

Solidarity in the EU: wishful thinking or status quo?

Analysing the paradox of EU solidarity and national sovereignty in civil
protection in the context of Art. 222 TFEU (Solidarity Clause)

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Abstract

The Lisbon Treaty added a new article to the EU primary legislation (Art. 222 TFEU also referred to as the *Solidarity Clause*) which requires solidarity between the EU and its Member States in crisis situations brought about by natural or man-made hazards and terrorist attacks. At the same time, solidarity remains a vague legal concept and the EU is struggling to develop joint *solidary* policies, e.g. in response to the economic and financial crisis and most recently with respect to asylum and immigration in the context of the *refugee crisis*. This gives the impression that solidarity is less a political reality than mere wishful thinking. Consequently, the character and intention of primary legislation referring to solidarity remains rather confusing. Have respective norms been created to build a basis for joint efforts and concrete measures in the respective policy fields, or are they insubstantial statements narratively adding to what the Union *should* be? This question is at the core of this work. The thesis analyses how solidarity is conceptualised at different levels (national and EU) and in different contexts (*normal* conditions vs. crisis) and relates it to Art. 222 TFEU to finally put these aspects into context of civil protection as an important policy field for the conceptualisation of political entities.

Key words: Civil Protection, Solidarity, EU legislation

Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity.

—Robert Schuman, Declaration of 9th May 1950

Table of Contents

A.	Introduction	1
B.	Solidarity: a matter of scale!?	6
I.	Preliminary conceptual thoughts on solidarity	6
II.	Solidarity at the nation state level.....	10
III.	Solidarity at EU level	14
1.	Political solidarity	17
a)	Solidarity between Member States	18
aa)	Financial policies.....	23
bb)	Policies on Border Checks, Asylum and Immigration and the Principle of Burden Sharing	25
b)	Solidarity as a societal value	29
aa)	EU citizenship.....	30
bb)	Economic solidarity or the willingness to share resources	34
2.	Moral solidarity	39
C.	Solidarity Clause (Art. 222 TFEU) in context	45
I.	Civil protection: the development of a policy field at EU level.....	45
II.	Art. 222 TFEU – Solidarity Clause.....	50
1.	Triggering events.....	52
a)	Terrorist attacks	52
b)	Natural hazards and man-made disasters	53
c)	Other profound disruptions	55
2.	Geographic scope	55
3.	Actors.....	56
a)	Union action	56

aa)	Preventive action	57
bb)	Response measures	61
b)	Action of the Member States	64
4.	Implementation of the Clause.....	66
a)	Activation mechanism	67
b)	Response arrangements at Union level	67
c)	Financial implications	68
d)	Threat assessment.....	68
5.	Competences of the European Court of Justice (ECJ)	69
III.	Art. 222 TFEU in practice – practical action measure or empty vessel?	70
1.	Activation of Art. 42.7 TEU in the aftermath of the Paris terrorist attacks	70
2.	Collaboration under Art. 42.7 TEU – The Member States’ response to France’s request	73
3.	Lessons of the 2015 Paris terrorist attacks for Art. 222 TFEU	75
D.	Solidarity in the field of civil protection – moral obligation or (lack of) political interest?.....	78
I.	Dominance of Member States in civil protection.....	78
II.	One policy field, different solidarities	81
III.	Meaning of emergency governance for national self- perception.....	84
1.	Conceptualising and managing risk.....	84
2.	The impact of emergencies on sovereignty and the nation state narrative.....	86
3.	Addressing emergencies through law?	88

IV.	National sovereignty vs. political solidarity or the need for collaboration.....	94
E.	Conclusion	99
I.	Solidarity at different political scales	99
II.	Solidarity and civil protection at EU level.....	102
III.	The meaning of emergencies for national sovereignty and their governance by the means of law	107
	Literature.....	111

Abbreviations

ARGUS	A general European rapid alert system
Art.	Article
CBRN	chemical, biological, radiological and nuclear
CDU	Christlich Demokratische Union Deutschlands (Christian Democrats)
CEAS	Common European Asylum System
CECIS	Common Emergency Communication and Information System
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
COSI	Standing Committee on Operational Cooperation on Internal Security
CPM	Civil Protection Mechanism
CSDP	Common Security and Defence Policy
DG ECHO	Directorate-General for Civil Protection and Humanitarian Aid Operations
DG	Directorate-General
EC	European Communities
ECB	European Central Bank
ECJ	European Court of Justice
ECOFIN	Economic and Financial Affairs Council
ECRE	European Council on Refugees and Exiles
ECSC	European Coal and Steel Community
EEAS	European External Action Service
EEC	European Economic Community
EERP	European Economic Recovery Plan
EFAS	European Flood Awareness System
EFFIS	European Forest Fires Information System
EFSF	European Financial Stability Facility
EMU	European Monetary Union

EPCIP	European Programme for Critical Infrastructure Protection
ERCC	Emergency Response Coordination Centre
ESM	European Stability Mechanism
ETA	Euskadi Ta Askatasuna (Basque Country and Freedom Organisation)
EU	European Union
Euratom	European Atomic Energy Community
Eurojust	Agency of the European Union (EU) dealing with judicial cooperation in criminal matters
Europol	European Police Office
FP7	European Union's Research and Innovation Funding Programme No. 7 (2007–2013)
Frontex	Agency of the European Union to manage the cooperation between national border guards securing its external border (from French: Frontières extérieures)
GDP	Gross domestic product
GNI	Gross national income
Horizon 2020	European Union's Research and Innovation Funding Programme No. 8 (2014–2020)
HR	High Representative of the Union for Foreign Affairs and Security Policy
IDNDR	International Decade for Natural Disaster Reduction
IMF	International Monetary Fund
IRA	Irish Republican Army
IRGC	International Risk Governance Council
JHA	Justice and Home Affairs
LI	Liberal Intergovernmentalism
MIC	Monitoring and Information Centre
NATO	North Atlantic Treaty Organization
OECD	Organisation for Economic Co-operation and Development
PEGIDA	German acronym for Patriotic Europeans against an Islamisation of the Occident

PVV	Partij vor the Vrijheid (Dutch “Freedom Party”)
QMV	qualified majority voting
RAF	Red Army Faction
SPD	Sozialdemokratische Partei Deutschlands (German Social Democratic Party)
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TREVI	Terrorism, Radicalism, Extremism and International Violence (Intergovernmental forum to exchange information and develop occasional cross-border coordination)
UN	United Nations
UNISDR	United Nations Office for Disaster Risk Reduction
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
US	United States

A. Introduction

Since its establishment in 1951, the European Union (EU) has always been confronted with the determination of its own scope, competences and identity. Being constructed as the agent of Member States, the EU has in many respects developed a life of its own, specifically in those policy fields which have been unleashed from their sovereign control and which are now subject to supranational decision-making processes. This gain in competences is accompanied by a constant struggle to link supranational policymaking to the lived reality of citizens' lives so as to increase the legitimacy of decisions taken at the EU level.

Supposing that narratives both represent and constitute social actors and the social world in which they act, such narratives form the very basis not only for the social construction of political systems, but also for their continuity. At the national level, respective narratives are particularly strong and anchored in law and *de facto* solidarity between citizens. Since a comparative bond is still lacking at the EU level, policymakers have sought to establish a narrative of a *European We* which is supposed to bring citizens' mind-sets in line with political realities. This narrative-creating process is implemented by way of symbols such as the EU anthem or flag, as well as by referring to shared values, European citizenship and *solidarity* between Member States and citizens. In this regard, "A New Narrative for Europe" is one of the latest initiatives by the European Commission to shape the future of Europe, stressing the meaning and importance of narratives for the institutional set-up of governance systems.

At the same time, *solidarity* is increasingly referred to in primary legislation such as Art. 2 TEU, which defines solidarity as a founding value of the Union. Solidarity is further related to the Common Policy on Asylum, Immigration and External Border Control (Art. 67 TFEU), and Energy Security (Art. 194 TFEU). For the field of Civil Protection,

Art. 222 TFEU (also referred to as the *Solidarity Clause*) requires solidarity between the EU and its Member States in crisis situations brought about by natural or man-made hazards and terrorist attacks.

Simultaneously, solidarity remains a vague legal concept and the EU is struggling to develop joint *solidary* policies, e.g. in response to the economic and financial crisis and most recently with respect to asylum and immigration in the context of the *refugee crisis*. This gives the impression that solidarity is less a political reality than mere wishful thinking. Consequently, the character and intention of primary legislation referring to solidarity remains rather confusing. Have respective norms been created to build a basis for joint efforts and concrete measures in the respective policy fields, or are they insubstantial statements narratively adding to what the Union *should* be?

This question determines the implementation of potential measures and policies and sheds light on the essence of the European Union and the meaning of solidarity at this governance level. At the same time, it also raises further questions regarding the relation between the Union and its Member States in the different policy fields and contexts in which the concept of solidarity is invoked. For example, how does the narrative of a European solidary society relate to national narratives, and is this solidarity the same in everyday life and in crisis situations? The terrorist attacks in Paris, Brussels, Berlin and London were followed by avowals of solidarity by Heads of States and citizens across Europe, while the inability and unwillingness to effectively address the refugee crisis or the Brexit movement have been contradictory to transnational solidarity.

This lack of understanding on the nature of solidarity in EU legislation, the intention of norms such as Art. 222 TFEU, their interlinkage with politics, as well as the relationship between national and EU solidarity is subject to this work. This thesis aims to analyse

conceptualisations of solidarity within the European Union at *different scales*. Differentiating between the nation state and the EU level, as well as between several context-related forms of solidarity, this work will exemplarily analyse the *implications of Art. 222 TFEU* which speaks to one of the core fields of solidarity through its reference to disasters. The conceptualisation of solidarity at EU level and the implications of emergency governance stemming from Art. 222 TFEU will be synthesised in respect of their *meaning for national sovereignty* in order to draw a conclusion about the *Status Quo of the EU-Member States relationship* in the field of civil protection and the nature of their solidarity in general. The chapters of the thesis will proceed as follows:

- I. **Different scales of solidarity:** Assuming that a system of multi-level governance may be linked to multi-level solidarity at the European and national level, the relation between respective solidarities is of interest to assess the potential impact of Art. 222 TFEU. The thesis pursues the question as to what extent solidarity is already linked to the EU or remains at the nation state level. If solidarity can be detected at the EU level, is it stable and potentially conflicting with national solidarity? Or does the national or the European iteration of solidarity dominate at the expense of the other depending on the situational context? What would a respective change or conflict reveal about the nature of solidarity, which is frequently supposed to be an ethical and thereby stable construct? And what role does disaster play in the wider context of solidarity?
- II. **Implications of Art. 222 TFEU (Solidarity Clause):** Having discussed the solidarity concept and its meaning for different scales and situations, the implications of Art. 222 TFEU are analysed. Which competences are determined for the Member States and the EU respectively? Does the Article

define binding implications or does it remain rather vague, and what does this mean for its implementation? What conclusions can be drawn about Art. 222 TFEU from the 2015 Paris terrorist attacks and what does it say about the relation between civil protection policies at EU level and national sovereignty?

- III. **Solidarity in the field of civil protection:** This chapter synthesises the findings of Chapters I and II. It looks into the potential conflict between different forms of EU solidarity and national sovereignty and analyses the conclusions that can be drawn from the fact that the emergency is addressed *by law*. It finally asks whether (a lack of) integration in the field of civil protection can be fully explained by the subsidiarity principle and reveals the meaning of emergency governance for the nation state.

In line with the depicted fields of analysis, this work addresses the following hypotheses:

- I. Varying types of solidarity exist across scales which differ between general political settings and crisis situations. While solidarity remains a dominant concept at the nation state level, different forms of solidarity can be identified at the EU level. These forms vary between actors and are context-specific. Consequently, solidarity is not stable and thus not an ethical but a political construct.
- II. Although cross-border solidarity is generated in times of crisis, no real political integration is arranged for civil protection policies. Art. 222 TFEU hardly defines binding implications for the Member States and additional competences for the EU are largely lacking. Art. 222 TFEU can thus be characterised as a norm representing the area of conflict between *moral* (empathic) solidarity and

political solidarity driven by rational choices. It also reflects the conflict between the need for integration in the field of civil protection and national sovereignty.

- III. Member States remain the primary actors in civil protection activities due to the meaning of emergency governance for sovereignty and the nation state narrative. It can thus be doubted that the dominance of Member State competence in civil protection matters is only driven by subsidiary aspects.
- IV. Finally, despite being of limited value for civil protection policies at EU level, Art. 222 TFEU reflects the tenor that emergency situations are to be addressed by the means of law and thus allows us to draw a conclusion about the EU's constitutional nature.

Overall, the purpose of this thesis is to provide a qualitative analysis and differentiation of different forms of solidarity at various levels in the general political context as well as in exceptional circumstances (disasters) to derive insights about the EU-Member State relationship and the nature of integration in the field of civil protection. While conceptualisations of solidarity are consulted so as to frame the solidarity context, this work does not seek to offer an explicit definition of the concept. Instead, the implications of different forms of solidarity for the EU and the nation state as complementary but also conflicting political constructs will be discussed in light of Art. 222 TFEU.

B. Solidarity: a matter of scale!?

I. Preliminary conceptual thoughts on solidarity

Solidarity has become a buzzword which is used in a variety of political regimes and policy contexts, stretching from union movements to military alliances and humanitarian actions. Solidarity also forms the basis of the welfare state and is a core value of the European Union (Art. 2 TEU). The North Atlantic Treaty Organization (NATO) applies solidarity to the case of defence against a common enemy¹ and within the United Nations (UN) system, solidarity was identified as a basic principle to promote peace, human rights, as well as social and economic development. In the Millennium Development Declaration, for example, solidarity was recognised as one of the core values for the 21st century, “wherein those who either suffer or benefit least deserve help from those who benefit most”² and in 2002 the General Assembly established the World Solidarity Fund³ to eradicate poverty and promote human and social development in developing countries, in particular among the poorest segments of their populations⁴.

But what is actually meant by different references to solidarity? Broadly speaking, solidarity can be defined as the cohesion between people who are members of a certain group for reasons such as sympathy, responsibility or interest. Religion is thereby one of the most ancient constructs for cohesion which created meaning and rules for individuals long before the idea of the nation state emerged. Grace of charity⁵ thereby defined rules and reasoning for care and

¹ Art. 5 of the North Atlantic Treaty.

² *United Nations*, International Human Solidarity Day, available via: <http://www.un.org/en/events/humansolidarityday/background.shtml> (30.05.2014).

³ United Nations General Assembly, A/RES/57/265 of 28 February 2003.

⁴ *United Nations* (FN 2).

⁵ In the Jewish-Christian belief, community is based on several core ideas: 1. Agape or the pure love of God for all human beings; 2. This love of God builds the precondition for the idea of loving thy neighbour who is equal before God; 3. Brotherhood of man meaning that all people are brothers and sisters before God;

solidarity amongst people.⁶ It also has roots in the Aristotelian concept of friendship (*philia*) among free burghers being members of the *polis* without referring to tribal or blood relations.⁷ In the Roman Law context, *in solidum* encompassed joint and several liability of a group of debtors towards a trustee⁸. The French Revolution took up these conceptualisations of solidarity and tied them closely to territory and democracy (the Republic).⁹ The core idea of brotherhood (*fraternité*) thereby encompassed the egalitarian freedom to participate in public affairs. However, brotherhood was only created amongst those who supported the state's revolutionary aim.¹⁰ Some decades after the revolution, *brotherhood* and *solidarity* were applied to the context of labour movements influenced by Marx and Lasalle. Based on the insight that workers could reduce their dependency on employers when they unite with fellow workers¹¹, solidarity remains to this day one of the unions' guiding concepts.

Providing a historical overview helps to explain when and how the concept of solidarity was developed and ultimately tied to a geographical entity being democratically organised. Yet such an overview fails to explain the major drivers that generate solidary feelings. In this regard, economic and social-scientific scholars have developed different approaches to analysing (the roots of) solidary feelings. Overall, there are three main and partly overlapping approaches to explain solidarity: *functional*, *rational choice*, and *normative* perspectives. *Functional* approaches explain solidarity as a

4. An idea of fraternity which means also sharing with others as in a family. It is reflected in the maxim of loving one's neighbour as oneself (Leviticus 19, 18) – also see Brunkhorst, *Solidarität*, 2002, 44 f.

⁶ Röttgers, *Fraternité und Solidarität in politischer Theorie und Praxis*, in: Busche (Ed.), *Solidarität*, 2011, 19 (33 ff).

⁷ Although burghers were understood as men in certain (upper) classes forming an exclusive legal community – see Aristotle, *The Politics*, edited by Everson, 1988; Brunkhorst (FN 5), 24 ff and also Canfora, *Der Bürger*, in: Vernant (Ed.), *Der Mensch in der griechischen Antike*, Essen, 2004.

⁸ Brunkhorst (FN 5), 10.

⁹ Brunkhorst (FN 5), 80 ff.

¹⁰ Röttgers (FN 6), 33 ff.

¹¹ Bernstein, *Die Arbeiterbewegung*, 1910.

stabilising mechanism of society which is established through subjective feelings towards (members of) a group.¹² The limitation of the group and the resulting exclusion of others thereby play an important role.¹³ Since the modernisation of societies, their occupational specialisation and social differentiation reduce the effectual glue towards the group (members), functional interdependencies between the people come to replace this function.¹⁴ *Rational choice* theory instead presupposes that individuals have clear preferences and are driven by material interest. The approach assumes that individuals strive to satisfy their own needs and expect to benefit from becoming or remaining a member of a group. According to *normative* approaches, individuals' behaviour is determined by rules. Norm-conforming behaviour is explained by the identification with and acceptance of respective norms through socialisation.¹⁵ Solidarity between individuals is generated through the process of developing and internalising these norms.

Regarding the analysis of solidarity at both nation state and EU levels, all three approaches are relevant. The *functional approach* plays a specific role at the nation state level, which is characterised by a high density of organisational structures, such as the welfare system, that bind citizens together. The *rational choice* approach plays only a limited role at nation state level, since citizens in general do not choose their citizenship and may not opt out from welfare systems if they do not serve their preferences¹⁶. At EU level, however, the rational choice perspective plays a crucial role in understanding the shift of competences from Member States to a supranational level and the consequent diminishing of nation state sovereignty. The

¹² Weber, *Economy and Society*, 1968.

¹³ Rorty, *Contingency, Irony and Solidarity*, 1989, 190 ff.

¹⁴ Durkheim, *The Division of Labor in Society*, 1933.

¹⁵ Hechter, *Principles of Group Solidarity*, 1987, 20 ff.

¹⁶ Although this is partially true for health insurance schemes.

rational choice approach will therefore build a basis for framing solidarity in the EU. In order to frame and understand the meaning of norms at the nation state and EU level for the generation of solidarity, this work finally also builds on the *normative approach*. It is thereby presumed that law is a social practice driven by a set of *beliefs* about the self, the community, as well as authority and representation, and that, in addition, the rule of law is shaped by religious and monarchical *remnants* from the past¹⁷. Consequently, the acceptance of and adherence to norms can be explained by their interconnection with people's belief systems.

The above approaches constitute the basis for an analysis of solidarity at the nation state and EU levels. Emphasis is thereby placed on the identification of qualitative variations of attachment to political systems and the drivers for Member State solidarity at the EU level.

¹⁷ Kahn, *The Cultural Study of Law*, 1999, 41.

II. Solidarity at the nation state level

In the political context, solidarity is first of all related to the nation state where it is built on three main aspects: narrative, organisational structure, and strong interlinkage between people and law. The term *nation state* thereby already reveals the importance of narratives for its existence. The concept of the nation is based on ethnic identity, i.e. a subjective sense of common origin which often draws on cultural ties such as religion, language, and culture. It is, however, more abstract and substantially political in the sense that it relates to a “large cultural-historical community possessing its own territory, a unified economy and education system, and common legal rights and duties”.¹⁸ While a considerable number of states consist of several ethnic groups, the nation state propagates one official version of the community’s history and a consensual view of its destiny.¹⁹

Yet the nation state is characterised not only by an educational system that serves to maintain this narrative, but also by a legal and an economic system, public administration, and a multitude of cases by welfare systems. Established to provide security in the face of risks such as illness and unemployment²⁰, welfare systems are counterbalanced by civic obligations such as taxpaying²¹. The willingness to contribute to the welfare community, based on the principle of mutual solidarity, thereby correlates with the state’s power to avoid free-riding²² (see Figure 1).

¹⁸ *Smith*, *Ethnie and Nation in the Modern World*, *Journal of International Studies*, 14(2), 1985, 127 (132).

¹⁹ *Ibid.*, 131.

²⁰ *Beckert, Eckert, Kobl, and Streeck*, *Einleitung*, in: Beckert et al. (Eds.), *Transnationale Solidarität*, 2004, 9 (9 f).

²¹ *Lukes*, *Solidarität und Bürgerrecht*, in: Bayertz (Ed.), *Solidarität. Begriff und Problem*, 2002, 389 or *Schmidt*, *Zur Leistungsfähigkeit von Demokratien*, in: Katenhusen and Lampig (Eds.): *Demokratien in Europa. Der Einfluss der europäischen Integration auf Wandel, Leistungsfähigkeit und neue Konturen des demokratischen Verfassungsstaates*, 2003, 269.

²² *Offe*, *Pflichten versus Kosten: Typen und Kontexte solidarischen Handelns*, in: Beckert et al. (Eds.), *Transnationale Solidarität*, 2004, 35.

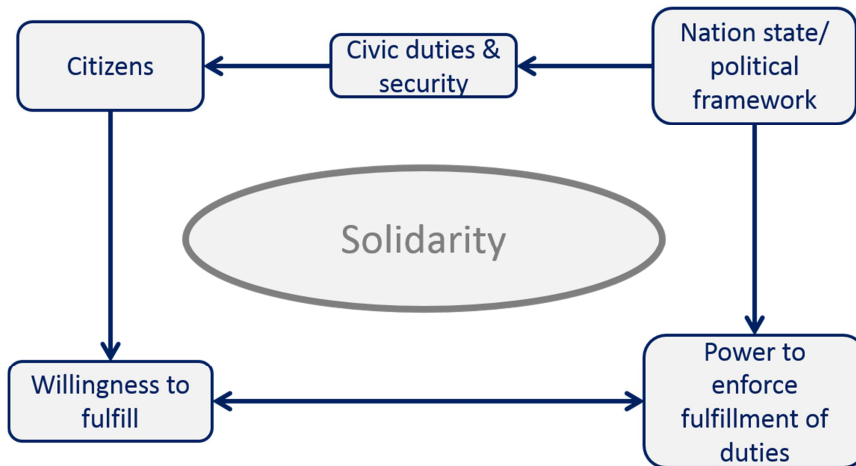


Figure 1: Solidarity and civic duties

Source: Author's own.

Welfare systems are thus an expression of solidarity amongst the citizens, while also serving to reinforce this solidary connection. That said, communitarians argue that the institutionalisation of solidarity in the (welfare) state degrades solidarity by detaching it from personal feelings and voluntary action.²³ In line with the functionalist approach, it can be supposed that the welfare state changes its nature to an abstract but *legally based* solidarity amongst strangers²⁴. It thereby decreases the dependency on personal relationships²⁵ and follows a line of increasing individualisation and decreasing, small-scale forms of solidarity²⁶.

Overall, the legal basis plays a particular role in the establishment and organisation of the nation state and its welfare system. It is an expression of pre-existing solidary feelings, but it also visualises solidarity and as such becomes, like the welfare system, a reinforcing power. In other words, it is the “enabling, result and guarantee of solidarity”²⁷ (compare Figure 2).

²³ Giddens, *The Third Way*, 1998, 34 ff or Etzioni, *The Spirit of Community*, 1993.

²⁴ Habermas, *Die Einbeziehung des Anderen*, 1996, 189.

²⁵ Bedarf, *Politik, Recht oder Moral?*, in: Busche (Ed.), *Solidarität*, 2011, 107 (116 f).

²⁶ Durkheim (FN 14).

²⁷ Volkmann, *Solidarität*, Tübingen, 1998, 74.

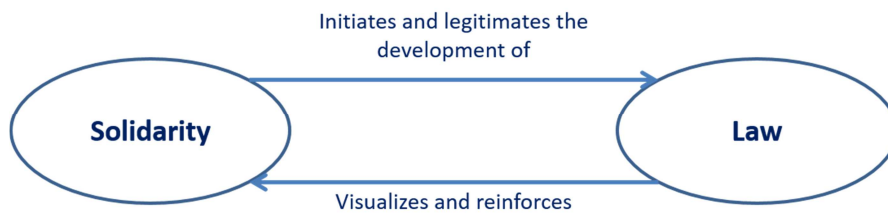


Figure 2: Relation between solidarity and law

Source: Author's own.

Due to its contribution to societal self-conception²⁸, its role in constructing the State and building the framework for its functioning and maintenance, law is closely connected to citizens' belief systems and their imagination of the nation state²⁹. As Kahn notes, the law must "rule the imagination before it can rule the state"³⁰. However, law does not just functionally tie together the nation state and belief systems; it also preserves the *mystic momentum* of the revolutionary act of State creation. The specific affiliation to the nation state by the means of law is generated by *constitutions* which stretch the historical consensus of State formation across generations and time,³¹ even if historical commonalities, such as culture or language, are lacking³². Believing in the constitution makes citizens part of the sovereign and aligns legal content and social practices.³³

This interrelationship of law, narrative, and organisational structures which bond citizens to a solidary society is also explicitly mentioned in a variety of constitutions. Art. 2 of the Italian Constitution, for example, states that the "Republic expects that the fundamental duties of political, economic and social solidarity" are fulfilled, while Art. 2 of the Spanish Constitution refers to solidarity between the regions. In the Preamble to the Polish Constitution, solidarity is

²⁸ Volkman (FN 27), 69 ff.

²⁹ Haltern, Recht und soziale Imagination, in: Gephart (Ed.), Rechtsanalyse als Kulturforschung, 2012, 89.

³⁰ Kahn (FN 17), 83.

³¹ Volkman (FN 27), 74 f.

³² Bogdandy von, Europäische und nationale Identität: Integration durch Verfassungsrecht?, VVDStRL 62, 2003, 156.

³³ Haltern (FN 29), 80. For the overall relationship between national sovereignty and imagination see also Haltern, Was bedeutet Souveränität?, 2007.

referred to as a basic value. This reflects the particular bond between citizens and nation state as well as the citizens' solidarity towards their fellow citizens even to the extent that it rationalises the killing of fellow humans and sacrificing of one's own life in order to *defend* the nation and secure the state's survival. Although the nation state has been revealed as contingent and imagined,³⁴ many human lives continue to be sacrificed in conflicts around the world. Although this appears to be, in many respects, neither just nor rational, it is still widely regarded as legitimate³⁵.

³⁴ Anderson, *Imagined Communities*, 2006.

³⁵ Haltern, *Notwendigkeit und Umriss einer Kulturtheorie des Rechts*, in: Dreier and Hilgendorf (Ed.), *Kulturelle Identität als Grund und Grenze des Rechts*, 2008, 193 (201).

III. Solidarity at EU level

At the European level, solidarity has played a key role since the founding phase of the European Communities. The Schuman Declaration already outlined that solidarity in production would prevent future wars³⁶ and the Preamble to the Treaty establishing the European Coal and Steel Community (ECSC) stated that “Europe can be built only by concrete actions which create a real solidarity”. While the Treaty of Rome stressed that solidarity would bind Europe and overseas countries together, the Preamble to the Single European Act referred to the need to “act with consistency and solidarity” in order to safeguard Europe’s common interests. The European Court of Justice (ECJ) declared already in 1973 that the European Community was built on solidarity represented by its legal system. According to the ECJ, a unilateral breaking of Community Regulations due to national interests, and the disturbance of the equilibrium between advantages and obligations flowing from its adherence to the Community, represented a “failure in the duty of solidarity accepted by Member States” striking a blow at the fundamental basis of the Community legal order.³⁷ During the 1980s, solidarity as a conceptual framework for policymaking in Europe retreated into the political background since economic aspects, in terms of the creation of the single market, were a leading goal. By the end of this decade, however, solidarity took on a more concrete form in the establishment of funds for economic and social cohesion and its importance has increased since then. While the Maastricht Treaty referred to solidarity only once, approximately 20 references can be found in the Constitutional Treaty and 15 references were finally introduced into the Treaty of Lisbon³⁸ (Figure 3).

³⁶ *Schuman*, Declaration of 9th May 1950.

³⁷ CJEU, Case C-39/72, 1973, I-101, *European Communities v. Italian Republic*, paras. 24–25.

³⁸ The decline in the number of references in the Treaty of Lisbon as compared to the Constitutional Treaty can be explained by its more condensed character: e.g.

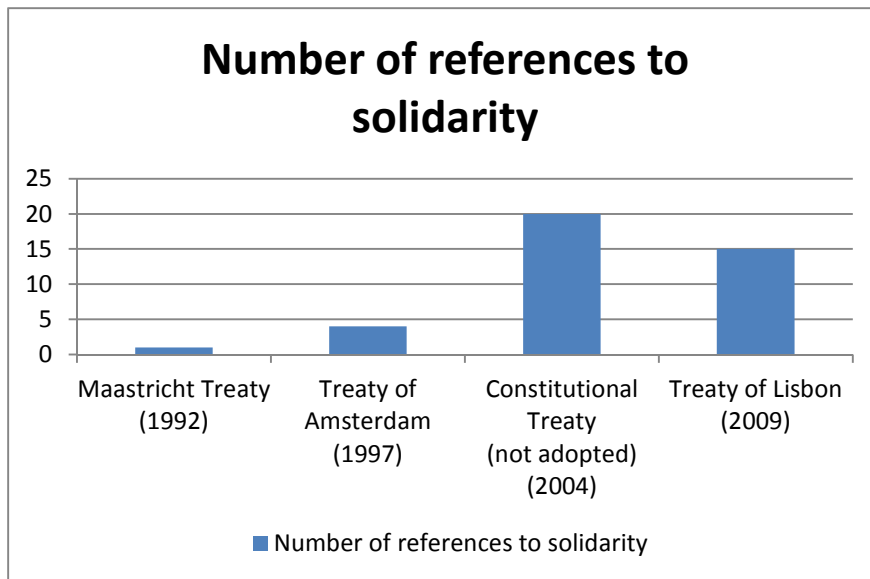


Figure 3: Number of references to solidarity in EU Treaties

Source: Author's own.

In the Preamble to the Treaty on European Union (TEU), the Member States stressed that the aim of the European Union's establishment was to deepen solidarity between their peoples while respecting their history, culture and traditions. Solidarity is declared to be a core value of the EU (Art. 2 TEU) and builds the basis for reasoning the fight against social exclusion and intergenerational equality (Art. 3 TEU). It is established as a guiding principle for the Union's action on the international scene (Art. 21 TEU) as well as for its Common Foreign and Security Policy (Art. 24 and 31 TEU). Furthermore, primary legislation relates solidarity to policies on asylum, immigration and external border control (Art. 67 TFEU and Art. 80 TFEU), economic policies (Art. 122 TFEU), energy policy (Art. 194 TFEU) and disasters (Art. 222 TFEU). In parallel, solidarity is mentioned in secondary legislation and policy initiatives at the European level encompassing a broad range of policy fields.³⁹ The Charter of Fundamental Rights of the European Union even dedicates a whole chapter to solidarity (Chapter IV: Solidarity) under which the

the Charter of Fundamental Rights including a section on solidarity did not become part of the Lisbon Treaty.

³⁹ A "title only" search in EUR-lex with respect to EU law and related documents accounts for more than 300 results.

rights of workers are summarised and access rights, e.g. to social security and social assistance or healthcare, are addressed (Art. 27-38 Charter of Fundamental Rights of the European Union).

These developments and the anchoring of solidarity in the Treaties of the European Union seem to establish it as a guiding or even organising principle for Member States' collaboration⁴⁰. At the same time, the identification of solidarity as the very basis for integration is challenged by two main deficiencies. Firstly, a definition and list of concrete policy implications are often lacking. Secondly, the benefits generated through the European Union are not an end in themselves, but also reflect the decreasing ability of nation states to secure their citizens' livelihood in an increasingly globalising world. As such, solidarity can be defined less as an altruistic motive than one that reflects the Member States' interests. In addition, in a variety of policy fields, such as refugee and asylum policy, the behaviour of EU Member States currently falls far short of what solidary burden sharing would encompass (see also the chapter below on *Policies on Border Checks, Asylum and Immigration and the principle of burden sharing*). Moreover, solidarity between EU citizens and their attachment to the EU is relatively low when compared to the nation state.

Consequently, one needs to ask, on the one hand, whether the growing number of references to solidarity reflects a greater solidarity between the Member States or whether it hides the fact that solidarity is lacking at EU level and is instead (ab)used to label the political fight about social and political integration⁴¹. On the other hand, solidarity is not simply a matter between the Member States; it is also one between EU citizens which calls for a differentiation in the analysis of solidarity at EU level. Finally, at the EU level, belief

⁴⁰ *Lais*, Das Solidaritätsprinzip im europäischen Verfassungsverbund, 2007, 348 ff.

⁴¹ *Schorkopf*, Nationale Verfassungsidentität und europäische Solidarität: Die Perspektive des Grundgesetzes, in: Calliess (Ed.), Europäische Solidarität und nationale Identität, 2013, 99.

systems and law are less interlinked than they are at the nation state level. As a result, the integration process as steered by the Member States and solidarity between the people of Europe have to be understood as rather technical or *political*, while *moral* solidarity, expressing compassionate feelings, plays no particular role in everyday life but can be triggered in times of crisis, for example, in the context of disasters.

This differentiation assumes that the political and the moral worlds coexist in every individual, but nevertheless it is impossible to make them one⁴². It supposes that humans are primarily political beings. Yet, in certain moments, the political sphere recedes into the background and becomes irrelevant to the benefit of the moral sphere which then determines thoughts and decision-making. Such moments are designated by their distinctiveness encompassing, for example, religious holidays, but also events causing tremendous loss of life. Respective (mystic) moments or moments in which an extreme threat has to be faced highlight similarities and the shared humanity of all people.

1. Political solidarity

Political solidarity can be clustered into two main categories: *solidarity between the Member States* and *solidarity as a societal value*.⁴³ Solidarity between the Member States thereby reflects the integration process in general and can be interpreted as the counter-principle to subsidiarity. Understanding the Member States as the main drivers of the integration process, political solidarity is driven by the need to find responses to political challenges which cannot be addressed by nation states individually. Consequently, it varies in terms of its intensity and practical implementation for different policy fields. Solidarity as a societal value instead addresses the bond

⁴² Kahn (FN 17), 38 ff.

⁴³ Adapted from Kadelbach, *Solidarität als europäisches Rechtsprinzip?*, in: Kadelbach (Ed.), *Solidarität als Europäisches Rechtsprinzip?*, 2014, 9, 9 ff.

between Member States' citizens. Both forms are based on and represented by EU primary legislation. While Art. 2 TEU defines solidarity as a founding value of the Union, the Treaty on the Functioning of the European Union (TFEU) contains several references to Member State solidarity, e.g. with respect to economic policies (Art. 122 TFEU)⁴⁴ or to policies on asylum, immigration and external border control (Art. 67 2. TFEU)⁴⁵. Regarding the bond between Member States' citizens, EU citizenship plays an important role (see also Art. 20 TFEU).

Both forms of political solidarity allocated between the interests of nation states and citizenship are heterogeneously distributed and shaped along and within Member States. They are also subject to change prompted by economic and political framework conditions, the development of the EU itself, as well as by the governmental set-up within the Member States.

a) Solidarity between Member States

The competences of the EU have constantly been extended since the foundation of the European Coal and Steel Community (ECSC) in 1951. Spanning from initial regulations in the coal and steel production, they have stretched from economic policy coordination and cooperation to the support of nuclear energy development by the foundation of the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) in 1957. Today, the EU is active in a wide range of areas including agriculture, economic and monetary affairs, foreign and security policy as well as research and innovation, among others. This is reflected by the current 33

⁴⁴ According to Art. 122 1. TFEU and without "prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy".

⁴⁵ According to Art. 67 2. TFEU the Union shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States.

Directorates-General (DGs) of the European Commission dedicated to a broad range of policy fields⁴⁶ and over 40 agencies that oversee technical, scientific or managerial tasks that help the EU institutions to make and implement policies⁴⁷.

But does this obvious increase in EU competences necessarily reflect solidarity between the Member States? The integration process has always been caught between the shift of competences to the EU and the maintenance of Member States' sovereignty and interests. A broad range of scholars have sought to understand and explain this shift of competences by developing federalist, (neo-)functionalist, constructivist and multi-level governance approaches, to name but a few.

Liberal Intergovernmentalists have argued that the integration process was mainly driven by rational choice decisions of the Member States, which believed they would benefit from intergovernmental collaboration⁴⁸ and had developed economic, ideological or geopolitical preferences⁴⁹. Certainly, the integration process has largely been driven by the Member States, *the Masters of the Treaties* which aimed to secure peace across Europe, specifically in its founding phase. Regarding the development of supranational governance aspects, however, additional theories must be considered.

Neo-functionalists have argued that initial integration steps would trigger economic and political dynamics leading to further integration. According to this view, respective spill-overs would occur

⁴⁶ European Commission, Departments (Directorates-General) and services, available via: http://ec.europa.eu/about/ds_en.htm (04.09.2015).

⁴⁷ *Groenleer*, *The Autonomy of European Union Agencies*, 2009 and *European Union, Agencies and Other EU Bodies*, available via: http://europa.eu/about-eu/agencies/index_en.htm (28.06.2014).

⁴⁸ Most prominently *Moravcsik*, *Preferences and Power in the European Community*, *Journal of Common Market Studies*, 1993, 31(4), 473.

⁴⁹ *Moravcsik*, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*, 1998, 476 ff.

in order to increase the effectiveness of existing policies (functional spill-over)⁵⁰ or they are driven by a self-reinforcing process of institution-building of supranational organisations (political spill-over)⁵¹.

The development of the doctrines of *supremacy* and *direct effect* fixing the legal relationship between Community and Member State law,⁵² for example, can be seen as a *political spill-over*. Enabling the invocation of community norms by individuals before their State courts⁵³ and establishing community law as the higher law, the Court was “implicitly or explicitly placing itself in a power situation as the Community institution with the ultimate authority [...]”⁵⁴ and seized competences which were initially not or only partly foreseen in the Treaties.

Although theories other than Liberal Intergovernmentalism (LI) explain certain aspects of the integration process, it will be the predominant theory for understanding the behaviour of nation states with respect to decisions taken in the context of civil protection and solidarity. While LI frequently focuses on economic aspects and preferences⁵⁵, various additional elements have to be taken into account in their decision-making processes. In recent decades, a broad range of political challenges, such as climate change, international terrorism or most recently the economic and financial crisis, have stressed that nation states no longer have the capacity to address these challenges individually and instead need to collaborate

⁵⁰ Haas, *The Uniting of Europe*, 1958, 297 ff as well as *Rosamond*, *The Uniting of Europe and the Foundation of EU Studies*, *Journal of European Public Policy*, 12(2), 2005, 237.

⁵¹ *Lindberg*, *The Political Dynamics of European Economic Integration*, 1963.

⁵² *Weiler*, *The Transformation of Europe*, *The Yale Law Journal*, 1991, 100(8), 2403 (2413 ff) and *Weiler*, *A Quiet Revolution*, *Comparative Political Studies*, 1994, 26(4), 510.

⁵³ *Weiler* 1991 (FN 52), 2413 ff and *Weiler* 1994 (FN 52), 513.

⁵⁴ *Weiler* 1994 (FN 52), 516.

⁵⁵ For example *Moravcsik* (FN 49) and *Mattli*, *The Logic of Regional Integration*, 1999.

if they want to develop effective responses.⁵⁶ The respective engagement can thus also be regarded as a rational choice approach to inter- and supranational policymaking.

This LI approach to describe the integration process and the Member States' relationship as driven by both interests and political needs⁵⁷ was reflected by a speech of the former President of the European Council, Herman Van Rompuy, who characterised political solidarity between Member States as an obligation: "Solidarity is a duty. It is not a virtue, because a virtue is voluntary".⁵⁸ His statement might be interpreted in line with the ECJ who had described solidarity in 1973 as a rather voluntary commitment and defined solidarity as *reciprocal responsibility* being expressed through compliance with joint regulations even if they do not reflect the preferences of the individual nation state⁵⁹ and identified EU legislation as an expression and implementation of solidarity between the Member States⁶⁰. At the same time, it can also be regarded as an expression of a lack of choice.

This dilemma is already reflected in the development of EU legislation which was a necessary prerequisite for the functioning of the Union to which the Member States had voluntarily agreed⁶¹. Nevertheless, it was also a means to the end of enforcing political decisions taken at the EU level⁶² and policy challenges that the Member States wanted to address. Solidarity expressed by EU law can thus also be regarded as a requirement. In other words, and

⁵⁶ See also *Giddens* (FN 23) as well as *Beck*, *Weltrisikogesellschaft*, 2008.

⁵⁷ *Pernice*, *Solidarität in Europa*, in: Calliess (Ed.), *Europäische Solidarität und nationale Identität*, 2013, 25 (43).

⁵⁸ *Rompuy*, *Speech on the Occasion of the Departure of the President of the ECB*, Frankfurt, 19th October 2011, available via: http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/125374.pdf (19.04.2015).

⁵⁹ CJEU, Case C-39/72, 1973, I-101, *European Communities v. Italian Republic*, paras. 24–25 and *Schorkopf* (FN 41).

⁶⁰ *Calliess*, in: Calliess and Ruffert (Eds.), *EUV/AEUUV*, 2016, Art. 222 AEUV, para. 4.

⁶¹ This encompasses also the acceptance of the principles of supremacy and direct effects as developed by the ECJ.

⁶² *Haltern*, *Europarecht*, 2007, 452.

since certain challenges could not be addressed efficiently at the national level, Member State solidarity represented by European integration can be defined as the counter-principle to subsidiarity. According to Art. 5 1st para. 1st sentence TEU, the use of Union competences is governed by the principle of subsidiarity which is outlined in Art. 5 3rd para. TEU:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

As a matter of principle, policy issues which can be efficiently addressed at local or national level do not generate EU competences. A range of political challenges, however, cannot be solved at the local or national level, which requires the Member States to transfer competences.⁶³ In a globalised world, these requirements are ever increasing.⁶⁴ In this regard, Member State solidarity as indicated by Herman Van Rompuy is a prerequisite for finding solutions to policy challenges. As such, Member State solidarity cannot be regarded as altruistic, a point that is also reflected by policies in response to the economic and financial crisis and those pertaining to the refugee crisis. Despite European solidarity being called upon in both policy fields, and indeed a fair sharing of responsibility is even anchored in the primary legislation for asylum and immigration policies (Art. 80 TFEU), individual Member State interests tend to dominate the actual policies which are developed and implemented.

⁶³ Pernice (FN 57), 40.

⁶⁴ See for example Beck (FN 56).

aa) Financial policies

The financial and economic crisis which started to unfold in 2007/2008 has shown that the nation state's sovereignty and autonomy is limited by illustrating that economic decisions of one State can have effects on global financial markets and other States. For the Euro Area, the crisis required governments to develop intervention measures in order to stabilise the financial sector and support overall economic activity.⁶⁵ Respective measures were coordinated under the *European Economic Recovery Plan* (EERP) by the European Commission which suggested an immediate budgetary impulse amounting to €200 billion (1.5% of GDP)⁶⁶ including capital injections for weak banks and the provision of government guarantees for depositors and banks issuing bonds. Nevertheless, liquidity through financial markets could no longer be accessed by Greece, Ireland and Portugal between Autumn 2009 and Spring 2011. Financial emergency support was provided to them via the European Financial Stability Facility (EFSF) of Euro Area Member States which was set up in 2010.⁶⁷ Following the EFSF, the European Stability Mechanism (ESM) was established in October 2012 as a permanent mechanism for responding to new requests for financial assistance by Euro Area Member States. It has provided loans to Spain and Cyprus and may provide financial assistance to ESM Members which are experiencing or threatened by severe financing problems to safeguard the financial stability of the Euro Area.⁶⁸

Specifically, those measures taken in the context of EFSF and ESM were highly debated due to the large sums involved. The Eurozone

⁶⁵ *Riet van*, Euro Area Fiscal Policies and the Crisis, European Central Bank Occasional Paper Series, 109, 2010.

⁶⁶ Commission of the European Communities, Communication from the Commission to the European Council, A European Economic Recovery Plan, Brussels, 26.11.2008 COM(2008) 800 final.

⁶⁷ *Schuknecht, Moutot, Rother and Stark*, The Stability and Growth Pact: Crisis and Reform, CESifo DICE Report, 3, 2011, 12.

⁶⁸ Treaty establishing the European Stability Mechanism as well as Treaty establishing *European Stability Mechanism*, Financial Assistance, 2014.

States' combined commitments encompassed €1.2 trillion corresponding to more than 12% of the total Eurozone GDP and dwarfing the EU budget of €129 billion in 2012. Decision makers who had to defend those unpopular measures and explain them to the citizens frequently invoked the notion of solidarity. For example, the need for solidarity to address the financial crisis played a role in social democratic party platforms across Europe.⁶⁹ The need and reasons for stabilising *other* countries by the means of *national* expenditure⁷⁰, the legitimacy of those measures⁷¹ and the potential effects on the European Union⁷² were discussed by politicians and the media in order to convince citizens of their necessity. The identification of the respective measures as political requirements to prevent a further expansion of the crisis and to delimit its negative effects at the same time stressed that it was more a response to macroeconomic realities than a request for integration by the Member States.⁷³ Measures labelled as solidary action were largely driven by the attempt to

⁶⁹ For Germany e.g. *Fachausschuss EU-Angelegenheiten of the Social Democratic Party (SPD)*, Mit mehr Solidarität aus der Krise in der Eurozone, Spring 2013: <http://www.spd-berlin.de/w/files/spd-fachausschuesse/argumente-eu-2013.pdf> (02.08.2016), for Spain e.g. *Partido Socialista Obrero Español, Manifiesto del PSOE*, Día de Europa, 8th May 2013: <http://www.psoe.es/saladeprensa/docs/688056/page/otra-europa-posible.html> (02.05.2014), for France e.g. *Parti Socialiste (PS)*, L'Europe, une intégration solidaire, available via: <http://www.parti-socialiste.fr/nos-idees/europe-et-international> (02.05.2014).

⁷⁰ For example *Schmidt*, Pflicht zur Solidarität, Die Zeit, 6th January 2013, available via: <http://www.zeit.de/2013/01/Euro-Krise-Solidaritaet-Helmut-Schmidt> (02.08.2016) or *Fischer*, Europa zerbröselt, Süddeutsche Zeitung, 2nd May 2013, available via: <http://www.sueddeutsche.de/politik/folgen-der-krise-europa-zerbroeselt-1.1662826> (02.08.2016).

⁷¹ For example: *Niehaus and Siedenbiedel*, Eine Frage der Solidarität, Frankfurter Allgemeine Zeitung (FAZ), 11th June 2013, available via: <http://www.faz.net/aktuell/wirtschaft/eurokrise/europaeische-zentralbank-eine-frage-der-solidaritaet-12214573.html> (02.08.2016).

⁷² For example *Chaves Gonzáles*, Alemania y la solidaridad europea, El País, 10th May 2013, available via: http://elpais.com/elpais/2013/04/30/opinion/1367345208_925526.html (02.08.2016) or *Debons, Généreux, Habel, Harribey, Khalifa, Vergiat and Wurtz*, Le MES n'est pas un mécanisme de solidarité européen, Le Monde, 1st March 2012, available via: www.lemonde.fr/idees/article/2012/03/01/le-mes-n-est-pas-un-mecanisme-de-solidarite-europeen_1649890_3232.html#icA6Ce5j98GtwqTV.99 (19.01.2016).

⁷³ *Gaitanides*, Ein Solidaritätsprinzip in der Krise?, in: S. Kadelbach (Ed.), Solidarität als Europäisches Rechtsprinzip?, 2014, 33.

regain control and democratic self-determination. At the same time, those states which provided financial support and guarantees to those in need became restricted in their own budgetary policies⁷⁴ but also those parliaments receiving support partly lost their capacity to play an active role in policymaking due to saving obligations required by third parties such as the International Monetary Fund (IMF). In this respect, the attempts to delimit negative effects created new governance challenges and posed additional questions about integration. The negative transnational effects of multiple States' economic decisions on one another, which also lack democratic accountability⁷⁵, will likely only be prevented by an concerted coordination of economic and financial policies at the supranational level⁷⁶. Paradoxically, the regaining of sovereignty will thus be achieved through a reduction in financial sovereignty⁷⁷. The fundamental challenge consists thereby in accepting that a respective need for integration and collaboration is defined not by the Member States, but rather by external factors, i.e. a globalised economy and the power of (financial) markets.⁷⁸

bb) Policies on Border Checks, Asylum and Immigration and the Principle of Burden Sharing

In the field of Policies on Border Checks, Asylum and Immigration and the Principle of Burden Sharing (Chapter 2, Art. 77-80 TFEU), and more specifically in relation to asylum policies, the phenomenon of developing and implementing policies that serve individual Member

⁷⁴ Calliess, "In Vielfalt geeint" – Wie viel Solidarität? Wie viel nationale Identität?, in: Calliess (Ed.), Europäische Solidarität und nationale Identität, 2013.

⁷⁵ Pernice (FN 57), 47.

⁷⁶ The mere surveillance of national economic and financial policies by the Union is provided for in Art. 121 TFEU and for the Member States whose currency is the Euro in Art. 136 TFEU.

⁷⁷ In this respect, the German Constitutional Court had stressed already in 1993 that a financial union with respect to economic stability was a precondition for the accession of Germany to the Monetary Union: BVerfG, Decision of 12th October 1993, 2 BvR 2134/92; 2 BvR 2159/92, BVerfGE 89 (200 ff).

⁷⁸ Calliess (FN 74), 5.

State interests under the label of solidarity is even further aggravated.

The development of joint policies on border checks, asylum and immigration functionally resulted from the establishment of the Schengen area in 1985 as an area without internal borders and respective border checks in order to complete the single market. Today, these policies include, for example, checks on persons and efficient monitoring of the crossing of external borders (Art. 77 1. (b) TFEU) or the development of measures regarding a common policy on visas and other short-stay residence permits (Art. 77 2. (a) TFEU).

The present asylum system is based on Regulation 604/2013 (Dublin III Regulation)⁷⁹ establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. Governments had sought to designate a single country as responsible for the handling of asylum applications in order to prevent asylum seekers from making multiple application claims in different Member States following their rejection in another State⁸⁰. For the majority of cases the Regulation identifies the responsible party as those countries in which the asylum applicant irregularly crossed the border (Art. 13 Regulation 604/2013). This leads to an extreme imbalance in the distribution of the number of asylum applicants for which Member States are responsible at the southern and eastern periphery of the Union. Accordingly, in the context of the economic and financial crisis, certain countries, like Greece, have been

⁷⁹ Regulation (EU) No. 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (OJ L 180 of 29.06.2013, 31).

⁸⁰ The European Council on Refugees and Exiles (ECRE), From Schengen to Stockholm, available via: <http://www.ecre.org/topics/areas-of-work/introduction/194.html> (07.05.2015).

overburdened by the number of applicants for whom they are responsible. One of the results of the weak social conditions for asylum applicants and the lack of a fair procedure for granting the right of asylum was the decision by the European Court of Human Rights according to which these conditions violate Art. 2, 3 and 13 of the European Convention on Human Rights.⁸¹ Despite this decision and a decision by the ECJ that asylum seekers cannot be transferred to the Member State responsible for examining their application if there is a real risk that they will suffer inhuman and degrading treatment⁸², these countries receive little support. Although Art. 80 1st sentence TFEU stresses that the policies of the Union and their implementation set out under Chapter 2 *Policies on Border Checks, Asylum and Immigration and the principle of burden sharing* are to be “governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States”, the Dublin III Regulation does not create a solidary system, but instead disproportionately burdens the countries at the southern and eastern periphery of the European Union.⁸³

Instead of granting comprehensive financial and organisational support to develop a joint approach to address the increasing number of persons seeking asylum in the EU, some Member States refuse to even receive refugees. Although quotas had been developed to relocate refugees to other EU countries so as to assist Greece and Italy⁸⁴, certain Member States (specifically Romania,

⁸¹ ECHR, Judgment of 21 January 2011, *M.S.S. vs. Belgium and Greece* (No. 30696/09).

⁸² CJEU, Judgment of 11 December 2011, Joined Cases C-411/10 *N. S. v. Secretary of State for the Home Department* and C-493/10 *M.E. v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, ECR 2011, I-13905.

⁸³ Bast, *Solidarität im europäischen Einwanderungs- und Asylrecht*, in: Kadelbach (Ed.), *Solidarität als Europäisches Rechtsprinzip?*, 2014, 19 (26).

⁸⁴ *Council of the European Union*, Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece, Brussels, 22 September 2015, 12098/15, ASIM 87 and also *European Commission*, *Refugee Crisis – Q&A on Emergency Relocation*, available via: http://europa.eu/rapid/press-release_MEMO-15-5698_de.htm (14.06.2016).

Czech Republic, Slovakia and Hungary) refuse to accept the relocation plans. Having been overruled in the Council, they have gone on to declare the decision an “assault on their sovereignty”⁸⁵. But moreover, those Member States that had supported the decision have failed to fulfil their quotas of refugees and many have even built barricades to try to keep out both migrants and refugees⁸⁶.

In this respect, Member States act not only contrary to the solidary commitment determined in primary legislation with respect to asylum and immigration policies (Art. 80 TFEU)⁸⁷, but also against solidarity between the Member States as referred to in Art. 2 TEU. Contrary to the “solidary” action in financial policies, solidarity is not exercised in asylum policies due to the lack of advantages for the Member States and the perceived challenges to national self-perception. They represent “a disturbing issue” to “the modern nation-state [...] [B]y breaking the continuity between mankind and citizenship, between birthplace and nationality, they question the original fiction of modern sovereignty”⁸⁸.

⁸⁵ *Traynor and Kingsley*, EU governments push through divisive deal to share 120,000 refugees, *The Guardian*, 22nd September 2015, available via: <https://www.theguardian.com/world/2015/sep/22/eu-governments-divisive-quotas-deal-share-120000-refugees> (14.06.2016).

⁸⁶ *Baczynska and Ledwith*, How Europe built fences to keep people out, *Reuters*, 4th April 2016, available via: <http://www.reuters.com/article/us-europe-migrants-fences-insight-idUSKCN0X10U7> (14.06.2016).

⁸⁷ Since the Dublin-III Regulation was put in place before Art. 80 TFEU, this pertains to the inaction to adapt the Regulation.

⁸⁸ *Agamben*, *Homo Sacer – Le pouvoir souverain et la vie nue*, 1997, 142.

b) Solidarity as a societal value

Contrary to this development, in 1950 when the nations of Europe were struggling to overcome the devastation of World War II and planning to prevent future wars by generating economic interdependencies in the coal and steel sector, Robert Schuman argued that “Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity”.⁸⁹ He believed that the material impossibility of war would also bring the European citizens closer to each other. Solidarity would be the outcome of integration, he was convinced. In this context, solidarity referred to a societal value being complemented by a European identity addressing the bond between Member States’ citizens and being based on mutual respect and responsibility.⁹⁰ A solidary value system was thereby not fixed, but rather was constantly in the process of being constructed and reconstructed.⁹¹

Today, Art. 2 TEU defines solidarity as one of the EU’s founding societal values:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Distinct from solidarity between the Member States, solidarity as a societal value can be characterised as an intrinsic value or expression of affection, albeit one that can exist heterogeneously among Member States. Solidarity between the citizens is thereby not a mere end in itself but determines the *(output) legitimacy* of Union

⁸⁹ *Schuman* (FN 36).

⁹⁰ *Pernice* (FN 57).

⁹¹ *Doty*, *Sovereignty and the Nation*, in: Biersteker and Weber, *State Sovereignty as Social Construct*, 1996, 121 (123).

actions.⁹² In this sense, democratic procedures were able to achieve “the goals citizens collectively care about”.⁹³ Overall, solidarity as a societal value is reflected by two main aspects: allegiance to the EU (the meaning of EU citizenship) and the willingness to share resources.

aa) EU citizenship

One of the core pillars of the European society and its values is EU citizenship, created by the Treaty of Maastricht. According to Art. 20 1. TFEU, every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship. As such, they are entitled to the following rights (Art. 20 2. TFEU):

(a) the right to move and reside freely within the territory of the Member States;

(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

(c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

⁹² *Scharpf*, Economic Integration, Democracy and the Welfare State, *Journal of European Public Policy*, 4(1), 1997, 18 or *Scharpf*, *Governing in Europe: Effective and Democratic?*, 1999.

⁹³ *Scharpf* 1997 (FN 92), 19.

Union citizenship is based on citizenship in the Member States and does not include regulations for its acquisition.⁹⁴ It forms a legal bond between the citizens of the individual Member States although is not characterised by an intensity comparable to that within a single State and gives a legally binding expression to the community which already exists.⁹⁵ The specific potential of the nation state to generate affection among citizens by connecting with their belief systems through its constitution, symbolism, and narrative of the nation as a group of citizens *belonging* together⁹⁶ and making them perceive this *imagined community*⁹⁷ as real⁹⁸ is mainly lacking at the EU level. The *anchorage of EU citizenship in the citizens' belief systems* is challenged by the lack of structures resembling the nation state, namely a constitution generated by the sovereign, a welfare system establishing rights and obligations, as well as a joint narrative. The EU has been trying to construct a respective European value system and narrative based on "a common culturally defined European identity"⁹⁹ for several years. Symbols such as the European flag, anthem or Europe Day¹⁰⁰ are seen as means of strengthening European awareness and identity¹⁰¹ and are accompanied by a variety of EU programmes, e.g. in the arts, research, and education¹⁰². As one of its most recent initiatives, the European

⁹⁴ Faist, Social Citizenship in the European Union: Nested Membership, *Journal of Common Market Studies*, 39(1), 2011, 37.

⁹⁵ BVerfG, Decision of 12th October 1993, 2 BvR 2134/92; 2 BvR 2159/92, BVerfGE 89 (184).

⁹⁶ Kahn (FN 17), 36.

⁹⁷ Anderson (FN 34).

⁹⁸ Risse, *Solidarität unter Fremden?*, in: Kadelbach (Ed.), *Solidarität als Europäisches Rechtsprinzip?*, 2014, 115 (118).

⁹⁹ Jacobs and Maier, *European Identity: Construct, Fact and Fiction*, in: Gastelaars and de Ruiter (Eds.), *A United Europe*, 1998, 13 (19).

¹⁰⁰ Symbols such as the flag and anthems were explicitly mentioned in Article IV-1 of the Draft Treaty establishing a Constitution for Europe, adopted by the European Convention on 13 June and 10 July 2003 (Draft Treaty establishing a Constitution for Europe 2003/C 169/01, OJ 169 of 18.07.2003, pp. 1–105), but not introduced into the Lisbon Treaty.

¹⁰¹ See e.g. Haltern, *Europe goes Camper*, ConWEB No. 3/2001, 4 or Pichler, *Affection to and Exploitation of Europe*, Sociological Series, Institute for Advanced Studies, 2005, 6.

¹⁰² Jacobs and Maier (FN 99), 22 f.

Commission has even launched the “New Narrative for Europe” project which defines “Europe as a state of mind and a moral and political responsibility shared by citizens across the continent”¹⁰³. It was established as an appeal for a scientific and artistic renaissance in order “to tell a story about Europe”¹⁰⁴. Finally, the explicit designation of solidarity as a founding value of the Union can also be seen in line with this attempt to construct community.¹⁰⁵

The link between the rule of law and belief systems, however, is determined by specific historical conditions and initiated by the *mystic* creation of a Constitution as the expression of sovereign will formation.¹⁰⁶ This intrinsic belief can hardly be externally generated through the top-down invention of narratives.¹⁰⁷ In this respect, the European integration process and the respective endeavours to establish a culture related to the rule of law by the means of symbols have thus far failed¹⁰⁸ and are likely to continue to fail. While Habermas has argued that discourse could expand solidarity to a broader scale¹⁰⁹, there are as yet no fora that would encompass a Europe-wide discourse on relevant policies. Thus, it remains questionable whether overcoming nationalist views in EU-wide discourses will happen in the near future and whether a respective discourse could actually replace the will formation of a sovereign and be capable of creating a link to citizens’ belief systems.

¹⁰³ *European Commission*, Culture, New Narrative for Europe, available via: <http://ec.europa.eu/debate-future-europe/new-narrative/> (18.07.2014).

¹⁰⁴ *Barroso*, Speech at the Launch of New Narrative for Europe initiative, Brussels, 23rd April 2013, available via: http://ec.europa.eu/debate-future-europe/new-narrative/index_en.htm (18.07.2014).

¹⁰⁵ *Körner*, Identitätsstiftung durch den Europäischen Verfassungsvertrag, 2009, 457.

¹⁰⁶ *Ibid.*, 456.

¹⁰⁷ This fact also explains the limited effectiveness of international law. See *Kahn* (FN 17), 86.

¹⁰⁸ See also *Haltern*, Pathos and Patina, *European Law Journal*, 2003, 9(1), 14; *Möllers*, Pluralität der Kulturen als Herausforderung an das Verfassungsrecht?, in: Dreier and Hilgendorf (Ed.), *Kulturelle Identität als Grund und Grenze des Rechts*, 2008, 223 (233).

¹⁰⁹ *Habermas*, Gerechtigkeit und Solidarität, in: Edelstein and Nunner-Winkler (Eds.), *Zur Bestimmung der Moral*, 1986, 291 or *Habermas*, *Between Facts and Norms*, 1996.

This difference in attachment to the EU as compared to the nation state is also reflected in Eurobarometer figures, which show that around 90% of respondents feel attached to their country and their city or village. Only 46% of respondents indicate attachment to the EU (see Figure 4).

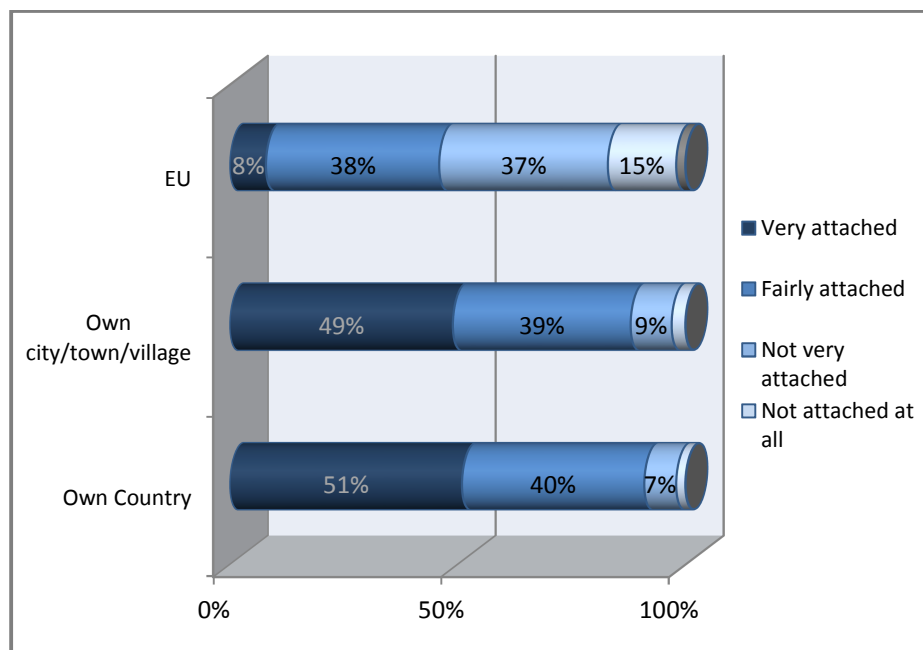


Figure 4: Attachment of EU citizens to different levels of governance

Source: Author's own work based on Eurobarometer figures¹¹⁰

In this respect, Risse also stresses that the *nestedness*, i.e. the coexistence of identities, varies strongly between Member States. While the British, the Irish and the Czechs identify exclusively with their nation, two-thirds of the Dutch, Germans or French identify themselves at least partly with the EU.¹¹¹ Despite variations in the identification with the EU across Member States, attachment is also socio-demographically biased, e.g. with respect to gender, age or education. The feeling of being a citizen of the EU decreases with the respondents' age; it is slightly more prevalent among men (62%) than women (59%); it is shared by a large majority of Europeans who have studied up to the age of 20 or beyond (72%), while only a minority of

¹¹⁰ European Commission, Standard Eurobarometer 77, European Citizenship Report, Spring 2012, 7.

¹¹¹ Risse (FN 98), 119 f.

those who left school before the age of 16 feel that they are EU citizens (about 48%).¹¹²

bb) Economic solidarity or the willingness to share resources

A second indicator which might shed light on the status of solidarity between the EU citizens is their willingness to share resources (economic solidarity). This willingness can be analysed in the context of the economic and financial crisis during which the Member States developed measures to prevent a collapse of the banking system (financial crisis). Furthermore, it is evident in the support provided to those countries that were beginning to have problems financing their debts due to market uncertainties. This led to normal government borrowing operations becoming more costly and eventually impossible (debt crisis).¹¹³ Specifically, the debt crisis thereby required financial support between the Member States. However, citizens' perception of these measures was mainly dependent on the economic situation of their own Member State. About 75% of the citizens in the countries specifically affected by the financial and economic crisis, and thus benefiting from the measures taken, thought that a share of the public debt of all Member States should be held jointly "in the name of solidarity". In contrast, in Germany for example, only 56% saw the need for such *solidary measures*. Between 40 and 62% of the citizens in economically more stable Member States, such as Germany, Austria, Latvia and Finland, even disagreed with this statement¹¹⁴ and many perceived European

¹¹² *European Commission* (FN 110), 22.

¹¹³ *European Commission*, Economic and Financial Affairs, EU Response to the Crisis, available via: http://ec.europa.eu/economy_finance/crisis/index_en.htm (04.07.2016).

¹¹⁴ *European Parliament*, Europeans and the Crisis, European Parliament Eurobarometer Summary, October 2011, 4.

economic governance as an unnecessary additional burden of responsibilities and costs¹¹⁵.

Overall and despite the governance measures by the EU, the economic and financial crisis was accompanied by an overall though divergent rise in Euroscepticism among Member States with the most pronounced increase occurring in Greece, Portugal, Slovenia, Lithuania, Spain, Cyprus and Ireland.¹¹⁶ In line with this, right-wing nationalist parties have gained popularity in a variety of Member States including, for example, the Front National in France¹¹⁷, the Freedom Party (Partij voor de Vrijheid, PVV) in the Netherlands¹¹⁸, the Alternative for Germany (Alternative für Deutschland, AfD)¹¹⁹, the Austrian Freedom Party (Freiheitliche Partei Österreichs, FPÖ)¹²⁰. This trend culminated in right-wing parties being elected to government in Hungary and Poland and finally in the UK's *Brexit* decision.

This tendency to privilege one's *own* people, however, is not necessarily a phenomenon at the nation state level. In several regions

¹¹⁵ Kuhn and Stoeckl, When European Integration becomes Costly: The Euro Crisis and Public Support for European Economic Governance, *Journal of European Public Policy*, 2014, 21(4), 624.

¹¹⁶ Serricchio, Tsakatika and Quaglia, Euroscepticism and the Global Financial Crisis, *Journal of Common Market Studies*, 2013, 51(1), 51 (57).

¹¹⁷ The Front National received almost 18% of the votes in the first ballot of the presidential elections in France in 2012 as compared to 28% of the voters who favoured the current president François Hollande and even became the strongest party in the first round of the regional elections (almost 28%) in 2015: *Ministère de l'Intérieur*, Résultats de l'élection présidentielle 2012, available via:

[http://www.interieur.gouv.fr/Elections/Les-resultats/Presidentielles/elecresult_PR2012/\(path\)/PR2012/FE.html](http://www.interieur.gouv.fr/Elections/Les-resultats/Presidentielles/elecresult_PR2012/(path)/PR2012/FE.html) (09.05.2014)

and *Ministère de l'Intérieur*, Elections regionales et des assemblées de Corse, Guyane et Martinique 2015, available via:

<http://elections.interieur.gouv.fr/regionales-2015/FE.html> (13.01.2016).

¹¹⁸ Geert Wilders and his extreme right are represented in the Parliament of the Netherlands with 12 seats (8%): *The Dutch House of Representatives*, Members of Parliament, available via:

http://www.houseofrepresentatives.nl/members_of_parliament (09.05.2014).

¹¹⁹ The AfD gained between 12% and 24% of the votes in the state selections in March 2016: *Elmer and Hebel*, Wahlanalyse: Die Hochburgen der AfD, *SpiegelOnline*, 14th March 2016, available via:

<http://www.spiegel.de/politik/deutschland/landtagswahlen-2016-das-sind-die-hochburgen-der-afd-a-1082181.html> (04.07.2016).

¹²⁰ The FPÖ gained almost 50% in the 2016 presidential elections:

Bundesministerium für Inneres der Republik Österreich, Bundespräsidentenwahl 2016, available via: <http://wahl16.bmi.gv.at/> (05.07.2016).

within the EU, secessionist movements are increasingly active, including those, for example, in Catalonia, Scotland, and Flanders. These regions are characterised by well-defined territories with unique historical, cultural, economic, and political identities that have been maintained within their parent states.¹²¹ Beyond that, they represent the wealthier parts of the country under consideration. They argue that they would disproportionately contribute to the State's expenses and would want to regain control over *their* finances. In the case of Scotland, the discovery of oil in the North Sea in 1970 led nationalists to argue for greater Scottish control over these resources¹²². Respective economic disputes with the parent States have been given impetus by the economic and financial crisis which has further increased the desire to protect their own status.¹²³

The drivers for these attitudes and a lack of empathy for weaker sectors of the society are manifold.¹²⁴ One of the reasons which makes people defend what they claim to be *theirs* is the increasingly globalised economic system which excludes parts of society from the gains accrued by the modernisation process.¹²⁵ Instead of enjoying the fruits of economic growth, more flexible employment contracts¹²⁶, less security in the employment relationship,¹²⁷ and

¹²¹ *Guibernau*, Nations Without States, Michigan Journal of International Law, 2003, 25, 1251.

¹²² *Devine*, The Scottish Nation: A History: 1700–2000, 1999, 585 f.

¹²³ *Connolly*, Independence in Europe: Secession, Sovereignty, and the European Union, Duke Journal of Comparative and International Law, 2013–2014, 51, 51 (55).

¹²⁴ For the EU-15 countries the trend in suicides, for example, has been rising since the economic crisis in 2008. See *McKee, Karanikolos, Belcher and Stuckler*, Austerity: A Failed Experiment on the People of Europe, Clinical Medicine, 2012, 12 (4), 346.

¹²⁵ *Swank and Betz*, Globalization, the Welfare State and Right-wing Populism in Western Europe, Socio-Economic Review, 2013, 1, 215 but also *Kitschelt*, The Radical Right in Western Europe, 1995, as well as *Kriesi*, Movements of the Left, Movements of the Right: Putting the Two Types of Social Movement into Context, in: *Kitschelt, Lange, Marks and Stephens* (Eds.), Continuity and Change in Contemporary Capitalism, 1999, 398.

¹²⁶ *Bradley, Crouchley and Oskrochi*, Social Exclusion and Labour Market Transitions, Labour Economics, 2003, 10, 659 or *Gagliarducci*, The Dynamics of Repeated Temporary Jobs, Labour Economics, 2005, 12, 429.

increasing transnational interactions¹²⁸ worsen their situation and create insecurities about status recognition and their economic position. At the same time, social security systems are cut back to generate competitive investment conditions for globalised financial markets.¹²⁹ These side-effects of globalised economies also trigger the desire for ontological closure which is no longer represented by class systems.¹³⁰ Instead, new constructs of identity and culture, separating the “insiders” from the “others” against whom one’s own status needs to be defended, are created by the aforementioned nationalist parties and separatist movements.

Yet, most importantly, inequalities between different parts of society are increasing. Inequality with respect to the distribution of wealth is at its highest level in most OECD countries in the last 30 years. The richest 10% of the population in the OECD area earn 9.5 times more than the poorest 10% as compared to a ratio of 7:1 in the 1980s¹³¹ (compare Figure 5).

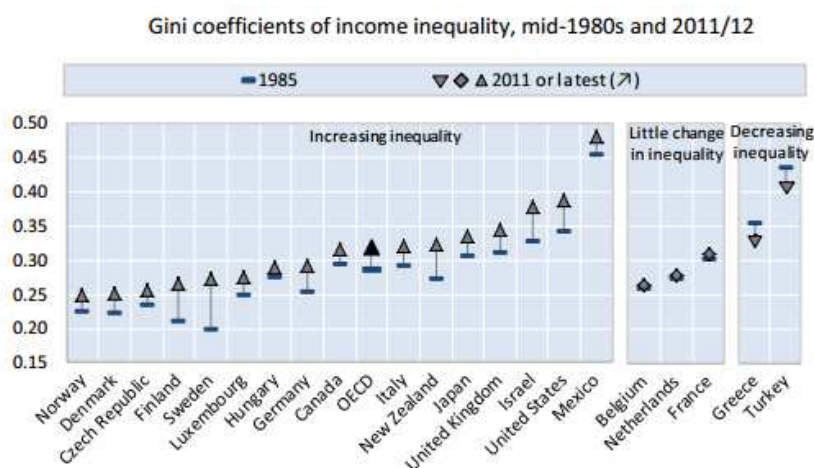
¹²⁷ *Green and Leeves*, Job Security, Financial Security and Worker Well-Being: New Evidence of the Effects of flexible Employment, *Scottish Journal of Political Economy*, 2013, 60(2), 121.

¹²⁸ *Beck*, Die 50-jährige Unbekannte – Die Europäische Union als kosmopolitisches Narrativ, *Internationale Politik*, Juli/August 2008, 7–8, 64.

¹²⁹ *Delanty*, Fear of Others: Social Exclusion and the European Crisis of Solidarity, *Social Policy & Administration*, 2008, 42(6), 676 or *Habermas*, Jenseits des Nationalstaats? in: *Beck* (Ed.), *Politik der Globalisierung*, 1998, 67.

¹³⁰ *Young*, *The Vertigo of Late Modernity*, 2007, 206.

¹³¹ *Organisation for Economic Co-operation and Development (OECD)*, Does Income Inequality Hurt Economic Growth? Directorate for Employment, Labour and Social Affairs, 2014, available via: <http://www.oecd.org/els/soc/Focus-inequality-and-growth-2014.pdf> (31.12.2014).



Note: Incomes refer to household disposable income, adjusted for household size.
Source: OECD Income Distribution Database (<http://oe.cd/idd>).

Figure 5: Income inequality in OECD countries¹³²

Source: OECD, Focus on Inequality and Growth, Directorate for Employment, Labour and Social Affairs, 2014, p. 1.

In contrast to the increasing wealth of an ever smaller part of the society, in 2011, about 24% of the EU-27 population or 122 million people were estimated to be at risk of poverty.¹³³ However, inequality is negatively correlated with solidarity: “The more inequality, the less people are willing to make a contribution to improve the living conditions of others in their community, of older people, and of the sick and disabled”¹³⁴. This causal relation between increasing inequality, a lack of gains from globalisation on the part of major sections of society and rising support for populist parties and movements was also recognised by the IMF which even admitted

¹³² Inequality is indicated by Gini coefficients, a measure of inequality which ranges from zero, where everybody has identical incomes, to 1, where all income goes to only one person.

¹³³ Eurostat uses a relative indicator measuring the share of the population with an income that is less than 60% of the national median disposable income; Eurostat, Europe 2020 indicators – poverty and social exclusion, available via: http://ec.europa.eu/eurostat/statistics-explained/index.php/Europe_2020_indicators_-_poverty_and_social_exclusion#How_do_poverty_and_social_exclusion_affect_Europe.3F (19.08.2016).

¹³⁴ Paskov and Dewilde, Income Inequality and Solidarity in Europe, Research in Social Stratification and Mobility, 2012, 30, 415 (428).

that social inequality was endangering the international liberal order.¹³⁵

Overall, economic solidarity plays a limited role in the EU which is also reflected by its restricted total budget. If economic policies are to be coordinated or even integrated, then the respective acceptance and solidarity might only be able to grow and endure if societal inequalities can be reduced jointly by Member States.

2. Moral solidarity

Contrary to political solidarity which is closely tied to territory, history, and power relations, moral solidarity is universal. It addresses all humans as equal beings and does not take into account citizenship, ethnicity or any other socially constructed differentiation between *insider* and *outsider*. Thus, it does not distinguish between the stranger on the other side of the globe and the neighbour.¹³⁶

Moreover, contrary to political solidarity and as a result of its universal nature, moral solidarity lacks an ambivalent value or preference-related dimension and thus (normative) societal discourse. It is triggered in situations of extreme loss or religious events that provoke awareness about humanity and it is maintained for a short period of time. Support to the *recipients* of moral solidarity is driven by mercy and the wish to alleviate suffering; it lacks any expectation of reciprocity. In general, moral solidarity is also described as socially real or ethical solidarity.¹³⁷

One of the religious examples illustrating the sudden dominance of moral over political aspects of solidarity is that of Christmas 1914, also known as the “Christmas Truce” in the midst of the First World

¹³⁵ Schieritz, Der Kapitalismus soll netter werden, in: Die Zeit, 29th July 2016, available via: <http://www.zeit.de/2016/32/globalisierung-kapitalismus-umverteilung-g20-gipfel-rechtspopulismus> (19.08.2016); IMF, The IMF’s Work on Inequality: Bridging Research and Reality, available via: <https://blogs.imf.org/2017/02/22/the-imfs-work-on-inequality-bridging-research-and-reality/> (19.06.2017).

¹³⁶ Kahn (FN 17), 38ff.

¹³⁷ Kadelbach (FN 43), 10.

War which claimed the lives of around 9 million combatants. German, French and British soldiers lay in their trenches, when they started to sing Christmas songs and agreed to a ceasefire for the feast in light of the holy, the birth of Jesus Christ. The soldiers set up candles and little Christmas trees; they chatted with each other, exchanged presents and used the ceasefire to bury the dead who had been lying in no-man's land. Although unofficial ceasefires and Christmas celebrations did not take place everywhere, breaks from war and meetings in no-man's land are reported selectively for the whole front.¹³⁸ Following the truce, which lasted between several hours and up to several days, the soldiers went back to war.

A similar phenomenon can be observed during natural or man-made catastrophes. In extreme conditions, particularly those human beings affected by loss and damage are confronted with existential questions. "The responses of disaster-stricken people invariably involve the moral and ethical core of the belief system and include deep delving into concepts of both social and cosmic justice, sin, [...] and the existence and nature of the divine".¹³⁹ Freud had spoke of this phenomenon already in 1927:

*One of the gratifying and exalting impressions which mankind can offer is when in the face of an elemental crisis, it forgets the discordances of its civilization and all its internal difficulties and animosities, and recalls the great common task of preserving itself against the superior power of nature.*¹⁴⁰

But those not directly affected are also moved by tremendous losses and threats to their existence. By means of media, images of disasters spread around the world and generate moral obligations to those who are not directly affected to donate to (supranational)

¹³⁸ Jürgs, Der kleine Frieden im großen Krieg – Westfront 1914: Als Deutsche, Franzosen und Briten gemeinsam Weihnachten feierten, 2005.

¹³⁹ Oliver-Smith, Anthropological Research on Hazards and Disasters, Annual Review of Anthropology, 1996, 25, 303 (308).

¹⁴⁰ Freud, The Future of an Illusion, 1927, 21.

disaster relief campaigns.¹⁴¹ This obligation is triggered in light of an incredible and destructive power reminding everyone of their own mortality and finitude as the lowest common denominator of humanity. In exposing the vulnerability of humanity, disasters trigger assistance and rescue activities across class and other boundaries. They prompt individuals to recognise each other's needs and lead to some profound sense of shared identity that can unite otherwise differentiated people.¹⁴² While trends in donation closely track media coverage of disasters¹⁴³, coverage decreases as time passes¹⁴⁴ as does the support of individuals. Accordingly, the moral sphere retreats into the background of the individual whereas the political sphere reappears as the dominant one in everyday life.

An essential driver for triggering moral solidarity and for interpreting the alleviation of *suffering* as necessary is its *perception as unjust*. Mercy and charity of grace as guiding values in Christianity were contrasted by war but were recalled at the holy feast. By contrast, catastrophes and specifically *natural* disasters were not always perceived as unjust. Historically, catastrophes were conceptualised as acts of God and as such they were seen as an unforeseeable event born of a divine logic. Contrary to this conceptualisation, the emergence of liberalism in political philosophy and its focus on the individual introduced and established an understanding of disasters as being influenced by anthropogenic action or even the result of social construction. In liberal jurisprudence, catastrophes are no longer seen as beyond the law's power, but rather as a challenge to it

¹⁴¹ Oosterhof, Heuvelman and Peters, Donation to Disaster Relief Campaigns: Underlying Social Cognitive Factors Exposed, Evaluation and Program Planning, 2009, 32, 148.

¹⁴² This sudden creation of solidarity towards strangers was also sociologically determined – see for example Oliver-Smith, The Brotherhood of Pain: Theoretical and Applied Perspectives on Post-disaster Solidarity, in: Oliver-Smith and Hoffman (Eds.), The Angry Earth – Disaster in Anthropological Perspective, 1999, 156.

¹⁴³ See for the Indian Ocean "Boxing Day" Tsunami: Brown and Minty, Media Coverage and Charitable Giving After the 2004 Tsunami, Southern Economic Journal, 2008, 75(1), 9.

¹⁴⁴ Miles and Morse, The Role of News Media in Natural Disaster Risk and Recovery, Ecological Economics, 2007, 63, 365.

that calls for a legal response.¹⁴⁵ With respect to natural hazards, for example, disasters became understood as an interaction between the environmental and human systems, arriving at the conclusion that “if a society cannot withstand without major damage and disruption a predictable feature of its environment, that society has not developed in a sustainable way”.¹⁴⁶ Consequently, the suffering of human beings and the failure to ameliorate this suffering were understood no longer as *misfortune* but as *injustice*¹⁴⁷ requiring action by the State.

This conceptualisation of disaster even considers governmental failures to develop and implement adequate prevention and response measures as part of the catastrophe itself, as evident, for example, in the devastating case of Hurricane Katrina.¹⁴⁸ A government’s disaster management capacities hence not only determine the hazard impact, but have also become a benchmark for the government’s performance, as demonstrated by the 2002 Elbe flooding in Germany. The former Chancellor Gerhard Schröder visited the affected areas, presented himself as an empathic crisis manager, promised the State’s support and organised a European crisis summit. According to the polls, his party, the SPD, had been clearly lagging behind the CDU, the main conservative party in Germany, until the flooding. In the Bundestag elections right after the flood in September 2002, Schröder gained a narrow majority and managed to stay in power.¹⁴⁹ Similarly, the mismanagement of the national crisis

¹⁴⁵ Meyer, *Catastrophe: Plowing up the Ground of Reasons*, in: Sarat, Douglas and Umphrey (Eds.), *Law and Catastrophe*, 2007, 19.

¹⁴⁶ Oliver-Smith (FN 139), 304.

¹⁴⁷ Shklar stresses that the difference between misfortune and injustice are frequently determined by our (lack of) willingness and/or capacity to act on behalf of the victims: *Shklar, The Face of Injustice*, 1992.

¹⁴⁸ For example *Moynihan, The Response to Hurricane Katrina*, available via: http://irgc.org/wp-content/uploads/2012/04/Hurricane_Katrina_full_case_study_web.pdf (04.04.2015).

¹⁴⁹ *Dausend, Der gestiefelte Kanzler: Vor zehn Jahren entschied ein Hochwasser die Bundestagswahl. Oder nicht? Was Gerhard Schröder und Edmund Stoiber heute*

caused by the 11th March 2004 terrorist attacks in Madrid, as well as false information of the public, contributed to the acting Prime Minister José María Aznar losing the elections only three days later.

Contrary to the perception of disasters as unjust events which need to be avoided, commonly shared misfortunes frequently do not trigger moral solidary feelings: “The state can figuratively step over the body of the homeless without triggering a crisis of legitimacy”.¹⁵⁰ An important factor determining whether suffering addresses the moral or political sphere of the human being is *fault*. While individuals are frequently deemed responsible for their own socio-economic fate¹⁵¹, hazard impacts are not perceived as self-inflicted. Paradoxically, the perception of a disaster as unjust thereby drives the citizens’ willingness to support the affected countries and people, although the societal contribution to disaster risk has been internationally acknowledged.¹⁵² Accordingly, solidarity measures with respect to crisis situations which are not perceived as self-inflicted, such as the 2004 Indian Ocean tsunami, generate a wide amount of support in society. By contrast, those citizens affected by the economic and financial crisis were perceived as accountable for it.¹⁵³ Another example is the case of a sudden (unintentional) shortfall of gas or oil in a Member State. Between 65% (Austrians) and 85% (Italians) of the respondents indicated that the affected State should also be able to rely on the reserves of other Member

dazu sagen, Zeit-Online, 16th August 2012, available via:

<http://www.zeit.de/2012/34/Flutkatastrophe-Sachsen> (02.08.2016).

¹⁵⁰ Douglas, Sarat and Umphrey, A Jurisprudence of Catastrophe: An Introduction, in: Sarat, Douglas and Umphrey (Eds.), *Law and Catastrophe*, 2007, 1.

¹⁵¹ For the US see for example Kluegel and Smith, Beliefs About Stratification, *Annual Review of Sociology*, 1981, 7, 29. For Europe the individual blame explanation (laziness) has lost importance in recent decades while the social blame explanation (injustice) has gained ground: Oorschot van and Halman, Blame or Fate, Individual or Social?, *European Societies*, 2000, 2(1), 1 (20).

¹⁵² For example *United Nations Office for Disaster Risk Reduction (UNISDR)*, *Global Assessment Report on Disaster Risk Reduction*, 2015.

¹⁵³ De Winter wrote for example in the German journal *Der Spiegel*: “Kein Tsunami hat die griechischen Inseln verwüstet – was den Griechen zugestoßen ist, ist selbst fabriziert”: Winter, Zurück zur EWG, *Der Spiegel*, 2010, 20, 150.

States¹⁵⁴. In relation to natural hazards causing disasters, more than 90% of the citizens in the EU agree that not all countries have sufficient national means to deal with them on their own and more than 80% agree that coordinated EU action is more effective than action by individual countries. Almost 90% of respondents even agree that the disaster support should not be limited to just the EU, but that the EU should support any non-EU country in the world.¹⁵⁵

¹⁵⁴ *European Commission, Attitudes on issues related to EU Energy Analytical report, Eurobarometer, April 2007, 20.*

¹⁵⁵ *European Commission, Special Eurobarometer 383 – Civil Protection Report, June 2012, 18.*

C. Solidarity Clause (Art. 222 TFEU) in context

Against the background of the different solidarities at EU level, Art. 222 TFEU, also referred to as the *Solidarity Clause*, which relates solidarity to the civil protection context, was introduced to the EU's primary legislative framework by the Lisbon Treaty. In order to assess its implications and meaning for international and potentially even supranational solidarity, the development of civil protection as a policy field with EU relevance forms the basis for analysis.

I. Civil protection: the development of a policy field at EU level

The term *civil protection* describes all measures aiming to protect civil populations against incidents and disasters. It is rooted in the philosophy of civil defence which implies the management of civilian populations in the face of armed aggression by means of authoritarian techniques and restriction of individual freedoms.¹⁵⁶ In contrast to civil defence command-and-control methods, civil protection measures generally focus on collaboration and information sharing.¹⁵⁷ Civil defence measures were developed during wartime in order to organise sheltering arrangements and non-combatant warnings and they were later extended during the Cold War to measures addressing nuclear attacks.¹⁵⁸ By the end of the Cold War, however, the importance of civil defence gradually decreased while the civilian character of emergency preparedness and response to natural and technological hazards came to the fore. This process was facilitated by the United Nation's International Decade for Natural Disaster Reduction (IDNDR, 1990–2000) and the insight that military means cannot effectively address civil emergencies, such as floods or major accidents, due to their

¹⁵⁶ Alexander, From Civil Defence to Civil Protection – and Back Again, *Disaster Prevention and Management: An International Journal*, 2002, 11(3), 209 (209).

¹⁵⁷ Masri and Moore II, *Integrated Planning Information Systems: Disaster Planning Analysis*, *Journal of Urban Planning and Development*, 1995, 121(1), 19.

¹⁵⁸ Alexander (FN 156), 209.

complexity and the need for flexible management.¹⁵⁹ In addition, it was recognised that disasters specifically of natural origin were by no means *natural* but socially constructed and the result of social vulnerability factors, such as income and settlement structures, failures in disaster risk management and governance shortfalls as well as imbalances of power.¹⁶⁰ New technologies and societies' increasing dependence on its services added to this shift in threat perception and required the development of respective civil protection and disaster risk management strategies. In addition to natural and man-made disasters, the 11th September 2001 terrorist attacks have added international terrorism to the list of contemporary threats. This shift in focus from civil defence to civil protection has not only led to the introduction of new scenarios, equipment requests and strategies, but has also raised the question of whether and to what extent civil protection measures can and have to be addressed by legal means.¹⁶¹

In line with the overall development of civil protection as a policy field at the regional and nation state levels, it has also started to evolve at the EU level around two decades ago as a result of several disasters across Europe which accompanied the shift in threat paradigm. These incidents included the chemical accident in Seveso, Italy in 1976 which led to mass evacuations and dioxin poisoning of approximately 2,000 citizens, the 2002 flooding in major parts of Europe, and the sinking of the *Prestige* oil tanker in 2002 in front of the Spanish coast which polluted thousands of kilometres of coastline in Portugal, Spain and France. Terrorism was brought to the civil protection agenda by the New York terrorist attacks of September 2001, the bombings in Madrid in 2004 and London 2005. Most

¹⁵⁹ Alexander (FN 156), 210.

¹⁶⁰ Prominently *Blaikie, Cannon, Davis and Wisner, At Risk: Natural Hazards, People's Vulnerability, and Disasters*, 1994.

¹⁶¹ For example *Tulis and Macedo (Eds.), The Limits of Constitutional Democracy*, 2010; *Honig (Ed.), Emergency Politics*, 2009; *Ramraj (Ed.), Emergencies and the Limits of Legality*, 2008.

recently the terrorist attacks in Paris, Brussels, Nice, Berlin, and London revealed that European societies are threatened by international terrorism. Early forms of terrorism had been addressed after World War II though. They included terrorist acts by the IRA (Irish Republican Army) in Northern Ireland, the ETA (Basque Country and Freedom Organisation) in Spain or the RAF (Red Army Faction) in Germany. Collaboration and pooling of experience on this topic was initiated within the European Economic Community in the TREVI (Terrorism, Radicalism, Extremism and International Violence) group, established in 1976 by Member States facing similar experiences.

Since that time, a variety of resolutions building the basis for Community cooperation in the field of civil protection have been developed by the (European) Council.¹⁶² Nevertheless, only in 1992 was civil protection mentioned as a policy field with EC competences by the Maastricht Treaty (Art. 3 para. 1 (t) TEC – now Art. 6 (f) TFEU)¹⁶³. In 1999, Council Decision 1999/847/EC established the first Community Action Programme on civil protection in the field of natural and man-made hazards to address five aims:

- preventing risks and damage to persons, the environment and property in the event of natural and technological disasters;
- increasing the degree of preparedness of those involved in civil protection in the Member States;
- detecting and studying causes of disasters;
- improving methods of response and rehabilitation after emergencies;

¹⁶² For example Resolution of 25 June 1987 on the introduction of Community Cooperation on Civil Protection, 87/C 176/01 (OJ, C 176 of 4.7.87, 1); Resolution of 13 February 1989 on the new developments in Community cooperation on civil protection, 94/C 313/01 (OJ C 313 of 10.11.94, 1); Resolution of 23 November 1990 on Community cooperation on civil protection, 90/C 315/01 (OJ C 315 of 14.12.90, 1); Resolution of 8 July 1991 on improving mutual aid between Member States in the event of natural or technological disasters, 91/C 198/01 (OJ C 198 of 27.7.91, 1); Resolution of 31 October 1994 on strengthening Community cooperation on civil protection, 94/C 313/01 (OJ C 313 of 10.11.94, 1).

¹⁶³ Also *Calliess*, in: *Calliess and Ruffert* (Eds.), *EUV/AEUV*, 2016, Art. 196 AEUV, para. 3.

- providing public information, education and awareness.

However, the non-binding nature and its comparatively small annual budget of €7.5 million rendered the Programme relatively ineffective.¹⁶⁴ It was selectively complemented by secondary legislation such as the Council Framework Decision on Combating Terrorism (2002/475/JHA)¹⁶⁵ or Decision 2007/779/EC establishing a Community Civil Protection Mechanism¹⁶⁶.

Recent events have seen the issue of security move up the political agenda, particularly in light of the realisation that many events affect more than one Member State and cannot be addressed individually. The Lisbon Treaty therefore explicitly established civil protection as an area in which the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States (Art. 6 (f) TFEU). It generated therewith a legal basis for the adoption of civil protection measures which had been hitherto lacking. Nevertheless, civil protection measures had been developed in the past but were based on the former Art. 308 TEC, the so-called “flexibility provision”. This had empowered the Council to take action for the purpose of achieving Community objectives (under unanimity voting) when the Treaty did not provide an adequate basis.¹⁶⁷ The introduction of Art. 6 (f) TFEU, however, not only specified the Union’s competence, but also responded to the need for improvements to longstanding crisis and disaster management practices in terms of efficiency and coherence as also formulated by the EU’s 2010 Internal Security Strategy according to which today’s cross-sectoral threats call for “both solidarity in response, and responsibility in prevention and preparedness with an

¹⁶⁴ *Gestri*, EU Disaster Response Law: Principles and Instruments, in: de Guttry et al. (Eds.), *International Disaster Response Law*, 2012, 105.

¹⁶⁵ Framework Decision 2002/475/JHA (OJ L 164 of 22.06.2002, 3).

¹⁶⁶ Decision 2007/779/EC, Euratom of 8 November 2007 establishing a Community Civil Protection Mechanism (OJ L 314 of 1.12.2007, 9).

¹⁶⁷ *Gestri* (FN 164).

emphasis on better risk assessment and risk management at EU level of all potential hazards”.¹⁶⁸

According to Art. 6 TFEU, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action, at the European level, shall be: (a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, vocational training, youth and sport; (f) civil protection; (g) administrative cooperation.

It identifies parallel competences of the EU and the Member States according to Art. 2 5. TFEU. It shall not, however, entail harmonisation of Member States’ laws or regulations. The main civil protection competency remains thus with the Member States.¹⁶⁹ The specific competences of the EU and the Member States in civil protection matters are, however, defined by Art. 222 TFEU and substantiated by Art. 196 TFEU for natural and man-made disasters, and by Art. 43 TEU as well as Art. 75, 83, 88 and 215 TFEU for terrorist attacks.

¹⁶⁸ *European Commission*, Communication from the Commission to the European Parliament and the Council, The EU Internal Security Strategy in Action: Five steps towards a more secure Europe, Brussels, 22.11.2010, COM(2010) 673 final, 13.

¹⁶⁹ *Eilmansberger and Jaeger*, in: Mayer and Stöger (Eds.), *EUV und AEUV*, 2012, Art. 6 TFEU, paras. 3 and 4.

II. Art. 222 TFEU – Solidarity Clause

Solidarity in addressing disasters was given specific significance by the Lisbon Treaty which introduced the *Solidarity Clause* (Art. 222 TFEU) dealing with the EU's and Member States' responsibilities in preventing and responding to disasters while underlining their cohesion. The Solidarity Clause therewith represents a specification of solidarity as a core value of the Union as defined in Art. 2 TEU. It had been developed by Working Group VIII Defence for the Constitutional Treaty (Art. I-43 and Art. III-329) in order to enable "all the instruments available to the Union to be mobilised [...] aimed, in particular, at averting terrorist threats, protecting the civilian population and democratic institutions and assisting a Member State within its territory in dealing with the implications of a possible terrorist attack".¹⁷⁰ The Clause was designed in response to the 9/11 and 2004 Madrid terrorist attacks and was initially referred to as *Mutual Assistance Clause*.¹⁷¹ It was broadened in scope to natural and man-made disasters, to differentiate it from the Mutual Assistance Clause relating to armed aggressions (Art. 42 7. TEU)¹⁷² and to distinguish the EU from a military defence alliance.¹⁷³

In its final version, which was introduced by the Lisbon Treaty, the Solidarity Clause defines the EU's as well as the Member States' obligations in dealing with natural or man-made disasters.

¹⁷⁰ *The European Convention*, Final report of Working Group VIII – Defence, WG VIII 22, CONV 461/02, Brussels, 16.12.2002, p. 20.

¹⁷¹ *Myrdal and Rhinard*, The European Union's Solidarity: Empty Letter or Effective Tool?, Occasional papers of the Swedish Institute of International Affairs, 2/2010, 3 f and also *European Council*, Declaration on Combating Terrorism of 25th March 2004, Declaration on Solidarity against Terrorism, 18.

¹⁷² *The European Convention*, Summary sheet of proposals for amendments concerning external action, including defence policy: Draft Articles for Part One, Title V (Articles 29, 30 and X), Part Two, Title B (Articles 1 to 36) and Chapter X (Article X) of the Constitution, CONV 707/03, Brussels, 9.05.2003, 29; *Vedder*, in: *Vedder and Heintschel von Heinegg* (Eds.), *Europäischer Verfassungsvertrag*, Art. I-43 EVV, para. 1.

¹⁷³ *Blockmans*, L'union fait la Force: Making the most of the Solidarity Clause (Article 222 TFEU), in: *Govaere and Poli* (Eds.), *EU Management of Global Emergencies*, 2014, 111 (113).

Furthermore, it provides for the case of terrorist attacks and outlines the implementation of the Clause:

Art. 222 TFEU was granted a prominent place within the Treaty on the Functioning of the European Union. Art. 196 TFEU concretising the actions by the Union with respect to natural and man-made disasters is allocated under Part Three “Union Policies and Internal Action” Title XXII: Civil Protection. The Solidarity Clause instead falls under Part Five “External Action by the Union”. This is surprising insofar as it addresses the EU and its Member States in case that one of them has been subject to a terrorist attack or a disaster and is thus geographically related to the EU. The specific location of Art. 222 TFEU can, however, be explained by its close link to external action in the fight against terrorism. Additionally, the reference to the potential use of military sources provided by the Member States relates it to the Common Foreign and Security Policy (CFSP) of the Union which is regulated under Part Five.¹⁷⁴ Art. 222 TFEU also followed the CFSP decision-making procedure for its implementation.¹⁷⁵

Overall, the solidary obligations stemming from Art. 222 TFEU have both a vertical and a horizontal dimension, i.e. obligations are generated between the Member States as well as between the Member States and the Union.¹⁷⁶ Although the Clause already entered into force with the Lisbon Treaty in 2009, a Decision on the arrangements regarding its implementation was only taken in 2014.¹⁷⁷ Yet its concrete application in the aftermath of a crisis event

¹⁷⁴ *Blockmans* (FN 173), 120.

¹⁷⁵ *Schusterschitz and Stillfried*, in Mayer and Stöger, EUV und AEUV, 2012, Art. 222 TFEU, para. 4.

¹⁷⁶ *Kielmansegg von*, Die Verteidigungspolitik der Europäischen Union, 2005, 166 and 208; *Hummer*, Neutralität versus “Beistands”- und “Solidaritätsklausel” im Vertrag über eine Verfassung für Europa, in: Hummer (Ed.), Staatsvertrag und immerwährende Neutralität Österreichs, 2007, 285 (335 f.).

¹⁷⁷ Decision 2014/415/EU of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause (OJ L 192 of 1.7.2014, 53).

remains to be determined since it has not yet been invoked by any of the Member States.

1. Triggering events

a) Terrorist attacks

A terrorist attack is the first mentioned event which would open the scope of application of Art. 222 TFEU. Terrorist attacks comprise the unofficial or unauthorised use of violence in the pursuit of political aims including the promotion of religious and ideological ends¹⁷⁸ threatening the (democratic) functioning of States. However, since an official definition of a respective situation is lacking, Art. 1 of Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA)¹⁷⁹ might be applied.¹⁸⁰ It defines in Art. 1.1 terrorist attacks as

offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of seriously intimidating a population, or unduly compelling a government or international organisation to perform or abstain from performing any act or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or international organisation, shall be deemed to be terrorist offences:

(a) attacks upon a person's life which may cause death;

(b) attacks upon the physical integrity of a person;

(c) kidnapping or hostage taking;

(d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information

¹⁷⁸ Enders and Sandler, *Terrorism: Theory and Application*, in: Sandler and Hartley (Eds.), *Handbook of Defense Economics*, 1995, 213.

¹⁷⁹ Council, Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (OJ L 164 of 22.06.2002, pp. 3-7).

¹⁸⁰ See also Calliess, in: Calliess and Ruffert (Eds.), *EUV/AEUV*, 2016, Art. 222 AEUV, paras. 16–21.

system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;

(e) seizure of aircraft, ships or other means of public or goods transport;

(f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;

(g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;

(h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;

(i) threatening to commit any of the acts listed in (a) to (h).

In addition to this, Working Group VIII Defence, which contributed to the drafting of the Treaty establishing a Constitution for Europe, and which developed the Solidarity Clause, stressed that terrorism was understood as a threat by non-State actors.¹⁸¹

b) Natural hazards and man-made disasters

A definition for natural hazard and man-made disasters is lacking in Art. 222 TFEU. However, a certain degree of destruction to the environment and the life of humans and animals respectively can be presupposed. According to the United Nations Office for Disaster Risk Reduction (UNISDR), a disaster can be defined as, for example, a

serious disruption of the functioning of a community or a society involving widespread human, material, economic or environmental

¹⁸¹ *The European Convention, Final report of Working Group VIII – Defence, CONV 461/02, 2002, 20.*

*losses and impacts, which exceeds the ability of the affected community or society to cope using its own resources.*¹⁸²

The equal treatment of natural and man-made disasters takes into consideration their frequently interrelated occurrence. Wildfires, for example, might be caused by human action; the effects of natural hazards, such as flooding, are increased, e.g. by spatial development practices; while anthropogenic climate change might increase the frequency and intensity of extreme weather events.

Besides the missing disaster definition, Art. 222 TFEU does not provide for a threshold value for its application.¹⁸³ Art. 2 2. of Council Regulation (EU) 661/2014 amending Council Regulation (EC) No. 2012/2002 establishing the European Union Solidarity Fund¹⁸⁴ defines a “major disaster” by a damage of €3 billion in 2002 prices, or more than 0.6% of an eligible State’s gross national income (GNI). Art. 3 (a) of Decision 2014/415/EU on the arrangements for the implementation by the Union of the Solidarity Clause does not follow these specifications but defines disaster more broadly as

any situation which has or may have a severe impact on people, the environment or property, including cultural heritage.

Art. 3 (c) of Council Decision on the arrangements for the implementation of the Solidarity Clause by the Union¹⁸⁵ specified crisis as

a disaster or terrorist attack of such a wide-ranging impact or political significance that it requires timely policy coordination and response at Union political level.

¹⁸² United Nations Office for Disaster Risk Reduction (UNISDR), UNISDR Terminology on Disaster Risk Reduction, 2009, 9.

¹⁸³ Schusterschitz and Stillfried, in Mayer and Stöger, EUV und AEUV, 2012, Art. 222 TFEU, para. 14.

¹⁸⁴ Regulation (EU) 661/2014 of 15 May 2014 amending Council Regulation (EC) No. 2012/2002 establishing the European Union Solidarity Fund (OJ L 189 of 27.06.2014, 143).

¹⁸⁵ Decision 2014/415/EU (OJ L 192 of 1.7.2014, 53).

Since an automatic application of the Clause is not provided, its invocation will depend on a situational assessment by the affected Member State and the European Union. Overall, the missing definition and the lack of a threshold values make Art. 222 TFEU harder to operationalise, but it also stresses a generic solidarity between Member States which does not relate to a specific event or threshold.¹⁸⁶

c) Other profound disruptions

An application of the Clause to other profound disruptions in Member States as caused, for example, by the economic and financial crisis does not come into consideration due to the precise reference to the above-mentioned crisis situations. Additionally, other *exceptional occurrences beyond the Members State's control* are addressed by Art. 122 2. TFEU.

2. Geographic scope

Art. 222 TFEU refers to a *Member State* being the object of a terrorist attack or victim of a natural or man-made disaster. Art. 1. (a) 2nd and 3rd bullet point as well as Art. 1. (b) TFEU relate the support to the Member State's territory. According to Art. 2 of Decision 2014/415/EU on the implementation of the Clause, it should apply within the territory of the Member States to which the Treaties apply including territorial sea and airspace irrespective of the origin of the terrorist attack or natural or man-made disaster (Art. 2 1. (a) Decision 2014/415/EU). If infrastructures such as offshore oil and gas installations are affected, Decision 2014/415/EU on the arrangements for the implementation of the Solidarity Clause applies to those infrastructures situated in the territorial sea, the exclusive economic zone or the continental shelf of a Member State (Art. 2 1. (b) Decision 2014/415/EU). Overall, the Decision clearly limits the Solidarity Clause to the Member State's territory. It

¹⁸⁶ *The European Convention*, Final report of Working Group VIII – Defence, CONV 461/02, 2002, 20.

deviates from the proposal by the Commission and the High Representative for Foreign Affairs and Security Policy which suggested its extension also to ships (when in international waters) or aeroplanes (when in international airspace) (Art. 2 (b) of Proposal JOIN(2012) 39 final 2012/0370 (NLE)). However, it remains open in terms of how far it could be applied to Member States' embassies in Third Party Countries.¹⁸⁷ Since the affectedness of embassies is hardly likely to overwhelm a nation state's capacities and would thus not activate Art. 222 TFEU, this question is of less relevance for the application of Art. 222 TFEU.

With respect to the prevention of terrorist attacks and the protection of democratic institutions, Council Decision 2014/415/EU stressed that the Union is bound by international law and shall not encroach upon the rights of non-Member States (Art. 2 2. Decision 2014/415/EU).

3. Actors

According to Art. 222 1. 1st sentence TFEU, the European Union as well as the Member States are addressees of the Clause and obliged to take solidary action.

a) Union action

The Union action required in the event of a disaster is outlined in Art. 222 1. TFEU. The action to be taken thereby differs for terrorist attacks and other threats. It encompasses a preventive (Art. 222 1. (a) 1st and 2nd bullet point TFEU) and a response dimension (Art. 222 Art. 1. (a) 3rd bullet point and 1. (b) TFEU). The means *available* to the Union have to be fully applied (Art. 222 1. 2nd sentence TFEU) including a broad range of concrete instruments such as financial measures, judicial or intelligence measures as well as technical or logistical support. The mechanisms

¹⁸⁷ Schusterschitz and Stillfried, in Mayer and Stöger, EUV und AEUV, 2012, Art. 222 TFEU, para. 17.

and resources to be used by the Union, however, remain vague and are subject to implementation discussions,¹⁸⁸ while much of the operational capacity of the EU depends on the national resources deployed through EU means¹⁸⁹.

aa) Preventive action

Art. 222 1. (a) 1st and 2nd bullet point TFEU require the Union to *prevent* terrorist attacks and to *protect* the democratic institutions in the Members States defining thus EU competences for the time span *prior* to a terror attack. Measures to prevent terrorist attacks and to protect the democratic institutions in the Members States are not limited to one Member State. They encompass the territory of the European Union as a whole, owing to the transnational character of terrorist activities. In order to develop and implement effective civil protection measures, a request for action by a Member State is no precondition for the Union to take action.¹⁹⁰ To effectively address the prevention of terrorist attacks and the protection of democratic institutions, a close collaboration between national actors and the EU is required. The democratic institutions which are to be protected from terrorist attacks remain to be specified.

Concrete goals and activities with respect to the prevention of terrorist attacks have already been developed by the Council Framework Decision on Combating Terrorism (2002/475/JHA)¹⁹¹ in 2002 which required the Member States to criminalise terrorist activities. More concrete measures, however, were developed by the 2005–2009 Hague Programme on strengthening freedom, security and justice in the European Union. It aimed to reinforce operational cooperation and to provide a new dimension for information sharing among the Member States. The prevention of terrorism alongside

¹⁸⁸ *Myrdal and Rhinard* (FN 171), 6 and *Gestri* (FN164), 113.

¹⁸⁹ *Blockmans* (FN 173), 116.

¹⁹⁰ *Kielmansegg von* (FN 176), 167 and *Becker*, in: Schwarze et al. (Eds.), EU-Kommentar, 2012, Art. 222 AEUV, para. 6.

¹⁹¹ Framework Decision 2002/475/JHA (OJ L 164 of 22.06.2002, 3).

immigration and asylum policies dominated the programme, encouraging Member States to:

- use the powers of their intelligence and security services not only to counter threats to their own security, but also, as the case may be, to protect the internal security of the other Member States;
- bring immediately to the attention of the competent authorities of other Member States any information available to their services which concerns threats to the internal security of these other Member States;
- ensure that no gaps occur in their surveillance as a result of their crossing a border in cases where persons or goods are under surveillance by security services in connection with terrorist threats.¹⁹²

More specifically, it referred to the EU action plan on combating terrorism¹⁹³ and recalled, amongst other things, to make use of passengers' data for border and aviation security as well as to develop measures to combat the financing of terrorism.¹⁹⁴ In addition to the Hague Programme which addressed the overall strengthening of freedom, security and justice in the European Union, the European Union Counter-Terrorism Strategy was developed in 2005.¹⁹⁵ The EU added value was stressed for the fields of information and knowledge sharing, the development of collective policy response making best

¹⁹² Council of the European Union, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, Brussels, 13 December 2004, 16054/04, JAI 559, 19.

¹⁹³ After the terrorist attacks of 11th September 2001, the European Council met in an extraordinary session on 21st September 2001 "in order to analyse the international situation following the terrorist attacks in the United States and to impart the necessary impetus to the actions of the European Union": European Council, Conclusion and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001, SN 140/01.

¹⁹⁴ Council of the European Union, The Hague Programme, 16054/04 JAI 559, 2004, 209.

¹⁹⁵ Council of the European Union, European Union Counter-Terrorism Strategy, 30 November 2005, 14469/4/05 REV 04.

use of the capability of EU bodies such as Europol, Eurojust and Frontex as well as for cooperating with international partners. In this respect, the Commission has developed policies on issues such as countering terrorist financing or hindering access to explosives and chemical, biological, radiological and nuclear (CBRN) materials. Additionally, it developed a European Programme for Critical Infrastructure Protection (EPCIP)¹⁹⁶ and introduced a variety of themes linked to civil security (anti-terrorism and crisis management) into the European Union's Research and Innovation funding programmes for 2007–2013 (FP7)¹⁹⁷ and 2014–2020 (Horizon 2020)¹⁹⁸.

With respect to primary legislation substantiating preventive action of the EU, the Lisbon Treaty introduced a variety of norms which further define the Union's competence in the fight against terrorism. According to Art. 75 1st para. TFEU, the European Parliament and the Council shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities. Art. 83 1. TFEU defines that the European Parliament and the Council may establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension. Art. 88 TFEU describing the Europol mission identifies the competence to support and strengthen action by the Member States' police authorities and other law enforcement services and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and

¹⁹⁶ Commission of the European Communities, Communication from the Commission on a European Programme for Critical Infrastructure Protection, Brussels, 12.12.2006, COM(2006) 786 final.

¹⁹⁷ European Commission, Research and Innovation, FP7, Security, available via: https://ec.europa.eu/research/fp7/index_en.cfm?pg=security (14.01.2016).

¹⁹⁸ European Commission, Horizon 2020, Security, available via: <http://ec.europa.eu/programmes/horizon2020/en/area/security> (14.01.2016).

forms of crime which affect a common interest covered by a Union policy. Articles 43 TEU and 215 TFEU have created additional competences for the Union with specific regard to the Common Foreign and Security Policy (CFSP). While Art. 43 TEU establishes the competence to combat terrorism through the Common Security and Defence Policy (CSDP), Art. 215 TFEU generates the competence to adopt sanctions against natural or legal persons and groups or non-State entities (Art. 215 2. TFEU). Art. 43 1. TEU relates to joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation including by supporting third countries in combating terrorism in their territories.

In spite of the established EU competences, the practical fight against terrorism specifically suffers from a lack of focus and implementation problems.¹⁹⁹ Most activities came in the form of separate technical action plans and are based on transnational (expert) networks as well as diverse Member State and sector-specific initiatives. That said, the EU provides research funding and supportive action rather than a comprehensive strategy in this regard.²⁰⁰ Initiated already a decade ago, the police and intelligence cooperation still does not work effectively, as illustrated by the Paris attacks in November 2015 when the perpetrators' jihadi background was known by intelligence services but their border-crossing was not effectively monitored within the Schengen zone. With respect to Art. 222 TFEU, the lack of a definition of the democratic institutions which are to be protected reflects this shortfall in practically implementing the generated competences.

¹⁹⁹ *Bossong*, The Evolution of EU Counter-Terrorism – European Security Policy After 9/11, 2013, 142.

²⁰⁰ *Ibid.*, 124.

bb) Response measures

In the *aftermath* of a terrorist attack, natural or man-made disaster, Member States should be assisted by the EU in their territory *at the request of the Member State's political authorities* (Art. 222 1 (b) TFEU). While political authorities (in delineation to military authorities) have to request support, response measures are determined by the Council and have to be related to the reduction or elimination of the negative effects of the disaster. All measures are consequently linked to the territory of the affected Member State(s).²⁰¹ The measures to be taken in response actions have to encompass the mobilisation of all instruments at the disposal of the Union. These instruments will be determined by the actual negative impact as well as the budgetary position of the Union.²⁰² Concrete measures to be taken by the Union under Art. 222 TFEU remain to be explored in the implementation process and by the application of the Clause. This explicitly includes the use of military means provided to the Union by the Member States (Art. 222 1. 2nd sentence TFEU) although its use on EU territory and for the purpose of the elimination of disaster impact can be expected to be unproblematic.²⁰³

Overall, the scope of response measures for natural and man-made hazards is substantiated by Art. 196 TFEU (Title XXIII Civil Protection). Based on Art. 6 (f) TFEU, Art. 196 TFEU legitimatises the EU to support the collaboration of the Member States in civil protection matters. It thereby focuses on the *prevention* and *protection* against natural or man-made disasters. However, it mainly defines measures that are developed in the forefront of disasters but this usually

²⁰¹ *Kielmansegg von* (FN 176), 166.

²⁰² *Becker*, in: Schwarze (Ed.), EU-Kommentar, 2012, Art. 222 AFEU, para. 9.

²⁰³ *Calliess*, in: Calliess and Ruffert (Eds.), EUV/AEUV, 2016, Art. 222 para. 30; *Becker*, in: Schwarze (Ed.), EU-Kommentar, 2012, Art. 222 AFEU, para. 9 and also *Kielmansegg von* (FN 176), 168.

means *reactive* as opposed to preventive measures.²⁰⁴ Specifically under Art. 196 1. (a) and (b) respective measures were developed encompassing, amongst others, support in preparing personnel and in responding to disasters and promotion of interoperability of national civil protection services. In order to prepare civil-protection personnel (Art. 196 1. (a) TFEU), the EU has established training and education programmes²⁰⁵, for example, simulated disaster scenario exercises involving the interaction of national capacities and intervention forces²⁰⁶. Generic measures were also developed in relation to the interoperability of national civil protection services (Art. 196 1. (b) TFEU). The EU emergency and crisis coordination arrangements (EU-CCA) define, for example, rules for interactions between EU institutions and affected EU States during a crisis. The EU arrangements for crisis management with cross-border effects (EU-ICMA) facilitate practical cooperation between EU States.²⁰⁷

In practice, response measures are designed on the basis of modules reflecting the Members States' capacities with respect to (hazard) specific requirements²⁰⁸ stemming from events such as natural hazards, terrorist attacks, technological, or environmental accidents²⁰⁹. The activation of these models is also known as the EU's Civil Protection Mechanism (CPM)²¹⁰ which was developed in 2001 and consists of several tools. Apart from the pre-positioned and self-sufficient civil protection modules, the CPM includes the Emergency Response Coordination Centre (ERCC) which monitors emergencies around the globe 24/7, and coordinates the response of the

²⁰⁴ *Calliess*, in: Calliess and Ruffert (Eds.), EUV/AEUV, 2016, Art. 196 AEUV, para. 5.

²⁰⁵ Decision 2007/779/EC, Euratom (OJ L 314 of 1.12.2007, 9), Art. 5 5.

²⁰⁶ *Fink-Hooijer*, The EU's Competence in the Field of Civil Protection (Article 196, Paragraph 1, a-c TFEU), in: Govaere and Poli (Eds.), EU Management of Global Emergencies, 2014, 137 (138).

²⁰⁷ *European Commission*, Migration and Home Affairs, Crisis Management, available via: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/crisis-and-terrorism/crisis-management/index_en.htm (13.08.2015).

²⁰⁸ Decision 2007/779/EC, Euratom of 8 November 2007 establishing a Community Civil Protection Mechanism (OJ L 314 of 1.12.2007, 9), Art. 3 5.

²⁰⁹ *Calliess*, in: Calliess and Ruffert (Eds.), EUV/AEUV, 2016, Art. 196 AEUV, para. 2.

²¹⁰ Decision 2007/779/EC, Euratom (OJ L 314 of 1.12.2007, 9).

participating countries in case of a crisis²¹¹, a Common Emergency Communication and Information System (CECIS), and a training programme. CECIS and hazard specific early-warning systems for forest fires (EFFIS) or flooding (EFAS) enable the EU to inform the Member States about emergency situations and the required capacities. CECIS and the Monitoring and Information Centre (MIC) serve the (disaster affected) Member States' requirement to inform the Commission and other Member States about an (imminent) disaster potentially having cross-border effects.²¹² With respect to Art. 222 TFEU, both systems also allow the administration of assistance as requested by affected Member States. Requests for support from the Civil Protection Mechanism encompassed, amongst others, the forest fires in Portugal in 2005 or in Italy and Greece in 2007.²¹³ However, the CPM relied mainly on ad hoc assistance from Member States, which leads to a high level of uncertainty about the potential assistance and creates the necessity to improvise response actions. To improve this situation, the European Emergency Response Capacity in the form of a voluntary pool of pre-identified capacities from participating States was established in October 2014.²¹⁴

Another tool for disaster response is the European Union Solidarity Fund which was established in 2002 to provide "financial assistance and to contribute to a rapid return to normal living conditions in the disaster-stricken regions".²¹⁵ While man-made disasters and terrorist attacks are excluded from the fund, it provides for a fixed budget for

²¹¹ *European Commission*, Humanitarian Aid and Civil Protection, EU Civil Protection Mechanism, available via: <http://ec.europa.eu/echo/en/what/civil-protection/mechanism> (21.02.2015).

²¹² Decision 2007/779/EC, Euratom (OJ L 314 of 1.12.2007, 9), Art. 6 1.

²¹³ *European Commission* (FN 208).

²¹⁴ *Georgieva*, Stakes and Challenges of EU Response to Global Emergencies: An EU Policy Perspective, in: Govaere and Poli (Eds.), *EU Management of Global Emergencies*, 2014, 13 (15) and *European Commission*, Humanitarian Aid and Civil Protection, EU Civil Protection Fact Sheet, available via: http://ec.europa.eu/echo/files/aid/countries/factsheets/thematic/civil_protection_en.pdf (04.01.2016), 3.

²¹⁵ Regulation (EC) 2012/2002 (OJ L 311 of 14.11.2002, 3).

essential natural hazards related emergency operations such as the restoration of infrastructure.

Overall, a variety of civil protection measures which complement the national systems have been established at EU level. However, the Member States decide on the extent of contributions to civil protection modules and measures maintained at the Union level and thus determine the Union's power to supplement national action. Several measures remain thus fragmented while the European Union plays a mediating role.²¹⁶

Regarding the response to disasters, Member States might also address requests for support directly to one another without making use of the MIC. This was also preferred in the past in order to maintain control over the operations (compare also Chapter C. III Art. 222 TFEU in practice).

b) Action of the Member States

The Member States should assist a Member State that is the object of a terrorist attack or victim of a natural or man-made disaster *upon request* and act in a *reactive* rather than a preventive way. If a request of the political authorities of the affected State has been received, Member States are obliged to provide assistance. This obligation has to be interpreted against the decision of the Member States about the extent and kind of support they are granting in light of Union Declaration No. 37 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon (Declaration on Article 222 TFEU) and stresses that

[...] none of the provisions of Article 222 is intended to affect the right of another Member State to choose the most appropriate means to comply with its own solidarity obligation towards that Member State.

²¹⁶ Calliess, in: Calliess and Ruffert (Eds.), EUV/AEUV, 2016, Art. 196 AEUV, para. 7.

In contrast to the Union, Member States are consequently not required to mobilise all the instruments at their disposal.

Since Art. 222 TFEU addresses threats by non-State actors and response action is to be taken only upon request by a Member State, no collective defence action can be derived.²¹⁷ Although it was discussed whether the EU would turn into a defence alliance²¹⁸, limiting the measures to the territory of the EU and to natural and man-made disasters as well as to terrorist attacks, and finally the interdisciplinary approach of the Solidarity Clause, emphasise the aim to respond to non-State triggered threats²¹⁹. This was also explicitly expressed by Working Group VIII Defence developing the Clause:

*Such a clause would not be a clause on collective defence entailing an obligation to provide military assistance, but would apply to threats from non-State entities.*²²⁰

Additionally, the focus on the aftermath of a crisis situation and the lack of a reference to pre-emptive measures does not permit to derive a requirement for action in the context of the prevention of terrorist attacks at the Member State level.²²¹ Since no reference is made to the provision of military forces which provide essential assets in civil emergencies at the nation state level and Member State action should only be responsive, also military involvement for

²¹⁷ With respect to its intention see also The European Convention, Final Report of Working Group VIII – Defence, CONV 461/02, 20 and also *Calliess*, in: Calliess and Ruffert (Eds.), EUV/AEUUV, 2016, Art. 222 AEUV, paras. 22–34, 30.

²¹⁸ *The European Convention*, Comments by Ms Gisela Stuart to the preliminary draft final report of Working Group VIII “Defence” (WD 022), December 2002, WD 27, 3 and *The European Convention*, Dutch comments on the preliminary draft final report of Working Group VIII “Defence” (WD 022), December 2002, WD 28, 4.

²¹⁹ *Gussone*, Das Solidaritätsprinzip in der Europäischen Union und seine Grenzen, 2006, 97 f.; *Ramsperger*, Die Terrorismusbekämpfung im Rahmen der Europäischen Sicherheits- und Verteidigungspolitik, 2009, 312.

²²⁰ *The European Convention*, Final Report of Working Group VIII – Defence, CONV 461/02, 20.

²²¹ *Calliess*, in: Calliess and Ruffert (Eds.), EUV/AEUUV, 2016, Art. 222 AEUV, paras. 35–37.

the prevention of and protection from terrorist attacks is not foreseen under Art. 222 TFEU.²²²

According to Art. 222 2. 2nd sentence TFEU, Member States have to coordinate their action in the Council which does not generate any additional EU competence but offers a forum for coordination.²²³

4. Implementation of the Clause

According to Art. 222 3. 1st para. TFEU, arrangements for the implementation of the Solidarity Clause were to be defined by a decision adopted by the Council acting on a joint proposal of the Commission and the High Representative (HR) of the Union for Foreign Affairs and Security Policy. Without prejudice to Art. 240 TFEU, the Council should be assisted by the Political and Security Committee with the support of the structures developed in the context of the Common Security and Defence Policy and by the Committee referred to in Art. 71 TFEU (Standing Committee Operational Cooperation on Internal Security, COSI).

The joint proposal for a decision according to Art. 222 3. 1st para. TFEU was developed and published by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy in December 2012.²²⁴ In June 2014 it was adopted by the Council with some minor changes.²²⁵ It set out the scope of the Clause and specified terminology, details of its invocation as well as response arrangements. Whether additional

²²² See also *Ondarza von and Parkes*, *The EU in the face of disaster – Implementing the Lisbon Treaty’s Solidarity Clause*, SWP Comments 9, German Institute for International and Security Affairs, 2010, 7.

²²³ *Calliess*, in: *Calliess and Ruffert* (Eds.), *EUV/AEUV*, 2016, Art. 222 AEUV, paras. 35–37.

²²⁴ *European Commission and High Representative of the European Union for Foreign Affairs and Security Policy*, Joint Proposal for a Council Decision of 21.12.2012, JOIN(2012) 39 final, 2012/0370 (NLE) on the arrangements for the implementation by the Union of the Solidarity clause.

²²⁵ Decision 2014/415/EU (OJ L 192 of 1.7.2014, 53).

and case-by-case decisions regarding the implementation of the Clause could be based on Art. 222 Abs. 3 TFEU remains unclear.²²⁶

a) *Activation mechanism*

Art. 4 Decision 2014/415/EU outlines the procedure for activating the Solidarity Clause and emphasises that its activation is a last resort after having exploited all existing means at nation state and Union level. According to Art. 4 2. Decision 2014/415/EU, the political authorities of the affected Member State shall address their request to the Presidency of the Council as well as to the President of the European Commission through the Emergency Response Coordination Centre (ERCC).

b) *Response arrangements at Union level*

After the invocation of the Clause, the Council ensures the political and strategic response of the Union. This includes the activation of Integrated Political Crisis Response (IPCR) arrangements and the information of all Member States while taking account of the Commission and the High Representative of the Union for Foreign Affairs and Security Policy (HR) (Art. 5 1. Decision 2014/415/EU). The Commission and the HR will, amongst other things, identify the relevant Union instruments which can best contribute to crisis response (Art. 5 2. Decision 2014/415/EU). These include instruments developed under the EU Internal Security Strategy²²⁷, the EU Civil Protection Mechanism (CPM)²²⁸, the Emergency Response Coordination Centre (ERCC)²²⁹, Decision No. 1082/2013/EU of the European Parliament and the Council on serious cross-border threats to health²³⁰ as well as those structures of intelligence and military

²²⁶ *Lais* (FN 40), 316 f.

²²⁷ *European Commission*, The EU Internal Security Strategy in Action: Five Steps Towards a More Secure Europe, Brussels, 22.11.2010, COM(2010) 673 final.

²²⁸ Established by Decision 1313/2013/EU of 17 December 2013 on a Union Civil Protection Mechanism (OJ L 347 of 20.12.2013, 924).

²²⁹ Established by Decision 1313/2013/EU of 17 December 2013 on a Union Civil Protection Mechanism (OJ L 347 of 20.12.2013, 924).

²³⁰ Decision 1082/2013/EU of 22 October 2013 on serious cross-border threats to health and repealing Decision 2119/98/EC (OJ L 293 of 5.11.2013, 1).

expertise which the European External Action Service (EEAS) has at its disposal. The ERCC shall act as the central 24/7 contact point at Union level.

Within the course of response actions, situation awareness reports will be tailored to the needs of the Union as defined by the Presidency of the Council in order to give a strategic overview of the situation (Art. 6 Decision 2014/415/EU).

The measures taken upon invocation of the Clause shall be reviewed with respect to the identified needs and within 12 months in order to evaluate the lessons learned. This review shall be carried out in the Council on the basis of a joint report prepared by the Commission and the HR (Art. 9 Decision 2014/415/EU).

c) Financial implications

The financial resources necessary for the implementation of the Solidarity Clause should stay within the agreed annual expenditure limits and in accordance with the existing Union instruments and their financial ceilings (Art. 10 Decision 2014/415/EU).

d) Threat assessment

Threat assessments according to Art. 222 4. TFEU may be requested by the European Council from the Commission, the HR and the Union agencies in order to produce reports on specified threats (Art. 8 1. Decision 2014/415/EU). They will be based on available assessments of threats compiled by the Union institutions, bodies and agencies under existing arrangements and on information provided voluntarily by the Member States (Art. 8 2. Decision 2014/415/EU). Member States are not obliged to provide any information where disclosure contradicts the essential interests of their security. While a “common situation awareness is hardly

possible without a culture of information sharing”²³¹, it remains open and subject to the support of the individual Member States as to how far comprehensive assessment reports reflecting threat situations effectively can be developed. Threat assessments may build on the various initiatives underway in areas such as civil protection, health security, CBRN (chemical, biological, radiological and nuclear) security, critical infrastructure protection and counter-terrorism. Threat assessments should serve as early-warning systems and need to also address threats which only individual Member States are facing when an activation of the Solidarity Clause might be assumed.²³²

5. Competences of the European Court of Justice (ECJ)

Art. 222 TFEU falls under Part Five of the Treaty on the Functioning of the European Union (TFEU) which details the European Union’s External Action. It is therewith subject to the jurisdiction of the European Court of Justice.

²³¹ *European Parliament*, Report on the EU’s Mutual Defence and Solidarity Clauses: Political and Operational Dimensions of 31 October 2012, (2012/2223(INI)) Structures and procedures, No. 37.

²³² *Calliess*, in: Calliess and Ruffert (Eds.), EUV/AEUV, 2016, Art. 222 AEUV, para. 38.

III. Art. 222 TFEU in practice – practical action measure or empty vessel?

The Solidarity Clause represents an application of the core value of solidarity (Art. 2 TEU). It locates solidarity within the context of civil protection and focuses on solidarity in aftermath-crisis situations. As such, Art. 222 TFEU reflects not only the relationship between the Member States, but also that between the Member States and the EU. It also forms a legal basis for their mutual support in disaster response. In the aftermath of the Paris terrorist attacks of November 2015, as the first major disaster after the establishment of the Solidarity Clause by the Lisbon Treaty and the development of its implementation arrangements, the French President decided to activate the Mutual Defence (Assistance) Clause (Art. 42.7 TEU) instead of calling for support under Art. 222 TFEU. The reasons for this decision need to be analysed in order to draw conclusions about the practical relevance of the Solidarity Clause.

1. Activation of Art. 42.7 TEU in the aftermath of the Paris terrorist attacks

On 13th November 2015, three teams of gunmen and suicide bombers targeted a concert hall, a major stadium, restaurants and bars in Paris, almost simultaneously and left 130 people dead and hundreds wounded. The *Islamic State* (IS) claimed responsibility for the attacks in response to the French airstrikes on IS targets in Syria and Iraq which had been initiated to contain the expansion of the Islamic State and to support the Iraqi Army. Instead of asking for aftermath-crisis support from Member States and the EU under Art. 222 TFEU, President Hollande classified the attacks as *an act of war*²³³ and said that IS was “not only an enemy of France but an

²³³ Nossiter, Bredeh and Bennedold, Three Teams of Coordinated Attackers Carried Out Assault on Paris, Officials Say; Hollande Blames ISIS, The New York Times, 14th November 2015, available via: http://www.nytimes.com/2015/11/15/world/europe/paris-terrorist-attacks.html?_r=0 (18.05.2016).

enemy of Europe”²³⁴. Moreover, he asked for support in the fight against the Islamic State from fellow EU countries and therefore decided to invoke the *Mutual Defence (Assistance) Clause* (Art. 42.7 TEU) which had not been applied since its establishment by the Lisbon Treaty. This decision was taken by surprise since an invocation of Art. 5 of the North Atlantic Treaty Organization (Collective Defence) or Art. 222 TFEU (Solidarity Clause) would have represented alternative and potentially more suitable legal bases for the provision of assistance. Why did François Hollande thus decide to activate Art. 42.7 TEU in particular?

Although Art. 5 of the North Atlantic pact was only recently activated after the 9/11 terror attacks, France would have had the option to invoke it. At the same time, France could rely on bilateral support from NATO allies to fight against the Islamic State (IS) given that the US-led mission against IS in Iraq had already received support from Belgium, Britain, Denmark and the Netherlands for over a year. Additionally, the decision against invoking Art. 5 of the North Atlantic pact was influenced by the idea of avoiding alienating Russia and complications with the NATO member Turkey²³⁵. Opting against Art. 5 also circumvented counter-productive side-effects to the efforts in seeking a political transition in Syria²³⁶. In addition, deciding to invoke Art. 42.7 TEU instead was also a political statement reflecting France’s longstanding support for an autonomous European defence policy without interference from Washington²³⁷ and its positioning as the principal security power in Europe.

²³⁴ *Taylor and Siebold*, France may get more EU help in Mali or Iraq than Syria, Reuters, 18th November 2015, available via: <http://www.reuters.com/article/us-france-shooting-eu-idUSKCN0T72F020151118> (17.05.2016).

²³⁵ *Ibid.*

²³⁶ *Legrand*, Will CSDP enjoy “collateral gains” from France’s invocation of the EU’s “mutual defence clause”?, DG for External Policies, Policy Department, 14th December 2015, 8.

²³⁷ *Valero*, France “at war” inaugurates EU’s mutual defence clause, Euractiv.com, 17th November 2015, available via: <http://www.euractiv.com/section/justice->

More questions in relation to the decision for Art. 42.7 TEU arise in light of the availability of Art. 222 TFEU, developed upon the terrorist attacks in New York (2001), Madrid (2004) and London (2005). It explicitly refers to solidary assistance in response to *terrorist attacks*. The main reasons which led to President Hollande's decision are the requirements of Art. 222 TFEU with respect to its geographic applicability, the responsibilities it generates and the preconditions for its activation. The scope of the Solidarity Clause restricts preventive measures and assistance in the aftermath of terrorist attacks geographically to the territory of EU Member States. In contrast, the Mutual Assistance Clause does not include such limitation. Yet France sought support *outside* the Union in its interventions in Syria and Iraq and relief from existing foreign military commitments²³⁸. At the same time, the wording of Art. 42 7. TEU supposes that a Member State has been the victim of an *armed aggression* on its territory. However, the extent to which the Paris terrorist attacks can be regarded as such an act of aggression and thus legitimate the activation of Art. 42 7. TEU is debateable. An armed aggression is usually defined as armed force by a State²³⁹. It is inherent to terrorist attacks, however, that they are committed by non-State actors.

With respect to responsibilities, Art. 222 TFEU identifies the European Union and the Member States as actors which "shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster" (Art. 222 1. 1st sentence TFEU). Hence the application of Art. 222 TFEU would have handed a role to the European Commission, which

home-affairs/news/france-at-war-inaugurates-eu-s-mutual-defence-clause/
(13.05.2016).

²³⁸ *Reuters*, France requests European support in Syria, Iraq, Africa, 17th November 2015, available via: <http://www.reuters.com/article/france-shooting-eu-defence-help-idUSB5N13100220151117> (19.05.2016).

²³⁹ UN General Assembly, A/RES/29/3314, Article 1.

Paris wanted to avoid²⁴⁰ to deal bilaterally with other governments²⁴¹ and allowing for a higher degree of flexibility regarding their nature and scope. This allowed France to steer the needed assistance without the EU's involvement. Therefore, France could maintain its full sovereignty since each Member State's contribution could be negotiated and agreed upon individually.²⁴² Additionally, bilateral solutions under Art. 42.7 TEU did not require any formal decision or Council conclusions and thus no (lengthy) formalities regarding their implementation.

Finally, pursuant to Art. 4 of Council Decision of 24 June 2014 on the arrangements for the implementation by the Union of the Solidarity Clause (2014/415/EU), the affected Member State needs to have exploited all the "means and tools at national and EU level", and "considers that the situation overwhelms its response capacity" when invoking Art. 222 TFEU. Yet France had not exhausted all the means and tools at its disposal in the face of the terrorist threat, and was not *overwhelmed* by the crisis.²⁴³

2. Collaboration under Art. 42.7 TEU – The Member States' response to France's request

Upon the invocation of Art. 42.7 TEU by France, the Defence Ministers of the European Union expressed their unanimous and full support to France and their readiness to provide all the necessary aid

²⁴⁰ Traynor, France invokes EU's article 42.7, but what does it mean?, The Guardian, 17th November 2015, available via: <http://www.theguardian.com/world/2015/nov/17/france-invokes-eu-article-42-7-what-does-it-mean> (18.05.2016).

²⁴¹ Council of the European Union, Outcome of the Council Meeting, 3426th Council meeting, Foreign Affairs, Brussels, 16 and 17 November 2015, 14120/15, 6 or *Cirlig*, The EU's mutual assistance clause: The first ever activation of article 42(7) TEU, Europäisches Parlament – Think Tank, 27th November 2015, available via: [http://www.europarl.europa.eu/thinktank/de/document.html?reference=EPRS_BR I\(2015\)572799](http://www.europarl.europa.eu/thinktank/de/document.html?reference=EPRS_BR I(2015)572799) (17.05.2016).

²⁴² Faleg, European Security after the Paris Attacks, Centre for European Policy Studies (CEPS) Commentary, 24th November 2015.

²⁴³ Legrand (FN 237), 9.

and assistance.²⁴⁴ Instead of establishing a new operation, Paris wanted to strengthen support for existing ones such as the bombing campaigns against the Islamic State and requested relief from its foreign military commitments such as the UN missions in Africa and Lebanon.²⁴⁵ Concretely, France expressed the need for three types of assistance in the two regions of the Middle East and sub-Saharan Africa: direct participation in the coalition against the Islamic State, support for its military campaign in Iraq and Syria (Opération Chammal) through logistics, intelligence, and refuelling capabilities, and support for French deployments (either national, European or UN operations) in Mali and the Central African Republic (CAR)²⁴⁶.

Art. 42.7 TEU requires Member States to aid and assist the affected Member State by “all the means in their power”. Although the Member States expressed full support, their willingness to actually engage in external activities was weak. Only a few States had committed military assets in the Middle East and contributions in Africa had mainly been granted before the Paris terrorist attacks. In December 2015, the UK, Germany and several other Member States responded rapidly to France’s request. The UK began conducting airstrikes against IS in Syria and Germany deployed a naval frigate to operate alongside the French aircraft carrier Charles de Gaulle. In addition, it provided refuelling aircrafts and reconnaissance jets with up to 1,200 personnel.²⁴⁷ Simultaneously, Germany planned to reinforce its mission to Mali by deploying up to 650 personnel.²⁴⁸

²⁴⁴ *European Union*, External Action, EU Defence Ministers ready to assist France after Paris Attacks, 17th November 2015, available via: http://eeas.europa.eu/top_stories/2015/171115_fac_defence_france_en.htm (22.05.2016).

²⁴⁵ *Maurice*, Weak start for EU mutual defence clause, EUobserver, 20th January 2016, available via: <https://euobserver.com/foreign/131918> (22.05.2016).

²⁴⁶ *Tardy*, Mutual defence – one month on, European Union Institute for Security Studies, 55, December 2015, 2.

²⁴⁷ *Ibid.*, 2 as well as *Die Bundesregierung*, Bundestag beschließt Syrien-Einsatz, 4th December 2015, available via: <https://www.bundesregierung.de/Content/DE/Artikel/2015/12/2015-12-01-syrien-mandat-bundeswehr.html> (25.05.2016).

²⁴⁸ *Die Bundesregierung* (FN 248).

Belgium sent a frigate to support the French aircraft carrier, and Sweden provided logistical support (munitions, planes, transport). Other countries such as Estonia, Latvia, Lithuania and Slovakia contributed to the request by sending personnel for the ongoing operations, mainly in Africa (compare Figure 6). “For the rest of the EU Member States, the will to help is there but resources are limited or the arrangements take time”, noted the French ministry of defence in respect of the bilateral negotiations²⁴⁹ which constituted more of a patchwork than an organised and solidary response.²⁵⁰

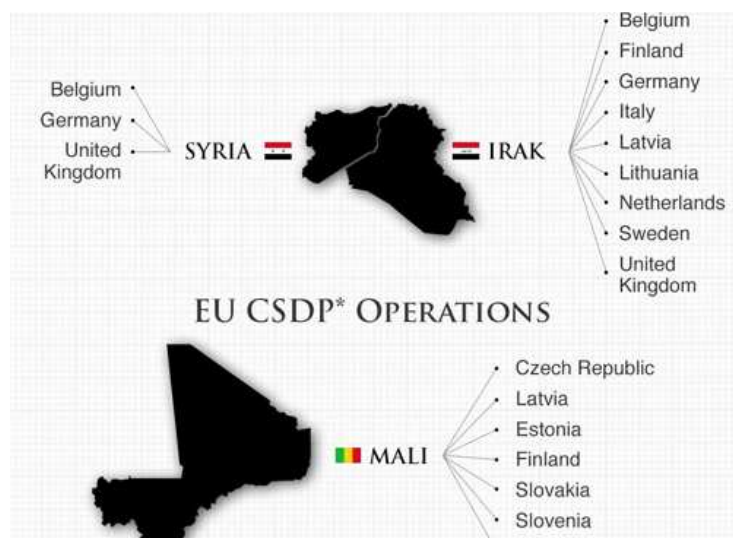


Figure 6: Support for operations in Syria and Iraq and Mali respectively
Source: European Parliament²⁵¹

3. Lessons of the 2015 Paris terrorist attacks for Art. 222 TFEU

The Paris attacks and the activation of the Mutual Assistance Clause have highlighted important aspects of Art. 222 TFEU. To begin with, its being referred to as Solidarity Clause is confusing. In the aftermath of the attacks, people around the world expressed their solidarity with France by making use of social media and politicians pledged

²⁴⁹ *Maurice* (FN 246).

²⁵⁰ *Pertusot*, Semi-Mutual Defense: Europe’s Patchwork Response to Paris Attacks, International Peace Institute, Global Observatory, 9th December 2015, available via: <https://theglobalobservatory.org/2015/12/european-union-isis-syria-paris-attacks/> (24.05.2016).

²⁵¹ *European Parliament*, Mutual Defence Clause: What the Requirement to Help Out Other Member States Means, Plenary Session, 20th January 2016.

that they would stand in solidarity with the French. One would thus assume that the Solidarity Clause would provide a basis for providing practical support in the aftermath of a disaster. In fact, different forms of support must be differentiated. While Art. 222 TFEU provides a basis for relief measures, France was seeking support in fighting the roots of terrorism and the Islamic State responsible for it. However, Art. 222 TFEU was not designed to fight terrorism outside the Union and thus could not have served as a legal basis for France's purposes. At the same time, Art. 42.7 TEU presupposes an *armed aggression* which usually defines armed aggression by a State actor²⁵² and as such does not encompass terrorist attacks. On the one hand, this raises the question of whether it can be legitimately applied in the aftermath of a terrorist attack, while on the other, discussions need to be had as to the extent to which Art. 42.7 TEU and Art. 222 TFEU complement one another, might be triggered together or have potentially even created a legal gap. In any case, in the aftermath of the Paris attacks, solidarity of the EU Member States was confusingly expressed via the *Mutual Assistance Clause* (Art. 42.7 TEU) instead of making use of the *Solidarity Clause* (Art. 222 TFEU).

What is more, the Paris attacks and the discussion about the invocation of Art. 42.7 TFEU instead of Art. 222 TFEU also illustrated that Art. 222 TFEU has some inadequacies with respect to its application. This relates to the requirement to have exploited all existing means at the nation state and Union levels before activating the Solidarity Clause (Art. 4.2. Decision 2014/415/EU). Yet while a Member State might not necessarily be overwhelmed by a disaster, it can still be in need of support. Moreover, in the event that the Member State is overwhelmed by a disaster, it might not want to admit this and thus refrain from its activation. In this regard, a

²⁵² UN General Assembly, A/RES/29/3314, Article 1.

specification on how to determine whether a State is overwhelmed is also lacking.²⁵³

Finally, the application of Art. 42.7 TEU revealed that the bilateral development of joint action allowing for fast and tailor-made support was favoured over the EU's involvement. Regarding the implementation of Art. 222 TFEU, one needs to ascertain that EU involvement allows for a very prompt response that does justice to the disaster situation. In this respect, it remains to be seen whether the implementation arrangements by Decision 2014/415/EU and the disaster risk management measures in place fulfil this prerequisite.

²⁵³ *Legrand* (FN 238), 12.

D. Solidarity in the field of civil protection – moral obligation or (lack of) political interest?

I. Dominance of Member States in civil protection

Art. 6 (f) TFEU provides that the EU has the competence to “support, co-ordinate or supplement” civil protection policies, but stresses that the principal responsibility for civil protection remains with the Member States while any harmonisation of Member States’ laws or regulations is excluded from EU competences. Although it allows for complementary action rather than drastic changes, it might serve as a basis for the adaptation of civil protection legislation²⁵⁴. Furthermore, Art. 222 TFEU specified the Union competences regarding disaster related preventive (Art. 222 1. (a) 1st and 2nd bullet point TFEU) and response action (Art. 222 1. (a) 3rd bullet point and 1. (b) TFEU). Consequently, the *Solidarity Clause* (Art. 222 TFEU) builds a legal basis for the concrete development and implementation of measures at EU and Member State level with respect to the prevention of and response to disasters, and defines binding obligations of mutual assistance for both the EU and its Member States. Although the EU encompasses its own competences and civil protection as a policy field is stretched beyond purely State-centric activities²⁵⁵, for preventive as well as reactive measures Union action largely depends on the provision of resources by the Member States and their willingness to cooperate and collaborate at the Union level. Council Decision of 24 June 2014 on the arrangements for the implementation by the Union of the Solidarity Clause (2014/415/EU) specified some open questions, for example, with

²⁵⁴ *Konstadinides*, Civil Protection in Europe and the Lisbon “solidarity clause”: A genuine legal concept or a paper exercise, Uppsala Faculty of Law Working Paper, 2011, 3, 13 or *Myrdal and Rhinard* (FN 171), 8.

²⁵⁵ For example *European Commission*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Agenda on Security, Strasbourg, 28.4.2015, COM(2015) 185 final or *European Commission*, Fighting terrorism at EU level, an overview of Commission’s actions, measures and initiatives, Fact Sheet, 11th January 2015.

respect to response arrangements at the Union level. Nevertheless, the application of the Clause in terms of concrete measures remains vague. It is characterised by a “sense of symbolic gesture rather than by concrete regulations”²⁵⁶. Instead, the manner and extent of support in crisis situations are decided upon by the Member States on an ad hoc basis.

One could argue that EU competences in civil protection which were only granted to a limited extent reflect the principle of subsidiarity (Art. 5 3. 1st para. TEU) as the basic principle for the functioning of the EU, according to which it shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States. It would thus constitute the basis for political solidarity between the Member States which cooperate only on civil protection challenges that cannot be solved at the local or national level. The transboundary nature of terrorist activities and (certain) natural and man-made hazards, for example, requires for joint counter-measures and collaboration in civil protection since Member States “can no longer succeed fully on their own”²⁵⁷ in providing security to their citizens. Given the competences resulting from Art. 222 TFEU, it could thus be assumed that a majority of challenges can still and most efficiently be addressed at the nation state level.

At the same time, however, an efficient, coherent, and timely crisis control and response would require more integrated arrangements built on best practices by the Member States. Moreover, a streamlining of national crisis coordination efforts with the EU and the integration of EU services and networks would be essential.²⁵⁸ Deeper levels of integration have thereby repeatedly been requested by the Member States specifically in aftermath-crisis situations. Most

²⁵⁶ *Becker*, in: Schwarze et al. (Eds.), EU-Kommentar, 2012, Art. 222 AEUV, para. 2 as well as *Calliess*, in: Calliess and Ruffert (Eds.), 2016, Art. 222 AEUV, para. 21.

²⁵⁷ European Commission, The European Agenda on Security, 28.04.2015, COM(2015) 185 final.

²⁵⁸ *Blockmans* (FN 173), 128 f.

recently, this concerned, for example, improved intelligence sharing with respect to the prevention of terrorist attacks.

Overall, this dilemma demonstrates how Member States have to negotiate the “tension between the duty of solidarity and the respect for national sovereignty in a field that many States still see as essentially reserved to their responsibility”²⁵⁹.

²⁵⁹ *Gestri* (FN 164), 126.

II. One policy field, different solidarities

This deviation between functionally useful integrated civil protection arrangements and the actual dominance of Member States in a policy field in which solidarity is explicitly anchored in primary law is reflected by Art. 222 TFEU. But does the useful lack of functionally preferable integration simply reflect a lack of solidarity between the Member States, and does the explicit reference to solidarity in Art. 222 TFEU potentially camouflage this? And if the urge for sovereign civil protection policies is particularly strong, why was Art. 222 TFEU developed and integrated into the Lisbon Treaty? The answer lies in the distinction between different forms of solidarity at the EU level allowing for a more detailed analysis of Member State interests in the civil protection field.

The development and implementation of the Solidarity Clause are characterised by different forms of solidarity or, more specifically, a transition from moral to political solidarity which becomes clear against its historical background. The origins of the Clause can be traced back to the European Convention (2002–2003) debates on a draft constitution for the EU. In this context, Working Group VIII on defence introduced several suggestions for the development of instruments on collective security. One strand of the debate focused on mutual defence, while the second strand sought to bind EU governments together against a range of new threats. A respective second option was discussed to address the full range of crisis and disaster response capacities available to the EU as well as to distinguish the EU from a military alliance. The consideration of new threats by non-State actors was thereby shaped initially by the 9/11 attacks and later also the 2004 Madrid terrorist attacks.²⁶⁰ Emotionally affected and confounded by the attacks, immediate action was taken by the EU and its Member States in 2001. Head of

²⁶⁰ Myrdal and Rhinard (FN 171), 3 f.

States expressed their *unlimited*²⁶¹ and *profound*²⁶² solidarity with the United States, even stating that they were all Americans²⁶³. At EU level, mere days after the 9/11 attacks, policy proposals were tabled, which led to a Plan of Action adopted by a special European Council on 21st September 2001.²⁶⁴ Driven by compassion for the victims and their relatives and by the intention to prevent the recurrence of such catastrophes in the future, policymakers and citizens were galvanised by *moral* solidarity.

Having overcome the shock of the new threat dimension and having returned to everyday life, however, moral solidarity morphed into *political* solidarity between the Member States reflecting the integration process in the field of civil protection. Driven by the need to find joint responses to new political challenges, the Solidarity Clause was introduced into the Constitutional Treaty following its failed ratification into the Lisbon Treaty. On the basis of political solidarity, the Clause's development and implementation process was now shaped by a return to intergovernmentalism and a rational choice approach to collaboration. Although the Member States have identified the need for collaboration on transboundary threats²⁶⁵, they nevertheless remain reluctant to establish integration or

²⁶¹ *Spiegel Online International*, Schröder on Sept. 11 and Afghanistan: "I Remember My Own Tears", 25th October 2006, available via: <http://www.spiegel.de/international/schroeder-on-sept-11-and-afghanistan-i-remember-my-own-tears-a-444689.html> (22.10.2015).

²⁶² *Blair*, Speech on the terrorist attacks of September 11th 2001, *The Guardian*, Full text: Tony Blair's speech (part one), available via: <http://www.theguardian.com/politics/2001/oct/02/labourconference.labour6> (22.10.2015).

²⁶³ *Chirac*, Nous sommes tous Américains, *Le Monde*, 13th September 2001, available via: http://www.lemonde.fr/idees/article/2007/05/23/nous-sommes-tous-americains_913706_3232.html (22.10.2015).

²⁶⁴ For example EU Delegation to the UN in New York, EU response to September 11, available via: http://eu-un.europa.eu/articles/en/article_1425_en.htm (22.10.2015).

²⁶⁵ For example (9) of Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (OJ L 164 of 22.06.2002, 3 (4)): Given that the objectives of the proposed action cannot be sufficiently achieved by the Member States unilaterally, and can therefore, because of the need for reciprocity, be better achieved at the level of the Union, the Union may adopt measures, in accordance with the principle of subsidiarity.

collaboration measures that could undermine Member States' sovereignty.

III. Meaning of emergency governance for national self-perception

The reluctance to give up or share sovereignty in the field of civil protection as compared to other policy fields, such as trade, which are highly integrated, might be explained by its particular meaning for national self-perception.

1. Conceptualising and managing risk

The perception and meaning of *disasters*²⁶⁶ have changed drastically over the course of centuries.²⁶⁷ Traditionally, disasters such as famine, plagues or natural hazards were characterised as *Acts of God* with the implication that nothing could be done about their occurrence. The rise of Enlightenment, secularism, and science changed people's perception of disaster, being characterised more as *Acts of Nature*. Although the origin of disasters was now conceptualised differently, it was believed that their occurrence was *natural* and thus not to be influenced or prevented. It was only several decades ago during the 1980s that disasters began to be understood as socially constructed or *Acts of Men and Women*.²⁶⁸ With respect to natural hazards it was recognised that settlements, for example, were created within dangerous zones and that due to political or economic forces, certain parts of the society in question were placed in a more perilous position than others.²⁶⁹ In addition to this new focus on the anthropogenic aspects of natural disasters,

²⁶⁶ Disaster is understood as a serious disruption of the functioning of a community or a society involving widespread human, material, economic or environmental losses and impacts, which exceeds the ability of the affected community or society to cope using its own resources: *UNISDR* (FN 182), 9.

²⁶⁷ *Furedi*, *The Changing Meaning of Disaster*, *Area*, 2007, 39(4), 482 (483).

²⁶⁸ *Hewitt*, *The Idea of Calamity in a Technocratic Age*, in: *Hewitt* (Ed.), *Interpretations of Calamity*, 1983, 3 or *Blaikie, Cannon, Davis, Wisner* (FN 160).

²⁶⁹ *Hoffman and Oliver-Smith*, *Anthropology and the Angry Earth: An Overview*, in: *Oliver-Smith and Hoffman* (Eds.), *The Angry Earth – Disaster in Anthropological Perspective*, 1999, 1.

risks induced and introduced by modernisation²⁷⁰ and their systematic control gained attention.

Today, disaster risk is actively shaped by risk governance, i.e. societal decision making and intervention²⁷¹ which holds true for natural and man-made hazards as well as for terrorist threats. Although the latter strains the capacity of quantitative risk analysis, on account of its high levels of uncertainty²⁷², both follow the rather *classical* risk management which can be divided into two main areas:

- risk reduction (identification and prevention/mitigation); and
- disaster management (response and recovery).²⁷³

Disaster management measures for natural hazards, man-made disasters, and terrorist attacks display some similarities, but they differ strongly in respect of their prevention. Response and recovery measures are usually implemented by civil protection actors, such as fire services and relief organisations, and encompass, for example, the provision of first aid, shelter, and food as well as restoration efforts. With regard to preventive measures and actors, natural and man-made hazards must be differentiated from terrorist attacks. While private actors and market-based insurance and financial protection schemes play an important role in shifting the financial consequences of natural and man-made hazards from one party to another²⁷⁴, terrorism represents an uncontrollable and unpredictable danger against which insurance schemes do not usually exist²⁷⁵. Similarly, conventional legal risk reduction measures, such as land-use regulations or building codes, fail to address terrorism in a

²⁷⁰ Beck, *Risk Society*, 1992, 21.

²⁷¹ Beck, *The Reinvention of Politics*, 1997, 30.

²⁷² Slovic, *Terrorism as Hazard*, *Risk Analysis*, 2002, 22(3), 425.

²⁷³ Cardona, *The Need for Rethinking the Concepts of Vulnerability and Risk from a Holistic Perspective: A Necessary Review and Criticism for Effective Risk Management*, in: Bankoff, Frerks and Hillhorst (Eds.): *Mapping Vulnerability: Disasters, Development and People*, 2003, 37.

²⁷⁴ *UNISDR* (FN 182), 27.

²⁷⁵ Beck, *The Terrorist Threat: World Risk Society Revisited, Theory, Culture & Society*, 2002, 19(4), 39.

preventive way. Instead, intelligence services and the police enforce prevention measures based on the collection and analysis of data in order to detect suspected terrorists. For all hazards and with respect to preventive as well as response and recovery measures, the State remains the main actor. Its capacity to actively shape risk is thereby mirrored by its broader institutional and legal framework²⁷⁶ or conversely, the set-up of its governance structures determines its risk management capacity. As a result, the (un)successful management of disaster risk reveals the status quo of the nation state's capability to protect its citizens.

2. The impact of emergencies on sovereignty and the nation state narrative

Sovereignty can be regarded as the absolute and perpetual power within a State to govern itself without any interference from outside²⁷⁷ encompassing authority, legal power as well as the competence of imposing duties and conferring rights²⁷⁸. While sovereignty's internal dimension refers to the State's right to determine its type, governance structure and rules within its territory, the external dimensions encompass the capability to deal with other States on an equal basis.²⁷⁹ Sovereignty can thus be defined as supremacy over all other potential authorities within the State's territory as well as a State's independence in and acceptance by a system of States.²⁸⁰ Although it is frequently claimed that sovereign nation states were in the process of becoming obsolete²⁸¹,

²⁷⁶ Tierney, *Disaster Governance: Social, Political, and Economic Dimensions*, Annual Review of Environment and Resources, 2012, 37, 341.

²⁷⁷ Bodin, *On Sovereignty*, edited by Franklin, 1992.

²⁷⁸ Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, The Yale Law Journal, 1944, 53(2), 207 (208).

²⁷⁹ Núñez, *About the Impossibility of Absolute State Sovereignty – The Early Years*, International Journal for the Semiotics of Law, 2014, 27(4), 645 (651).

²⁸⁰ Bodin already recognised that sovereignty encompasses internal supremacy and external independence (FN 278).

²⁸¹ E.g. Avbelj, *Theorizing Sovereignty and European Integration*, Ratio Juris, 2014, 27(3), 344; Krasner, *Think Again: Sovereignty*, Foreign Policy, 2001, 122, 20; Bellamy and Castiglione, *Building the Union: The Nature of Sovereignty in the Political Architecture of Europe*, Law and Philosophy, 1997, 16, 421; Camilleri and

sovereignty remains in its external dimension to act as a common denominator expressing status among States²⁸² and the number of sovereign political entities is steadily increasing.

Regarding its internal dimension, disasters play a particular role in affirming or negating sovereignty by manifesting the State's willingness and power to protect its citizens. The handling of emergency situations can even be characterised as a "legal-political technique through which sovereign power is [...] (re)affirmed"²⁸³. In this respect, emergencies emphasise the nation state narrative by inscribing a common destiny to its society and stressing solidarity within the State. This function is usually also reflected in crisis-related speeches. George W. Bush, for example, stated after the 9/11 terrorist attacks: "These acts of mass murder were intended to frighten our nation into chaos and retreat. But they have failed. Our country is strong. A great people has been moved to defend a great nation. Terrorist attacks can shake the foundations of our biggest buildings, but they cannot touch the foundation of America. These acts shatter steel, but they cannot dent the steel of American resolve"²⁸⁴. Following the 2005 London terrorist attacks, Tony Blair expressed that when "they try to divide our people or weaken our resolve, we will not be divided and our resolve will hold firm. We will show by our spirit and dignity and by a quiet and true strength that there is in the British people, that our values will long outlast theirs"²⁸⁵.

Falk, The End of Sovereignty? 1992; *Khan*, The Extinction of Nation States, *American University Journal of International Law and Policy*, 1992, 7, 197, *Soroos*, Beyond Sovereignty, 1986 or *Goodwin*, The Erosion of External Sovereignty?, in: *Ionescu* (Ed.), *Between Sovereignty and Integration*, 1974, 100–117.

²⁸² *Fowler and Bunck*, *Law, Power and the Sovereign State*, 1995, 5 ff.

²⁸³ *Adey, Anderson and Graham*, Introduction: Governing Emergencies: Beyond Exceptionality, *Theory, Culture & Society*, 2015, 32(2), 3 (7).

²⁸⁴ *Bush*, Speech after terrorist attacks on New York and Washington, CNN US, The text of President Bush's address Tuesday night, 11th September 2001, available via: <http://edition.cnn.com/2001/US/09/11/bush.speech.text/> (02.08.2016).

²⁸⁵ *BBC News*, In full: Blair on bomb blasts, 7th July 2005, available via: http://news.bbc.co.uk/2/hi/uk_news/4659953.stm (18.07.2015).

This specific meaning of emergencies for State sovereignty was already determined by the authoritarian right-wing political thinker Carl Schmitt who claimed that “sovereign is he who decides on the exception”²⁸⁶. While this statement has to be evaluated against its historical context and its implications for the constitutional order²⁸⁷, it stresses the interrelation of emergency and sovereignty as well as the role of power in determining emergencies. This triad finds its analogy in Art. 222 1. (b) and 2. TFEU which presuppose the request of a Member State’s political authorities before assistance by the Member States or the EU can be granted.

3. Addressing emergencies through law?

In addition to the meaning of emergencies for State narratives and the reflection of sovereignty in emergency management, the means that are chosen to provide security also allow for conclusions to be drawn about the nature of a political entity. Whether or not emergencies are addressed by law offers some insight into a State’s self-conception. Schmitt argued that the sovereign deciding about the emergency would necessarily have to take measures to address the emergency that would go beyond the existing legal system. The exception, he argued, was too specific to anticipate necessary response measures and incorporate them into the legal system. According to him, “a general norm, as represented by an ordinary legal prescription, can never encompass a total exception”.²⁸⁸ He further claimed that the judicial order was threatened by the exception and could only be maintained or recovered by acting beyond it.²⁸⁹ Whether exceptional circumstances have been or ought to be addressed beyond the existing judicial order has been subject

²⁸⁶ *Schmitt*, *Political Theology*, translated by Schwab and Strong, 2010, 5.

²⁸⁷ For a detailed analysis see *McCormick*, *The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers*, *Canadian Journal of Law and Jurisprudence*, 1997, 10, 163.

²⁸⁸ *Schmitt* (FN 287), 6.

²⁸⁹ *Schmitt* (FN 287), 6 f.

to scientific debate²⁹⁰ and numerous thinkers have stressed that there is a set of constitutional procedures and constitutionally based formal emergency mechanisms allowing for effective but legally constrained employment of emergency power.²⁹¹ They can be found in a variety of constitutions²⁹² and are designed in advance and are *switched on* in a state of emergency in order to preserve constitutional governance²⁹³. Emergency situations and their counter-measures are thus constitutionally demarcated and differentiated from normal politics.²⁹⁴ The state of exception is, for example, regulated by the constitution or law in France or Germany, while countries such as Italy, Switzerland, the UK or the United States have not specified the handling of emergencies.²⁹⁵ For example, in France, the state of emergency was put in place after the Paris terrorist attacks in November 2015 to cover the Euro 2016 football championship. It introduced special emergency measures which gave extra powers to the police and officials to conduct house searches or to place people under house arrest outside the normal judicial process.²⁹⁶ In contrast to such an approach which embeds emergency measures in the legal order, the US government decided to respond

²⁹⁰ *Tulis and Macedo* (FN 161); *Honig* (FN 161); *Ramraj* (FN 161); *Sarat, Douglas and Umphrey* (Eds.), *Law and Catastrophe*, 2007; *Dyzenhaus, Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order*, *Cardozo Law Review*, 2005–2006, 27, 2005; *Sarat, Douglas and Umphrey* (Eds.), *The Limits of Law*, 2005; *Ferejohn and Pasquino*, *The Law of the Exception*, *International Journal of Constitutional Law*, 2004, 2, 210 or *Agamben*, *State of Exception*, 2005 to name a few.

²⁹¹ *Gross and Ní Aoláin*, *Law in Times of Crisis*, 2006, 17; *Ferejohn and Pasquino* (FN 291).

²⁹² For example *Scheppele*, *Exceptions that Prove the Rule – Embedding Emergency Government in Everyday Constitutional Life*, in: *Tulis and Macedo* (Eds.), *The Limits of Constitutional Democracy*, 2010, 124.

²⁹³ For example *Gross and Ní Aoláin* (FN 292) or *Ferejohn and Pasquino* (FN 291).

²⁹⁴ *Scheppele* (FN 293), 130.

²⁹⁵ *Agamben* (FN 291), 9 f.

²⁹⁶ *République Française*, *State of Emergency in France: What are the Consequences?*, available via: <http://www.gouvernement.fr/en/state-of-emergency-in-metropolitan-france-what-are-the-consequences> (20.07.2016) as well as *Chrisafis*, *France seeks to extend state of emergency until end of July*, *The Guardian*, 20th April 2016, available via: <https://www.theguardian.com/world/2016/apr/20/france-seeks-to-extend-state-of-emergency-until-end-of-july> (20.07.2016).

to the 9/11 terrorist attacks outside the legal order and existing legal frameworks in the US were suspended due to them impeding the prosecution of a *morally just war*.²⁹⁷

Relating the discussion of whether and to what extent emergencies may be addressed by the means of law to civil protection and Art. 222 TFEU requires a specification of *emergency*. In many cases, an emergency is understood as an “urgent threat to the state or regime”²⁹⁸. In line with this definition of an emergency as threatening the very existence of a State, Schmitt’s definition of an exception or emergency relates to a severe economic or political disturbance requiring the application of extraordinary measures ensuring the State’s survival. This emergency characterisation also encompasses terrorist attacks as offences which seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country.²⁹⁹

Often, however, emergency is simply characterised as “an interval after an event, where life and death are at stake, outcomes are uncertain and timely action is demanded”³⁰⁰. This definition also encompasses hazards of natural or man-made (accidental) origin which might have devastating effects but are neither intentional nor do they *threaten* the existence of the State. Although they might pose a challenge to governments and emergency management institutions, effective risk and disaster management can reduce the negative effects of an event.³⁰¹ Regular emergency planning actions allow for the prevention of, response to and recovery from natural and man-made hazards such as trans-species epidemics, industrial

²⁹⁷ *Dickinson*, *Terrorism and the Limits of Law*, in: Sarat, Douglas and Umphrey (Eds.), *The Limits of Law*, 2005, 21 (23) as well as *Scheuerman*, *Emergency Powers and the Rule of Law After 9/11*, *The Journal of Political Philosophy*, 2006, 14(1), 61.

²⁹⁸ *Ferejohn and Pasquino* (FN 291), 210.

²⁹⁹ See also Art. 1 of Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (OJ L 164 of 22.06.2002, 3).

³⁰⁰ *Anderson and Adey*, *Governing Events and Life*, *Political Geography*, 2012, 31, 24 (24).

³⁰¹ *Adey, Anderson and Graham* (FN 284), 5.

accidents or weather-related disruptions. The management of such hazards is generally operated *within* the given legal framework and does not require for (ad hoc) new legal instruments. This is particularly true for the broad area of preventive actions encompassing, for example, safety standards or spatial planning regulations.

Art. 222 TFEU, however, addresses both cases, the State threatening event represented by a terrorist attack as well as disasters which might significantly challenge or even overwhelm a State's capacities but do not aim to provoke its nature and existence. Although the question as to whether and to what extent emergencies are addressed by the means of law is mainly relevant for terrorist attacks, Member States have expressed their will to address emergency situations through law and constitutional governance. Therewith, Art. 222 TFEU is also a statement about the self-conception of the EU and its constitutional order. Contrary to a conceptualisation of emergencies as a threshold or limiting concept to the judicial order³⁰², the overall EU civil protection policy aims to establish "an EU area of internal security where individuals are protected in full compliance with fundamental rights"³⁰³. In light of this, a derogation of fundamental rights in times of emergency comparable to that of Art. 15 of the European Convention on Human Rights or Art. 4 of the UN Covenant on Civil and Political Rights was not included in the EU Charter of Fundamental Rights. Furthermore, the protection of fundamental rights, particularly in the civil protection context, was also stressed by the Court of Justice of the European Union (CJEU). The CJEU has rarely dealt with the legality of measures taken by the EU or its Member States in the context of civil protection, primarily due to the withdrawal of the policy field from its influence unless the

³⁰² *Agamben* (FN 291), 4.

³⁰³ *European Commission*, The European Agenda on Security, Strasbourg, 28.4.2015, COM(2015) 185 final.

CFSP decision had a link with an EC act.³⁰⁴ In a set of cases concerning the legality of asset freezing measures against individuals supporting terrorism, the CJEU stressed that individuals may rely on judicial review. It annulled³⁰⁵ Regulation 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban³⁰⁶ since it breached the right to defence and to effective judicial protection³⁰⁷. Following the decision, those individuals who had been included on a list of suspected terrorists and whose funds had been frozen were provided with a summary of the underlying reasons as to why access had not been granted beforehand. Since the impugned act was enacted at the end of 2008³⁰⁸ although it was claimed that the evidence justifying the listing was still not fully disclosed, a new action for annulment was thus lodged in 2009. The CJEU decided again that the Commission had breached fundamental rights.³⁰⁹ It stressed that in a Union based on the rule of law, fundamental rights are guaranteed and that specifically those measures to address the threat of terrorism are subject to the highest level of intensity of judicial review. Furthermore, it emphasised the need to ensure a fair balance between the

³⁰⁴ *Poli*, Emergencies, Crises and Threats in the EU: What Role for the Court of Justice of the European Union?, in: *Govaere and Poli* (Eds.), *EU Management of Global Emergencies*, 2014, 195 (195ff).

³⁰⁵ CJEU, Judgment of 3 September 2008, Joined Cases C-402/05 P and C-415/05, P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*, 2008, I-6351.

³⁰⁶ Regulation (EC) 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No. 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ L 139 of 29.05.2002, 9-22).

³⁰⁷ ECJ, Judgment of 21 September 2005, Case T-315-/01, *Yassin Abdullah Kadi v. Council and Commission*, 2005, II-3649.

³⁰⁸ Regulation (EC) 1190/2008 of November 2008 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban (OJ L 322 of 2.12.2008, 25).

³⁰⁹ ECJ, Judgment of 30 September 2010, Case T-85/09, *Yassin Abdullah Kadi v. European Commission*, 2010, II-5177.

maintenance of international peace and security and the protection of the fundamental rights and freedoms of the person concerned³¹⁰.

³¹⁰ CJEU, Judgment of 18. July 2013, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and Others v. Yassin Abdullah Kadi*, 2013, I-518, para. 88.

IV. National sovereignty vs. political solidarity or the need for collaboration

The theoretical concept of State sovereignty as a concept of absolute State power gives only limited information about the actual status of nation state sovereignty. In fact, the idea of authority and power within a certain territory is not unlimited but restricted by a variety of factors, such as the State's own legal system and economy or international political or environmental effects.³¹¹ In a global political and economic system where framework conditions are no longer determined by the nation state but by systemic interdependencies, national power and sovereignty become necessarily limited.³¹² Both partly lose their relevance due to their incapacity to address global challenges³¹³. In this respect, the former UN Secretary-General Boutros Boutros-Ghali already noted over two decades ago: "A major intellectual requirement of our time is to rethink the question of sovereignty – not to weaken its essence, which is crucial to international security and cooperation but to recognise that it may take more than one form and perform more than one function"³¹⁴. A respective context-specific differentiation of sovereignty would be useful to allow for a more integrated collaboration and thus gain greater control of global challenges. However, the pursuit of full self-determination frequently remains to prevent governments from agreeing to rules or processes limiting their actual self-determination.³¹⁵ At the same time, the amount of policy fields in which collaboration will be needed to develop efficient strategies is steadily increasing.³¹⁶

³¹¹ Núñez (FN 280), 649.

³¹² Habermas (FN 129).

³¹³ For example Beck (FN 128).

³¹⁴ Boutros-Ghali, *Empowering the United Nations*, Foreign Affairs, 1992, 71, 89 (99).

³¹⁵ Keohane, *Ironies of Sovereignty*, *Journal of Common Market Studies*, 2002, 40(4), 743 (748).

³¹⁶ Beck (FN 128).

In recent decades, EU Member States have recognised this challenge and have broken the classical conceptualisation of *maximum* sovereignty, and restructured towards a system of *pooled* sovereignty. Sovereignty can be understood as pooled in the sense that “in many areas, states’ legal authority over internal and external affairs is transferred to the Community as a whole, authorising action through procedures not involving state vetoes”³¹⁷. Although any revision of the Treaties requires unanimity between the Member States, binding law can be created without their unanimous consent, while supremacy and direct effect of EU law have already limited the Member State’s sovereignty.³¹⁸ The concept of pooled sovereignty thereby responds in a functionalist sense to the limitations of State sovereignty. It does justice to global challenges and the dependence on collaboration with other States to address those challenges effectively (relational sovereignty).³¹⁹ Paradoxically, this transfer of sovereign control enables the nation states to regain sovereignty. As such, sovereignty becomes less a territorially defined barrier and more a bargaining resource.³²⁰ Although this shift in sovereignty is accompanied by a reduction in democratic control and accountability by the nation states, one could argue that the broadened scope of action of national regimes and their increased power to address existing challenges might outweigh this loss (output legitimacy).³²¹

This need for collaboration and integration has been identified and institutionalised by the development of the EU. It was also described as political solidarity between the Member States. Nevertheless, in some areas, such as civil protection, Member States remain reluctant

³¹⁷ *Ibid.*, 748.

³¹⁸ For example *Weiler*, *The Constitution of Europe*, 1999.

³¹⁹ “Relational sovereignty argues for a model of responsible governance that can account for the extent of international intercourse that exists under globalization”: *Stacy*, *Relational Sovereignty*, *Stanford Law Review*, 2003, 55(5), 2029 (2058).

³²⁰ *Keohane* (FN 316), 748.

³²¹ *Scharpf*, *Demokratie in der transnationalen Politik*, in: Beck (Ed.), *Politik der Globalisierung*, 1998, 228.

to transfer sovereignty which is frequently justified by the subsidiarity principle.

At the same time, the EU has reached a degree of integration at which further integration steps necessarily fall in policy fields that reflect core functions of the nation state, e.g. the provision of security. In this respect, Member States continue to be particularly reluctant to advance integration in the field of foreign and security policy as a pivotal policy field for State sovereignty in the classical sense in which supranational institutions have currently little or no power.³²² Similarly, other policy fields encompassing core functions of the nation state, such as education and social security, as well as all fields related to national welfare, remained under the (main) competence of the Member States.³²³ These policy fields are not necessarily characterised by higher levels of efficiency which could be achieved at a national level and would thus reflect an application of the subsidiarity principle. They do represent, however, core functions of the State and form integral parts of national self-perception.

In the civil protection context, the meaning of the policy field in relation to national self-conception is repeatedly reflected in reluctant collaboration efforts. This encompasses the limited implementation efforts regarding the EU prevention competences generated by Art. 222 TFEU or the fragmented capacities provided to existing civil protection measures. The establishment of civil protection assistance intervention modules consisting of the resources of one or more Member States as suggested by the EU (e.g.

³²² Irrespective of its competences in the field of foreign and security policy, the EU is crucial for European security. Its security functions can be made sense of only in terms of admitting the EU's character of a post-sovereign experiment: *Wæver*, *The EU as a Security Actor*, in: Kelstrup and Williams (Eds.), *International Relations Theory and the Politics of European Integration*, 2000, 250.

³²³ For example *Mann*, *Nation-States in Europe and Other Continents: Diversifying, Developing, Not Dying*, *Daedalus*, 1993, 122(3), 115.

Art. 3 2. (b) or Art. 9 1. 1st para. of Decision 1313/2013³²⁴) to strengthen civil protection at EU level is slowly implemented. In many cases, the limited availability of existing resources has been experienced throughout the existence of the Civil Protection Mechanism to which only a small number of States contribute.³²⁵ In contrast to this, it had already been asserted more than a decade ago that European civil protection relied “too heavily on help that is forthcoming spontaneously”³²⁶ and that the lack of an organised European response including scenarios, protocols, and identified resources was impeding the effectiveness of the response.

Similarly, the European fight against terrorism and related intelligence sharing is hindered by strong national agendas. The need to share available information between the intelligence services of the Member States and avoid the occurrence of gaps in their surveillance was already stressed by the 2005–2009 Hague Programme.³²⁷ Yet implementation efforts remained fragmented amongst Member States and sectors, and was based on transnational (expert) networks as well as diverse Member State initiatives.³²⁸ The resulting gap between free movement of terrorists across Europe and the absence of EU-wide intelligence sharing was sadly illustrated by the Paris terrorist attacks of 13th November 2015. While policymakers have repeatedly promised to improve intelligence sharing across Europe, and Member States’ Ministers of the Interior have demanded an anti-terrorist centre for information exchange at EU level

³²⁴ Decision 1313/2013/EU of 17 December 2013 on a Union Civil Protection Mechanism (OJ L 347 of 20.12.2013, 924).

³²⁵ *European Commission*, Strengthening the EU Capacity to Respond to Disasters, 2009, 146.

³²⁶ *Barnier*, For a European Civil Protection Force: Europe Aid, 2006.

³²⁷ *Commission of the European Communities*, The Hague Programme, Brussels, 10.5.2005, COM(2005) 184 final.

³²⁸ *Bossong*, The Action Plan on Combating Terrorism, *Journal of Common Market Studies*, 2008, 46(1), 27.

following the Paris terrorist attacks³²⁹, no concrete action has been taken. In the past, Council decisions and Commission proposals included an obligation for EU Member States to share information but these requirements had little practical impact. While there may be good reasons for exercising caution in sharing sensitive information with an EU agency, such as the protection of sources, the reluctance is mainly caused by the struggle over control of investigative authorities and the maintenance of an influential national role in State-specific areas, such as policing, criminal justice, and intelligence gathering.³³⁰

Both examples show that the failure to develop and implement joint civil protection measures at the EU level has mainly occurred in the intergovernmental sphere. However, this lack cannot be justified by the principle of subsidiarity and the conviction that such policies can best be addressed at the national or subnational level, since the need for intergovernmental collaboration was identified by both the EU and the Member States. While moral solidarity can explain the development of Art. 222 TFEU, the recurrence of political Member State solidarity in terms of integration efforts in policy fields where nation states can no longer act efficiently, exposes the predominant problem of the EU as a political construct. It shows that a lack of further integration can no longer be justified by subsidiarity but is explained by the nation state narrative and national self-perception. If the European Union should, however, provide responses to pressing challenges, such as the governance of a global financial system or increasing numbers of refugees, such concepts and imaginations must be revised.

³²⁹ *ZeitOnline*, Strengere Grenzkontrollen auch für EU-Bürger, 20. November 2015, available via: <http://www.zeit.de/politik/ausland/2015-11/eu-minister-terrorismus-grenzkontrolle> (15.01.2016).

³³⁰ *Bureš*, Intelligence Sharing and the Fight Against Terrorism in the EU, *European View*, 2016, 15, 57.

E. Conclusion

I. Solidarity at different political scales

In a time of crisis, terrorism, and the rising popularity of right-wing nationalist parties across Europe, solidarity has become a political buzzword. It was widely invoked and applied in the context of the economic and financial crisis and the support measures designed for those countries most acutely affected by the crisis. The concept of solidarity was also used with respect to the increasing numbers of refugees arriving into the EU and most recently related to the fight against acts of terrorism as executed by the *Islamic State*. These references to solidarity between the Member States seem to have quantitatively increased and qualitatively broadened in terms of the policy fields to which they are related. Although the recurring use of solidarity in varying contexts seems to be a relatively recent development, its application to the European policy context can be traced back to the founding phase of the European Union. In his declaration proposing the European Coal and Steel Community, Robert Schuman noted that solidarity in production would prevent future wars by making it materially impossible. Thus, dating back to the 1950s, it was the Lisbon Treaty which finally determined solidarity as one of the EU's founding values in primary legislation (Art. 2 TEU).

In the EU's policy context, solidarity presupposes the subordination of a country's own preferences in order to achieve a common goal. This solidarity is reflected by the European integration process and specifically the introduction of qualified majority voting as well as the development of Union law and its direct effect and primacy. Consequently, it was also the European Court of Justice which decided that the unilateral breaking of the Union's regulations

represented a “failure in the duty of solidarity accepted by Member States”, going to the fundamental basis of its legal order.³³¹

In addition to the nation state, the European Union builds therewith a reference level for solidarity. The nation state disposes of powerful narratives of history, language, and culture which are passed on from generation to generation, e.g. through education systems. It constitutes the means through which a community is institutionalised through welfare and legal systems. In addition, specific affiliation to the nation state is generated through constitutions representing the historic and revolutionary acknowledgement of State creation by the people. Although imagined, the affiliation to the nation state is sufficiently powerful to rationalise violence and lead humans to go to war in defence of their State. Since respective *resources* to trigger and organise solidarity are mainly lacking at the EU level, the nation state remains the primary political construct, being the source of and subject to solidarity between people. This qualitative difference in solidarity between different policy levels can be analysed in more detail by introducing *political* and *moral* solidarity as distinctive features. Rather than drawing on moral or ethical aspects, *political* solidarity is closely tied to the territory and history of political entities and their citizens. At the nation state level, political solidarity relates to those human beings who share the same citizenship and are thus politically organised within the State. At the EU level, political solidarity has to be subdivided into *Member State solidarity*, i.e. solidarity between political entities, and solidarity as a *societal value* or closeness between the people as resulting from EU citizenship.

Solidarity between the Member States reflects the integration process in general. It can be interpreted as the counter-principle to subsidiarity and is driven by a rational choice approach or the need to find responses to political challenges which cannot be addressed by

³³¹ CJEU, Judgment of the Court of 7 February 1973, Case C-39/72, *European Communities v. Italian Republic*, 1973, I-101.

individual Member States. Different policy fields are reflected by the established EU competences which include, for example, policies on the internal market as well as social, economic or agricultural policies (Art. 4 2. TFEU). Solidarity between the Member States varies in terms of its intensity and practical implementation for different policy fields depending on the composition of Member States' interests. Solidary financial policies to address the crisis, for example, were driven by Member States' interest in protecting their own economies and could be rapidly implemented. However, effective policies on border checks, asylum and immigration to address the ongoing refugee crisis are still lacking, largely as a result of the Member States seeing little benefit in doing so. Southern Member States, such as Greece and Italy, are thus left with an unbearable burden, although the wording of Art. 80 1st sentence TFEU stresses that respective policies should be "governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States".

Solidarity as a societal value instead addressed the bond between Member States' citizens. Although EU citizenship creates a basis for solidarity between people, the EU fails to a large extent to establish a belief system which connects to citizens' realities in the sense that they feel affiliated to the political system and connected to their fellow EU citizens. The intrinsic belief that is established at the nation state level through narratives and the *mystic* creation of a Constitution is missing at the EU level. Although the EU's legal system might be regarded as constitutional, it does not have a strong connection to the citizens' belief systems, mainly due to its top-down process of establishment. In this respect, the European integration process and the respective attempts to establish narratives and a culture related to the rule of law by means of symbols have failed so far. This lack of alignment between the belief system and the rule of law represents a key challenge for the (output) legitimacy of EU

policy responses as reflected by the low level of citizen support. For example, this concerns the willingness to share resources, as noted in the context of the economic and financial crisis, or the acceptance of increasing numbers of refugees reaching the EU. The refusal to adopt policies in these areas is reflected by the increasing success of nationalist movements in a variety of EU Member States, which can be explained in part by a lack of attachment to the EU. It is also a result of cutbacks in social security systems and growing inter- and cross-societal inequalities, which reduces citizens' willingness to improve the living conditions of others. As such, to develop and implement true solidary policies at the EU level which respond to ongoing challenges, it will also be essential to address inequalities and cuts in social services jointly.

In contrast to political solidarity, *moral* solidarity is not tied to a political construct, but instead addresses all people as equal, fellow human beings. It can be identified as universal and is triggered by situations of extreme loss which evoke existential questions. While it can be triggered within the nation state, moral solidarity is particularly relevant at the EU level since it might prompt forms of solidarity in areas where political solidarity is absent. This is especially true of the civil protection context wherein suffering is perceived as unjust and alleviation measures are broadly and almost unanimously supported.

II. Solidarity and civil protection at EU level

The concept of civil protection emerged out of the philosophy of civil defence which implied the management of civilian populations in the face of armed aggression. The end of the Cold War and natural and man-made disasters, such as the chemical accident in Seveso, Italy in the 1970s, the reactor catastrophe in Chernobyl in 1986 or the 1980 Italian earthquake which caused more than 4,500 deaths, led to the insight that the civilian character of emergency preparedness and

response needed to be emphasised. In addition to the changed threat setting, risk started to be recognised as a product of social construction, being constituted by social vulnerability factors, such as income or settlement structures, which can be shaped by governance approaches. Consequently, new policies and disaster risk management strategies were developed at both national and EU levels.

Although the main civil protection responsibilities remained at the nation state level, EC competences for this policy field were established by the Maastricht Treaty (Art. 3 1.(t) TEC – now Art. 6 (f) TFEU) in 1992 which laid the foundations for the development of joint strategies and measures to address natural and man-made hazards as well as terrorist attacks. They encompassed, for example, Council Decision 1999/847/EC establishing a Community action programme in the field of civil protection, Council Framework Decision on Combating Terrorism (2002/475/JHA), the development of the Community Civil Protection Mechanism (CPM) or the Emergency Response Coordination Centre (ERCC). These programmes, regulations, and measures formed the basis for Member State collaboration in the civil protection context and specifically improved crisis responses to natural hazards inside and outside the EU.

However, the terrorist attacks of 11th September 2001 again changed the range of threats to be considered by civil protection activities. In order to address international terrorism and in response to the Madrid 2004 and London 2005 terrorist attacks, Art. 222 TFEU (Solidarity Clause) was introduced by the Lisbon Treaty. It builds on Art. 2 TEU which defines solidarity as a core value of the European Union and is to be differentiated from the Mutual Assistance Clause relating to armed aggressions (Art. 42 7. TEU).

Pursuant to Art. 222 1. 1st sentence TFEU, the Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Solidarity Clause limits the scope of its application to EU territory and specifies the competences of the EU (Art. 222 1. TFEU) and the Member States (Art. 222 2. TFEU). For the EU, this encompasses both a preventive dimension, which does not require a request for action by a Member State, and a response dimension. This includes the prevention of terrorist attacks, the protection of democratic institutions in the territory of the Member States, and the provision of assistance to Member States in the aftermath of a terrorist attack, natural or man-made disaster (Art. 222 1. TFEU). Yet the Member States are only supposed to provide assistance in the aftermath of a disaster upon request by a Member State (Art. 222 2. TFEU). Strategies and measures that seek to prevent terrorist attacks have been identified, for example, by the *EU action plan on combating terrorism* or the *European Union Counter-Terrorism Strategy*. Additionally, a variety of primary legislation specifies the Union's competences in the fight against terrorism, namely Art. 75 1st para. TFEU regarding capital movements and payments, Art. 83 1. TFEU regarding sanctions in the areas of particularly serious crime with a cross-border dimension, Art. 88 TFEU on the Europol mission, Art. 215 TFEU regarding sanctions against natural or legal persons, and finally Art. 43 TEU establishing the competence to combat terrorism through the Common Security and Defence Policy (CSDP).

Response actions to terrorist attacks, natural and man-made hazards by the Union stemming from Art. 222 TFEU are substantiated by Art. 196 TFEU. They encompass support in preparing personnel by running regular simulated disaster scenario exercises and in responding to disasters. In practice, the EU disposes of early-warning systems and civil protection response modules including an

Emergency Response Coordination Centre as well as the European Union Solidarity Fund. The Fund provides financial assistance to disaster stricken regions. Harmonisation actions in the civil protection context are explicitly excluded by Art. 6 (f) TFEU and Art. 196 2. TFEU respectively.

For the Member States, Art. 222 TFEU generates only a reactive civil protection competence. Although they are obliged to provide assistance upon request, the means and scope of support are individually determined by each Member State (Union Declaration No. 37 annexed to the Final Act of the intergovernmental conference which adopted the Treaty of Lisbon on Art. 222 TFEU).

Decision 2014/415/EU on the arrangements for the implementation by the Union of the Solidarity Clause specifies the disaster related terminology and the scope of Art. 222 TFEU. In addition, it outlines the procedure for activating the Solidarity Clause, potential EU response arrangements, and the implementation of threat assessments at Union level.

Overall, the Solidarity Clause specifies the Union's competences in the field of civil protection and obliges the Member States to support each other in severe aftermath-crisis situations. Since the Member States' contribution remains to be determined by each of them on a case-by-case basis, binding obligations are rarely created. For the EU, competences in the prevention of terrorist attacks have been established. While the implementation of these competences lack focus and the Member States' support specifically with respect to intelligence sharing, all EU response measures, such as civil protection modules, are dependent upon support by the Member States, which is granted to a limited extent. In line with this, the generated EU prevention competences in the terrorist context lack implementation efforts and the institutions to be protected have not even been defined. The interest in EU civil protection engagement

support is comparatively low and, in the past, requests for support in disaster response have been directly addressed to other Member States without activating Art. 222 TFEU. The establishment of Art. 222 TFEU under the CFSP and its subsequent withdrawal from the ECJ's influence complete the picture of a rather superficial civil protection solidarity between the Member States. The Paris terrorist attacks of November 2015 have highlighted this impression. Although solidary support in the fight against Islamic State was requested by France under the Mutual Defence Clause (Art. 42. 7 TEU), the response by EU Member States resembled more of a patchwork than an organised and solidary response and thereby underlined the precariousness of Member State solidarity particularly in situations in which there are no clear advantages to be gained.

With respect to the implementation of the Solidarity Clause, the activation of Art. 42 7. TEU instead of Art. 222 TFEU in the aftermath of the Paris attacks also revealed a conceptual mismatch between the two legal bases. While Art. 42 7. TEU allows for actions outside the Union, it was designed to respond to an *armed attack*. It remains unclear whether terrorist attacks can be subsumed under armed attacks and would thus allow for the activation of Art. 42 7. TEU, while Art. 222 TFEU was specifically designed to enable joint response measures to terrorist attacks but its geographical application is limited to the EU. The potential complementarity of the two norms would thus need to be subject to further discussion. What is more, the Paris terrorist attacks and the debate about the applicability of the Solidarity Clause revealed two additional aspects. Firstly, the requirement of a Member State to be overwhelmed by a disaster might prevent it from requesting support since it might not want to admit its limited crisis management capacities. Secondly, it needs to be ensured that any EU involvement does not prolong the provision of disaster support and generates additional value if the Solidarity Clause is to be applied. Otherwise future requests for

solidary disaster support will be either based on alternative norms, such as Art. 42 7. TEU, or subject to bilateral arrangements without EU involvement.

III. The meaning of emergencies for national sovereignty and their governance by the means of law

Having argued that different forms of solidarity exist at the EU level and that *political solidarity* between the *Member States* reflects the overall integration process, one might argue that this is also true for the field of civil protection. A major part of civil protection collaboration and competences is regulated by the *Solidarity Clause* (Art. 222 TFEU) which represents one of a few references in primary legislation to this core value of the EU (Art. 2 TEU). Consequently, it could be assumed that solidarity and thus collaboration between the Member States would be particularly strong. In contrast, however, it has been shown that hardly any integration has taken place on civil protection matters and that Member States scarcely collaborate on an intergovernmental basis, e.g. with respect to intelligence sharing. One might further argue that this low level of integration and intergovernmental collaboration could be explained by the principle of subsidiarity (Art. 5 3. TEU). Hence the EU would only become active if the Member States' action is not sufficient or can be achieved in a better or more efficient way at the EU level. As a result, it could be conceived that civil protection matters are addressed in the best and most efficient way at the nation state level. However, this assumption contradicts the introduction of Art. 222 TFEU, the establishment of EU competences as well as the needs defined by the Member States.

To understand the introduction of the Solidarity Clause to the EU's primary legislation framework as being caught between solidary affirmation and a lack of collaboration between the Member States,

its historical background and the different forms of solidarity must be considered. The Clause's origins can be traced back to the debates on a draft constitution for the EU of the European Convention (2002–2003) which were shaped by the 9/11 terrorist attacks and emotionally affected by the Member States' will to stand together. Being driven by the intention to alleviate suffering and prevent the recurrence of such catastrophes in the future, policymakers were initially driven by *moral* solidarity when developing the Solidarity Clause. Having overcome the shock and returned to everyday life, moral solidarity turned into *political solidarity between the Member States* reflecting the integration process and its underlying rational choice approaches. Understanding the need for collaboration specifically in the prevention of terrorist attacks, the Member States followed the morally initiated process and introduced the Solidarity Clause into the Constitutional Treaty and the Lisbon Treaty respectively.

With this shift from moral to political Member State solidarity, civil protection has become part of the diverse European integration process being composed of supranational and intergovernmental policy fields. While the limited integration in certain policy fields is frequently explained with reference to subsidiary reasons, it is questionable whether this also holds true for the bargaining process about shifts in civil protection competences. Improved civil protection collaboration for natural and man-made hazards and terrorist attacks with respect to prevention and response has repeatedly been requested by experts and Member States' representatives.

The predominant reason for the reluctance to improve collaboration and the implementation of Art. 222 TFEU is not subsidiarity, but the maintenance of national sovereignty in a policy field which represents a core responsibility of the nation state. The management

of disasters crystallises and reaffirms the State's sovereign power in protecting its citizens and strengthens the nation state narrative by inscribing a common destiny on the society and by stressing its internal solidarity. Consequently, the Member States are caught between, on the one hand, maintaining their sovereignty in a political area that is a vital part of their very existence and, on the other, recognising the need for better collaboration as, for example, requested by the Ministers of the Interior in the aftermath of the Paris terrorist attacks of 13th November 2015.

This predicament reflects the EU's difficulties in other policy fields, such as immigration policies in the context of the refugee crisis. The Member States see an increasing need for collaboration in these traditionally sovereign policy fields but are struggling with their identity and nationalist pressure from the right in dealing with the reduced impact and effectiveness of national policies. If challenges such as international terrorism, global flows of refugees or increasing economic inequalities are to be addressed effectively, the Member States will have to find new ways of developing a wider scope for policy design and conceptually challenging State sovereignty while at the same time maintaining their connection to citizens' belief systems. This would require communicating such external factors which limit the scope for target-oriented sovereign policymaking. Whether such aims can be effectively translated into plausible national (democratic) policy options and election programmes, as well as into a prospective programme for the EU, remains to be seen.

In this light, Art. 222 TFEU represents the dichotomy between political solidarity and Member State sovereignty, but its introduction to primary EU legislation also offers us an insight into the EU's character. In contrast to the authoritarian right-wing political thinker Schmitt who claimed that emergency response measures would necessarily have to go beyond the existing legal order, Art. 222 TFEU

denies the (partial) suspension of the EU's constitutional basis in the disaster context. While the management of risk in the context of natural and man-made hazards is usually applied by means of ordinary legal instruments, such as safety standards or spatial planning regulations, the maintenance of the existing legal order plays a specific role in the prevention of and response to terrorist attacks. In this respect, the CJEU ruled that measures to address terrorism are subject to judicial review and that fundamental rights and freedoms need to be protected³³². Art. 222 TFEU and the ruling of the CJEU thus also shed light on the self-perception of the EU and its constitutional character.

³³² CJEU, Judgment of 18. July 2013, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and Others v. Yassin Abdullah Kadi*, 2013, I-518.

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