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**Is There an Obligation to Do More than the Fair
Share? European Inter-State Solidarity and Global
Human Rights-Based Solidarity**

Carl Jauslin

European University Institute
Academy of European Law
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**Is There an Obligation to Do More than the Fair Share?
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Based Solidarity**

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Abstract

The aim of this paper is to contribute to a better understanding of the notion of solidarity and shared responsibility by providing conceptual clarifications on the different obligations that fall on the members of a community of solidarity. Members of a community of solidarity share responsibility for and among each other. But: What happens if a member is not doing its fair share? Do the other members of the community of solidarity have the obligation to take over the share of non-complying members? The answer to this question can only be given by distinguishing the different solidarity regimes applicable to the situation. This paper takes the example of state's obligations under EU law and international human rights law in the area of refugee protection to show the interplay between regional interstate solidarity and global human rights-based solidarity. It concludes that general human rights obligations like the principle of non-refoulement are valid independently from possible burden sharing agreements between EU-member states. This means that states can be required to do more than their fair share they agreed upon among each other if fundamental human rights guarantees are at stake.

Keywords

European Inter-State Solidarity; Global Human Rights-Based Solidarity; Non-Refoulement; Shared Responsibility; Fair Share.

Author information and acknowledgements

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1. Introduction

Solidarity regimes can either compete or complement each other. Whether they compete or complement each other largely depends on who is part of the respective community of solidarity and what their objective is. Either way, to focus only on the obligations that a member state of a community of solidarity has under *one* solidarity regime does not take other solidarity regimes into account that could be relevant to the situation. The focus of this paper lies on the interplay between different solidarity regimes – more concretely between regional inter-state solidarity and international human rights-based solidarity.

Let us imagine the following situation as a starting point of our thought experiment: EU members agree upon a solidarity mechanism that states unambiguously the share of refugees every member has to take when they enter the common Schengen/Dublin area. This agreement constitutes an expression of European inter-state solidarity. At the same time, they are in fact all obliged to respect the fundamental principle of non-refoulement that prescribes that no one may be deported to a state where he or she is threatened with torture or any other form of cruel and inhuman treatment or punishment. This customary and *ius cogens* norm is an expression of international human rights-based solidarity. Against this background, the question arises how the principle of non-refoulement affects the fairness among the duty bearing states. More generally: whether members of a regional community of solidarity like the EU are obliged under certain circumstances to do more than their fair share they agreed upon if other members are not doing their share.

2. Non-compliance and the question of doing more

The aim of this paper is to contribute to a better understanding of the notion of solidarity and shared responsibility by providing conceptual clarifications on the obligations that arise from different solidarity regimes applicable to a certain situation.

This paper asks whether there is an obligation to do more than the fair share. Do members of a community of solidarity where the responsibility towards the realization of a common goal is shared have an obligation to do more than their fair share they agreed upon, in the case one or more members are not compliant and therefore not doing their fair share?¹

Cases of non-compliance with a norm constitute problems of enforcement. We tend to focus on the consequences for the state that breached an obligation. The focus therefore lies on the enforcement of the primary obligation and (where not possible) on questions of reparation. In the meantime, we tend to overlook the consequences of non-compliance *for complying members* in situations of shared responsibility.

The fundamental question “*Is there an Obligation to Do More than the Fair Share in a Community of Solidarity?*” is illustrated by looking at how possible burden sharing rules among EU member states in the Common European Asylum System (CEAS) interact with the principle of non-refoulement under international human rights law. In other words: Do EU member states have a legal obligation under *international human rights law* to do more than their fair share according to *EU law*, in the case one or more member states are not doing their share?

Conceptual distinctions are crucial in order to provide correct legal answers. The following paragraphs distinguish between different forms of solidarity (III.-VI.) before presenting the functional understanding of solidarity as shared responsibility responding to the over demandingness objection (VII.-VIII.) in order to answer the question of whether there is an obligation to do more than the fair share (IX.-X.).

3. Communities of solidarity

There is no solidarity without a *community* of solidarity. However, normative solidarity must be distinguished from descriptive solidarity. *Descriptive solidarity* refers to the bond and cohesion between members of a community. It deals with the reasons for which the members are or feel tied together from a sociological or psychological perspective. Possible examples for promoting such a cohesion are a shared vision or goal, shared values, a common history, joint action, common interests or a common destiny. On the other hand, *normative solidarity* refers to the moral or legal obligations members of community have among each other. It deals with the legitimacy, the basis and the extent of duties among members from a normative perspective.

Arguments for the cohesion of a community can be relevant for the legitimacy of obligations among members. However, direct deductions from descriptive to normative thoughts on solidarity contain the danger of making a naturalistic fallacy and not distinguishing “is” and “ought”.

Communities of solidarity differ from each other especially regarding the in- and exclusiveness of the members. Conservative policies use solidarity often in an exclusive manner and past-oriented (e.g. common roots and history). Progressive policies on the other hand use the term in a more inclusive manner in order to involve people that traditionally have been excluded. They are future-oriented (e.g. joint action, shared goal, common destiny) and point at the increasing interdependence among members to show the necessity to work together.

Legal obligations of solidarity require a legal basis. This basis can be found either in a horizontal agreement regarding burden sharing rules (e.g. a possible solidarity mechanism on refugee protection in the EU) or just lie in common but independent obligations of the members to realize a common objective (e.g. multilateral human rights treaties).

¹ For a political science perspective on this question and the debate see: Zofia Stemplowska (2016) Doing more than one's fair share, *Critical Review of International Social and Political Philosophy*, 19:5, 591-608.

Legal solidarity in this sense does not primarily serve as a source for new obligations² but rather as a basis to justify duties to cooperate in order to fulfil *existing* positive obligations that cannot be realized alone. “Solidarity is first and foremost a principle of cooperation.”³ Moreover, the narrative of solidarity helps to understand the interplay between different communities of solidarity. It contributes therefore to the discussion of multilevel governance in the sense that every community of solidarity has its regime that constitutes a level in the multilevel governance of today’s normative structure.

4. Internal and external solidarity

In cases of solidarity, we must always distinguish between *two conceptually different obligations*: the obligations *among the members* of the community of solidarity (internal solidarity) and the obligation of each member state *towards the realization of the common goal* (external solidarity). In other words: *Solidarity towards whom? Solidarity among EU member states* to tackle the refugee crisis (burden sharing) or *solidarity of EU member states towards the refugees* (rights of refugees)?⁴ These two dimensions are closely related, and being blind for one dimension while analysing the other leads to wrong conclusions.

5. Regional inter-state solidarity and universal human rights-based solidarity

In contrast to global justice, solidarity is perceived as an exclusive concept in the sense that it applies only to members of a defined community. For the understanding of solidarity, it is therefore crucial to identify who is a member of the community of solidarity and what sort of competing or overlapping solidarity regimes are relevant to the situation.

By the end of World War II, states as the members of the global community were more ready to create a legal basis for global cooperation and shared responsibility.⁵ On the global human rights level, the UN 1948 Universal Declaration of Human Rights, the UN 1966 International Covenant on Civil and Political Rights, the UN 1984 Convention against Torture and the UN 1951 Refugee Convention enshrine certain fundamental unalienable rights. All states are obliged to respect, protect and fulfil these rights independently of questions of nationality. Applied to our concrete example these conventions state that no one may be deported to a state where he or she is threatened with torture or any other form of cruel and inhuman treatment or punishment. This so-called principle of non-refoulement constitutes customary international law with *ius cogens* character. Furthermore, it is widely accepted that a serious violation of a peremptory norm of general international law triggers a duty to cooperate of all other international persons to end the serious breach.⁶ These human rights with peremptory character therefore constitute a basis for a *global community of solidarity*.

² For the different opinions on the role solidarity may have in international law see: MacDonald, *Solidarity in the Practice and Discourse of Public International Law*, 8 *Pace Int'l L. Rev.* 259 (1996), Available at: <https://digitalcommons.pace.edu/pilr/vol8/iss2/1>, p. 262.

³ MacDonald, *Solidarity in the Practice and Discourse of Public International Law*, 8 *Pace Int'l L. Rev.* 259 (1996), p. 259.

⁴ See also: Anja Radjenovic, *Solidarity in EU asylum policy*, European Parliamentary Research Service, PE 649.344 – March 2020, p. 3.

⁵ MacDonald, *Solidarity in the Practice and Discourse of Public International Law*, 8 *Pace Int'l L. Rev.* 259 (1996), p. 261-262.

⁶ Nollkaemper/Aspremont/Ahlborn/Boutin/Nedeski/Plakokefalos/Jacobs: *Guiding Principles on Shared Responsibility in International Law*, *European Journal of International Law*, Volume 31, Issue 1, February 2020, Pages 15–72, <https://doi.org/10.1093/ejil/chaa017>, Principle 13.

On the European interstate level, the principle of solidarity and fair sharing of responsibility is stated in Article 80 TFEU. It constitutes the basis for the *European solidarity among EU member states* in the context of border checks, asylum and immigration.

These two solidarity frameworks differ significantly from each other: Inter-state-solidarity among EU member states refers to horizontal cooperation and aims at strengthening the fairness among duty bearers. International human rights-based solidarity on the other hand aims at granting effective protection to the right holders. Solidarity here is required from states towards individuals in a vertical way, although it is also achieved by horizontal inter-state cooperation. In sum, horizontal duty bearer focused solidarity (e.g. inter-state solidarity) is therefore distinct from a vertical right holder focused solidarity (e.g. international human rights-based solidarity).

6. Two perspectives on the problem

The conclusions we make depend on the perspective we take: According to an *internal and regional perspective*, it is not clear why a state should do more when others do less.⁷ Granting asylum is seen as a *cooperative project* among EU member states where the non-compliance of certain members cannot augment the responsibility of the complying members. The reason for this lies in the principle of solidarity and fair burden sharing among EU member states (Art. 80 TFEU).

According to an *external and global perspective*, the rights of refugees' must be fulfilled. This human rights-based perspective sees internal issues regarding the sharing of responsibility as irrelevant (Art. 5 UDHR, Art. 7 ICCPR, Art. 3 para. 1 Convention against Torture, Art. 33 para. 1 UN Refugee Convention). A state has to do what can be reasonably expected from it independently from the contingent fact of compliance of other members of the community of solidarity.

In order to conceptually reconcile these two perspectives, a *functional understanding* of solidarity is needed. The relevant question therefore is: To what problem does solidarity give an answer? I argue that solidarity is a legitimate normative construction to overcome individual powerlessness by distributing the responsibility and posing duties of cooperation on those who share responsibility.

7. Solidarity as a response to the “over-demandingness objection”

Global challenges require collective action. Refugee and migrant crises are manageable, but they cannot be addressed by states acting alone.⁸

The “over-demandingness objection” asserts that there is a limit to the effort obligations can legitimately demand of agents. It can be interpreted as the subjective defence derived from the roman principle of *ultra posse nemo obligatur*. Law can oblige states only to do what is *possible*. The wrongfulness of an act of a state is precluded if it is impossible in the circumstances to perform the obligation.⁹ What goes beyond the call of duty is called supererogatory. Supererogatory describes what is marked as good but cannot be demanded

⁷ Murphy, Liam B., 1993, “The Demands of Beneficence,” *Philosophy and Public Affairs*, 22: 267–292.

⁸ UN Secretary-General's Op-Ed: “Refugees and Migrants: A Crisis of Solidarity”, <<https://www.un.org/youthenvoy/2016/05/secretary-generals-op-ed-refugees-migrants-crisis-solidarity/>> (23.10.2021)

⁹ See for example Art. 23 (force majeure) of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001).

by an agent because the burden to fulfil that obligation would be too high. These supererogatory acts are often seen as heroic or holy.¹⁰

To draw a clear line between what is possible and what is impossible is absolutely crucial in the case of positive obligations. Positive obligations demand an active behaviour (e.g. helping others in need) that goes beyond the duty of non-interference in the sphere of others (e.g. not harming others). Only what is possible and can be reasonably expected can also be demanded legally.

However, there is a big difference between what is *individually possible* and what is *collectively possible*. Taking shared responsibility and duties to cooperate seriously means to demand what is *collectively possible*.

8. Solidarity as shared responsibility

What do members of a community of solidarity share with each other? Common values, common interests, a common identity, a common history or a common plan – this and more is often suggested as the common aspect binding the members. I argue instead that *what members of a community of solidarity necessarily share is responsibility*. A shared responsibility to engage in joint or at least coordinated action. In other words: “What matters is what we together *do*, rather than what we happen to *be*, or what we have *experienced*.”¹¹ Cooperation and shared responsibility lie at the heart of a normative concept of solidarity. Questions of emotional bonds, empathy and cohesion are unappropriated starting points for legally enforceable obligations.¹² Members have a shared responsibility towards each other (internal solidarity) or/and they share responsibility among each other towards the realization of a common objective (external solidarity).

By sharing the responsibility and not leaving the whole burden on one person or state, the above-mentioned over-demandingness objection loses practical importance. By dividing the huge responsibility of solving the refugee crises and putting it upon different states, the obligation on the singular state is not unbearable anymore. From a functional perspective, solidarity therefore can be seen as an instrument to overcome the problem that many challenges of today (e.g. security, migration, climate change) are unbearable on the shoulders of one single state and can only be managed through international cooperation.

The threshold of over demandingness depends on the resources and capabilities of the respective state: The principle of common but *differentiated* responsibilities in international environmental law can concretize the concept of shared responsibility with respect to the different problem solving capacities of states. The principle balances, on the one hand, the need for *all* states to take responsibility for global environmental problems (common responsibility) and, on the other hand, the need to recognize the wide differences in levels of economic development between states (differentiated responsibility).¹³ This logic is transferrable to other situations of shared responsibility like burden sharing in EU asylum law (Art. 80 TFEU). It allows a more nuanced determination of what is possible and bearable for every singular state in its specific situation.

Shared responsibility – differentiated or undifferentiated – differs significantly from collective responsibility. Shared responsibility is a cumulative concept and is based on the *individual responsibility* of the different members of a community of solidarity. It consists of the obligation to do its fair share and to cooperate or at least coordinate with the other members that are

¹⁰ Heyd, David, "Supererogation", The Stanford Encyclopedia of Philosophy (Winter 2019 Edition), Edward N. Zalta (ed.), <<https://plato.stanford.edu/archives/win2019/entries/supererogation/>>.

¹¹ Sangiovanni, Andrea 'Solidarity as Joint Action' Journal of Applied Philosophy 32: 340-59 (2016).

¹² See above for the distinction between descriptive and normative solidarity.

¹³ Epstein, Charlotte. "Common but differentiated responsibilities". Encyclopedia Britannica, <<https://www.britannica.com/topic/common-but-differentiated-responsibilities>> accessed 23 October 2021; See also Principle 7 of the Rio Declaration.

contributing with their share. *Collective responsibility* on the other hand is not the aggregate of the individual sums of responsibility of each member state. Rather the community in its own capacity as independent entity is the duty holder.¹⁴ How the collective responsibility then triggers or translates into individual responsibility of the members is addressed either separately or not at all. In the latter case, members are an undistinguishable organic part of the community and therefore not considered as sovereign any more. In the first case, questions of competences between the responsibility of the collective and the individual entity must be clarified.

However, solidarity as presented here is about inter-governmental cooperation and not about collective responsibility. This is also due to the functional understanding of solidarity as an instrument to strengthen the *problem solving capacity* of every state through international cooperation. Furthermore, the described scenario regarding refugees is not in the exclusive competence of the EU (Art. 3 TFEU) but located in the normative context where the Union shares the competence with the Member States (Art. 4 para. 2 lit. j TFEU). Cooperation and coordination on a horizontal level is therefore paramount.

Two different grounds for shared responsibility must be distinguished: *Either*, states come together to achieve a common purpose that is in their interest. They deliberately decide towards what end they want to work together without having any prior obligation towards the promotion of the common goal (e.g., the construction of an international airport at the border of three states). *Or*, every singular state has a separate individual obligation towards a goal they are not capable of achieving on their own (e.g., the realization of refugee rights).

In the first case, the common goal is only legally binding among the duty bearers (horizontal agreement). Fairness among them is the reason why they are bound to comply and do their share. In the second case on the other hand, the common goal is legally binding for each duty bearer separately (vertical obligation). The protection of those in need (e.g. refugees) is the reason why they are bound to comply and do their share.¹⁵ While in the first case fairness among duty bearers is concerned, in the second scenario fundamental rights of those in need are affected.

Only in the second scenario, the members of the community of solidarity are obliged to do more than their fair share in the case others do not comply. The reason for this lies in the fact that solidarity among member states constitutes a facilitator in achieving a *pre-existing* separate individual legal duty.

9. Is there an obligation to do more than one's fair share?

Based on this short conceptual analysis, I argue that there are situations where there is an obligation to do more than one's fair share. The grounds for this are threefold:

9.1. The fair share is usually less than what can reasonably be expected

Apart from its membership in the community of solidarity, every member is obliged to do whatever can be reasonably expected from it to fulfil its own legal obligation. The bigger the community of solidarity, the smaller the share of responsibility on each member. Dividing the responsibility and putting it upon different shoulders is profitable for every single member of the community of solidarity. In situations of shared responsibility, the fair share is *less* than what can reasonably be expected because the responsibility is shared by different states.

¹⁴ Smiley, Marion, "Collective Responsibility", The Stanford Encyclopedia of Philosophy (Summer 2017 Edition), Edward N. Zalta (ed.), <<https://plato.stanford.edu/archives/sum2017/entries/collective-responsibility/>>.

¹⁵ The question of how goals in contrast to norms that regulate a certain conduct or behavior can be legally binding cannot be addressed in this paper. However, with the rise of solidarity as a legal concept and principle the importance of common goals as legal category will gain importance in the (soft) law discussion.

Therefore, in cases of non-compliance of certain members, complying members are obliged to do what *they are obliged to do at least what they would have to do if there was no community of solidarity at all.*

9.2. Internal burden sharing issues are irrelevant for the separate legal obligation of every member towards the realization of the common goal

In the case that every member of the community of solidarity has a pre-existing legal obligation that is cooperatively addressed, the legally required effort cannot be dependent on whether the other members do their share or not. The legally required effort is only *lowered* because of *practical reasons* in the case of full compliance of all members but *revives* in the case some are not doing their share.

Moreover, the principle of joint and several liability (in private law) states that every member of a community of solidarity is obliged to provide full reparation to the victim or damaged entity although only partly responsible for it. The consequence is that every member is obliged to do more than its fair share – at least towards the (external) victim. By analogy, this legal construction regarding secondary norms supports the view that internal burden and responsibility-sharing issues are irrelevant for the determination of what is owed to external actors.

9.3. Overlapping solidarity regimes

The question of whether a state has to do more than its fair share in cases of non-compliance of others can only be answered with reference to *overlapping* solidarity regimes. In our example of EU refugee law, the question must be answered with reference to the interplay between European inter-state solidarity¹⁶ and global human rights-based solidarity¹⁷. European solidarity (solidarity among member states) is complemented by global solidarity (solidarity with the refugees). By complementing the European inter-state solidarity with human rights-based solidarity, it becomes clear that solidarity among EU member states constitutes only a *facilitator* for the separate legal obligations to respect, protect and fulfil the rights of refugees under international law. The objective of European *external* solidarity is the realization of global *internal* solidarity. European solidarity serves global solidarity.

10. Conclusion

Fairness among duty bearers has its legal fundament in regional agreements on burden sharing, but why must this fairness among duty bearers take priority over the obligation of granting protection to persons from cruel and inhuman treatment? This paper has argued that to do one's fair share does not exempt from other independent obligations.

Is there an obligation to do more than the fair share? – It depends. If members have an individual, pre-existing separate legal obligation to further the common goal of the community, the answer is 'yes'. Applied to our example, it can be concluded that international human rights and refugee law, especially the principle of non-refoulement, is applicable independently from violations of burden sharing rules in EU law. *The reason why EU member states have an obligation to do more than their fair share does not lie in the solidarity or fairness with other EU member states but is based on the solidarity with refugees.* External solidarity requires in this case that the members do more than they are obliged to do under internal solidarity

¹⁶ Biondi/ Dagilyté/ Küçük (Ed.), *Solidarity in EU Law, Legal Principle in the Making*, 2018.

¹⁷ UN Human Rights Council, *Draft declaration on the right to international solidarity and Report of the Independent Expert on human rights and international solidarity* (UN Doc. A/HRC/35/35) v. 25.4.2017.

mechanisms. It is therefore paramount to distinguish between the goals that are set by the members of the (regional) community and the objectives that aim at facilitating the realization of pre-existing legal obligations. However, this leaves us with some serious free rider problems that emerge from the fact that under the described circumstances members are obliged to take over the share of others.