing of others. However, this does not mean that all individual concessions for the common good are necessarily made voluntarily by all members of society. One should not disguise and gloss over significant resistance and pushbacks against concessions or duties

<sup>96</sup> Arendt, *The Origins of Totalitarianism* (1958) at 290–302.

<sup>97</sup> Sikkink *supra* n 61.

<sup>98</sup> Other perspectives are possible as well. For example, for a liberal approach based on equity, see Kolers, *A Moral Theory of Solidarity* (2016), and for an agonistic approach based on Critical Theory, see Duford, *Solidarity in Conflict: A Democratic Theory* (2022).

<sup>99</sup> Marshall and Bottomore, 'Citizenship and Social Class', in Marshall and Bottomore, *Citizenship and Social Class* (1992); Simpson, *Social Citizenship in an Age of Welfare Regionalism: The State of the Social Union* (2022).

<sup>100</sup> Moses, 'Social citizenship and social rights in an age of extremes: T. H. Marshall's social philosophy in the longue durée' (2019) 16 *Modern Intellectual History* 155 at 158.

<sup>101</sup> ICESCR *supra* n 13.

<sup>102</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 19: The Right to Social Security (Art. 9) (Committee on Economic, Social and Cultural Rights, thirty-ninth session 2008) E/C.12/GC/19; UN Committee on Economic, Social, and Cultural Rights *supra* n 4.

<sup>103</sup> Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.

imposed by the state in the name of the broader common good. In other words, the state may ask for, and even legally require, individual contributions to solidarity in order to advance ESCR enjoyment. That is to say, civic responsibilities do not replace legal duties; civic responsibilities complement legal duties.

The real potential of the principle of solidarity as an interpretative guide for the realisation of ESCR has been largely overlooked. Solidarity mediates between the individual and the community, and it implies a notion of collective responsibility.<sup>104</sup> Solidarity is the foundation for contributory social security schemes, public healthcare systems and other collectively financed welfare-related public services.<sup>105</sup> The recognition of these social rights creates not only positive obligations on the state but also civic responsibilities on individuals to contribute meaningfully, within their means, to the progressive realisation of ESCR for everyone in society. While the state, as regulatory authority and guarantor of ESCR, is ultimately accountable for making progress on ESCR, taking these rights seriously will necessarily have implications for individual rights and duties. Solidarity is thus a prerequisite and a lever for ESCR realisation.

We all are members of one or several political communities. Yet, the ability to make individual sacrifices for the general interest is not evenly distributed. Some will be fitter, stronger, wealthier and otherwise more powerful than others. Expectations stemming from solidarity ought to be commensurate with individual abilities and power. This idea of solidarity is consistent with recent case law concerning housing from the CESCR. In *Ben Djazia and Bellili v Spain* (2017), the Committee established that there must be an independent assessment of the proportionality of evictions in the private rental sector on a case-by-case basis.<sup>106</sup> In *López Albán v Spain* (2019), the CESCR went further and established that the principle of proportionality requires not only looking at the circumstances of the individual or family at risk of eviction but also at the circumstances of the landlord seeking the eviction. In the Committee's opinion, the proportionality test 'entails examining not only the consequences of the measures for the evicted persons but also the owner's need to recover possession of the property. This inevitably involves making a distinction between properties belonging to individuals who need them as a home, or to provide vital income and properties belonging to financial institutions'.<sup>107</sup> As the Committee observes, while the income from private renting may be essential or close to essential for many private individuals, it would not be so for many corporate landlords. The principle of solidarity sustains this sort of application of proportionality: The right to adequate housing should impose different civic responsibilities and legal duties, as well as different interpretations of private property rights, for different types of landlords (see further discussion in Subsection 4.B).

In sum, this idea of intra-societal solidarity as an underlying principle in implementing ESCR derives from a holistic view of the rights and responsibilities enshrined in IHRL, including the 1948 American Declaration of Rights and Duties of Man and the 1981 African Charter of Human and Peoples' Rights, but also recent case law from Strasbourg. It is also closer to non-Eurocentric indigenous cosmovisions and epistemic perspectives.<sup>108</sup> We argue that ESCR read

<sup>104</sup> Along similar lines, Morris recently advocated for the addition of a new ingredient in the European Court of Human Rights' analysis of vulnerability: the idea of caring democracy, meaning, a society made of individuals invested in the wellbeing of others beyond their family members or immediate circle, and a society where care for others is deemed a responsibility for the collective (Morris, 'Vulnerability, Care Ethics and the Protection of Socioeconomic Rights via Article 3 ECHR' (2023) 23(4) *Human Rights Law Review* ngad028 at 9).

<sup>105</sup> This did not go unnoticed in the drafting process of the ICESCR. For example, both the Chilean and the Portuguese delegates made the point that solidarity is 'the foundation of social insurance and social security schemes' (UNGA Third Committee A/C.3/SR.726 (9 January 1957) at para 45; UNGA Third Committee A/C.3/SR.729 (11 January 1957) para 27; Saul supra n 14 at 1823, 1842 and 1474).

<sup>106</sup> UN Committee on Economic, Social and Cultural Rights, *Ben Djazia and Bellili v Spain*, Comm. No. 5/2015, E/C.12/61/D/5/2015 (2017) at para 15.1.

<sup>107</sup> UN Committee on Economic, Social and Cultural Rights, *López Albán v Spain*, Comm. No. 37/2018, E/C.12/66/D/37/2018 (2019) at para 11.5.

<sup>108</sup> Goodale, *Reinventing Human Rights* (2022) at chapter 5.

through the lens of the principle of solidarity mandate both legal duties and civic responsibilities within territorial borders. This can lead to a societal set-up that counteracts inequalities, secures minimum subsistence (if not sufficiency) levels of rights and builds on fair, proportionate contributions to, and benefits from, public services and social assistance schemes.<sup>109</sup> The precise implications for specific ESCR would require further research. For now, the next section will illustrate the effects that interpreting and applying ESCR through the prism of intra-societal solidarity may have in relation to two key policy areas. We first look at taxation as an appropriate measure to mobilise the maximum of available resources for the realisation of ESCR, before turning to the relationship between the right to property and ESCR in light of the social function of property.

#### 4. OPERATIONALISING INTERNAL SOLIDARITY IN RELATION TO TAXATION AND PROPERTY

##### A. A Fair Tax System to Fulfil Economic, Social and Cultural Rights and the Civic Duty/Responsibility to Pay Taxes

States' positive obligations to protect and fulfil ESCR to the maximum of their available resources under Article 2(1) ICESCR involve an obligation to mobilise, allocate and spend resources in a way that is in line with, and advances, the enjoyment of ESCR, all within the resource constraints and growth rates of the state.<sup>110</sup> To discharge its duties as guarantor, regulator and provider of the rights to an adequate standard of living, including housing, social security, healthcare and education, the state is expected to mobilise, allocate and spend resources that are sufficient to guarantee, at the very least, a minimum essential level of these rights.<sup>111</sup>

In her 2014 report, the then UN Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, highlighted the importance of fiscal policy for the realisation of human rights, with taxation being the primary source to generate public resources.<sup>112</sup> Such state-administered redistribution of wealth and resources to safeguard an adequate standard of living for everyone presupposes strong solidarity ties within society: It is based on contributions and duties of individuals as members of a given society, as well as of other private actors like corporations. Statutory social insurance and social assistance schemes are typically the main pillars of social security systems.<sup>113</sup> While these can be of a contributory or non-contributory nature, the former is more widespread. This means that entitlements to benefits are acquired through contributions made by individuals, often with employers' and state participation. Non-contributory schemes, in turn, require no direct contribution from beneficiaries, but are financed through taxes (i.e. through indirect contributions from individuals) and other state revenues.

As said earlier (Subsection 3.A), the African Charter on Human and Peoples' Rights includes an individual duty to pay taxes.<sup>114</sup> This implies a parallel obligation on state parties to put in

<sup>109</sup> About redistributive justice and egalitarianism in human rights: Joo-Young Lee, 'Distributive Justice, and Economic and Social Rights' in MacNaughton, Frey and Porter (eds), *Human Rights and Economic Inequalities* (2021) 247 at 259; Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (2008) at 357; Fredman, 'Substantive equality revisited' (2016) 14 *International Journal of Constitutional Law* 712.

<sup>110</sup> Multiple iterations in the context of the UN CESCR's periodic state reviews, e.g. of the Democratic Republic of the Congo, E/C.12/COD/CO/6 (2022) at para 24; Belgium, E/C.12/BEL/CO/5 (2020) at para 17; Senegal, E/C.12/SEN/CO/3 (2019) at para 10; Tunisia, E/C.12/TUN/CO/3 (2016) at para 15.

<sup>111</sup> UN Committee on Economic, Social, and Cultural Rights supra n 4 at para 10.

<sup>112</sup> Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona (2014) A/HRC/26/28 at para 2.

<sup>113</sup> International Labour Conference, *General Survey Concerning the Social Protection Floors Recommendation, 2012 (No. 202) International Labour Conference, 108th Session, 2019: Universal Social Protection for Human Dignity, Social Justice and Sustainable Development* (2019) app VI; UN Committee on Economic, Social and Cultural Rights supra n 102.

<sup>114</sup> Art 29(6) of the African Charter supra n 17.

place an effective, human rights–advancing taxation system.<sup>115</sup> A minimum of 143 out of 193 national constitutions stipulate a citizen’s duty to pay taxes.<sup>116</sup> While it could be claimed that this constitutes a limitation of the individual freedom to dispose of one’s private property, such limitation is compatible with IHRL provided that it is proportionate, in accordance with the law and serves a legitimate aim. In fact, privately owned goods and services should (under certain conditions) be seen as part of the maximum of available resources that public authorities could make use of in order to realise ESCR. In other words, contributing to fulfil ESCR can be seen as one of the social functions of property, including private property (see Subsection 4.B). Taxation is not simply a legitimate form of control of the use of property, as it is commonly seen from the perspective of Article 1 Protocol 1 of the ECHR. Taxation is also a necessary public tool to materialise ESCR. As observed by the CESCR, ‘progressive taxation schemes’ are one of the mechanisms through which the state mobilises resources to discharge its obligation to fulfil human rights.<sup>117</sup>

Conversely, a narrow tax base and tax evasion will likely result in a state’s inability to guarantee minimum essential levels of social protection and public service provision. Low levels of revenue collection tend to hit the poorest segments of society the most.<sup>118</sup> This, in turn, entrenches inequalities and undermines any redistributive capacity of taxation.<sup>119</sup> Tax policy is also an important feature of states’ obligation of international cooperation and assistance: States allowing avenues for tax evasion undermine the ability of other states to mobilise the maximum available resources for the realisation of ESCR in line with Article 2(1) ICESCR.<sup>120</sup> For example, in 2016, the CESCR expressed concern that the UK’s ‘financial secrecy legislation and permissive rules on corporate tax’ were affecting the ability of the UK and other states to meet the obligations of Article 2(1) ICESCR.<sup>121</sup>

Progressive taxation has the potential to counteract substantive inequalities within society,<sup>122</sup> provided that the resources are being adequately and transparently used. To this end, the former UN Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, called for human rights assessments of fiscal policy with broad public participation, ‘including analysis of the distributional consequences and tax burden borne by different income sectors and disadvantaged groups’.<sup>123</sup> Though progressive taxation does not by definition lead to less inequality in outcome or to a more collective understanding of ESCR, it is nonetheless redistributive in nature and builds on the idea of solidarity.<sup>124</sup>

What does solidarity, as interpretive guide for ESCR, represent for fiscal policy? A fair and effective tax system is a legal requisite stemming from Article 2 ICESCR for states and public authorities. The state is expected to assume its role as regulator of social insurance and assistance schemes and as guarantor of a proportionate balance between individual benefits from, and contributions to, such schemes. Individuals are legally required to pay taxes in line with the

<sup>115</sup> African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights (2011) at para 15.

<sup>116</sup> Constitute Project supra n 79.

<sup>117</sup> UN Committee on Economic, Social and Cultural Rights, Concluding Observations: UK, 14 Jul. 2016, E/C.12/GBR/CO/6 at para 17.b.

<sup>118</sup> Special Rapporteur on extreme poverty and human rights supra n 112 at para 44.

<sup>119</sup> Ibid. at para 16.

<sup>120</sup> Ibid. at para 32; Maastricht Principle 21 supra n 24; see also recent initiative for a UN tax treaty, UN General Assembly resolution ‘Promotion of inclusive and effective international tax cooperation at the United Nations’, A/C.2/77/L.11/Rev.1, tabled on 16 November 2022.

<sup>121</sup> UN Committee on Economic, Social and Cultural Rights supra n 117 para 16.

<sup>122</sup> Special Rapporteur on extreme poverty and human rights supra n 112 at para 45.

<sup>123</sup> Ibid. at para 79(e).

<sup>124</sup> Special Rapporteur on Extreme Poverty and Human Rights, Olivier De Schutter, Global Fund for Social Protection—International Solidarity in the Service of Poverty Eradication, A/HRC/47/36 (UN Human Rights Council 2021) at para 9.



respective domestic laws. From the perspective of solidarity as foundation for ESCR, besides those legal obligations, legislatures and courts have the responsibility to interpret property rights in accordance with the mandate to fulfil ESCR. There is also an individual civic responsibility to contribute willingly to the sustainability of public institutions and social welfare, and to support politically, as a citizen, the design and implementation of a fair and progressive tax system. Such a taxation system that advances the enjoyment of ESCR, and that every member of society contributes to according to one's means, is thus steeped in the idea of a broad solidarity web anchored in society. A strong solidarity web can render taxation systems more sustainable and resilient by creating a sense of ownership and shared responsibility for the social welfare among all actors involved. Even if tax duties are written into law, a pre-existing solidarity web certainly contributes to compliance with the law.

### B. Social Function of Property as an Expression of Solidarity

The right to property is another domain where the principle of solidarity can play a significant role through the prism of the social function of property. The right to property is recognised in IHRL and multiple constitutions around the world.<sup>125</sup> Particularly in Europe, the right to property is often treated as a civil right. Conversely, the right is generally interpreted more broadly in the Inter-American and the African human rights systems, including the protection of communal property as a cultural right.<sup>126</sup> For example, the right to property is the first article listed in the 2010 Principles and Guidelines on the Implementation of ESCR in the African Charter on Human and Peoples' Rights.<sup>127</sup> We see the right to property in its social dimension, and as such as a socio-economic right, since property consists of ownership and possession over things that have, or can have, an economic and a social value.

The social function of property has been incorporated into a number of national constitutions primarily in Latin America and in Europe.<sup>128</sup> It has been conceptualised as 'a notion that aims to secure the goal of human flourishing for all citizens within any state'.<sup>129</sup> However, from a human rights perspective, the social function would not be a mere moral aspiration. The social function would articulate an idea of property as a public institution with legally established rights but also obligations in light of the needs in society.<sup>130</sup> Hence, from the perspective of human rights, the social function would combine not only legal duties for the state and legal duties for individuals but also civic responsibilities to contribute to human flourishing of other members of the political community one is part of. As such, the social function would revamp the scope of the human right to property with a theory of property to ensure autonomy or self-authorship for all,<sup>131</sup> the *haves* and the *have-nots*. It would be a theory based on the principle of responsibility, in order to establish, as Gerhart puts it, 'how individuals ought to treat one another if they are to form an authentic community'.<sup>132</sup> The social function cannot

<sup>125</sup> Casla, 'The Right to Property Taking Economic, Social and Cultural Rights Seriously' (2023) 45 *Human Rights Quarterly* 171.

<sup>126</sup> African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Communication 276/2003, Decision of 4 February 2010, para 187; Inter-American Court of Human Rights, *Indigenous Communities of Lhaka Honhat v Argentina*, Judgment on Merits, Reparations and Costs of 6 February 2020, at paras 202–54.

<sup>127</sup> African Commission on Human and Peoples' Rights, *Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* (2010) at para 51.

<sup>128</sup> Foster and Bonilla, 'The Social Function of Property: A Comparative Perspective' (2011) 80 *Fordham Law Review* 1003 at 1008.

<sup>129</sup> Crawford, 'The Social Function of Property and the Human Capacity to Flourish' (2011) 80 *Fordham Law Review* 1089; Alexander, Peñalver, Singer and Underkuffler, 'A Statement of Progressive Property' (2009) 94 *Cornell Law Review* 743.

<sup>130</sup> Katz, 'It's Not Personal: Social Obligations in the Office of Ownership' (2020) 29 *Cornell Journal of Law and Public Policy* 587; Akkermans, 'Sustainable Ownership—new obligations towards achieving a sustainable society' (2021) 10 *European Property Law Journal* 277; Walsh, *Property Rights and Social Justice: Progressive Property in Action* (2021); Fox O'Mahony and Roark, *Squatting and the State: Resilient Property in an Age of Crisis* (2022).

<sup>131</sup> Dagan, *A Liberal Theory of Property* (2021) at 126.

<sup>132</sup> Gerhart, *Property Law and Social Morality* (2014) at ix.

be fully understood without community and responsibility, and solidarity provides a coherent foundation to redefine property in accordance with the ESCR recognised in international law. A human rights–based approach to the social function would be a reminder that property in all its forms—public, communal or private—is a socially constructed institution indispensable for the fulfilment of ESCR.

Despite the mentioned relatively prominent place of the social function of property in comparative constitutionalism, the concept has struggled to find its way into the regional human rights systems. The social function of property is not mentioned in the treaties, and there is only one reference in the online digest of the Inter-American Court of Human Rights: In *Chiriboga v Ecuador* (2008), the Inter-American Court of Human Rights observed that, due to its social function, the state can limit or restrict the right to property in the name of public welfare and collective rights, or in order to preserve individual rights of others.<sup>133</sup> Neither the search engine of the European Court of Human Rights, nor the authoritative guide on Article 1 of ECHR Protocol 1 suggest that the social function has ever been explicitly part of the Court's interpretation of that provision.<sup>134</sup> No reference can be found in the search engine of the African Commission on Human and Peoples' Rights either.<sup>135</sup> Having said that, one could argue that a version of the social function is somehow implicit in the Inter-American and African case-law in relation to communal property for indigenous peoples.

The lack of engagement of international human rights bodies with the social function of property is regrettable. There is room for exploration of this idea within the international human rights system, searching for new links between private law and human rights. The idea of the social function of property as an expression of solidarity can be important for all human rights, but particularly for ESCR. This is so for at least three reasons.<sup>136</sup>

Firstly, the social function of property can provide the baseline for a more holistic approach to human rights. An example of such a holistic approach is *Lhaka Honhat v Argentina* (2020), where the Inter-American Court for the first time articulated the interdependence between property and ESCR. The Court did so by drawing an explicit connection between the right to communal and traditional property of indigenous peoples through Article 21 ACHR, and the rights to food, water, cultural identity and diversity, and the right to a healthy environment through Article 26 ACHR, the equivalent of Article 2(1) ICESCR.<sup>137</sup> In *Lhaka Honhat*, the Inter-American Court concluded that the state had failed to intervene to protect the indigenous community from environmentally harmful activities that negatively affected their way of life and the access to and enjoyment of communal property, as well as their right to food and water as part of the right to an adequate standard of living.<sup>138</sup>

Secondly, the social function can contribute to bringing to the fore the material gaps and structural inequalities between property-holders and propertyless. This could result in a richer understanding and acknowledgment of the cumulative and varied effects of discrimination and disadvantage due to the combination of identity (sex, ethnicity, disability, etc.) and material

<sup>133</sup> Inter-American Court of Human Rights, *Salvador Chiriboga v Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 6 May 2008, at para 60. Digesto Themis Inter-American Court of Human Rights, available at: [https://www.corteidh.or.cr/cf/themis/digesto/digesto.cfm#\\_ftn\\_8\\_4270](https://www.corteidh.or.cr/cf/themis/digesto/digesto.cfm#_ftn_8_4270) [last accessed 14 September 2023].

<sup>134</sup> HUDOC ECHR, available at: <https://www.echr.coe.int/Pages/home.aspx?p=caselaw/HUDOC&c=->. [last accessed 14 September 2023]; Council of Europe and European Court of Human Rights, *Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights: Protection of property* (Updated 31 August 2022), available at: [https://www.echr.coe.int/Documents/Guide\\_Art\\_1\\_Protocol\\_1\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf) [last accessed 14 September 2023].

<sup>135</sup> African Commission on Human and Peoples' Rights database, available at: <https://www.achpr.org/communications> [last accessed 14 September 2023].

<sup>136</sup> As argued by one of us elsewhere: Casla supra n 125.

<sup>137</sup> Inter-American Court of Human Rights, *Indigenous Communities of Lhaka Honhat v Argentina* supra n 126.

<sup>138</sup> *Ibid.* at paras 278–89.

conditions (income and wealth disparities).<sup>139</sup> International human rights bodies are increasingly showing awareness of intersectional inequalities, for example, in relation to residential segregation (Greece)<sup>140</sup> and evictions from informal settlements of Roma people (Bulgaria),<sup>141</sup> communal property rights of indigenous people (Kenya),<sup>142</sup> unsafe working conditions affecting predominantly low-income women (Brazil)<sup>143</sup> and the relevance of non-contributory social security schemes for women (Ecuador), who are disproportionately affected by poverty and unpaid domestic work.<sup>144</sup>

Thirdly, the social function would contribute to identifying the core content of the right to property. One of the elements that the African Commission on Human and Peoples' Rights takes into account when determining the proportionality of a limitation of rights is whether the 'very essence' of the right is at risk.<sup>145</sup> In line with this principle, a basic level of private property should be preserved under all circumstances, while private property above and beyond such a level could be subjected to greater scrutiny if necessary and proportionate for the public interest of fulfilling other human rights. A helpful normative reference to draw a line above and below the very essence of property would be Article 23 of the American Declaration of the Rights and Duties of Man of 1948, which provides protection as a matter of human rights *only* to the level of property that 'meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home'.<sup>146</sup>

Solidarity contributes to redefine property as a public institution that must meet the needs of all, those with property and those without, taking account of individual rights as well as responsibilities. The margin of such a responsibility varies depending on the resources at the disposal of the individual, in other words, based on one's wealth. Interpreting ESCR through the prism of intra-societal solidarity invites us to explore the possible applications of the social function of property. We identified three areas where the social function could make a difference: as the baseline for a more holistic interpretation of rights having due regard to the whole corpus juris of IHRL, as a lever to address identity-based inequalities and material-based inequalities together and as a potential identifier of the core content of the right to property, meaning, the level of property that meets the essential needs of decent living. The exercise shows that solidarity as a foundational principle of ESCR opens the door to reinterpret property, not as an exclusivist, absolutist and individualist right, but as a socio-economic right that must coexist and enhance other ESCR.

## 5. CONCLUDING REMARKS

Solidarity is the glue that keeps society together and makes it resilient in the face of turbulences. Building on legal duties of the state and civic responsibilities of individuals, we have argued in this article that solidarity is essential to ensure the progressive realisation of ESCR. And yet, solidarity has been grossly understudied in the legal community of ESCR.

<sup>139</sup> O'Connell, 'The Potential and Pitfalls of Intersectionality in the Context of Social Rights Adjudication', in Atrey and Dunne (eds), *Intersectionality and Human Rights Law* (2020) 59.

<sup>140</sup> European Committee of Social Rights, *ERRC v Greece*, Complaint No. 15/2003, Decision on the Merits of 8 December 2004, at para 19.

<sup>141</sup> *Yordanova and Others v Bulgaria*, Application No. 25446/06, Judgment of 24 April 2012 at para 133.

<sup>142</sup> African Commission on Human and Peoples' Rights *supra* n 126 at para 196.

<sup>143</sup> Inter-American Court of Human Rights, *Workers of the Fireworks Factory in Santo Antônio de Jesus and Their Families v Brazil*, Judgment Preliminary Objections, Merits, Reparations and Costs of 15 July 2020, paras 199–200.

<sup>144</sup> UN Committee on Economic, Social and Cultural Rights, *Trujillo Calero v Ecuador*, Comm. No. 10/2015, E/C.12/63/D/10/2015 (2018) at para 14.2.

<sup>145</sup> African Commission on Human and Peoples' Rights, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe*, Case 284/03, Judgment of 3 April 2009, at para 176.

<sup>146</sup> American Declaration of the Rights and Duties of Man *supra* n 62.

International human rights treaties, foundational documents, monitoring bodies and scholars refer to solidarity between states as a matter of IHRL. However, in this paper, we express scepticism about the existence of solidarity as a principle with specific legal content in international law, let alone as a stand-alone right or correlative duty for states. In contrast, we argue that ESCR read through the lens of solidarity (as an interpretive guide) provide the space for both legal duties and civic responsibilities for individuals within a given state, in addition to the legal obligations of the state itself—all of which are necessary to realise ESCR in the most sustainable, egalitarian and robust way. We explore some of the implications of this approach in relation to two policy areas that play a key role in the progressive realisation of ESCR, namely, taxation and private property.

Particularly in the context of a new global international society less prone to cosmopolitanism and with ever smaller space to forge global consensus, we urge the ESCR community to focus on the value of solidarity as an interpretive guide for the realisation of these rights. The legal recognition of ESCR creates obligations for public authorities, but it also engenders civic responsibilities on individuals, endowed with social citizenship, to contribute meaningfully, within their means, to the progressive realisation of ESCR for every member of their political community.

The very existence of IHRL is based on the fundamental idea that the wellbeing and integrity of all human beings should be a concern of humanity at large. Justice will trump or even compete with national interests in global politics, but compliance with IHRL is not dependent upon reciprocity. Governments are obliged to respect, protect and fulfil the human rights of people in their jurisdictions irrespective of what their neighbouring states do in their own jurisdictions. Diplomats, academics, practitioners and non-governmental organisations discuss, promote, draft and negotiate international human rights norms that contribute to advancing IHRL around the world. IHRL is an ‘international protection regime’<sup>147</sup> equipped with legal mechanisms, some more powerful than others, and as such, it is built on the premise that what happens in faraway countries is, or must be, of (some) concern. However, one should acknowledge that members of a political community feel greater attachment, identity, empathy and interest in the circumstances affecting other members of the same political community. A political community can be local, regional or national, but it has a geographical limit. It is not global. Whether we like it or not, solidarity will be greater within than between political communities.

This does not mean that global solidarity is meaningless or inexistent. But the real potential of solidarity as an interpretive guide for giving effect to ESCR within society has been unattended to. Solidarity connects the individual with the collective, makes individual wellbeing dependent upon the wellbeing of other members of that society. Solidarity entails civic responsibilities; its concrete implications will hinge upon one’s role and position in society. Far from undermining human rights,<sup>148</sup> taking the state’s obligation and civic responsibility seriously can strengthen this universal project by enlarging the political community around it. However, one should be mindful of the existence of an increasingly vocal and powerful illiberal project that rejects the universality of human rights and claims to care only about nationals and/or people of a certain ethnic group.<sup>149</sup> Not only against nativist scapegoat populism but also critical of atomistic and

<sup>147</sup> Cronin, *Institutions for the Common Good: International Protection Regimes in International Society* (2003).

<sup>148</sup> The position adopted by Amnesty International against the so-called Universal Declaration of Human Responsibilities in 1998. See Amnesty International, ‘Muddying the waters: The Draft “Universal Declaration of Human Responsibilities”: No complement to human rights’ (1998), available at: <https://www.amnesty.org/en/documents/ior40/002/1998/en/> [last accessed 14 September 2023].

<sup>149</sup> See the symposium on the (mis)appropriation of human rights by the New Global Right, convened by Gráinne de Búrca and Katharine G Young, in the *International Journal of Constitutional Law*, Vol. 21(1) (2023).

individualistic conceptions of ESCR,<sup>150</sup> our proposition contributes to the formulation of a more collectivist, republican and egalitarian agenda for human rights.

### ACKNOWLEDGEMENTS

Earlier versions of this paper were presented in front of the Public International Law Research Cluster of the University of Essex in March 2023, at the annual gathering of the Flemish Interuniversity Research Network on Law and Development in April 2023, at the London School of Economics Interdisciplinary Human Rights Circle workshop in May 2023 and at an ad hoc event of the Law and Development Research Group of the University of Antwerp in September 2023. We sincerely appreciate the valuable feedback from participants, as well as detailed comments provided by Judith Bueno de Mesquita, Elif Durmuş, Audrey Guinchard, Noam Lubell, Michaël Merrigan, Sabine Michalowski, Michael Marcondes Smith, Emma Várnagy and two anonymous reviewers. Mistakes are only ours. The authors received a YERUN mobility award that allowed them to travel, research and write this article.

<sup>150</sup> Critiqued, among others, by Jensen and Walton (eds), *Social Rights and the Politics of Obligation in History* (2022); Moyn, *Not Enough: Human Rights in an Unequal World* (2018); Langford, 'The Norwegian Welfare State and Social Rights', in Kotkas and Kenneth Veitch (eds), *Social rights in the welfare state: origins and transformations* (2017); Fischer, 'The Political within the De-Politicised: Poverty Measurement and Implicit Agendas in the MDGs' in Langford, Sumner and Yamin (eds), *The Millennium Development Goals and Human Rights: Past, Present and Future* (2015).