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Failing Solidarity: Justified or Excused? Assessing EU Member States' Arguments in Defence of the Failure to Share Responsibility for Refugee Protection

Abstract: The concept of solidarity has been receiving growing attention from scholars in a wide range of disciplines. While this trend coincides with widespread unsuccessful attempts to achieve solidarity in the real world, the failure of solidarity as such remains a relatively unexplored topic. In the case of the so-called European Union (EU) refugee crisis, the fact that EU member states failed to fulfil their commitment to solidarity is now regarded as established wisdom. But as we try to come to terms with failing solidarity in the EU we are faced with a number of important questions: are all instances of failing solidarity equally morally reprehensible? Are some motivations for resorting to unsolidaristic measures more valid than others? What claims have an effective countervailing force against the commitment to act in solidarity?

Keywords: solidarity; non-compliance; justification; asylum; European Union.

Introduction

The concept of solidarity has been receiving growing attention from scholars in a wide range of disciplines. While this trend coincides with widespread unsuccessful attempts to achieve solidarity in the real world, the failure of solidarity as such remains a relatively unexplored topic. In the case of the so-called European Union (EU) refugee crisis, the fact that EU member states failed to fulfil their commitment to solidarity is now regarded as established wisdom. But as we try to come to terms with failing solidarity in the EU we are faced with a number of important questions: first of all, are all instances of failing solidarity equally morally reprehensible? Are some motivations for resorting to unsolidaristic measures more valid than others? And what claims have an effective countervailing force against the commitment to act in solidarity?

In this paper I aim to address these questions by assessing common arguments advanced in defence of unsolidaristic actions by EU member states. More specifically, I discuss the failure of EU member states to comply with their commitment to solidarity and ask in what cases (if any) their defence of unsolidaristic measures is sound. I proceed in three steps. Firstly, I introduce and briefly discuss three key terms, namely responsibility sharing, solidarity, and responsibility shirking. Subsequently, I show how the conceptual distinction between justification and excuse can help us make sense of the motives behind

failing solidarity. I then assess three recurring arguments advanced by EU member states in defence of their failure to act in solidarity, and determine whether any of these is acceptable and why.

By tackling non-compliance with normative ideals and engaging with its justifications, this work seeks to establish another channel through which normative theories of solidarity can fruitfully dialogue with and inform empirical research.

Premises on how to deal with the arguments in defence of responsibility shirking

Before moving to the subject matter of this paper, let me start with some important premises as to what EU member states owe each other in the field of refugee protection and why we should be concerned with the way they justify their policy decisions in this field.

Responsibility sharing and solidarity

In the international arena, states are thought to have a first order responsibility not to create refugees by respecting the basic human rights of their citizens, and a second order obligation to open borders to and assist those individuals who lack adequate human rights protection by their state of nationality (Miller, 2016).¹ This paper takes the lead from the consideration that states do not only have a general humanitarian duty to assist refugees (Gibney, 2004), but that, instead, refugee protection is a legitimacy repair mechanism (Owen, 2016). This means that states are collectively responsible to provide adequate protection as a requirement of their legitimacy and that of the international order, and that the stringency and demandingness of their duties go beyond a humanitarian imperative.

Just like responsibility is collectively shared by all states, so should the costs connected to refugee protection. In order to be fair to both states and refugees, a protection regime should involve fair schemes of cooperation, should distribute costs in relation to some measure of each state's relative capacity to protect refugees, and should take the preferences of the latter into account.²

When we turn to the EU, the issue of responsibility sharing for refugee protection acquires particular relevance for several empirical and normative issues. Firstly, we should note that the EU is a regional polity whose members have agreed to establish forms of deeply institutionalised cooperation among

1 Specifying which human rights should be considered as fundamental is controversial when it comes to defining who should count as a refugee. Here I follow Shue (1980) in thinking about basic human rights as the claim of a person to have all interests that allow him or her to live a decently good life protected, including basic political and socio-economic rights.

2 See David Owen's (2020) recent contribution on this issue.

themselves, including legislative, executive, and judicial institutions of supranational governance. Most notably, EU member states have consented to partially give up their territorial sovereignty by establishing the Schengen area, including a system of data exchange (the Schengen information System) and an EU agency, FRONTEX, entrusted with the operational control of external borders.

This leads us to take stock of a second, related feature, namely that EU member states jointly produce and maintain a wide range of public goods, including crucial ones like a stable legal system, a single market, and mechanisms to ensure both internal and external stability. Coordination and multilevel governance structures serve specific policy goals and help member states distribute not only the benefits, but also the risks connected to integration. What is more, the EU functions as an insurance mechanism for its members: it enhances their individual problem-solving capacity acting as a ‘safety net’ and insures them against the inevitable risks of integration (Sangiovanni, 2013: 225-28).

Among these public goods is also refugee protection, which EU member states have agreed to devise through the establishment of the Common European Asylum System (CEAS). Surely, the public good of refugee protection is universal in scope, and not limited to the EU, just as universal is the state duty to provide protection. And yet the way member states have agreed to provide it is worthy of special consideration for several empirical and normative reasons.³

As for the empirical reasons, in accordance with the very nature of the EU, the CEAS is devised and maintained through a set of supranational governance institutions, including judicial and executive enforcement mechanisms and the representation of EU citizens and member states in the European Parliament and in the Council respectively (Bauböck, 2018a: 147). The CEAS is also a functional response to the member states’ strategic interests, most notably in relation to the partial loss of control over internal borders and the maintenance of an internal free-movement area (Noll, 2000: 124). These features suggest that the EU provides, at least in theory, for a nearly-ideal context for states to establish and comply with a mechanism of proportional contributions to share the costs connected to refugee protection (Bauböck, 2018b: 150), and this despite its repeated failures (Noll, 2003).

There is also a third element that should capture our attention, namely the nature of the member states’ commitment to sustain the public good of refugee protection. Their commitment to equally sharing the costs connected to the admission of asylum seekers, the adjudication of their claims, and the protection

3 On refugee protection as a public good in the EU and beyond see Suhrke (1998), Betts (2003), Thielemann and Dewan (2006), and Thielemann (2018).

of refugee status holders is enshrined in the Treaty on the Functioning of the European Union (TFEU), according to which EU asylum policies are to be governed in accordance with principles of solidarity and fair sharing of responsibility (European Union, 2008: Art. 80). Notice that this commitment does not only have a practical value in facilitating compliance (Bauböck, 2018b; Noll, 2003), but tells us also something about the reasons why member states *should* share resources in this realm.

While, as I sketched out above, the reference to fair responsibility sharing in the field of refugee protection is familiar, the place of solidarity in this debate is somewhat more puzzling. Specifically, what should we make of the reference to solidarity? And in what relationship does it stand with respect to responsibility sharing? These are important questions and addressing them in full goes beyond the scope of this paper. Reciprocity-based internationalism, yet, can help us navigate this complexity and shed light on the duties among member states. According to this view, most prominently held by Sangiovanni, duties of justice arise in the framework of interactions that involve the production of public goods, and consist of demands for a fair distribution of the benefits and costs generated by the joint production of those public goods (Sangiovanni, 2013: 220). The more important the public goods produced and pervasive the practices or institutions that sustain them, the greater the fair return that states – on behalf of their citizens and residents – will owe one another.

With this in mind, in what follows I will call 'duty to act in solidarity' the duty that EU member states have towards each other in relation to refugee protection. This duty is grounded in reciprocity in the sense that it arises from the fact that EU member states jointly established and sustain an EU system of refugee protection. This, while not entirely devised internally to the EU, presents distinctive characteristics and a strong functional link to other important EU public goods. As for its content, the duty to act in solidarity requires a fair allocation of the benefits and costs connected to the provision of asylum in the EU, including by redistributing resources and acting as a safety net for its member in distress (Sangiovanni, 2013: 225-28).

In other words, EU member states, in virtue of their membership should not only share the costs of refugee protection among them as they do with non-EU members. They also have an additional, associational duty to act in solidarity which is grounded in reciprocity and may also require them to do more than their fair share by pooling together resources and redistributing them in times of need. The duty to act in solidarity, therefore, presupposes the fair sharing of responsibility, but cannot be reduced to it.

Responsibility shirking

With this in mind, I will refer to ‘responsibility shirking’ as the failure of EU member states to meet their reciprocal obligations under the duty to act in solidarity. I believe this term to be compelling for two reasons, one theoretical and another empirical. The reason why it is theoretically compelling is that it refers to the failure to fulfil an imperfect duty, i.e. a responsibility (Goodin, 1995). The duty to act in solidarity is such because it sets a normatively required goal but tells us little as to how this should be achieved (and the responsibility discharged).⁴

I believe the term is also empirically compelling. While it has been used in relation to the externalisation of refugee admission and protection duties to third-countries, notably those bordering the EU (Thielemann and El-Enany, 2010), here I refer to the intra-EU dimension of the phenomenon. What happens, for instance, if an EU member state without an external border adopts measures to make access to its territory to asylum seekers more cumbersome? Border closure and pushbacks are the most recurring examples of such measures, but there can be also other ways in which a state behaves in an unfair manner.

In what follows I will assume that, when it comes to refugee protection, EU member states engage in three forms of putatively legitimate shirking, namely attributional, substantive and procedural shirking. By attributional responsibility shirking I mean the reliance on an unjust positional criterion to attribute admission and protection duties. In the case of the EU the positional criterion in question is the Dublin principle, or the country-of-first-entry principle, whereby the member state where an asylum seeker first sets her foot is also responsible for examining and adjudicating her claim. In the case of substantive responsibility shirking, member states fail to comply with their duty to act in solidarity by acting in ways that neglect their individual duties, including, for example, the duty of first arrival states to duly register asylum seekers who arrive on their territory. Lastly, I will refer to procedural responsibility shirking as instances where member states take unilateral decisions in relation to the first two issues.

My normative analysis of the arguments for responsibility shirking relies on examples drawn from public discourse across EU member states. While I will refer to country-specific examples, I intend to treat these as merely hypothetical cases. My aim is to analyse how public discourse on refugee policies features normative arguments and in what terms states justify their behaviour. Therefore, I will not attempt to establish whether the arguments put forward are sincere

⁴ Indeed, the duty to fairly share responsibility is an imperfect duty, too.

or cynical, but to tease out the underlying principles that different justifications are appealing to, and give examples of statements to do that.

Why the arguments in defence of responsibility shirking?

Why should we be concerned with the reasons advanced in defence of responsibility shirking? In empirical terms, we might have an interest in understanding what determines policy change, how that change is justified in public discourse, or how we get to certain policy outcomes. The aim of this paper is different. Here I aim at analysing the arguments in defence of responsibility shirking with respect to what they might mean for a theory of distributive justice in the EU.

This aim prompts three questions. Firstly, from a normative point of view, one might ask why justifications are needed in the first place. Why should we think that EU member states owe each other a justification for not living up to the duty to act in solidarity? Here I start from the assumption that member states ought to provide reasons in defence of responsibility shirking because they have violated a clearly defined reciprocal duty, i.e. the duty to act in solidarity. As I explained above, this means failing to recognise the contribution of each fellow member state to the production and maintenance of a functioning asylum system as well as imposing costs on others.

Against this background, what do we mean when we refer to the arguments in defence of responsibility shirking? At a minimal level, consider that *a member state has a sufficient reason to shirk responsibility if it is under no obligation to refrain from doing it.*⁵ In other words, the reasons I am going to engage with contain arguments for why it was not the duty of a member state to act in solidarity with its fellow member states. As we embark on the normative analysis of the arguments in defence of responsibility shirking, therefore, we should ask whether we have sufficient reasons to believe that the balance of moral considerations favours doing something that contravenes the duty to act in solidarity in particular circumstances or given other competing duties.

A third aspect that we should pause to consider is the minimal criteria on the basis of which the arguments in defence of responsibility shirking can be deemed worthy of consideration. To the very least, arguments in defence of responsibility shirking should be reciprocally and generally valid (Forst, 2014: 140). This means that neither party should make any claim to rights or reasons that are denied to others, and that neither party should argue for basic norms that reflect her needs, values, or reasons only. Those reasons need to be shared

5 Notice that the reason ought to be *sufficient*, but not necessarily *good*. In fact, if I am not under an obligation to refrain from doing X, even an entirely flimsy reasons for not doing X (e.g. I do not feel like doing it right now) will be sufficient for not imposing a duty on me to do X.

and cannot be imposed by a dominant party onto the others (*ibid.*: 140).⁶ The reason for starting from general and reciprocal arguments is that these should serve to determine morally binding norms and not ethical beliefs represented by a single member state (*ibid.*: 140).

Therefore, I will assume the same standards when evaluating the reasons of all member states. These reasons shall be minimally shareable by all of them, regardless of subject-specific factors like geographical location, GDP, population size, and political preferences that may give some parties a comparative advantage in making a claim for why they should be allowed to shirk responsibility. By adopting these criteria I aim at achieving general moral judgements that every member state, regardless of the vision of the good in its political community, is bound to accept.

Justification or excuse?

The arguments advanced in defence of responsibility shirking are by no means all the same. In what follows I am going to define a justification as an argument stating that, *given a duty D, the balance of moral reasons favours doing D*, even if this means contravening the original duty D.* I refer to an excuse as an argument for why, *although the balance of moral reasons does not favour the action taken, it still is reasonable for the agent in question to be unwilling to incur the costs of action under duty D.*

Before moving on, let me expose an important conceptual distinction in more detail. Take the case of a group of friends at a crowded party in a dance club and assume that all participants in the party have a reciprocal duty not to push each other while dancing (let me call this duty 'D'). The fact of being together at the party and having fun depends on each one of the friends fulfilling D.

Take now three participants, A, J, and E. During the party A is hit hard by both J and E. He asks what brought them to contravene D and break the golden rule of the party. J says in her defence: 'I pushed you, but I did it because I saw someone throwing a glass that was going to hit you. I did not actually push you, I saved you, and I am ready to show some evidence of that.' For his part, E claims 'I pushed you because K bullied me to push you or else he would have beaten me up after the party. I just could not help it.' What should A make of these arguments? J admits the fact of having pushed A, but presents a reason for why that was, under the circumstances, just the 'right' thing to do. For her part, E admits that what she did – i.e. pushing A – was wrong, but she claims that she could not refrain from violating D without incurring a very high cost.

⁶ This is argued in particular in the context where one party seeks to or might impose her own conception of the good on the others. In a context where toleration is demanded, one party owes a justification to another dissenting one when she argues for her claims.

Notice that J and E both admit to having pushed A and they both offer reasons for why they should not be asked to stop dancing or be kicked out of the dance club. Where their arguments differ is in the reasons that J and E give in their defence. Let us call J's reason a justification: J is justified in failing to comply with D because, notwithstanding D, it was reasonable for her to believe that the balance of moral considerations, all things considered, favoured doing something that contravenes D. The excuse presented by E differs from the justification in important ways: she should be excused for failing to comply with D because it was reasonable for E to believe that something significantly worse would have happened [to E] had E complied with D rather than violated it.

Drawing from this conceptual distinction and from our intuitions on the dance club example we may conclude the following:

J is *justified* in not complying with D only if there is some other action D* such that:

- i. notwithstanding the duty to D, the balance of moral reasons (as far as J can reasonably be expected to understand them) favours doing D*; and
- ii. J cannot do both D and D*; and
- iii. J does D*.

E is *excused* for not complying with D only if,

- a. although E has a duty to D, E reasonably believes that complying with D will imply a significant cost in things that E has good [moral or nonmoral] reasons to care about;
- b. although this cost is not by itself sufficient to shift the balance of moral reasons against D;
- c. it is reasonable for E to put great weight on avoiding this cost;
- d. by omitting D, E could avoid this cost;
- e. that is the reason E omits D.

This distinction will help us zero in on arguments in defence of what I have defined as responsibility shirking and either make (i) true and *justify* noncompliance with the duty to act in solidarity, or make (a) and (c) true, and *excuse* it.⁷

⁷ Note that, if what is at stake is a *justification*, the language of 'responsibility shirking' is misleading because, in this case, the duty no longer applies or, in the case of an imperfect duty, a given action is not required by it. For the sake of simplicity, I will still refer to 'justifications for responsibility shirking' until these are not found to be valid.

Justifications and their assessment

Granting asylum in the EU is not the answer

Let me start with an example of a justification in defence of substantive responsibility shirking. The justification that follows does not dispute the attribution of obligations to individual member states under the duty to act in solidarity, but the substantive policy actions that the duty requires. It argues, as I will show below, that *complying with the putative duty to act in solidarity would do some greater harm to the beneficiaries of that very same duty*. This consideration, therefore, should shift the balance of moral considerations in favour of taking a different course of action.

After a meeting with the presidents of Slovakia, Czech Republic, Hungary, and Croatia in 2015, Polish President Duda stated that taking measures of external border protection and providing humanitarian assistance were preferable solutions to imposing mandatory quotas (Sadowski and Szczawinska, 2017: 223). Duda echoed the concerns of the other Visegrad states (Czech Republic, Slovakia, Hungary, in addition to Poland) when emphasising: ‘[i]t is necessary to support countries with refugee camps from which migrants come to Europe’ (President.pl, 2015).

This argument does not only refer to policies that EU member states should jointly engage in, but also extends to the entry policies of individual member states. Announcing his government’s plan, Austrian Interior Minister Kickl stated that the intended effect of the policy changes was to dissuade people from applying for asylum in Austria and that ‘[i]t is necessary to send clear signals’ to that end (Deutsche Welle, 2019). Orbán remarked that ‘[i]rresponsibility is the mark of every European politician who holds out the promise of a better life to immigrants and encourages them to leave everything behind and risk their lives in setting out for Europe’ (Traynor, 2015b). In fact, ‘[q]uotas is an invitation for those who want to come. The moral human thing is to make clear, please don’t come’ (*ibid.*).

There is more to the justification ‘granting asylum in the EU is not the answer.’ Firstly, this justification as presented in the quotations above assumes that it counterproductive, and hence worse for the migrants themselves, to accept refugee quotas or allow entrance by lifting non-physical barriers. In this sense, the justification is not merely that asylum is not the answer, but that granting asylum positively harms the intended beneficiaries of the policy.

Secondly, and related to this, the justification assumes that asylum seekers should be given a safe haven in countries which are culturally and geographically closer to them. This can be achieved, for example, by establishing partnerships

for knowledge and financial transfers between poorer proximate countries and wealthy countries in the global north (Betts and Collier, 2017: 107, 127). On this account, this is not only more solidaristic with respect to countries proximate to refugee origins, but – importantly – it is also more just.⁸ If we are committed to meeting the demands of justice for what we owe to refugees and provide them with the opportunities they are entitled to, then we should make sure that they do so closer to home and are not forced to move further, including by resorting to smuggling networks (*ibid.*: 133). In fact, '[h]ad adequate protection been in place within the neighbouring countries in the region of origin, the desperate people who resorted to people-smugglers to come to European shores would have had an alternative' (*ibid.*: 119). Lastly, this is also feasible because the level of resource transfers needed to support proximate haven countries would be perfectly affordable for high-income countries and would generate attractive economic opportunities for the beneficiaries (*ibid.*: 135).

In sum, the argument concludes, taking measures to prevent refugees from accessing the territory of a member state while, at the same time, helping them closer to home meets duties of states among themselves as well as those towards refugees. In fact, what I labelled substantive responsibility shirking is a triple win: it relieves member states of refugee admission burdens, it gives refugees more opportunities closer to home, and it boosts the economies of proximate receiving countries. It follows that the EU asylum system is on the wrong track at the moment. The right way to protect refugees is to close borders and provide support externally. Member states do have a duty to act in solidarity with each other, but in preventing access to the EU in ways which are harmful or expose asylum seekers to life-threatening risks. Therefore, acting to prevent access to the territory of a member state is justifiable and should not count as a form of internal responsibility shirking because relying on the provision of international protection in the EU is not the answer to the global problem of displacement. Preventive measures – so the argument goes – are justified insofar as they allow to focus EU and international efforts on helping displaced persons where they need it most.

Before I engage with these arguments, note that the justification at stake is not only, and not mainly, one about what I called 'external responsibility shirking.' Certainly, one could view it as arguing in favour of diverting the migratory pressure away from the EU and towards non-members. But the point here is, as the quotations above show, that this has direct implications

8 Betts and Collier's version of the argument also suggests that admission *exceeds* states' duties, i.e. is supererogatory: '[t]he only way that high-income countries can meet the duty of rescue without exceeding it is if they partner with other country to offer havens that broadly match pre-refuge conditions' (Betts and Collier, 2017: 107), where the duty of rescue is what they believe is owed to asylum seekers.

for what EU member states owe each other. Those flows of people still reaching the EU might be marginal compared to the numbers and geographies of global displacement, and yet it is crucial to consider their moral implications. We are therefore bound to ask whether this justification is valid and morally acceptable. Are member states justified in engaging in substantive responsibility shirking with respect to each other in order to favour supposedly more just solutions at the global level (i.e. supporting proximate countries)? In what follows I explain why I believe this is not the case.

As a first step, let us look at this argument more closely. The argument is formally posed as a justification, claiming that the balance of moral considerations favours acting in the way that I defined as substantive responsibility shirking, i.e. helping asylum seekers closer to home. But what about the substantive validity of this justification, i.e. its content?⁹ Recall the example of J and her failure to comply with the golden rule of the party. Her justification fulfilled the formal elements to be defined as such (i.e. it consisted of an argument for why the conduct was carried out for the right reason), and therefore, it is formally valid. And yet, for her justification to be conclusively valid, we intuitively know that she needs to show more than just assert a firm and sincere desire to save A from an unpleasant accident. For example, what about a situation in which she was just trying to hide the fact that she wanted to push A? We could ask J to provide some evidence that the glass was actually a glass, and not a lighter object, and that it was actually going to hit A. In other words, we need to be able to reasonably establish that the balance of moral considerations actually shifted towards another course of action, one not prescribed under the duty to act in solidarity.

Our intuition is that the justification J is giving for violating the golden rule of the party cannot be conclusively valid *a priori*, but only if we have reasons to believe that: 1) what she claimed as the right course of action actually answers a (more pressing) moral ought; 2) and that her actions follow from the justification, i.e. that she acts upon what she said. In other words, in the example above the justification is not valid *a priori*, but instead its validity relies both on available reasons and on the defendant actually acting upon the content of the justification.¹⁰ In this sense, therefore, it can only be valid *a posteriori*.¹¹

9 Legal theorists offer a similar distinction between objective and subjective justification (see Ferzan, 2011), but here I refer to the difference between the form and the substance of a justification, the form being the formal elements defining a justification and the substance the substantial elements on which the justification is based.

10 Here I use evidence and reason to believe as synonymous (see Kelly, 2016).

11 For a justification to be valid *a priori*, it is enough to show that it does not depend on any evidence, experience, or reasonable belief and, therefore, its validity is achieved simply through the use of reason. On the contrary, a justification is valid *a posteriori* in the sense that its validity depends on some kind of empirical finding, experience, or reasonable belief (e.g., Steup, 2018).

We need to have good reasons to believe that the content of the justification is valid and, to that end, it becomes relevant how well-supported it is by reliable empirical evidence and reasonable beliefs about that (Kelly, 2016).¹²

If we agree that this justification is valid only *a posteriori*, we should then ask whether it passes the validity test as an *a posteriori* valid justification. In other words, we should ask how well this justification is supported by evidence or reasonable beliefs that 1) providing assistance closer to home is the right thing to do with respect to those arriving in the EU; and 2) that EU member states are providing such assistance in the way that the justification dictates. To answer these questions about the justification's validity we must consult empirical evidence, or our assessment will miss the *a posteriori* nature of the justification itself. Only then we will have made a conclusive case for why, given the validity of this justification, my argument for substantial responsibility shirking is defeated.

Consider the first element, namely the proposition that providing assistance closer to home is the right thing to do. As suggested above, this way asylum seekers could find sanctuary in a place that is closer to their home and more proximate in cultural and religious term, and they could also avoid risking their lives in journeys to Europe. Based on these elements, we might agree that providing assistance closer to home is the right thing to do, but we might still think that our question has been left unanswered: how about those who arrive in the EU?

On this point, the defendant of the 'granting asylum in the EU is not the answer' justification might rightly introduce an important caveat. Surely, she would claim, helping refugees closer to home and their respective origin countries does not rule out providing asylum elsewhere (Betts and Collier, 2017: 136). There is no doubt that spontaneous-arrival asylum, in the EU and elsewhere in the world, should be preserved both as a moral right and a policy tool, but only 'as a symbolic commitment to reciprocity,' i.e. to show first countries of asylum that other states are also ready to help; and 'as a last resort' in case protection is not available close to the country of origin (*ibid.*: 136).

But even if we accept this caveat and we are convinced that refugee protection in the EU should be residual, largely symbolic, and of last resort, I believe this justification is still unsatisfactory. It remains an example of coarse thinking where a moral judgement is shifted from one category of problems to an

¹² My explanation here does not intend to be evidentialist. I am not saying that this justification is entirely determined by empirical evidence, but that to deem it conclusively valid we need to recur to elements which are external to the justification itself.

adjacent one, and our judgement on the latter is applied to the former, too.¹³ The solution to the moral dilemma that it offers is one related to assistance in refugee receiving states, and not admission and protection duties in the EU. At the very least, it remains unsuccessful when it comes to defeating the obligations that EU member states have towards each other in relation to asylum seekers already in the EU or at the EU border in the present. In sum, even if we grant the substantive validity of this justification, the argument applies only *pro futuro* and not to asylum seekers already in the EU.

Let me now move to the second element to assess the validity of this justification, namely that member states' actions follow from the justification (i.e. that they are actually taking the measures contained in the justification). To counter this, it is not enough that we accept the substantive validity of the justification *pro futuro*. We need to go one step forward and question the substantive validity of the justification. In fact, my first response above implies that EU states have only temporary responsibilities under the duty to act in solidarity and that shirking some of these may still be justified instrumentally to bring about policy change. As I argued above, this justification would be valid only if member states were shown to do what they say is necessary.

To be sure, resource transfers targeting refugees have been substantial in the case of Turkey, Lebanon, and Jordan. Under the EU Facility for Refugees in Turkey, funded from EU budget and member states' contributions, the EU committed €3 billion in 2016-2017 and a further €3 billion in 2018-2019, of which €2.09 billion have been already allocated in 2016-2019 (European Commission, 2019). Data collected by the Organization for Economic Cooperation and Development (OECD), however, show that aid disbursement to countries in South-Saharan Africa has sharply decreased or has been very modest in the last 10 years (OECD, 2019). Hungary, for instance, transferred 2.96 USD million in development aid to the region in 2017, only 2% of its total aid disbursement (148.68 USD million). The same figure for 2007 amounted to 17.8 USD million (*ibid.*).

A further element to take into account is that, should the level of development aid designated by EU member states to sub-Saharan countries increase, the relationship between economic development and emigration shows an inverted-U pattern: in low-income or lower-middle-income countries, the rise in income is not associated with smaller emigrant stocks or lower emigration

13 For a definition of coarse thinking see Mullainathan et al. (2008).

rates (Clemens, 2014: 6).¹⁴ Quite to the contrary, countries in this income range show a positive relation between growing average incomes and emigration. It is only at higher income levels that the pattern reverses and higher incomes are associated with reduced emigration (*ibid.*: 6).¹⁵ In sum, migration flows reaching Europe originate in countries – typically in Sub-Saharan Africa – that are still far from reaching the income threshold where the pattern reverses.

This evidence has an important bearing on the assessment of the justification. This is precisely because the justification itself does not address the core of the problem, but instead relies on empirical facts and reasonable judgements about them to disconfirm that member states should still abide by the duty to act in solidarity. At a minimum, we can reasonably conclude that EU member states do not act upon the content of the justification above, at least in the present, and, were they to do that, the realisation of the content of the justification will not have the intended effects in the foreseeable future. To be sure, the reasons to reject the content of this justification as invalid might be undermined by further evidence.¹⁶ But, at least until this empirical truth is established, i.e. until there is no substantial and stable reason to believe that the opposite is true, the justification above should be deemed as an attempt to defeat the duty to act in solidarity without acting upon its very content. We can therefore reject the substantive validity of the justification on grounds of both effectiveness and morality.

At this point the proponent of this justification might object that my response so far – which refer to the inverted-U shape of the migration-development curve – does not counter effectively this justification. Recall that the latter's core claims are as follows: 1) the worst humanitarian outcome is for people to drown while trying to migrate; 2) if we admit those migrants who do arrive (and thereby meet the duty to act in solidarity), then we will incentivise more people to try to migrate, as a result of which more will drown; and 3) therefore the balance of moral reasons supports excluding migrants. 4) The second-worst

14 Recent research (Lanati and Thiele, 2018b, 2018a) shows that development aid might provide an incentive to stay at home to the extent that it is specifically targeted at improving public services. However, this effect is very small and aid would have to be doubled to reduce emigration rates by 15%. Therefore, the increase in aid that would be required to substantially reduce emigration is deemed to be unrealistic.

15 It could be objected that the so-called migration-development hump curve refers to migration in general, not to asylum seekers and refugees, and that EU member states do not have admission duties towards economically motivated migrants, only towards refugees. I suggest that our response to this objection should be twofold. Firstly, when we think about the scope of states' duties we should account for the fact that expansive interpretations of asylum today encompass those fleeing extreme poverty. In addition, and related to this, people who live their country as economic migrants often experience severe torture and human rights violations during their journeys (85% of those arriving in Italy according to MEDU), and this is taken into account for their status determination. Secondly, in a context where asylum seekers and other migrants are forced to make use of the same migratory routes, the distinction between asylum seekers and economic migrants loses its bite when it comes to defining states' duties.

16 In this sense I believe the evidence to be defeasible (see Kelly, 2016).

humanitarian outcome is for people to be stuck where they are without any aid; 5) we should not leave people stuck where they are without aid; and 6) therefore, we should send aid. Clearly, then, responding to this justification by saying ‘sending aid just encourages more people to migrate’ would simply enable a supporter of this justification to reply: ‘then we should not send aid either.’

What I want to suggest here is that we require two additional responses to conclusively counter the justification. Firstly, we need to show empirically that refusing to admit people doesn’t deter others from trying to migrate, and that, therefore, the incentives argument (‘if we admit those migrants who do arrive then we will incentivise more people to come, thereby risking their lives’) is false. Recent research on the existence of a potential ‘pull factor’ effect of search-and-rescue (SAR) operations on cross-Mediterranean migration finds no clear-cut evidence of a relationship (or of a non-relationship) between the measures taken to deter or stop such operations and the number of departures from Libya to Europe.¹⁷ Although not conclusive, this empirical evidence suggests that, at the very least, we have good reasons to be sceptical about a potential incentive effect of admissions on migration decisions, and demand that those who claim that SAR operations serve as an incentive provide further evidence in support of their case.

We still need to respond directly to the moral argument that risking drowning is worse than the status quo i.e. the situation of deprivation or human rights violations that would-be asylum seekers suffer before deciding to attempt a crossing to Europe. Here the empirical and the moral argument converge inasmuch as the evidence that the status quo is worse than risking drowning is precisely that people are willing to (continue to) risk drowning in order to escape the status quo.

In sum, we can conclude that substantive responsibility shirking and the duty to act in solidarity still stand. The justification ‘granting asylum in the EU is not the answer’ may be invoked on its own terms, but in the case at hand it is not successful in defeating the duty to act in solidarity. The reason for this is twofold: the duties towards asylum seekers and other states (outside the EU) do not defeat the duties EU member states owe to people seeking refuge who are already in the EU or at the EU border and fellow EU member states. Furthermore, the fact that those member states who invoke the justification

¹⁷ For example, Deiana et al. (2019) and Cusumano and Villa (2019) reach opposite conclusions on the effects of SAR operations on sea-crossings and do not provide conclusive evidence in support of either a relationship or a non-relationship between the two (Recchi and Lanati, 2020). For an overview of the concerns that SAR operations may act as an incentive for irregular migration see Bellezza and Calandrino (2017). Carrera et al. (2019) explore the effects of the EU’s approach to countering smuggling on civil society actors.

cannot be shown to act upon its content makes the justification invalid, at least in the present.

Excuses and their assessment

The duty to act in solidarity may sometimes require sacrifices to EU member states. These costs might be connected to keeping internal borders open, accepting refugees, and transferring resources to fellow member states. But what costs should member states be required to bear to fulfil the duty to act in solidarity? And in what cases should their non-compliance be excused, their moral failing notwithstanding?

The arguments that I am going to present now claim that, although the balance of moral reasons does not favour the action taken, it still is reasonable for member states to be unwilling to incur the costs of action under the duty to act in solidarity. In other words, the relevant questions here are what costs member states should be required to bear for the sake of complying with the duty to act in solidarity, and in what cases their failure to do so should be excused in virtue of those costs. The first excuse counters both my arguments on attributional and substantive responsibility shirking and questions full compliance with the duty to act in solidarity by weighting it against the costs of compliance. The second excuse speaks to my definition of procedural responsibility shirking and asks whether the non-compliance of one or more member states should be a sufficient reason for excusing the failure of the others.

Interstate solidarity puts national solidarity at risk

Consider the widespread concern about the consequences that pursuing interstate solidarity might have on national solidarity. It is reasonable to assume that, at least once a certain threshold of resource transfers and contributions has been passed, national solidarity and international solidarity might turn out to be incompatible: either we act in solidarity with our co-citizens and residents in our state, or we do so with those of other EU member states. What should EU member states be required to do if faced with a trade-off between national and interstate solidarity? Is it reasonable to put greater weight on avoiding the costs of interstate solidarity in order to maintain national solidarity?

Let me identify some real-world arguments which do not question the moral force of the duty to act in solidarity, but argue that non-compliance should be excused when the consequences of meeting its demands are too costly and, specifically, undermine national solidarity. The excuses that we are going to examine argue as follows: 'I should do D, but I do D then I will also stop meeting other duties that I have good reasons to care about, including D*', D* being national solidarity broadly conceived. In the public debate at the EU and

national levels we can find instances of this excuse on at least three grounds, namely lack of capacity, security risks, and threat to cultural homogeneity. Let me look at each of these more closely.

As for the excuse from lack of capacity, in 2015 Sweden made a drastic move from an open-door policy to a more restrictive one. Commenting on the decision, the leader of the Swedish Social Democratic Party (SAP) Löfven stated:

Sweden is a rich country. If people have to flee for their lives, then we will help them. You can't say that we can manage this or that amount. What we are saying is that we can manage it. We have a national budget of 1000 billion kronor, so of course there are funds for helping (Bucken-Knapp, 2017: 287).

Soon thereafter, Sweden's stance changed dramatically and SAP Migration Minister Johansson declared: 'Sweden has done more than any other EU country, and we are a fantastic country that has thus far managed the situation. But we also have our limits and that is where we are at now' (*ibid.*: 290). Löfven added: '[o]ur request to have the pressure taken off us when it comes to refugees is not about calming the Swedish people. It's about that we can't continue like this' (*ibid.*: 290).¹⁸

If we turn to the case of a first-arrival state, Kaitatzi-Whitlock and Kenterelidou (2017: 136) note that, in the midst of the 2015 humanitarian emergency, it was impossible for Greece to act in solidarity with the other member states because of '*limited capacity and lack of primary resources*' (italics in original). In the words of Papagiannakis, Deputy Mayor of Athens, '[t]he reality is we are being asked to do more with less,' referring to the consequence of the seven-year long economic crisis affecting Greece (Smith, 2016). On a similar note, Athens' Mayor Kamis admitted in an interview: '[t]he biggest challenge is to try to comply with basic rules and principles concerning refugees and asylum seekers, and at the same time keep the city functioning' (*ibid.*). In other words, the member states above argue that they have done their share when it comes to fulfilling the duty to act in solidarity (in addition to meeting their duties towards asylum seekers), but further action is no longer possible as it would imply significant or unbearable costs and put the livelihood of their citizens and residents at risk.¹⁹

The same excuse has also been advanced on security grounds, particularly in relation to substantive responsibility shirking. On this version of the argument,

¹⁸ On a similar note, Triandafyllidou (2018) notes that Austrian Chancellor Faymann deployed a similar shifting capacity-based argument.

¹⁹ Here we could ask whether the contribution that a member state has given so far by doing 'more than its fair share' matters when it comes to assessing the excuse. These member states could claim that, based on their past and generous contributions, they have not turned their back to other fellow member states until forced to do so.

the failure to comply with the duty to act in solidarity shall be excused because security risks outweigh what is owed to other member states.²⁰ As for arguments of positional responsibility shirking, instead, member states do not deny that their action (i.e. unilaterally closing internal borders) is wrongful (exclusive reliance on positionality, i.e. the country-of-first-entry principle as a criterion to attribute admission and protection duties is wrong), but claim that they did so for the right reason, namely to avoid the risks of spontaneous border crossings.

At the Western Balkans conference, in February 2016, Austria took the lead in shifting admission and protection duties onto Greece (which had not been invited to the conference). The guiding idea there was that public order and internal security pose an effective limit to what a transit or a destination state can be required to do in terms of keeping its borders open.²¹ The Austrian government passed an emergency decree in April 2016 restricting access to Austrian territory for asylum applicants. Without attempting to prove that this would still be incompatible with EU solidarity, the argument was made that this policy choice should be excused given the lack of security guarantees from first-arrival states (Gruber, 2017: 51).²² Along the same lines, Orbán claimed that 'Hungary must be protected' and this was not (or no longer) possible without sealing off national borders and shirking responsibility (Barlai and Sik, 2017: 155).²³

The last form this excuse takes is one based on the argument that the fulfilment of the duty to act in solidarity poses a risk for cultural homogeneity, and it is recurrently presented in relation to both attributional and substantive responsibility shirking. As the Hungarian government put it, for example, '[i]t is about questions that will determine our everyday life and our common future. If we do not act, we will not recognize our country in a few decades' (*ibid.*: 153). On another occasion, Orbán commented: '[i]s it not worrying in itself that European Christianity is now barely able to keep Europe Christian? There is no alternative, and we have no option but to defend our borders' (Traynor, 2015b).

The excuses above claim, albeit in different ways, that complying with the demands of the duty to act in solidarity may threaten the level of resources,

20 One may add that security concerns are often advanced as a basis for restricting immigration in general. Nevertheless, here I am concerned with the security as a ground for shutting borders particularly to flows coming from first arrival states.

21 This period saw Austria shifting from being a transit member state for flows of asylum seekers trying to reach Germany to becoming a destination state. This shift was part of the domino effect that triggered the closure of the Balkan route, leading to an increased push for joint control missions to police the external borders.

22 The new interior minister Sobotka echoed the same idea by joining the calls for an introduction of a ceiling on asylum applications (Gruber, 2017: 53).

23 The debate on the exclusion of Greece from Schengen zone confirmed the narrative around this form of responsibility shirking as one of 'sanitization' from the risk of contagion. This was a way to limit the migration threat to security and public order to one member state (Boukala and Dimitrakopoulou, 2018: 184).

security, and cultural homogeneity which are necessary for the functioning of the member state in question and that, therefore, the latter has good moral reasons for wanting to avoid these costs. Importantly, note that these are not just empirical claims. In advancing their excuses, member states assume that maintaining a certain level of resource capacity, security, and cultural homogeneity is the object of a duty, one which holds among co-citizens and residents of the same state.

The implications of fulfilling the duty to act in solidarity will undermine the ability to meet this further duty which – it seems – is more stringent and carries a higher moral weight, i.e. it bears on more pervasive moral reasons than the interstate duty to act in solidarity.²⁴ Should we then accept the excuses for responsibility shirking based on lack of capacity, security risks, or threats to cultural homogeneity? If we admit, as the member states above assume, that those three are the objects of duties among co-citizens and residents of the same state whose fulfilment would be considerably undermined, what should we do about the failure to fulfil the duty to act in solidarity at the EU level?

Think of this competing, more stringent duty as a national duty to act in solidarity. Different theories argue that shared identity (Miller, 1995, 2013, 2017) or doing things together, particularly facing risks and maintaining shared institutions (Sangiovanni, 2015), may ground what we commonly refer to as ‘solidarity.’ In the descriptive sense of solidarity, the excuses above claim that the features that we normally refer to as constituting solidarity, and national solidarity in particular, might be undermined if we were to fulfil the interstate duty to act in solidarity.

In the introduction I also went a step further and argued that the term solidarity has a normative meaning, too. In fact, certain institutional ties ground important obligations among members and it is not sufficient to bracket those obligations under the heading of a general duty of cooperation. We should rather define them, I claimed, as a duty to act in solidarity. In virtue of their co-responsibility for jointly established institutions, EU member states – on behalf of their citizens and residents – have a duty to pool together and redistribute resources to their fellow member states in a way that is not demanded with respect to other, non-EU states.

If we turn back to what these excuses are claiming, we quickly realise that my argument for an interstate duty to act in solidarity starts from a similar understanding of co-responsibility and shared public goods production at the

²⁴ See Lazar (2016: 33) for a definition of gravity and stringency as the two dimensions along which we can assess the moral force of duties.

state level. The institutions that co-citizens and residents of each EU member state have established, first and foremost among themselves, are more pervasive and important for their livelihoods (see Sangiovanni, 2007). Not only that. There must be a more pressing duty to act in solidarity with one's co-citizens in a member state. If that is true, then this more pervasive and stringent duty to act in solidarity within the state will come first and outweigh the interstate duty to act in solidarity with citizens and residents in other member states.²⁵ In fact, it would be hard to argue for an interstate duty to act in solidarity without stipulating that a more stringent national duty to act in solidarity exists. Co-responsibility for shared institutions at the EU level presupposes the existence of member states as the units that established them in the first place. Without the production and maintenance of key public goods *within* the state it would be pointless to theorise duties regarding their production at the interstate level.

If the impact of complying with interstate solidarity implies adverse consequences for national solidarity or makes it unfeasible to meet the duties attached to it in a sustainable way, then we have good reasons to think that responsibility shirking should be excused. While member states have, in principle, good moral reasons to avoid these costs, it remains to be seen whether, empirically, the duty to act in solidarity will actually imply them. In other words, we should also ask at what threshold the latter should be deemed considerable enough to undermine national solidarity.

In response, let me point to some important caveats apply to the view that responsibility shirking for these reasons should be excused. Notice that these caveats are essential because, even if excused, responsibility shirking continues to be a moral failing of the member states and the duty to act in solidarity still stands. While they are excused for (momentarily) avoiding the costs, member states are still bound by the interstate duty to act in solidarity to work to restore the internal conditions under which they can fulfil it. The security threats posed to the member state must be serious, immediate, and the measures taken in response must be proportionate to the risk incurred.

As for the lack of resources, we should be ready to excuse responsibility shirking only when the level of resources required in order to fulfil the duty to act in solidarity at the EU level is too high relatively to some measure of the member state's wealth. At what level or passed what threshold national solidarity should take precedence over the interstate duty to act in solidarity becomes an empirical interrogative. Still, we can reasonably assume that, for the excuse to apply and be valid, the member state in question should find itself in a

²⁵ The requirements of national solidarity differ because the national and the European are normatively relevant different sites of justice.

situation where the institutions and public goods that its citizens and residents jointly maintain are at serious risk. Furthermore, responsibility shirking should be proportional to the actual risk for national solidarity. In other words, it is unlikely to lead to complete border closure or very restrictive policies, but only to temporary or progressive limitations to balance increased internal pressure.

On this point one might object that there is a wide range of policies that might fall under the national solidarity banner, some essential to the citizens' livelihoods, others less so. We could call the first set basic national solidarity and refer to it as including all the costs associated with protecting nationals from the very threats that refugees are exposed to, including a stable legal system, institutional safeguards for civil and political rights, and sufficient guarantees that basic needs are met. The second set, which we could call the extensive national solidarity set, comprises any provision that goes beyond the first set. Now – it could be asked – should we deem the excuse on lack of capacity to be valid if what is at stake is the set of provisions associated with the extensive national solidarity set? Should we excuse the failure to fulfil the duty to act in solidarity if that is to preserve, for example, a very generous welfare system at the expenses of other, more burdened states or of the refugees themselves?

Recall that the duty to act in solidarity should require a sacrifice that is proportional to some measure of the wealth of the member state in question. Once we have excluded that the sacrifice required could go as far as impinging on the core of basic national solidarity, we should set the threshold in relation to the capacity taken as a whole, and not on the basis of whether or extensive national solidarity is (or should be) affected. This being said, the closer the sacrifice required gets to the core of basic solidarity, the greater force the excuse will acquire and the greater the responsibility shirking granted.

Excuses on the basis of preserving the cultural homogeneity of a member state deserve a somewhat different treatment. Above I hinted to the fact that there is quite a broad consensus on the fact that solidarity is grounded and/or nurtures (depending on the understanding) a shared conception of the 'we' and the ability to ascertain who belongs to 'the group' and who does not. But it is one thing to say that some minimally shared conception of the 'we' and its maintenance might be necessary or even required at the national level, quite another one to say that this coincides with a (political) conception of cultural homogeneity. Even if we want to concede that some member states may have a preference for a culturally more homogenous society and, consequently, highly exclusionary immigration policies, these policies could not be made the object of a duty (either at the state or at the interstate level). Therefore, their force in grounding an excuse will be considerably less than concerns for the costs of

failing to act in solidarity with other member states.²⁶ This is because the duty to act in solidarity is a second order moral duty. Highly exclusionary views of national identity as the one based on one religion or ethnicity cannot be morally demanded by it and cannot form the ground for why responsibility shirking should be excused.

Even if we set solidarity to the side, this excuse fails when confronted with the nature of the modern liberal state. While they do engage in nation-building, these states rule culturally heterogeneous societies and their free institutions preserve and protect this heterogeneity. In sum, highly exclusionary views of national identity such as the ones based on one religion or ethnicity cannot be morally demanded by the duty to act in solidarity and, more broadly, are incompatible with the nature of the modern liberal state. As such, they cannot be a ground for why responsibility shirking should be excused.

We cannot act in solidarity unless the others do the same

Consider now another excuse, this time deployed against my argument on procedural responsibility shirking, i.e. the way in which EU member states take decisions on how they should discharge their reciprocal duties. Like the previous one, this excuse claims that the duty-bearers have good moral reasons for being unwilling to incur the costs of compliance with the duty to act in solidarity. Yet, it is different from the excuse I examined above insofar as it revolves around the cooperative nature of the duty to act in solidarity. Recall that I defined the duty to act in solidarity as one that requires equalised contributions from member states across the different stages and domains of the protection process, but also one which can be fulfilled only if we accept that member states have specific and cooperative obligations. Some obligations under the duty to act in solidarity depend on the willingness of other member states to collaborate in a fair scheme.²⁷ But what if they do not do that?

The excuse that I will now consider claims that, even if *pro tanto* morally wrong, unilateral actions which openly fail to meet the duty to act in solidarity shall be excused when the consequences of waiting for the other member states to do their share would be unfair or morally wrong. The consequences of undertaking the first step and fulfilling the duty to act in solidarity when no (or very few) other member states do that would be too costly in moral and practical terms.

26 In other words, cultural homogeneity may be at best a legitimate policy preference of democratic majorities. David Miller thinks that such a policy is permissible, but even he would not call it a duty. If attempts to or preferences for preserving cultural homogeneity are merely permissible, it seems difficult to accept that avoiding costs to cultural homogeneity constitutes a morally acceptable reason to trump moral duties towards asylum seekers and duties of solidarity towards other EU states.

27 Procedurally the fulfilment of the duty to act in solidarity comprises some degree of sincere cooperation between member states, but also requires redistributive measures which span well beyond that.

In other words, with this excuse a member state claims that complying with the duty to act in solidarity would make it a sucker because no one else is complying with it, so it will be left to bear all the costs.

Here are some examples of how this excuse unfolds in the EU asylum policy debate. Referring to responsibility sharing with other member states, in 2015 Italian Prime Minister Matteo Renzi stated that,

if no equitable deal is struck, Rome would start issuing migrants with temporary visas allowing them to travel elsewhere in Europe, stop receiving the hundreds of boats arriving from Libya and refuse docking for foreign ships rescuing those stranded at sea (Traynor, 2015a).

On another occasion he added: '[i]f it's Italy's problem because Europe closes its eyes, then Italy will do it on its own. But in that case it would be a defeat not for Italy, but for the very idea of Europe' (BBC, 2015).²⁸

Transit states adopt the same excuse to back up their failure to act in solidarity, albeit with some variations. In the framework of the preliminary ruling asked by the Visegrad Four from the Court of Justice of the European Union (CJEU) on the legality of imposing a mandatory quota scheme, former Polish Secretary of State of European Affairs commented: 'in [...] humanitarian crisis, solidarity is necessary [...]. We are ready to admit a higher number of refugees, but only if this is a part of a comprehensive planning' (Sadowski and Szczawinska, 2017: 222).

Take now a different case. German Chancellor Angela Merkel decided to unilaterally suspend the Dublin Regulation and take in around 900.000 Syrian asylum seekers, causing an upsurge of discontent among other EU member states, particularly transit states along the Balkan route. This conduct falls in the definition of procedural responsibility shirking, but should it be excused? And are the cases above any different?

Note that excuses for procedural responsibility shirking question the cooperative nature of the duty to act in solidarity at its core, and consist of arguments for why individual member states should not be morally required to wait for others to do their share when there are no signs of them doing that. Surely, it would be better and closer to what justice requires to take concerted decisions as per the duty to act in solidarity. But the non-compliance of other

²⁸ Stocchiero (2017: 177) notes that Italy had an interest in playing by the EU rules to then demand the same of other member states that were not respecting their duties. For this reason, he argues Italy supported the Commission proposal to fine the member states who failed to fulfil their relocation quota in 2016. Yet, it is undeniable that Italian discourse was also geared towards renegotiating the moral demands of solidarity in the face of widespread unsolidaristic actions.

member states makes it impossible to do that without incurring higher costs, and this is why, the excuses claim, those member states are only left with go-it-alone options.

What strikes us about the German example, though, is that it reveals a tension between solidarity among EU member states and duties to refugees that is obscured in the other cases of putative procedural responsibility shirking, where the actions in question violate both sets of duties. For this reason, I suggest that they should be assessed differently.

First of all, Germany's faulty responsibility shirking (of a decisional kind) shall be excused because it was motivated by a first-order duty to accept asylum seekers. Germany, the excuse would go, is committed to respecting their rights and cannot fail to do so because other member states fail to act in solidarity with each other. In other words, Germany could argue, the situation of emergency and the widespread failure of other member states to fulfil the duty to act in solidarity left only a choice between the Hungarian policy of using violence and erecting border fences or letting refugees cross borders into Germany.

I believe we have another reason to excuse procedural responsibility shirking in the form suggested by the German example, and precisely the fact that the conduct was motivated by the firm intention to lead by example and create political pressure for a European relocation scheme. We can reasonably assume that a relocation scheme and other efforts under the duty to act in solidarity would have discarded immediately hadn't Germany taken the lead. Other member states are contingent compliers and Germany is in a position to act as a leading member state. In fact, Germany's failure to meet the demands of the duty to act in solidarity has its roots in the faulty policies of other member states.

In sum, member states should be excused for engaging in procedural responsibility shirking if, this is to comply with their duties towards asylum seekers when there is no assurance from other member states that they will do likewise. Importantly, though, we should be ready to accept the excuse only if member states show a continued commitment to restoring the conditions for collective decision making and return to the appropriate venues to take concerted decisions whenever the emergency ceases. And this because the moral failing of procedural responsibility, just like the duty to act in solidarity, remains upon them even if their policy actions are excused.

By the same reasoning, member states should not be excused for failing in their procedural duties towards other member states *and* also not admitting or protecting asylum seekers, even with little or no assurance from other member

states that they will do their share. The moral reasons for admitting asylum seekers, in fact, trump considerations of costs linked to compliance with the duty to act in solidarity, and this unless one of the other excuses or justifications apply.²⁹

Conclusion

In this paper I addressed two key questions: is responsibility shirking ever justified? And should it be excused? These questions point to intrinsically different aspects of the moral failure to fulfil the duty to act in solidarity in relation to refugee protection in the EU. While both justifications and excuses show that the content of the duty to act in solidarity is continuously re-negotiated by EU member states as duty bearers, they help us distinguish between different arguments pointing in that direction.

As a first step, I argued that we may encounter arguments of two kinds: justifications, holding that the balance of moral reasons favour the action taken (notwithstanding the duty to act in solidarity, or duty D); and excuses, claiming that, although the balance of moral reasons does not favour the action taken, it is still reasonable for the agent to be unwilling to incur the cost of action under duty D.

In the second part of the paper I presented and assessed a recurring justification deployed by some EU member states in defence of their failure to comply with the duty to act in solidarity in relation to refugee protection. I showed how these real-world examples draw on moral reasons for why responsibility shirking should not be regarded as morally wrongful. Yet, as I also showed, this justification generally proves unsuccessful in defeating the obligations contained in the duty to act in solidarity and the moral reasons grounding it.

The third part of the paper rehearsed the most recurring excuses for responsibility shirking in the EU. On these arguments, while still being a moral failing on the side of EU member states, responsibility shirking should be excused in virtue of the adverse consequences of compliance with their interstate duty to act in solidarity and the unfeasibility of meeting it in a sustainable way. The duty to act in solidarity does not have the moral force to override other, graver duties at the national level. In addition, the interstate duty to act in solidarity is less stringent and pervasive than other, state-wide duties. Therefore, the costs that duty bearers may be rightfully required to bear should be lower.

29 In this latter scenario, though, the question remains of how member states should respond to the risk of being suckers. Is there any limit to the share of people (or of costs) that they should be expected to bear? Should this be adjusted on the basis of the non-compliance of other member states or rather remain fixed, even when this means a lower level of asylum provision? Surely, it is not hard to imagine that it would become impossible to both meet one's own (insatiable) duties and avoid becoming a sucker.

Combining normative analysis and practical judgements, I conceded that responsibility shirking due to lack of resources and security risks should be excused, albeit only in serious circumstances. As for the threats to cultural homogeneity that complying with the duty to act in solidarity might involve, I ruled out the possibility of excusing responsibility shirking on these grounds. I also accepted that member states may be excused in actin unilaterally when opening their borders to admit asylum seekers if they have reasons to assume that other member states with not do it. More generally, I claimed that, even with those caveats, accepting that responsibility shirking might be excused does not relieve EU member states from their duty to act in solidarity whenever the reasons grounding the excuses will no longer hold.³⁰

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