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Global Solidarity and Common but Differentiated Responsibilities

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DOI
10.1007/978-94-6265-527-0_1
Publication date
2022
Document Version
Final published version
Published in
Netherlands Yearbook of International Law 2020
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Link to publication

Citation for published version (APA):
den Heijer, M., & van der Wilt, H. (2022). Global Solidarity and Common but Differentiated Responsibilities. In M. den Heijer, & H. van der Wilt (Eds.), *Netherlands Yearbook of International Law 2020: Global Solidarity and Common but Differentiated Responsibilities* (pp. 3-12). (Netherlands Yearbook of International Law; Vol. 51). Asser Press. https://doi.org/10.1007/978-94-6265-527-0_1

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Download date:16 Apr 2024

Chapter 1
Global Solidarity and Common but Differentiated Responsibilities

Maarten den Heijer and Harmen van der Wilt

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Abstract The theme of the present yearbook is solidarity and common but differentiated responsibilities. This introductory chapter explains the theme. It also takes stock of the contributions to the yearbook on the status and functioning of the principle of common but differentiated responsibilities in a variety of subdisciplines of international law. The yearbook shows that the principle is developing rapidly in quite diverse fields of international law and is a powerful legal concept for translating solidarity into legal commitments and frameworks for cooperation.

Keywords International law · general principles of international law · solidarity · common but differentiated responsibilities · international environmental law · the law of the sea

1.1 Introduction: Theme of This Yearbook

Two issues that dominated the agendas of global leaders in the past year were the COVID-19 pandemic and climate change. Both issues are widely perceived to be existential threats to humankind. They are global and indiscriminate emergencies that can only be successfully resolved through coordinated common efforts of states

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M. den Heijer and H. van der Wilt (eds.), *Netherlands Yearbook of International Law 2020*, Netherlands Yearbook of International Law 51,
https://doi.org/10.1007/978-94-6265-527-0_1

based on the idea of international solidarity.[1] The yearbook's editors chose the theme of global solidarity and common but differentiated responsibilities for the present volume.

As the past year demonstrated, global solidarity is widely endorsed in the international community as indispensable principle that should underpin common efforts to resolve global challenges. In a video message to the world, the director of the World Health Organisation pronounced that "[n]ow is the time for solidarity".[2] The WHO set up a Solidarity Response Fund and created COVAX, a global vaccine supply and distribution platform.[3] The UN General Assembly adopted a resolution on "Global solidarity to fight the coronavirus disease 2019 (COVID-19)".[4] The resolution calls for a global response based on unity, solidarity and renewed multilateral cooperation.

Meanwhile, global leaders convened during the 2021 United Nations Climate Change Conference (COP26) in Glasgow, Scotland, to discuss, for the first time since the Paris Agreement, enhanced commitments towards mitigating climate change. The Glasgow Climate pact announces the phasing out of coal and it urges developed countries to significantly scale up their provision of climate finance, technology transfer and capacity building for adaptation to developing countries.[5] South Africa, for example, is set to receive $8.5 billion to end its reliance on coal.

Despite such welcome, tangible achievements, progress in international law to meet global challenges tends to be slow. There is a huge gap between the language of solidarity and state practice. Even in the area of international climate law, lauded for having successfully translated solidarity into a concrete framework of cooperation and obligations, there is a general failure of implementation and oversight.[6] The Glasgow Climate Pact notes with concern that "the current provision of climate finance for adaptation remains insufficient to respond to worsening climate change impacts in developing countries."[7] Likewise, despite the high ambitions placed upon the COVAX vaccine mechanism, its rollout has been disappointing. It could not prevent growing discrepancies in vaccination coverage between the rich and the poor countries.[8]

In general, international law seems ill-equipped to deal with common goods as they often involve collective action problems. The international legal order is based on the fiction that states are sovereign and equal. Sovereignty, including the consensual character of international law, is often seen to complicate if not frustrate solidarity.

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[1] Report of the Independent Expert on human rights and international solidarity, 'International solidarity and climate change 2020', 1 April 2020, UN Doc. A/HRC/44/44.

[2] WHO Director General's remarks Launch of Appeal: Global Humanitarian Response Plan, 25 March 2020.

[3] See, extensively, the contribution of Wang and Zhang (Chap. 9) to this volume.

[4] UN GA Res. A/74/L.52, 2 April 2020.

[5] Glasgow Climate Pact, 13 Nov. 2021, not yet published, points 11 and 20.

[6] See *inter alia* the contributions of Roeben and Amakoromo (Chap. 2), Romanin Jacur (Chap. 4), and Barnes (Chap. 5) to this volume.

[7] Glasgow Climate Pact, n. 5 above, point 10.

[8] See further the contribution of Wang and Zhang (Chap. 9) to this volume.

Likewise, formal equality may stand in the way of equitable outcomes. Today's world consists of 195 states that are highly diverse and quite unequal in terms of size, population, politics, economy, culture, climate, geography and historical development. A major challenge for international law therefore, is not only the formulation of common goals and the provision of effective frameworks for cooperation, but also to allow for differentiated contributions from individual states.

The idea or principle of common but differentiated responsibilities (CBDR) is a conceptually promising bridge between the factual inequality and formal equality of states. "Common" refers to issues that affect the whole of humankind and which therefore should be of common concern to all states or peoples. "Differentiated" indicates that state efforts in pursuit of the common goal may differentiate according to divergent economic, military or technological capability, historical contribution or other relevant differences. The idea of common but differentiated responsibilities allows for translating notions of solidarity and equity into legal obligations and frameworks of accountability. It is therefore a powerful legal concept that may facilitate international law's shift from a law of co-existence to a law of cooperation.

The present volume explores to what extent solidarity and its operationalization through common but differentiated responsibilities has found a basis in international law. The contributions to this volume deal with a broad range of subdisciplines of international law. They show that solidarity is increasingly accepted as structural, or guiding principle, in quite a few disciplines of international law. Even if solidarity is formally pronounced as legal principle however, most authors in this volume question its efficacy. A common theme in this yearbook's contributions is that solidarity as legal obligation is often weakly formulated. It remains a challenge to formulate common obligations. Moreover, it is easy to recognise differences between states but it is far more problematic to devise remedies on the basis of factual inequalities between states, especially in a system that favours formal equality.

Yet, most authors in this volume agree that common but differentiated responsibilities has important untapped potential for the further development of international law. Disciplines such as global health law, refugee law, human rights and economic and trade law stand to benefit from lessons learned in those few areas of international law wherein solidarity is more strongly embedded, such as international environmental law and the law of the sea.

1.2 The Status of Solidarity and Common but Differentiated Responsibilities in International Law

As is clear from the very rich contributions to this yearbook, the notion of solidarity, including the formulation of legal obligations through common but differentiated responsibilities, has found its way into multiple areas of international law.

Fields wherein solidarity has been traditionally quite strongly embedded are international environmental law and the law of the sea, as the contributions of *Roeben* and *Amakoromo* (Chap. 2), *Romanin Jacur* (Chap. 4), *Barnes* (Chap. 5) and *Davenport* (Chap. 6) demonstrate. In international environmental law, common but differentiated responsibilities forms a structural or organizational principle that was first explicitly recognized in the 1992 Rio Declaration on Environment and Development.[9] As both Roeben and Amakoromo and Romanin Jacur argue, however, even in international environmental law, the effectiveness of solidarity tends to be undermined by the weak formulation of differentiated obligations as a consequence of states being unwilling to sacrifice sovereignty for the greater good. Although the climate change regime firmly embeds financial solidarity, national commitments to meet commonly identified goals suffer from voluntariness and monitoring problems.

In the Law of the Sea, solidarity is embedded through the designation of the deep seabed as the common heritage of mankind and a large number of legal provisions that differentiate between the obligations and entitlements of developed and developing states. The Law of the Sea Convention explicitly aims to realize a "just and equitable international economic order".[10] Yet, in this volume, Barnes and Davenport question the extent to which the Law of the Sea Convention truly aligns with global solidarity. Barnes observes that the law of the sea, not unlike the climate change regime, shows antipathy to strong differential commitments, such as in the fields of fisheries law and marine environmental obligations. Davenport shows that the lofty ambitions of the Law of the Sea Convention on solidarity suffer from lacklustre implementation in respect of the deep seabed. Despite being recognized as a common good that should chiefly benefit developing states, the regime for the deep seabed regime is not yet fully operational and only a handful of developing states have so far benefitted from its exploitation.

The principle of solidarity was key in the movement towards a New International Economic Order put forward in the UN General Assembly in the 1970s. Although the legacy of that reformist movement is mixed, both the GATT and WTO presume differentiation and more favourable treatment for developing states, for example through the Enabling Clause that was agreed upon by GATT state parties in 1979.[11] The contribution of *Venzke* and *Vidigal* (Chap. 7) about the recently launched Carbon Border Adjustment Mechanism (CBAM) which emerged from the European Green Deal shows that differential treatment is almost absent in that proposal. A key observation in both the text of the GATT and in findings of judicial bodies, interpreting and applying international trade law, is that equal treatment under unequal conditions may also amount to arbitrary and unjustifiable discrimination. While Venzke and Vidigal therefore see scope for the incorporation of the CBDR principle in the Carbon Border Adjustment Mechanism, they criticize the European Commission for

[9] UN Doc. A/CONF.151/26 (Vol. I), Annex I, Principle 7.

[10] 1982 United Nations Convention on the Law of the Sea, preamble.

[11] GATT Decision L/4903 of 28 Nov. 1979.

insufficiently taking that principle into consideration. That is in their view the more remarkable and deplorable, because international trade law itself is governed by the concept of Special and Differential Treatment, the twin sister of CBDR.

In respect of international water law, the picture drawn by *McIntyre* is somewhat rosier. Despite few express endorsements of solidarity in formal legal instruments, McIntyre shows that principles of equity and reasonable utilization have greatly facilitated cooperation between transboundary watercourse states. The central concern of international water law is to tame absolute assertions of state sovereignty in respect of transboundary watercourses. McIntyre demonstrates that notions of solidarity, cooperation and equity have since long informed the practice of international water law, leading to shifting transnational water law from a framework based on "hydro-sovereignty" to one based on "hydro-solidarity". Obviously, a key difference between international water law and some other fields of international law is that agreements are concluded on a regional as opposed to universal basis, and moreover between states that will normally have strong bilateral ties.

In quite a few areas of international law discussed in this volume, solidarity may be pronounced as normative rationale, but practice suffers from considerable responsibility sharing gaps. *Wang* and *Zhang* argue that the existing international health regime is inadequate to fully realize and substantiate the principle of solidarity. The COVID-19 pandemic has exposed significant weaknesses in global health governance. Wang and Zhang point to the pandemic as defining moment for further developing international health law. They advocate the application of common but differentiated responsibilities in the new global health regime. They show, for example, how developed states should take up much more firm obligations in taking the lead in pandemic preparedness and response and how developing countries should be provided assistance in their development health systems to allow the international community to act more rapidly to contain outbreaks.

International refugee law, too, does allude to burden sharing - in the 1951 Refugee Convention's preamble – but has since long been critiqued for failing to meet protection needs of refugees and host states in the global south. As discussed by *Mavropoulou* and *Tsourdi* (Chap. 11) in this volume, the 2018 Global Compact on Refugees identifies the contemporary refugee challenge as the "common concern of humankind", but the non-binding document rests fully on voluntariness. Regionally, the European Union did formulate solidarity as guiding principle for the development of the common EU asylum policy.[12] But Mavropoulou and Tsourdi show that this has not resulted in fair-sharing as a consequence of the reluctance of Member States to engage with refugee protection.

Possibly, translating the principle of common but differentiated responsibilities into legal commitments is even more difficult if the common good concerns the treatment of people. *Donders* in Chap. 10 concludes that the very concrete legal entry points for international assistance and differential obligations in the International

[12] Article 80 Treaty on the Functioning of the European Union.

Covenant on Economic Social and Cultural Rights have received little substantiation in the monitoring work of the Committee on Economic, Social and Cultural Rights. This is not only due to the limited enforcement power of the Committee, but also explained from the ongoing debate among States on the nature of economic, social and cultural rights, i.e. a difficulty to define a common goal.

1.3 Common Responsibilities

Even though this volume has identified quite a few areas of international law in which common but differentiated responsibilities form a guiding principle, the applicability of that concept is not self-evident in all subdisciplines of international law. After all, the concept is predicated on the major premise that (all) states bear responsibility to contribute to the common good of humankind. Only if that normative conclusion is reached, may it be equitable to differentiate in the efforts and performance – both qualitatively and quantitively – that are required from individual states. It becomes clear from this volume that common responsibilities may pertain to both global commons such as the deep seabed and to collective action problems such as climate change, COVID-19 and the refugee issue. As Peperkamp observes, common concerns tend to be defined weaker than global commons, as they give rise to issues of remedial responsibility.

The concept of sovereignty distorts the idea of common but differentiated responsibilities. It serves as a double edged sword, displaying an external and an internal dimension. On the one hand, sovereignty obviously connotes the privilege that other states are not to interfere with a state's internal affairs. On the other hand, it involves the deontological notion that states owe primary - if not exclusive – obligations to their citizens. This institutionalized myopia does not only reduce the state's potential – and willingness – to contribute to the common good of the international community. It also shatters the proposition that all states share a common responsibility to further (also) the well-being of the nationals of other states. This questions whether people may be the object of "common responsibilities".

On closer scrutiny, however, this sobering presentation is deceptive when we turn to the realm of human rights, as Donders has demonstrated in her contribution. States' obligations to protect and further the human rights of their citizens require financial sacrifices. And while Donders is correct in holding that the question whether and to what degree such financial efforts are warranted cannot be simply answered by pointing at the divide between classic (political and civic) rights and economic, social and cultural rights (after all, fair trial rights can only be guaranteed by considerable state investments in a well-functioning court system), she also observes that the second category devours a major part of the state's revenues. If developing states lack the necessary resources to afford their citizens a decent standard of living, other, more affluent states may be compelled to assist them, even on a structural basis. In principle, this would amount to a common responsibility, which can subsequently be differentiated on account of some states' moral debts in creating the political and

economic structures that have caused the developing state being destitute. Moreover, different (more demanding) responsibilities can originate from historical bonds or the rich state's abundant resources which may derive from lucrative trade relations with the state in need. In other words, the factors that have been identified as possible indicia for differentiation are relevant in the context of human rights as well.

Likewise, as is evident from Mavropoulou and Tsourdi, the refugee issue can be defined as a collective issue precisely because states fail to protect their own nationals. Refugees become a common responsibility after having left their country of origin, yet the international community has up to now done little to translate that responsibility into clear – and differentiated – obligations. As Mavropoulou and Tsourdi explain, the current regime of treaty obligations towards refugees hinges primarily on the arbitrary factor of geographical location.

Whereas the concept of common but differentiated responsibilities can therefore, with some ingenuity, be recognized in human rights and refugee law, the law of armed conflict provides an even greater challenge, especially if we consider the standards that apply in non-international armed conflicts (NIAC). The problem is that NIAC's have historically been considered as an internal affair. As long as internal disturbances and insurgency have not reached the level of protracted and organized conflict, other states are authorized – but not under a legal obligation – to come to the rescue of the beleaguered state. If the threshold of a NIAC has been crossed, states are in principle expected to keep aloof. Assistance to the state or to the rebels – the latter elevating the armed conflict to an international one – are predicated on purely political decisions. No legal provision creates a common obligation of states to intervene or put an end to hostilities, let alone that such an obligation could be 'differentiated'. Even the hotly contested phenomenon of humanitarian intervention is generally only authorized if the state in question takes the initiative and invites one or more state(s) to take action. A common responsibility of all states to rescue human lives is not at order. Of course, the Security Council can step in and, by adopting a resolution, enjoin states to take action, if necessary by military means. But that 'urgent request' is usually addressed to specific states (often permanent members of the Security Council), instead of to the entire international community of states.

Now *Gill* in Chap. 12 has provided an interesting interpretation of the concept of common but differentiated responsibility, severing it from the inter-state context from which the idea emerged. In his contribution, Gill investigates whether the concept of common but differentiated responsibilities is an adequate normative tool to gauge the interaction between and the respective responsibilities of the state military and non-state actors engaged in a non-international armed conflict. The backdrop of this issue is that the rights and obligations of these agents are legally of an asymmetric nature. While non-state actors are under an international obligation – arguably by virtue of conventional law, but certainly under customary international law – to observe basic principles of international humanitarian law that have been codified in Common Article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocol to the Geneva Conventions, they do not enjoy the collateral status of combatants. If they would do so, they would be impervious against criminal prosecution on charges of murdering or wounding their military adversaries. With a view to restoring the

balance of rights and obligations for both categories of belligerents, scholars of international humanitarian law have advocated the attribution of combatant-status to non-state insurgents under international law. Gill takes pains to demonstrate that such equivalence has not materialized, although he candidly avows that his opinion is not shared by many of his colleagues. What is innovative in his contribution is that Gill makes clear that the concept of common but differentiated responsibilities can be expanded beyond the inter-state context and tailored to an interaction between unequal entities under international law. After all, both state agents and non-state actors share a common responsibility to abide by the *jus in bello*, but – at least in Gill's opinion – these responsibilities are not similar as – in the case of non-state actors – they are not compensated by the concomitant privileges of the combatant.

1.4 Differentiated Responsibilities

The insertion of the word 'but' in the concept of 'common, *but* differentiated responsibilities' suggests an antithesis. At first blush, one may surmise that entities (states) having common responsibilities are bound to deliver equal performances. The second part of the concept, however, immediately negates that assumption by emphasizing that these responsibilities are or can be of different weight and nature. Several contributors to this volume have pondered on the motives for states to accept differentiated responsibilities. It is probably not too far-fetched to assert that the assumption of 'common responsibilities' is primarily imbued by (enlightened) self-interest. The notion that global threats can backfire on a state's population and resources inspires that state to take it's share in warding off the danger. The incentive for taking on a larger burden, compared to 'less privileged' states, is predominantly altruistic in nature. It is well-captured by the principle of solidarity.

Romanin Jacur has meticulously investigated the philosophical foundations of solidarity's maturing into a legal principle. She traces the emerging of the principle back to the antagonism between the Grotian and the Kantian conception of international relations, which might, in shorthand, be characterized as the difference between an international society and an international community of states. Solidarity is core to the latter representation, as it is predicated on comparative (dis)advantages between states and serves to re-balance inequities in order to achieve distributive justice.

On the basis of the Rio Declaration, Roeben and Amakoromo identify three arguments for differentiation: differentiation according to needs, differentiation according to pressures and differentiation according to capabilities. *Peperkamp* in Chap. 3 develops a more detailed taxonomy of possible factors for differentiation that also takes into account culpability, causality and benefit. It stands to reason that the precise mix of differentiation depends on the nature of the collective issue. The global response to the Covid pandemic, for example, is primarily concerned with needs and capabilities and not burdened with questions of culpability.

A second key issue concerns the subjects of differentiation. The classic distinction between developed and developing states still permeates most disciplines of international law which accept differentiated obligations. As Davenport shows, however, there is no single universally accepted indicator to classify countries as either developing or developed. More fundamentally, the binary distinction between developed and developing states is probably too rigid to take into account the large variety of potential factors favouring differentiation. As Romanin Jacur explains, international climate law has moved from binary differentiation to a system of groupings of states to a system of self-differentiation in the Paris Agreement. The danger of the latter approach is that it tends to sacrifice reciprocity and renders obligations weaker.

Focusing on international climate law from which the concept of common but differentiated responsibilities has emanated, contributors to this volume have identified factors that both explain disparities between states and provide moral reasons for the exercise of solidarity. For one thing, developed states have historically been the prime contributors to the rise of carbon emissions and owe their privileged position precisely to such activities. Hence, they also possess the capacities, in terms of financial means and human resources, to redress the situation. And finally, developing countries are, due to economic, geographical, cultural reasons, most vulnerable to the adverse effects of climate change (Roeben and Amakoromo, Romanin Jacur, Wang and Zhang). These authors draw our attention to the mechanism that those countries that are the main culprits in causing the climate crisis have least to fear from it, or are at least in a position to take adequate protecting measures. Inversely, those countries that have no blame in causing the problem are likely to bear the brunt of the consequences of excessive greenhouse gas emissions. Thus, the gap between privileged countries and disadvantaged states is widened, which reinforces the acknowledgement of differentiated responsibilities on the basis of solidarity. Yet, any preparedness to accept such differentiation is dependent of and subsidiary to the recognition that all states are, ultimately, exposed to the same threat that sustains the common plight to do something about it. And the imminence of this threat is increasingly realistic in the realm of global climate change, which obviously explains the success of CBDR in this context.

Wang and Zhang have helpfully clarified how the assessment of the components of CBDR work out differently within the framework of international health law that currently seeks to react to the COVID19 pandemic. A crucial difference with the climate crisis is that developed states, while paying lip service to solidarity, seek to isolate themselves from exterior threats by announcing travel restrictions and prioritize their own population in the distribution of vaccines. While the urge to acknowledge a common responsibility is therefore less articulate, the solidarity ('differentiation') prong of the concept is further eroded by other differences with the paradigmatic climate problem. Pristine responsibility (or 'blameworthiness') for causing the pandemic is much more difficult to ascertain than in case of the climate change. Social and cultural parameters, like housing conditions and health care, tend to have a huge impact on the spread of the virus. States would therefore be reluctant, if not outright unwilling, to take on additional responsibilities out of the sense that they owe a debt to the international community because of past performance. Furthermore,

the capacity to fight the pandemic may not be simply gauged along the axis of affluent and destitute states. Some smaller states may excel in having developed top-notch resources in pharmaceutical research and industry, while larger and seemingly richer states may have neglected this section.

1.5 Concluding Remarks

What lessons can be drawn from the collection of articles in the present volume? First, it is evident that common but differentiated responsibility has now firmly established itself as structural principle in quite diverse disciplines of international law. This in itself demonstrates that common but differentiated responsibilities is a very promising and powerful legal construct for translating opaque notions of solidarity and equity into legal rules and frameworks. Second, the significance of common but differentiated responsibilities depends on the nature of the global problem that is addressed by means of international law. The principle invites us to take structural – social and cultural - inequities into consideration, if these circumstances affect the (in)capacities to contribute to the solution of global problems or explain the greater vulnerability of states to the dire effects of a global threat. It stands to logic that common but differentiated responsibilities – as a principle and aspiration – does not function as a one size fits all measure and does not yield in each area the same (positive) results. But it is useful to demonstrate concretely what factors are relevant and how they influence the outcome. Comparative lessons and cross-fertilization between disciplines of international law should therefore be strongly encouraged. Third, it is key to further develop the meaning and content of common but differentiated responsibilities. This includes fundamental thinking about factors of differentiation and subjects of differentiation, but also the development of effective oversight and compliance mechanisms. Ultimately, common but differentiated responsibilities is highly instrumental, if not indispensable, for the continued relevance of international law. This is so precisely because it may soften the effects of sovereignty, formal equality and reciprocity.