Susanna Villani

THE CONCEPT OF SOLIDARITY WITHIN EU DISASTER RESPONSE LAW

A legal assessment

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LIST OF ABBREVIATIONS

AASM	Association of the Associated African States and Madagascar
ACS	Association of Caribbean States
AMCDRR	Asian Ministerial Conference on Disaster Risk Reduction
ASEAN	Association of Southeast Asian Nations
BSEC	Black Sea Economic Cooperation
CDERA	Caribbean Disaster Emergency Response Agency
CECIS	Common Emergency Communication and Information System
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CoE	Council of Europe
COSI	Standing Committee on Internal Security
COVID-19	COronaVIrus Disease 19
CROP	Council of Regional Organisations of the Pacific
CSDP	Common Security and Defence Policy
DA(s)	Draft Article(s)
DRR	Disaster Risk Reduction
EADRCC	Euro-Atlantic Disaster Response Coordination Centre
EADRU	Euro-Atlantic Disaster Response Unit
ECB	European Central Bank
ECHO	Directorate-General for *European* Civil Protection and Humanitarian Aid Operations
ECPP	European Civil Protection Pool
ECSC	European Coal and Steel Community
EEAS	European External Action Service
EEC	European Economic Community
EERC	European Emergency Response Capacity
EMC	European Medical Corps
ERCC	Emergency Response Coordination Centre

ESI	Emergency Support Instrument
EU	European Union
EUSF	EU Solidarity Fund
EVHC	European Voluntary Humanitarian Aid Corps
ICRC	International Committee of the Red Cross
IDRL	International Disaster Response Law
IFRC	International Federation of Red Cross and Red Crescent
ILC	International Law Commission
IPCR	EU Integrated Political Crisis Response
ISESCO	Islamic Educational, Scientific and Cultural Organization
LAS	League of Arab States
MIC	Monitoring and Information Centre
NGO	Non-Governmental Organisations
OAS	Organisation of American States
OCHA	United Nations Office for the Coordination of Humanitarian Affairs
OIC	Organization of Islamic Conference
PIF	Pacific Islands Forum
PSC	Political and Security Committee
RNDRF	Regional Natural Disaster Relief Fund
SAARC	South Asian Association for Regional Cooperation
SADC	Southern African Development Community
SPC	South Pacific Community
TFEU	Treaty on the functioning of the European Union
TEU	Treaty on the European Union
UCPM	Union Civil Protection Mechanism
UN	United Nations
UNGA	United Nations General Assembly
UNISDR	United Nations Office for Disaster Risk Reduction

PREFACE[1]

The world is in dire need of solidarity. Man-made and natural disasters afflict our globe in unprecedented scales; the COVID-19 pandemic that hit so many countries at the same time across the globe is yet another tangible example of the need to assist and help in the spirit of true solidarity.

If no one would contest the high ideals which solidarity reflects, one also needs to make sure that such an ideal is not confined to the realm of policy and rhetoric and is acted upon in concrete terms. In many human societies, law is considered to be a powerful tool to that effect. The work of Dr Susanna Villani, *The Concept of Solidarity within EU Disaster Response Law – A Legal Assessment,* is therefore most welcome as it seeks to ascertain whether the EU, as one of the most advanced regional integration organisations worldwide, has reached the stage where the mutual provision of assistance and relief in cases of disasters is more than words.

Solidarity is in effect already enshrined in the EU Treaties as a value, objective, and principle; the extent to which it has also become legally enforceable is at the core of this book.

To start with, let it be specified that Dr Villani's work focuses on solidarity in action within the EU; while the EU's record for assisting people in need outside of its borders has been well known for several decades now, EU humanitarian aid to third countries and other relevant external aid was not a subject of this research.

It has to be recognised that significant progress has been made in terms of civil protection cooperation at EU level, including through Treaty changes, and the introduction, over time, of specific components into the Union Civil Protection Mechanism in respect of which the 'voluntariness' element has been lessened (e.g. through the establishment of a pool of pre-committed assets and

[1] The opinions expressed in this Preface only reflect the personal views of the author and may in no circumstances be assigned to, or considered as representing an official position of the European Commission.

the most recent development of rescEU capacities and strategic stockpiles as an EU tactical reserve[2]). In addition, the adoption of the Emergency Support Instrument (ESI) is correctly noted as giving a firm footing to the provision of relief and assistance within the EU, beyond and in addition to the assistance offered through civil protection cooperation. The agility with which both the new rescEU strategic medical stockpiles and the assistance through ESI were amended to adjust to the new challenges posed by the COVID-19 pandemic has proven both to be effective and efficient.

As mentioned above, a legal basis in EU law on which a substantive duty to assist could be clearly ascertained exists in the EU Treaties. Article 222 of the Treaty on the Functioning of the European Union includes no less than a 'solidarity clause' setting out unequivocally a legal obligation for the EU and its Member States to assist each other in cases of natural and man-made disasters (including terrorist attacks).[3] Dr Villani analyses in great detail that clause and its implementing provisions[4] in her work; suffice it to say for the purpose of the present Preface that the major doubt of Dr Villani in respect of that clause does not so much concern the substance of the solidarity duty embedded therein than the fact that the effective operation of the clause is dependent from the latter to be activated. In other words, the legal effects of the clause will only be fully tangible after one or several Member States have officially requested assistance under it. Dr Villani ponders in this respect why this has not been the case in spite of past major crises affecting most or some of the EU Member States. While one can indeed discuss the reasons and motives of the (non-)invocation of the solidarity clause, the fact remains that a situation where there would be no legal basis whatsoever and a situation where there is such a legal basis but whose application depends on the willingness of the potential beneficiary, are materially different.

Admittedly, there are still some unknowns as to how the solidarity clause would operate in practice. Reference is often made on this occasion to Declaration 37 under "none of the provisions of Article 222 TFEU 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".

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[2] Decision (EU) 2019/420 of the European Parliament and of the Council of 13 March 2019 amending Decision No. 1313/2013/EU on a Union Civil Protection Mechanism (*OJ* L 77I, 20.3.2019, p. 1). See also the Proposal for a Decision amending Decision No. 1313/2013/EU on a Union Civil Protection Mechanism [COM(2020)220 final of 2 June 2020].

[3] There is also a 'mutual defence' clause to be found in Article 42(7) of the Treaty on European Union, which Dr Villani also considers in her work.

[4] Council Decision 2014/415/EU of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause (*OJ* L 192, 1.7.2014, p. 53).

However, as rightly pointed out in the work of Dr Villani, any exercise of the discretion as to the means through which solidarity is to be expressed can and may not nullify the substance of the obligation set out in the clause. The very wording of Declaration 37 itself refers unequivocally to a 'solidarity *obligation*' towards the affected Member State. In any event, whatever other Member States may eventually do, the EU itself is also required to act according to the solidarity clause by mobilising all the instruments at its disposal; and there is little doubt that the EU institutions, among which the European Commission, would fully and swiftly live up to their duties in this respect.

At the same time, it should also be underlined that the instruments of solidarity exist and are implemented within the EU through secondary legislation, such as the Union Civil Protection Mechanism with its rescEU component, as well as the Emergency Support Instrument, without there being an actual need for activating the 'solidarity clause' enshrined in Article 222 TFEU as a prerequisite. And as mentioned at the beginning, tangible offers of such solidarity were witnessed multiple times in the EU's response to the COVID-19 pandemic.

As outlined in the present work, it can confidently be asserted that, compared with the current state of public international law,[5] EU law is undoubtedly more advanced in that it sets out a solidarity obligation between the EU and its Member States and among the Member States themselves.

Dr Villani's work should be commended not only as a token of her legal sagacity and analytical skills but as epitomising the pivotal role of solidarity in a Union of values – the European Union – the Union that will now and in the future remain faithful to and live up to its solidarity ambitions!

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[5] Dr Villani reviews at some length, in the introductory part of her research, the 2016 draft Articles on the Protection of Persons in the Event of Disasters of the International Law Commission, as well as relevant regional schemes in place.

CHAPTER I

PREMISES, OBJECT, AND INVESTIGATION PLAN

1. Introduction

Disasters have always been an important part of the human species'[1] history, such as the eruption of the Vesuvius in 79 A.D., the plague of the Middle Ages or the more recent tsunamis and earthquakes which occurred in multiple parts of the world. Despite this fact, disasters have always been perceived as internal issues to be tackled by the authorities exercising control over the affected territory. As their frequency, intensity and complexity increased, showing greater humanity has become an imperative, progressively prompting relief interventions, assisting victims of major disasters in a spirit of solidarity.

In 1758 the Swiss diplomat and lawyer Emer de Vattel wrote the following:

> […] when the occasion arises, every Nation should give its aid to further the advancement of other Nations and save them from disaster and ruin, so far as it can do so without running too great a risk […] if a Nation is suffering from famine, all those who have provisions to spare should assist in its need, without, however, exposing themselves to scarcity […] To give assistance in such dire straits is so instinctive an act of humanity that hardly any civilized Nation is to be found which would refuse absolutely to do so […] Whatever be the calamity affecting a Nation, the same help is due to it.[2]

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[1] See, *ex multis*, M. Barkun, "Disaster in History", in *Mass Emergencies*, 2, 1977, pp. 219-231; J. Whittow, *Disasters: the anatomy of environmental hazards*, Penguin, 1980; F. L. Bates, W. G. Peacock, "Disaster and Social Change", in R. R. Dynes, B. De Marchi, C. Pelanda (eds), *Sociology of Disasters: Contributions of Sociology to Disaster Research*, Franco Angeli, 1987, pp. 291-330; E. Bryant, *Natural Hazards*, Cambridge University Press, 1991; D. Alexander, *Natural Disasters*, UCL Press, 1993; G. Bankoff, "Time is of the essence: disasters, vulnerability and history", in *International Journal of Mass Emergencies and Disasters*, 22(3), 2004, pp. 23-42; G. Ligi, *Antropologia dei disastri*, Laterza, 2009.

[2] E. de Vattel, *The Law of Nations, or the Principles of Natural Law, Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, CG Fenwick Trans, 1758, II Book, Chapter I, p. 5.

Since the beginning of the twentieth century, the regulation of international assistance provision in the event of disasters has gained momentum and has started to be included in the international community's agenda. It mainly emerged from the need for a framework that legally translated that spirit of solidarity into clear responsibilities for States and other international actors in disaster settings. In this manner, cooperation in the field of protection and assistance in the event of disasters also began to make its way into the realm of international law.[3]

One of the first attempts to develop a specific framework for international disaster response was undertaken in the 1920s under the auspices of the League of Nations, leading to the adoption of the Convention and Statutes Establishing an International Relief Union[4] which, however, was never put into effect and failed because of a lack of funding. The next effort to create a comprehensive international legal regime for international disaster assistance did not come for another fifty years, when the Office of the United Nations Disaster Relief Coordinator – the predecessor for the present-day Office for the Coordination of Humanitarian Affairs (OCHA) – proposed a Draft Convention on Expediting the Delivery of Emergency Assistance to the UN Economic and Social Council.[5] Although this Draft Convention sought to solve a number of crucial issues, it was never taken up by the UN General Assembly and no other attempts have been made.[6]

In the absence of a universal convention dealing with all the aspects related to disaster management, international law has developed at the global level in a

[3] See J. W. Samuels, "The relevance of international law in the prevention and mitigation of natural disasters", in L. H. Stephens, S. J. Green (eds), *Disaster Assistance: Appraisal, Reform and New Approaches,* New York University Press, 1979, pp. 245-266; C. Leben, "Vers un droit international des catastrophes", in Académie de droit international de La Haye (ed.), *The International Aspects of Natural and Industrial Catastrophe*, Brill, 2001, pp. 39-41; E. Harper, *International Law and standards applicable in natural disaster situations*, IDLO Report, 2009.

[4] The International Relief Union was designed to be a centralised operational agency aimed at channelling international funds and support in disaster settings, coordinating other actors, and promoting study and research on disaster management. For further information, P. Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Action in International Law and Organization*, Martinus Nijhoff Publishers, 1985; J. F. Hutchinson, "Disasters and the International Order. II: The International Relief Union", in *The International History Review*, 23(2), 2001, pp. 253-298.

[5] Draft Convention on expediting the delivery of emergency assistance, UN Doc. A/39/267/Add.2 – E/1984/96/Add.2, 18 June 1984, pp. 5-18.

[6] For insights, C. Clement, "International disaster response laws, rules and principles: a pragmatic approach to strengthening international disaster response mechanism", in D. D. Caron, M. J. Kelly, A. Telesetsky (eds), *International Law of Disaster Relief*, Cambridge University Press, 2014, pp. 70-71; E. Tokunaga, "Evolution of International disaster response law: towards codification and progressive development of the law", in D. D. Caron, M. J. Kelly, A. Telesetsky (eds), *International Law of Disaster Relief*, cit., pp. 46-64.

fragmented way[7] by drawing from customary law as well as cross-cutting treaties dealing with different branches of international law.[8] At present, the whole *corpus* of soft and hard law instruments describing common standards and rules, as well as the role of States and other relevant actors in response to (and recovery from) natural or man-made disasters describe the so-called International Disaster Response Law (hereafter IDRL).[9] As for soft law, it is composed of a number of resolutions, declarations, codes, models, and guidelines that, despite not being formally binding, are evidence of an overall international consensus and generalised *opinio iuris* regarding the existence of some basic rules to be respected when dealing with major disasters.[10] With respect to treaty law, it is possible to list more than 200 international treaties regulating various matters related to prevention, disaster management, and post-disaster rehabilitation and reconstruction.[11]

At the universal level two different trends have emerged. On the one hand, *ad hoc* rules were included to prescribe the specific duties for States in the event of a natural or man-made disaster in several multilateral treaties which govern general issues, such as the transport of goods by sea or air, customs, health regulations, human rights, waste management and especially the protection of the environment. On the other hand, sectoral multilateral treaties have been concluded only to deal with very specific issues related to disaster management or to categories of actors intervening in emergency situations.[12]

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[7] International Federation of Red Cross and Red Crescent Societies, *Law and Legal Issues in International Disaster Response: A Desk Study – Summary Version*, 2007, p. 6.

[8] Among the other branches of public international law that contribute to shape the substance of international disaster law, it is possible to mention international humanitarian law, human rights law, environmental law and international law on health. See G. Venturini, "International Disaster Response Law in relation to other branches of International Law", in A. De Guttry, M. Gestri, G. Venturini (eds), *International Disaster Response Law*, Springer, 2012, pp. 45-64.

[9] While the present work focuses on the legal framework concerning disaster response, a plethora of instruments dealing with the whole phases of the disaster management cycle, i.e. prevention, preparedness, response and recovery, now composes International Disaster Law (IDL).

[10] For insights, A. De Guttry, "Surveying the Law", cit., pp. 3-44; D. Cubie, "An Analysis of Soft Law Applicable to Humanitarian Assistance: Relative Normativity in Action?", in *Journal of International Humanitarian Legal Studies*, 2(2), 2011, pp. 177-215; T. Natoli, "Non-State Humanitarian Actors and Human Rights in Disaster Scenarios: Normative Role, Standard Setting and Accountability", in F. Zorzi Giustiniani, E. Sommario, F. Casolari, G. Bartolini (eds), *Routledge Handbook of Human Rights and Disasters*, Routledge, London, 2018, pp. 149-164.

[11] For a complete list of disaster-related agreements, the IDL database available at http://disasterlaw.sssup.it/disasters-database/. For insights, see A. De Guttry, "Surveying the Law", in A. De Guttry, M. Gestri, G. Venturini (eds), *International Disaster Response Law*, cit., p. 11 ff.

[12] Sectoral multilateral treaties contain norms concerning the prevention of and response to certain specific kinds of disasters, such as the Convention on the Early Notification of a Nuclear Accident and the Convention on Assistance in the Case of a Nuclear Accident or Radiological

At the regional (and sub-regional) level there are numerous treaties and instruments of secondary law regulating – in a comprehensive manner – all the relevant issues related to disaster prevention, mitigation, management and early recovery.[13] Finally, more recently the international community has assisted to an impressive accumulation of bilateral treaties governing disaster management and enshrining generic commitments to cooperate in fields of common interest, as well as more detailed rules concerning rights and duties of States when major natural or man-made disasters occur.[14] Given the existence of such a plethora of instruments, it can be argued that IDRL pertains more to soft law and conventional law rather than to international customary law but also that the existing international legal instruments are far from being uniform and coherent in regulating the various aspects of disaster response.[15] As such, IDRL is not contributing as much as might be hoped to the many legal problems that arise in field operations thereby limiting the effectiveness of the response in favour of the disaster-affected populations. Against this general and patchy background, the EU legal framework, although not devoid of shortcomings, can be considered a *unicum* in this field since it is characterised by several, but complementary, instruments which enable the Union as international organisation and its Member States to react in the event of serious disasters.

Emergency (1986), the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (1969), and the Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (1998). For insights, see A. De Guttry, "Surveying the Law", cit., pp. 33-38.

[13] For a brief overview see paragraph 3.3 of the present Chapter.

[14] Among bilateral treaties it is appropriate to include the Agreement between the Republic of Austria and the Republic of Hungary on mutual assistance in the event of disasters and serious accidents (1996), the Agreement between the Government of the Republic of South Africa and the Government of the Republic of Namibia, regarding the Coordination of Search and Rescue Services (2000), the Agreement between the Republic of Italy and the Republic of France concerning cross-border co-operation in case emergencies occurring in mountainous areas (2007). For more details, see A. De Guttry, "Surveying the Law", cit., pp. 11-17.

[15] See H. Fischer, "International disaster response law treaties: trends, patterns, and lacunae", in V. Bannon (ed.), *International Disaster Response Laws, Principles and Practice: reflections, prospects, and challenges*, International Federation of the Red Cross and Red Crescent Societies, Geneva, 2003, pp. 24-44; I. Reinecke, "International Disaster Response Law and the Coordination of International Organisations", in *ANU Undergraduate Research Journal*, 2010, pp. 143-163. In addition, see C. Adinolfi, *Humanitarian Response Review*, Office for the Coordination of Humanitarian Affairs, 2005; J. Bennett, *Coordination of international humanitarian assistance in Tsunami-affected countries*, Tsunami Evaluation Coalition, 2006; M. Hoffman, "Towards an international disaster response law", in *World Disasters Report 2000*, International Federation of the Red Cross and Red Crescent Societies, pp. 144-157.

This book provides an overview of the so-called EU disaster response law and an appraisal of its peculiarity by assessing the substantial practical and theoretical role of solidarity in shaping the main legal instruments for disaster response occurring inside the Union. Over the past few years, legal scholars have started to show an increasing interest in the analysis of the implications of solidarity in EU law, mainly focusing on the areas of EU citizenship, health, education, environment, migration, welfare, and territorial cohesion. Against this background, this work may contribute to enrich the debate concerning the legal nature of solidarity by looking at a less explored and developed field such as that of disaster response.[16]

In order to detail the aims and the structure of the present investigation (see section 4), it is first necessary to set the theoretical premises of investigation (see section 2) by identifying with greater accuracy its object and the conceptual borders of the notions at stake. Given that to survey the law's applicability it is indispensable to have a clear idea of the material scope of application, some initial remarks about the term 'disaster' as intended within IDRL is required (see section 2.1). Moreover, since the concept of solidarity and its legal value in EU disaster response law represents the core of the investigation, it is crucial to report its meaning under international law and the international legal doctrine (see section 2.2). These conceptual premises also allow to better frame the state of the art and mainstream of IDRL as well as to reveal the origin of the main shortcomings of this multi-layered field of international law (see section 3). Indeed, the legal foundations of IDRL are still underpinned by the principle of State sovereignty that limits both the possibility of external interventions in situations of disaster and the establishment of solidarity obligations (see section 3.1). The difficulty of dealing with these aspects is also revealed by the challeng-ing work of the International Law Commission on the codification and progres-sive development of international law in this area (see section 3.2). The remote prospect of finding common ground and having a uniform and comprehensive legal framework in the field of disaster response makes the regional dimension a crucial test bench to potentially establish clear State obligations on solidarity (see section 3.3).

[16] In this regard, it should be noted that the book can also be relevant for the purposes of the PRIN Research Project on *International legal obligations related to Prevention, Preparedness, Response and Recovery from CBRN events and status of their implementation in Italy (CBRN-ITALY)*, Grant n° 20175M8L32, started on 1st March 2020.

2. Theoretical premises of investigation

2.1 Clarifications concerning the term 'disaster'

The root of the word 'disaster' derives from Latin *dis astrum* and can be translated as 'evil star', thus referring to a sudden, overwhelming, and unforeseen event. In the minds of many, hazardous events causing disasters are strictly divided into those originating either from forces of nature or from the effects of human action. Natural disasters are naturally occurring physical phenomena caused by rapid or slow onset events which can be geophysical (earthquakes, landslides, tsunamis and volcanic activity), hydrological (avalanches and floods), climatological (extreme temperatures, drought and wildfires) and meteorological (cyclones and storms surges).[17] On the other hand, anthropogenic disasters are heterogenic and combine different types of events that are generally of a technological or industrial nature such as the Chernobyl disaster of 1986.[18] However, the strict separation between classical natural and man-made catastrophes represents just one aspect of the greater differentiation among disasters. Indeed, the classification is much more complex and should also cover health emergencies[19] such as the one almost the entire world is facing at the time of writing, that is the COVID-19 pandemic,[20] as well as phenomena of hybrid origin.[21]

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[17] A widely accepted definition characterises natural hazards as "those elements of the physical environment, harmful to man and caused by forces extraneous to him". See I. Burton, R. W. Kates, G. F. White, *The Environment as Hazard*, Oxford University Press, 1964, p. 413; D. Alexander, *Confronting catastrophe: new perspectives on natural disasters*, Oxford University Press, 2000, pp. 14-29.

[18] Report of the United Nations Scientific Committee on the Effects of Atomic Radiation, *Health effects due to radiation from the Chernobyl accident*, 2008. Moreover, some scholars have suggested including armed conflicts and terrorist attacks within this category (P. Slovic, "Terrorism as hazard: a new species of trouble", in *Risk Analysis*, 22, 2002, pp. 425-426; S. A. King, H. R. Adib, J. Drobny, J. Buchanan, "Earthquake and terrorism risk assessment: Similarities and differences", in J. E. Beavers (ed.), *Proceedings of the 6th US conference and workshop on lifeline earthquake engineering*, American Society of Civil Engineering, Reston, 2003, pp. 789-798), but there is no international consensus on this inclusion at the moment.

[19] While epidemics or other health problems may be the consequences of natural or man-made catastrophes, sometimes they may also represent the origin of a disaster. Biological disasters are causative of processes or phenomena of organic origin or conveyed by biological vectors, including the exposure to pathogenic micro-organisms, toxins and bioactive substances that may cause loss of life, injury, illness or other health impacts, property damage, loss of livelihood and services, social and economic disruption, or environmental damage.

[20] The outbreak of COVID-19 was declared a Public Health Emergency of International Concern on 30 January 2020 and on 11 March 2020 WHO characterised COVID-19 as a pandemic.

[21] According to quite an endorsed definition, "a hybrid disaster is a manmade [sic] one, when forces of nature are unleashed as a result of technical failure or sabotage" (I. Boyarsky, A. Shneider-

Such a complexity is also the reason why the term 'disaster' lacks a univocal and generally accepted legal definition at an international level.[22] Indeed, as evidenced in the following definitions, provided in some international legal instruments relevant to disaster response, they are far from being identical in terms of scope of application.

The first remarkable example is the explanation contained in the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, whose Article 1, para. 6, states that a disaster is:

> a serious disruption of the functioning of society, posing a significant, widespread threat to human life, health, property or the environment, whether caused by accident, nature or human activity, and whether developing suddenly or as the result of complex, long-term processes.

A similar wording is found in Article 2 of the 1998 Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on collaboration in Emergency Assistance and Emergency Response to natural and man-made disasters, according to which a disaster is:

> an event in a definite area that has occurred as a result of an accident, hazardous natural phenomena, catastrophe, natural or man-made, which may or have caused significant physical, social, economic and cultural damage to human lives or environment.[23]

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man, "Natural and Hybrid Disasters – Causes, Effects, and Management", in *Topics in Emergency Medicine*, 24(3), 2002, pp. 1-25). For example, as demonstrated by the Fukushima Daiichi disaster in 2011, nuclear disasters resulting from an earthquake and a subsequent tsunami may imply technological risks (H. Funabashi, "Why the Fukushima Nuclear Disaster is a Man-made Calamity", in *International Journal of Japanese Sociology*, 12, 2012, pp. 65-75). Experts refer to this as a 'synergistic' disaster, or Na-Techs, an expression adopted during the Yokohama Conference on Natural Disaster Reduction held in Japan in 1994 (Report of the World Conference on Natural Disaster Reduction, Yokohama, Japan, 23-27 May 1994, A/CONF.172/9 [P], pp. 36-37).

[22] UN Special Rapporteur Eduardo Valencia Ospina, *Preliminary report on the protection of persons in the event of disasters*, cit., p. 16. On the debate on what 'disaster' means, see R. W. Perry, E. L. Quarantelli (eds), *What is a disaster? New Answers to Old Questions*, International Research Committee on Disasters, 2005; C. Focarelli, "Duty to Protect in Cases of Natural Disasters", in *Encyclopaedia of Public International Law*, Oxford University Press, 2013.

[23] Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on collaboration in Emergency Assistance and Emergency Response to natural and man-made Disasters, 1998, Article 2.

According to Article 1(d) of the Agreement establishing the Caribbean Disaster Emergency Response Agency (CDERA),[24]

> disaster means the exposure of the human habitat to the operation of the forces of nature or to human intervention resulting in widespread destruction of lives or property but excludes events occasioned by war or national policies to prevent and mitigate the effects of disasters.

The Agreement on Disaster Management and Emergency Response Vientiane adopted by the Member States of the Association of Southeast Asian Nations proposes a very general definition, by affirming that:

> "Disaster" means a serious disruption of the functioning of a community or a society causing widespread human, material, economic or environmental losses.[25]

The Member States of the South Asian Association for Regional Cooperation (SAARC) adopted an Agreement referring just to natural disasters given the increasing frequency and scale of natural calamities in the region. According to Article 1, para. 3:

> "Natural disaster" means a natural hazard event causing 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.

Still in the Asiatic region, some Central Asian States have tried to improve cooperation among themselves by adopting the Cooperation Agreement for Prevention and Liquidation of Emergencies. According to it, an emergency is:

> a situation in the definite territory of State Parties resulted from accident, hazardous natural disaster, catastrophe, casualty or other disaster that may cause or have caused human losses, damage to human health or environment, considerable material loss and disruption of vital activities of people.[26]

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[24] Agreement establishing the Caribbean Disaster Emergency Management Agency, 1991.
[25] ASEAN Agreement on Disaster Management and Emergency Response Vientiane, 2005, Article 1(3).
[26] Agreement between Governments of Member States of Shanghai Cooperation Organization on Cooperation in Delivery of Assistance for Emergency Liquidation, 2005, Article 1.

For what concerns the EU context, Decision 1313/2013/EU of the European Parliament and the Council on a Union Civil Protection Mechanism adopts a very broad and all-encompassing definition by labelling a disaster as:

> any situation which has or may have a severe impact on people, the environment, or property, including cultural heritage.[27]

As for bilateral treaties, it is interesting to note how the Agreement between the Government of the French Republic and the Government of Malaysia on Cooperation in the Field of Disaster Prevention and Management and Civil Security defines a disaster [French version]:

> *Un événement autre que la guerre, survenant instantanément, de nature complexe, qui se traduit par des pertes de vies humaines, la destruction de biens ou de l'environnement et ayant des répercussions négatives sur les activités des collectivités locales. Ces événements requièrent une action spéciale nécessitant des moyens considérables, des équipements spéciaux et des personnels spécialisés provenant de divers organismes à l'intérieur ou à l'extérieur du pays.*[28]

Furthermore, it is worth analysing what 'disaster' is according to the most relevant soft-law instruments. On 30 November 2007, the State parties to the Geneva Conventions and the International Red Cross Red Crescent Movement unanimously adopted the *Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance* (also known as the IDRL Guidelines) at the 30th International Conference of the Movement. For the purposes of these Guidelines:

> "Disaster" means a serious disruption of the functioning of society, which poses a significant, widespread threat to human life, health, property or the environment, whether arising from accident, nature or human activity, whether

[27] Decision 1313/2013/EU of the European Parliament and of the Council on a Union Civil Protection Mechanism, *OJ* L 347/924 of 20 December 2013, Article 4(1).

[28] Accord entre le Gouvernement de la République française et le Gouvernement de la Malaisie sur la coopération dans le domaine de la prévention et de la gestion des catastrophes et de la sécurité civile, 1998, Article 1. English translation (by the author): "Disaster: an event other than war, occurring instantaneously, of a complex nature, resulting in loss of life, destruction of property or the environment, and negatively impacting the activities of local communities. These events require special action requiring considerable resources, special equipment and specialized personnel from various organizations inside or outside the country."

developing suddenly or as the result of long-term processes, but excluding armed conflict.[29]

Furthermore, the United Nations Office for Disaster Risk Reduction (UNISDR) has defined disaster as:

> a serious disruption of the functioning of a community or a society causing widespread human, material, economic or environmental losses which exceeds the ability of the affected community or society to cope using its own resources.[30]

Interestingly, the *Institut de Droit International* has adopted a very broad definition:[31]

> "Disaster" means calamitous events which endanger life, health, physical integrity, or the right not to be subjected to cruel, inhuman or degrading treatment, or other fundamental human rights, or the essential needs of the population, whether
> • of natural origin (such as earthquakes, volcanic eruptions, windstorms, torrential rains, floods, landslides, droughts, fires, famine, epidemics), or
> • man-made disasters of technological origin (such as chemical disasters or nuclear explosions), or
> • caused by armed conflicts or violence (such as international or internal armed conflicts, internal disturbances or violence, terrorist activities).

At the same time, it is worth highlighting the extremely precise definition of hazard reported in the Hyogo Framework for Action 2005-2015 adopted during the 2005 World Conference on Disaster Reduction.

> "Hazard" is defined as "A potentially damaging physical event, phenomenon or human activity that may cause the loss of life or injury, property damage, social and economic disruption or environmental degradation. Hazards can include latent conditions that may represent future threats and can have different origins: natural (geological, hydrometeorological and biological) or induced by human processes (environmental degradation and technological hazards)."[32]

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[29] Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance, definitions.

[30] International Strategy for Disaster Reduction (ISDR), UNISDR Terminology on Disaster Risk Reduction, available at www.unisdr.org/eng/library/ UNISDR-terminology-2009-eng.pdf.

[31] Resolution of the Sixteenth Commission on Humanitarian Assistance, Institut de Droit International, 2 September 2003, Article 1.2.

[32] Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters, 2005, p. 1, footnote 2.

Finally, the International Law Commission confirms the trend by affirming in the Draft Articles on Protecting People in the Event of Disasters[33] that:

> "Disaster" means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.[34]

Even if it is apparent that the definitions reported have some common elements, they are clearly divergent, mainly on two issues. First of all, while almost all the mentioned legal instruments adopt an all-encompassing approach by referencing the impact on people as well as on property, cultural heritage and environment, there is no convergence regarding the origins of the disaster.[35] In particular, as evidenced in the definitions given by the *Institut de Droit International* and the International Law Commission, an important distinction resides in the inclusion or not of armed conflicts and violence as examples of disasters.[36] Secondly, the definitions do not all agree on the unexpected and time-limited nature of disasters. While some Conventions focus just on disasters occurring without warning, the Tampere Convention as well as the International Law Commission recognise that calamitous events may be the result of complex and long-term processes.[37] In addition, both the Hyogo Framework and Decision 1313/2013/EU even cover events that can potentially provoke severe damages in general terms.

Whilst all the mentioned distinctions surely stem from the different areas of application of each instrument reported, their impact at the legal and practical level is relevant. Indeed, besides serving as a demonstration of the complexity of *subjecta materia*, the uneven approaches reflected in the mentioned instruments impinge on their simultaneous and effective applicability and, ultimately, on

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[33] The Draft Articles on the Protection of Persons in the Event of Disasters are explored and analysed in para. 3.2 of the present Chapter. For a deeper analysis of the ILC approach to the term 'disaster' see, *infra*, para. 3.2(a).

[34] International Law Commission, *Protection of persons in the event of disasters*, Draft Articles 1-5, Document A/CN.4/629, Article 3.

[35] C. Leben, "Vers un droit international de catastrophes?", in *International Aspects of Natural and Industrial Catastrophes*, cit.

[36] In this regard, it deserves to be pre-empted that, within EU disaster law, the term 'disaster' has been interpreted as also including conflicts. See, *infra*, Chapter IV.

[37] Long-term processes include the so-called 'creeping disasters' which, because of their repeated and constant character, can lead to major and irreversible damages. See D. Alexander, "The Study of Natural Disasters, 1977-1997: Some Reflections on a Changing Field of Knowledge", in *Disasters*, 21(4), 1997, pp. 284-304.

the final purpose of protecting the victims of serious disasters according to a transversal and uniform spirit of solidarity.

2.2 The notion of 'solidarity': what legal value under international law?

The term 'solidarity' comes from the Latin word solidum – that means 'hard' but also 'money' – and, in particular, from the expression of Roman Law *in solidum obligari*, that was used to indicate the obligation in which all common debtors committed themselves to pay the creditor the whole debt. Over the centuries, this definition of solidarity has assumed a sociological dimension by becoming the expression of the sameness of individuals who share a common interest. It is akin to the notion of *fraternité* which requires individuals to identify themselves with others and binds them together according to a feeling of common identity thus allowing them to receive mutual support when needed.

Accordingly, at the micro level and from a sociological point of view, solidarity includes not only philanthropic or altruistic considerations, but also a reciprocal (or self-interested) dimension institutionalised and normalised through the establishment of citizenship rights.[38] Thus, solidarity is also reflected in the preparedness to pool and share resources with others, as well as in the readiness for collective action.[39] However, according to the classic theory pioneered by Durkheim, in homogeneous societies such as national ones (even though this assertion calls for caution) the likeness of people makes philanthropy, rather than reciprocity, the main connotation of solidarity. Instead, at the supranational level, the heterogeneous construction based on diversity and legal plurality makes solidarity more inspired by the *do ut des* formula, given that the perception of the other is not the same.[40] When the notion of solidarity entails elements of reciprocity and interdependence, it departs from the notion of *fraternité*, thus creating societies in which it is more likely that individuals engage in solidarity when they expect a future return for their actions.

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[38] A. Somek, *Solidarity decomposed – being and time in European citizenship*, University of Iowa Legal Studies Research Paper, 2007, pp. 7-13.

[39] S. Stjernø, *Solidarity in Europe – the history of an idea*, Cambridge University Press, 2005; C. Barnard, "Solidarity and the Commission's Renewed Social Agenda", in M. Ross, Y. Borgmann-Prebil (eds), *Promoting solidarity in the European Union*, Oxford University Press, 2010, p. 80; M. Ferrera, "Towards an 'Open' Social Citizenship? The New Boundaries of Welfare in the European Union", in G. De Burca (ed.), *EU law and the Welfare State: In Search of Solidarity*, Oxford University Press, 2005, pp. 19-20.

[40] E. Durkheim, *The division of Labor in Society*, Mcmillan Publishers Ldt., 1984.

Therefore, solidarity is a very complex notion since a moral dimension and philanthropic-based aspirations are generally attributed to it, which are hardly measurable and observable.[41] For the purposes of the present work, the first problem is to frame the concept and to explore its effective scope within the international legal framework and according to international legal theory.

International law is not characterised by a longstanding tradition of solidarity, but rather by the idea of sovereignty, consolidated by the rising nation-States and empires after and in opposition with the previously united theological and imperial framework. Instead, solidarity as a potential principle of international law was first adopted in the mid-eighteenth century by Emer de Vattel who considered solidarity to be the essential and imperative condition for the existence of a community of States. Hence, States also had a duty of mutual assistance in the event of disasters in order to improve their general situation and relations.[42] At the end of the XIX century, the 'solidarist movement' spread throughout international legal scholarship, with Georges Scelle as one of its most prominent representatives, thereby clashing with the prominence of sovereignty in the international community. Despite the numerous attempts to reconcile the tension between the interests of individual States and those of the global community, sovereignty superseded solidarity and this was to continue until the UN was created. The two World Wars revealed the necessity to bring international law legislation beyond old frontiers and to find new fields of application by increasing the need for major multilateral cooperation.

The Charter of United Nations represents the first piece of evidence of the operation of (indirect) solidarity between States, by stating that the UN aims to "practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security". Similarly, Article 1(3) of the UN Charter provides that one of the purposes of the United Nations is "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character".

More recently, the concept of solidarity has been explicitly listed in two

[41] C. Boutayeb, "La solidarité, un principe immanent au droit de l'Union européenne. Éléments pour une théorie", in C. Boutayeb, *La solidarité dans l'Union européenne.* Éléments *constitutionnels et matériels*, Dalloz, 2012, pp. 1-3; E. de Wettel, "The emergence of international and regional value systems as a manifestation of the emerging international constitutional order", in *Leiden Journal of International Law*, 19, 2006, pp. 611-632.

[42] E. de Vattel, *The Law of Nations, or the Principles of Natural Law, Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, cit.

resolutions of the UN General Assembly – namely resolution 56/151 of 19 December 2001[43] and resolution 57/213 of 18 December 2002[44] – which have defined solidarity as:

> a fundamental value, by virtue of which global challenges must be managed in a way that distributes costs and burdens fairly in accordance with basic principles of equity and social justice and ensures that those who suffer or who benefit the least receive help from those who benefit the most.

Notwithstanding the anarchical nature of the international system which lacks a supreme authority and the tensions between the national realm and desires of solidarity, the progressive introduction of ethical and moral concerns in the development of the international legal system has contributed to reinforce the broader idea of a global community of interdependent States. At a practical level, the most significant number of texts dealing with solidarity has been created with regard to international economic and environmental law by including provisions on State's obligations to cooperate and protect the economic and environmental interests of other States.[45] Indeed, States have progressively determined that to act in a manner aimed at preserving the good of the whole community also preserves their own interests. Gradually, strict voluntarism and sovereignty have been challenged, and the fundamental transformation of the substance and structure of international law has paved the way to the transition from a 'law of co-existence' – where international law is limited to the traditional sphere of diplomatic inter-State relations and to the mutual respect of national sovereignty – to a 'law of cooperation' at universal and regional levels.[46] In this sense, the current international framework would be characterised by a shift from an "essentially negative code of rules of abstention to positive rules of cooperation."[47] This means taking the notion of solidarity in the theoretical discourse concerning the nature of international law and making it one of the

[43] UN General Assembly, Resolution on the Promotion of a democratic and equitable international order, A/RES/56/151 of 19 December 2001.
[44] UN General Assembly, Resolution on the Promotion of a democratic and equitable international order, A/RES/57/213 of 18 December 2002.
[45] These obligations, which have *erga omnes* character, have been articulated in the well-known *Barcelona Traction* case (International Court of Justice, *Barcelona Traction, Light and Power Company Ltd* (Second Phase), ICJ Report 3, 1970).
[46] This new theory of international law has been proposed by Professor Friedman, W. G. Friedman, *The Changing Structure of International Law*, Stevens and Sons ed., 1964.
[47] Ibid., p. 62.

facets of cooperation lato sensu.[48] As stressed in 2004 by Dos Santos Alves for the UN Commission on Human Rights:

> solidarity implies a communion of responsibilities and interest between individuals, groups, nations and States, and sometimes it appears linked to the ideal of fraternity proclaimed by the French Revolution. The notion of solidarity […] corresponds with the notion of cooperation, because one only cooperates in an act of solidarity. Solidarity is one of the greatest values in the construction of human rights. Resort to the use of the word cooperation, first in the Charter of the United Nations, later in most of the documents emanating from the Organization, is the main indication that solidarity has undergone a long and difficult journey.[49]

In such a broad meaning, solidarity thus becomes synonymous with cooperation which nowadays is certainly part of a number of international legal instruments. Nevertheless, this use of solidarity is not particularly incisive and clarifying, in part because solidarity does not perfectly equate to cooperation, but rather contains it. Therefore, from an international law perspective the main problem is how to frame the concept of solidarity: what does it mean exactly? Is it an idea, a value, or a principle? Or is it all of the above? As a matter of fact, no clear answer has been proposed so far, and thus it appears necessary to evaluate whether solidarity can be addressed as an independent notion to that of cooperation and to what extent it is more than the general concept of 'neighbourliness'.

What is reported above leaves no doubt regarding the nature of solidarity as a value or moral attitude that is to be pursued within the international community.[50] However, in this sense, the concept does not have any legal content, but

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[48] According to some scholars, solidarity is not the same as cooperation which requires a previous agreement upon a common objective (see L. Boisson de Chazournes, "Responsibility to Protect: Reflecting Solidarity?", in R. Wolfrum, C. Kojima (eds), *Solidarity: A Structural Principle of International Law*, Springer, 2010, pp. 93-109), but it is plausible that in a broader semantic perspective the two concepts can be put alongside. For greater insights into the international obligation to cooperate, see J. Delbrück, "The international obligation to cooperate – an empty shell or a hard law principle of international law? A critical look at a much-debated paradigm of modern international law", in H. P. Hestermeyer, D. König, N. Matz-Lück, V. Röben, A. Seibert-Fohr, P. Stoll, S. Vöneky (eds), *Coexistence, cooperation and solidarity.* Liber Amicorum *Rüdiger Wolfrum*, 2012, pp. 3-16.

[49] R. Alves, *Human rights and international solidarity*, Working paper, 15 June 2004, Economic and Social Council, Doc. E/CN.4/Sub.2/2004/43, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, para. 22.

[50] B. Simma, A. Paulus, "The 'International Community': Facing the Challenge of Globalization", in *European Journal of International Law*, 9, 1998, pp. 266-277.

belongs more to the arena of political projects adopted by individuals, States, and other actors. In this regard, Laurence Boisson de Chazournes summarises the core elements of solidarity as follows:

> First, solidarity is a form of help given by some actors to other actors in order to assist the latter to achieve a goal or to recover from a critical situation. At the international level, one should that such form of assistance does not necessarily have to be understood in the context of a state-to-state relationship but it can be understood as the help provided by a State, or a group of States, to the population of another State. Second, solidarity takes place within a shared value system at the level of a given community (in our case the international community). Third, solidarity entails a moral obligation in the sense that it is value-based, i.e. the moral obligation to take into account the interests of others and to provide them with assistance. Fourth, this moral obligation is owed by some members of the that is means to use it as a normative criterion for evaluating and judging the rightness of a given set of facts, and for fostering measures to strengthen cooperation international community towards other members of the same community, and this will vary from one situation to another.[51]

From such a perspective, solidarity would just be – albeit relevant – a universal value of the international community which only arises from international treaty law. Hence, the tendency to favour forms of integration at the international level is probably the highest expression of solidarity as a project to create a 'community'.[52] This 'constitutional' role played by solidarity is particularly evident in regional contexts, where the concept acts as a cornerstone for major integration and collaboration among the participating States. Apart from the EU experience that is comprehensively addressed in the following chapter, the constitutional side of solidarity also appears in other regional realities. The African Charter on Human and Peoples' Rights[53] refers to solidarity, *inter alia*, in Article 21(4): "States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity." In addition, the pre-

[51] L. Boisson de Chazournes, "Responsibility to Protect: Reflecting Solidarity", cit., pp. 94-95.
[52] J. H. H. Weiler, "The political and legal culture of European integration: an exploratory essay", in *I-Con*, 9, 2001, pp. 678-694.
[53] The African Charter on Human and Peoples' Rights was adopted on 27 June 1981 and entered into force on 21 October 1986.

amble of the Charter of the Association of Southeast Asian Nations (ASEAN)[54] recalls "the need to strengthen existing bonds of regional solidarity to realise an ASEAN Community that is politically cohesive, economically integrated and socially responsible in order to effectively respond to current and future challenges and opportunities."

A second approach aims at identifying solidarity as a *principle*, or as a structural principle, of international law thus giving it a legal structure that works in relation not only to other principles of international law – such as sovereignty, subsidiarity, good faith, and equity – but also to different regimes – such as disaster relief, humanitarian law, environmental law, refugee law, trade, international development, and State responsibility.[55] According to this view, solidarity is a multifaceted notion which can offer different declinations according to the different sectors and approaches concerned. First, solidarity as a principle implies assistance and collaboration to achieve a goal as well as recover from a critical situation. At the international level, such form of assistance does not necessarily operate in the context of a State-to-State relationship, but it can be provided by a State or a group of States to the population of another State. Secondly, solidarity takes place in any community where some basic values and principles (i.e. equity and social justice) are shared by the members of the community thereof. Finally, solidarity has a clear moral connotation which asks to consider the various interests and provide them with assistance, often on a spontaneous basis.[56]

However, Rüdiger Wolfrum has made progress in this regard by describing solidarity as a principle that "makes a joint action mandatory" wherever a community of States based upon common values and common interests exists, and that calls for balancing obligations in joint actions.[57] According to this perspective, solidarity has thus a constitutional dimension that, once it has entered into the norms of positive international law, is more than a

[54] The ASEAN Charter was adopted on 20 November 2007 and entered into force on 15 December 2008.

[55] In this regard, a very detailed overview is available in A.G. Koroma, "Solidarity: Evidence of an Emerging International Legal Principle", in P. Hestermeyer, D. König, N. Matz-Lück, V. Röben, A. Seibert-Fohr, P. Stoll, S. Vöneky (eds), *Coexistence, Cooperation and Solidarity* - Liber Amicorum *Rüdiger Wolfrum*, cit., pp. 103-130.

[56] This definition is driven by that provided by L. Boisson de Chazournes in "Responsibility to Protect: Reflecting Solidarity?", cit., p. 93.

[57] In particular, Wolfrum indicates three different levels of intervention: the achievement of common objectives through common action of States, the achievement of common objectives through differentiated obligations of States and actions to benefit particular States. See R. Wolfrum, "Solidarity amongst States: An Emerging Structural Principle of International Law", in *Indian Journal of International Law*, 49, 2009, pp. 8-20.

'simple' driving principle and implies extra-legal obligations. Indeed, it is a core and interpretative tool of many relevant primary and secondary international rules which constitute the "natural habitat for the creation of solidarist primary rules."[58] In this way, solidarity has become a trigger and cornerstone of both a normative and an operational dynamic in a number of branches of international law by also affecting the allocation of rights and duties among the agents of international law. In particular, it should be capable of creating negative obligations on States not to engage in certain activities as well as positive duties to carry out certain measures for the common good.[59] According to this definitional orientation the notion of solidarity is, hence, double-faced as it has the role of both inspiring the response to dangers or events and creating common rights and obligations that are to be perfectly balanced. Such a combination of, respectively, negative and positive dimensions completes the process of 'constitutionalisation' of the concept thereof and confirms the transformation of international law into a value-based international legal order.[60] Furthermore, the multifunctional character of solidarity makes it one of the constituent elements of the concept of justice in public international law. Hence, solidarity has reached different stages of development in the theoretical discourse.[61] But such an encouraging perspective – which makes solidarity both a value and a constitutional principle of international law – meets some pertinent obstacles and doubts.

Firstly, from the legal experience perspective, the whole range of descriptions of solidarity illustrated above are not as clear. Solidarity as a fact is present but relatively insignificant in its implications as a legal principle because in its practical application it needs to be balanced with other applicable principles, especially those of sovereignty and consent. The emerging character of solidarity as a principle is inevitably linked to the recognition that the international law

[58] K. Wellens, "Revisiting Solidarity as a (Re-) Emerging Constitutional Principle: Some Further Reflections", in R. Wolfrum, C. Kojima (eds), *Solidarity: A Structural Principle of International Law*, cit., p. 4.

[59] A. G. Koroma, "Solidarity: Evidence of an Emerging International Legal Principle", cit., p. 103.

[60] R. Wolfrum, "Solidarity amongst States: An Emerging Structural Principle of International Law", in *Indian Journal of International Law*, cit., p. 8.

[61] In this regard, it is of utmost importance the resolution adopted by the UN General Assembly *vis-à-vis* the COVID-19 pandemic. Besides calling upon the UN system to work for mobilising a coordinated global response, it has recognised that "the COVID-19 pandemic requires a global response based on unity, solidarity and renewed multilateral cooperation". See UNGA Resolution 74/270, Global solidarity to fight the coronavirus disease 2019 (COVID-19) of 2 April 2020.

of solidarity is being progressively created,[62] but also that it is "bound to create conflict" with the idea of State sovereignty.[63]

Secondly, the characterisation of solidarity as a key principle of international law does not appear to lead to clear implications in terms of normative quality. As a matter of fact, there is still a lot of scepticism among scholars regarding the autonomous normative character of solidarity in international law. Even though many rules in international law express some aspects of solidarity and it is used as a parameter for interpretation, at present there are no rules expressly prescribing solidarity *per se* as a legally binding norm. Moreover, as underlined by Wolfrum, solidarity may be a principle inherent to some regimes, but not in every regime: it lacks universality.[64] It is too abstract and indefinite in contours and content to become a normative concept that produces steering effects on State's behaviour in international relations. It is a mechanism to inspire and interpret many rules, but it is not a rule itself. This happens, *inter alia*, because, as pointed out by Emmanuelle Jouannet, incarnating moral values into the law – thus blurring the boundaries between law and morality, between categorical imperatives and moral duties – is dangerous if not very complex.[65]

Accordingly, even though in the field of disaster relief actors endeavour to act in favour of another State not for immediate profit but rather for reasons of empathy, in the absence of a clear legal framework and enforcement mechanisms solidarity risks just remaining a moral trigger. Leaving aside the intervention of NGOs and charitable organisations, without well-established obligations of solidarity on States no rights of solidarity can exist, but merely legitimate expectations, which do not necessarily result in effective interventions.[66] As is shown in the following section concerning the state of the art of IDRL, bringing moral values into the realm of law means confronting State sovereignty and the principle of subsidiarity which underpin the interdependence-based structure of international law.

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[62] I. de la Rasilla del Moral, "*Nihil Novum Sub Sole* since the South West Africa Cases? On *ius standi*, the ICJ and Community Interests", in *International Community Law Review*, 10, 2008, p. 196.

[63] E. Jouannet, "What is the use of International law? International law as a 21st century guardian of welfare", in *Michigan Journal of International Law*, 28, 2008, p. 818.

[64] R. Wolfrum, "Concluding remarks", in R. Wolfrum, C. Kojima (eds), *Solidarity: A Structural Principle of International Law*, cit., p. 228.

[65] E. Jouannet, "What is the use of International law? International law as a 21st century guardian of welfare", cit., p. 815.

[66] In this regard, see UN Special Rapporteur Eduardo Valencia-Ospina, *Preliminary Report on the Protection of Persons in the Event of Disasters*, Doc. A/CN.4/598 of 5 May 2008, para.14.

3. State of the art of IDRL under the lens of solidarity

Investigating how the notion of solidarity legally translates within IDRL means, *inter alia*, to verify the existence of specific duties and rights as an expression of solidarity both on the side of affected States and of third countries that could provide assistance. One of the most relevant gaps of IDRL is that customary international law, but also treaty law, fails to properly regulate the specific responsibilities and obligations of the States involved. This is mainly due to the centrality that the principle of State sovereignty traditionally has, thus justifying, on the one hand, the affected State's reluctance to seek external assistance and, on the other hand, the occasional third countries' inaction in providing assistance.

3.1 States' responsibilities to respond to disasters: between sovereignty and solidarity

State sovereignty has always been one of the cardinal principles of international relations and still resides in the nucleus of customary international law. Since Aristotle, the term 'sovereignty' has had a long and varied history during which it has had different meanings, hues and tones, depending on the context and the objectives of those using the notion.

For a long time, sovereignty has been defined as the right to exercise the supreme, absolute, and uncontrollable power of regulating internal affairs without external interference. The Bodin formula, which defines sovereignty as *potestas legibus soluta* and describes the monarch as being *legibus solutus*, that is 'not bound by law', has often been invoked to corroborate the understanding of sovereignty as absolute power. The new international order which came into existence with the Peace of Westphalia marked the transition from the Middle Ages to the modern world, by creating a system in which the main actors are equal and sovereign States. The premise of this new order is State sovereignty itself, seen from two different standpoints: from the inside, sovereignty implies the exercise of a supreme jurisdiction over its territory and its population; from the outside, it denotes the *status* of equality among States.[67] It implies, that their actions are not, and should not be, influenced by any higher power, especially in the management of economic, political, cultural, and social affairs, and that they are free to decide how to interact with other equal subjects.

Against this background, State sovereignty has gradually grown stronger and

[67] G. Nolte, "Sovereignty as Responsibility?", in *American Society of International Law, Proceedings of the 101st Annual Meeting*, 99, 2005, pp. 389-392.

it soon became synonymous, on the one hand, of a State's independence from, and legal impermeability in relation to, foreign powers and, on the other, of a State's exclusive jurisdiction and supremacy over its territory and inhabitants.[68] In this way, sovereignty has been a source of stability for more than two centuries and the principle of non-intervention in domestic affairs has developed in parallel by becoming "corollary of every State's right to sovereignty, territorial integrity and political independence."[69] Such a position was then confirmed by the concept of *domain réservé* enshrined in Article 2, par. 7, of the UN Charter, according to which: "[n]othing contained in the present Charter shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter."[70]

As part of international case law, the influence of the position expressed by the Permanent Court of International Justice in *Wimbledon* and the *Lotus Case* is evident.[71] In 1949, the International Court of Justice also noted that "between independent States, respect for territorial sovereignty is an essential foundation of international relations"[72] and forty years later, in the historic *Nicaragua* judgment, it ruled that "matters which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy".[73]

Such a perspective is also, and especially, valid with regard to the management of disaster situations. In fact, according to customary international law, the principle of State sovereignty governs the responsibilities of States by shaping a rigid pattern of duties and rights. On the one hand, disaster response falls within the jurisdiction – and is thus the responsibility – of the State in which the catastrophic event has occurred. On the other, third States only

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[68] A. Cassese, *International Law*, Oxford University Press, 2004, pp. 71-81.

[69] R. Jennings, A. Watts KCMG QC (eds), *Oppenheim's International Law*, Oxford University Press, 2008, p. 428.

[70] This approach has also been repeated by the General Assembly which, in Resolution 46/182 has stressed that "sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations", see UN General Assembly, *Resolution 46/182*, 19 December 1991, Annex – Guiding Principles, para. 3.

[71] Permanent Court of International Justice, *United Kingdom and others v. Germany (Wimbledon case)*, PCIJ (Series A), No. 1, 1923; Permanent Court of International Justice, *France v. Turkey (Lotus case)*, PCIJ (Series A), No. 10, 1927. In particular, point 44 of the *Lotus* judgement, the Court stated that "restrictions upon the independence of States could not be presumed."

[72] International Court of Justice, *The Corfu Channel Case*, Decision of 9 April 1949, p. 35.

[73] International Court of Justice, *Case concerning the military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment 27 June 1986, p. 108, para. 205.

have the right to provide assistance to the affected territory upon request or approval of the concerned State.

a) Duties and responsibilities of the affected State

According to the landmark UN General Assembly Resolution 46/182 of 1991, "each State has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory. Hence, the affected State has the primary role in the initiation, organization, coordination, and implementation of humanitarian assistance within its territory."[74] It is interesting to note that in this quote the General Assembly used two different terms in order to explain the various tasks of the victim State. On the one hand, the affected State has been conferred with the full *responsibility* to protect the victims in its territory, which means attributing to the victim State a greater burden that cannot be delegated to others. On the other hand, each State has the *primary role* in managing humanitarian assistance at any stage.[75]

The General Assembly confirmed this orientation in two following Resolutions where it argued that the affected States have the "primary role in the initiation, organization, co-ordination and implementation of humanitarian assistance within their respective territories."[76] References to these tasks are drawn, *inter alia*, from Article 4 of the Tampere Convention which affirms that "nothing in this Convention shall interfere with the right of a State Party, under its national law, to direct, control, coordinate and supervise telecommunication assistance provided under this Convention within its territory."[77]

Even though there has been an increasing trend of self-management in many recent disasters, at times it may be highly demanding for the State to react to a severe catastrophe by just using its own resources. If the magnitude and duration of the emergency goes beyond the response capacity of the country, international cooperation to address emergency situations and to strengthen the response capacity of affected countries may be necessary. However, neither a duty to seek nor a duty to accept international assistance have been established so far at the

[74] UN General Assembly, A/RES/46/182, cit., Article 1.4.

[75] J. Kokott, "States, Sovereign Equality", in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law*, Oxford University Press, 2007.

[76] UN General Assembly, Humanitarian assistance to victims of natural disasters and similar emergency situations, Resolution A/RES/45/100, 14 December 1990, para. 2; UN General Assembly, Humanitarian assistance to victims of natural disasters and similar emergency situations, Resolution A/RES/43/131, 8 December 1988, para. 2.

[77] Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operation, 18 June 1998, p. 5.

level of customary international law. At most, it regulates the external access to the territory of a disaster-affected State by stressing, in any case, the necessity to respect its sovereignty and primacy. Accordingly, as stated again in Resolution 46/182, international humanitarian assistance should only be provided "with the consent of the affected country and in principle on the basis of an appeal by the affected country.[78] Hence, assuming that disaster response falls within the jurisdiction of the State whose territory the catastrophic event has occurred in and that a State exercising any form of sovereignty in the territory of a foreign State is a wrongful act,[79] whenever assistance from foreign States or international organizations is needed, it has to be requested or at least consent must be given. Consent – as the expression of a State's willingness – is thus *conditio sine qua non* for the initiation of a humanitarian operation and the territorial State should always express some form of approval.[80]

Moreover, a consequence of the affected State's sovereignty is the freedom to select the legal framework governing the provision of assistance: after entering the affected State's territory, the national authorities determine the extent and the termination of the interventions by selecting those who can access the territory as well as specifying the goods and services required.[81]

Furthermore, State sovereignty is not only reflected in the fact that national authorities have a positive right to request/accept external assistance, but also in their right to refuse offers of help. To date, it is still unclear whether customary international law prohibits arbitrary refusals of humanitarian assistance and, even though it may seem odd, there have been cases where national authorities have refused external intervention, although the needs clearly outstripped domestic capacities. Generally, this may happen when the affected State wants to preserve its image of national pride or avoid potential interferences in its internal affairs. In this regard, it is noteworthy to recall that, after the passage of the Cyclone Nargis in late June 2008 and despite the serious scale of the emergency, the Burmese government imposed severe restrictions on humanitarian

[78] UN General Assembly, A/RES/46/182, cit., Annex – Guiding Principles, para. 3. In addition, see K. G. Park, *La protection des personnes en cas de catastrophe*, Recueil des cours, 2013, p. 348.

[79] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Fifty-third session, 2001, Article 20.

[80] It is worth to underline that acquiescence, that is the acceptance by not arguing or formally requesting, is considered as a form of consent. See also N. Ronzitti, "Use of Force, Jus Cogens and State Consent", in A. Cassese (ed.), *The Current Legal Regulation of the Use of Force*, Nijhoff, 1986, pp. 147-166.

[81] M. Costas Trascasas, "Access to the Territory of a Disaster-Affected State", in A. De Guttry, M. Gestri, G. Venturini (eds), *International Disaster Response Law*, cit., p. 225.

interventions and refused international offers of aid, insisting that only national authorities were supposed to guarantee assistance.[82]

Although it is legally reasonable for the affected State to be the first and leading handler in ensuring protection since disaster response falls within its jurisdiction, a disproportionate State discretion risks increasing the uncertainty regarding the State's capability to ensure appropriate interventions and, ultimately, to provide adequate humanitarian assistance to the victims. For a very long time, and in particular in the aftermath of the Nargis cyclone, the question of how to establish a duty to seek external assistance for States in the context of disasters has thus been at the centre of the legal debates without, however, finding a broad and deep consensus among scholars and among States.

Even though the extreme discretion of the affected State acquires special relevance, it cannot be ignored that some negative consequences may also arise from the absence of a clear duty to provide assistance to be undertaken by the States of the international community once external aid has been requested.

b) Providing assistance as the States' right

The principle of State sovereignty not only shapes the prerogatives of the national authorities of the affected State by establishing the mere right to seek external assistance, but also those of the third countries. Indeed, according to current customary international law, the latter do not have any duty to offer or provide assistance when their intervention is requested by the affected State. Rather, they may freely decide whether or not to intervene without any constraints. Ultimately, by excluding other international actors' activities, the provision of international assistance is essentially based on the will of the States. Hence, framing the present reasoning within the State sovereignty–international solidarity scheme, so far, the concept of solidarity has not been translated into a legal obligation to intervene when a serious disaster occurs, but only into a right, or at the most a moral duty, which cannot be legally challenged.[83]

From a practical point of view, the absence of a duty to provide assistance can be reasonably motivated by the fact that, when a serious disaster occurs, not all the States of the international community have sufficient and adequate re-

[82] For further information, see R. Barber, "The Responsibility to Protect the Survivors of Natural Disaster: Cyclone Nargis, a Case Study", in *Journal of Conflict and Security Law*, 14(1), 2009, pp. 3-34.

[83] R. Kolbe, "De l'assistance humanitaire : la résolution sur l'assistance humanitaire adoptée par l'Institut de droit international à sa session de Bruges en 2003", in *International Review of Red Cross*, 86, 2004, pp. 853-878.

sources to be put at the disposal of the affected State. From a legal point of view, the lack of a well-established duty to offer and to provide assistance is indicative of the sovereignty-centred, rather than solidarity-centred, perspective adopted at the international level. Moreover, the right to refrain from providing assistance is the natural consequence of the principle of primary responsibility of the affected State, which makes the right of the non-affected States complementary to the duty of the affected one.

This approach clearly reflects the traditional interpretation of international law as an instrument to regulate the international community by imposing some obligations on a State *vis-à-vis* another State which has a corresponding right in a context of perfect reciprocity of rights and duties. Accordingly, under customary international law, the fundamental principle of State sovereignty does not operate just in relation to the affected State, but also to the other States of the international community thus preventing the acknowledgement of the existence of a legal duty to help another State following a natural disaster. It is, however, evident that this approach based on complementarity is not actually fully balanced and the domination of the principle of State sovereignty in choosing whether and how to deal with a serious disaster risks being in great tension with the need to guarantee humanitarian assistance and solidarity to the victims.

This notwithstanding, practice shows that the existence of a simple right to intervene upon request of assistance has never prevented States from making significant donations of financial and in-kind resources. Conversely, when national authorities seek external assistance, States do generally provide aid either for humanitarian reasons or to advance their own national interests. Therefore, it is quite rare that potential assisting actors, other than international organisations and NGOs, do not intervene when the situation requires an immediate intervention. Besides, from an international law perspective, it is worth underlining the increasing acknowledgment of the liable nature of inter-States relations and the consolidated principle of cooperation that is also enshrined in the Charter of the United Nations and in the declaration on Friendly Relations.[84] In addition, according to some authors, it is exactly the principle of cooperation – which translates into a duty to cooperate with the authorities of the affected State – that could pave the way to a progres-

[84] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, General Assembly Resolution 2625 (XXV) of 24 October 1970.

sive establishment of a legal obligation to offer and provide assistance to the victims of a disaster.

Assuming that in the last century there has been a sharp shift from an international landscape characterised by a mere coexistence among States to a more cooperative structure, the very International Law Commission has questioned the existence of a duty to cooperate and, more specifically, whether it could imply a duty on States to provide assistance when requested by the affected State.[85] In fact, as Paolo Picone suggests, in some branches of international law – such as international environmental law – the duty to cooperate already exists and contains some 'instrumental' obligations.[86] However, it must be said that such a result appears quite unrealistic given that the duty to cooperate in the event of a disaster might not establish a proper duty to deliver assistance, but rather a set of secondary obligations on the States that have already decided to provide assistance. Obligations such as, to effectively cooperate with the national authorities and to respect the primary role of the affected State in the control over the delivery of assistance.

Against this uncertain legal background, the vivid human rights doctrine which has developed over the last decades could be a proper starting point to reframe the principle of State sovereignty by placing, at the centre, the necessity to provide urgent humanitarian assistance to the victims of a disaster.[87]

c) A human rights-based approach for remodelling State sovereignty

Over the last decades, many hypotheses have emerged to reconcile State sovereignty with the necessity to protect people in the event of a disaster by resorting to, *inter alia*, human rights instruments.[88] Indeed, disaster-like situations "endanger life, health, physical integrity, or the right not to be subjected to cruel, inhuman or degrading treatment, or other fundamental human rights, or the essential needs of the population."[89] As a consequence, as strongly stressed by

[85] International Law Commission, *Report of the International Law Commission on the work of its sixty-third session*, 2011, A/66/10, p. 9, para. 44.

[86] For example, the ASEAN Agreement of 2005, Article 4 (a) and Article 7. See also P. Picone, "Obblighi reciproci ed obblighi *erga omnes* degli Stati nel campo della protezione internazionale dell'ambiente marino dall'inquinamento", in *Comunità Internazionale e obblighi erga omnes*, Jovene Editore, 2006, p. 101.

[87] For insights, F. Zorzi Giustiniani, E. Sommario, F. Casolari, G. Bartolini (eds), *Routledge Handbook of Human Rights and Disasters*, Routledge, 2018.

[88] J. Delbruck, "International Protection of Human Rights and State Sovereignty", in *Indiana Law Journal*, 57(4), 1982, pp. 567-578.

[89] Institute de Droit International, *Sixteenth Commission Resolution – Humanitarian Assistance*, Bruges Session, 2 September 2003, para. 2.

the UN General Assembly, "the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity."[90]

The Covenant on Civil and Political Rights states that no one shall be arbitrarily deprived of their life and notes that this right may not be suspended even in the case of a "public emergency that threatens the life of the nation" – which has been recognised to include "a natural catastrophe."[91] The Human Rights Committee has thus interpreted the right to life as having both a positive and negative dimension,[92] implying that States have an obligation to respect and above all to ensure the respect of the right to life of all individuals in their territory and subject to their jurisdiction.[93]

Concerning socio-economic rights, the Covenant on Economic, Social, and Cultural Rights articulates, *inter alia*, the right "to an adequate standard of living […] including adequate food, clothing and housing" as well as "the right to be free from hunger", and the right to "the highest attainable standard of physical and mental health."[94] In the General Comment No. 12 of 1999, the Committee on Economic, Social and Cultural Rights stated that:

> the right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to respect, to protect and to fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide. The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfil (facilitate) means the State must

[90] UN General Assembly, Resolution A/RES/45/100, cit., Preamble, para. 5.

[91] International Covenant on Civil and Political Rights, Article 6(1), 16 December 1966 and Human Rights Committee, *General Comment No. 29*, Article 4, 24 July 2001.

[92] In this regard, the recent decision taken by the UN Committee on Human Rights in the *Teitiota v. New Zealand* case (UN Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016, 7 January 2020, CCPR/C/127/D/2728/2016) is also significant, and represents a landmark ruling dealing with, for the first time, a complaint filed by an individual seeking protection from the effects of climate change.

[93] For comments, see W. Kalin, R. C. Williams, K. Koser, A. Solomon (eds), *Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges*, American Society of International Law, 2010, pp. 53-62.

[94] International Covenant on Economic, Social and Cultural Rights, Arts. 11 and 12, 16 December 1966.

> pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly. This obligation also applies for persons who are victims of natural or other disasters.[95]

The acknowledgement of this complex and substantial set of needs and rights which may acquire relevance in the event of a natural or man-made disaster has led to discussions on the opportunity to recognise a distinct right to humanitarian assistance in this kind of situations which would reframe States' prerogatives in the field of disaster response.[96]

A number of international humanitarian organisations, like the Red Cross Movement, have fought for its recognition, by affirming that "the right to receive humanitarian assistance, and to offer it, is a fundamental humanitarian principle which should be enjoyed by all citizens of all countries."[97] In addition, a high number of soft-law instruments expressly mention the right under examination, from the 1987 Resolution approved during the *Première Conférence Internationale de Droit et Morale Humanitaire*,[98] to the Principles on Humanitarian Assistance adopted by the San Remo International Institute of Humanitarian Law in 1992,[99] the 1994 Code of Conduct for International Red Cross and Red Crescent Movements[100] and the 2003 Bruges Resolution on Humanitarian Assistance.[101] In particular, the latter proposed a definition of the concept

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[95] Committee on Economic, Social and Cultural Rights, *General Comment No.12*, Right to adequate food, UN Doc. E/C.12/1999/5, 1999, para. 15.

[96] For greater insight, M. Hesselman, "A Right to International (Humanitarian) Assistance in Times of Disaster: Fresh Perspectives from International Human Rights Law", in F. Zorzi Giustiniani *et al.* (eds), *Routledge Handbook of Human Rights and Disasters*, cit., pp. 65-86.

[97] International Federation of the Red Cross and Red Crescent Societies, *The Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief*, 1992, Principle 1.

[98] Première Conférence Internationale de Droit et Morale Humanitaire, *Résolution sur la reconnaissance du devoir d'assistance humanitaire et du droit à cette assistance*, 28 January 1987.

[99] San Remo International Institute of Humanitarian Law, "Principes Directeurs Concernant le Droit à l'Assistance Humanitaire", in *International Review of the Red Cross*, 804, 1993, pp. 548-554.

[100] International Federation of the Red Cross and Red Crescent Movements, *Code of Conduct for International Red Cross and Red Crescent Movements and Non-Governmental Organizations in Disaster Relief*, cit., Principle 1.

[101] Institute de Droit International, *Sixteenth Commission Resolution – Humanitarian Assistance*, cit., Article 2.

of humanitarian assistance by stating that it "means all acts, activities and the human and material resources for the provision of goods and services of an exclusively humanitarian character, indispensable for the survival and the fulfilment of the essential needs of the victims of disasters."[102] Moreover, some recent human rights treaties go in the direction of affirming such a right for victims of natural disasters. Clear outputs in this regard are represented by Article 11 of the 2006 International Convention on the Rights of Persons with Disabilities[103] which does affirm a right for internally displaced persons to seek humanitarian assistance and protection, and the African Charter on the Rights and Welfare of the Child ensures humanitarian protection to internally displaced children in the wake of a disaster.[104]

Nonetheless, the number of multilateral treaties making explicit reference to a right to humanitarian assistance is very limited. With reference to customary law, despite the fact that States' practice shows their willingness to render assistance, the existence of a right for victims of natural disasters to receive humanitarian aid is still remote. Thus, the *de lege lata* existence of a right to humanitarian assistance within international disaster law is not supported by a general treaty or customary recognition and still remains unclear.[105] As summarized by the UN Secretary General "notwithstanding assertions of the existence of a generalised right to humanitarian assistance, such position, to the extent that is it imposes a duty on the international community to provide assistance is not yet definitely maintained as a matter of positive law at the global level."[106] Accordingly, while a right to humanitarian assistance is well anchored in hard law when it relates to civilians in situations of armed conflicts, the same cannot be said for the victims of disasters in times of peace. Even in the absence of a

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[102] Institute de Droit International, *Sixteenth Commission Resolution – Humanitarian Assistance*, cit., Article I.1.

[103] United Nations Convention on the Rights of Persons with Disabilities, UN Doc. A/RES/61/106, 13 December 2006, Article 11.

[104] African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49, 11 July 1990, Art. 23 - Refugee Children, para. 4. As examples of international conventions recalling the right to humanitarian assistance it is worthy to mention also the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (*Kampala Convention on Internal Displacement*), Article 9.2(b).

[105] For further analysis of the debate on the right to humanitarian intervention, M. J. Domestici-Met, "Aspects juridiques récents de l'assistance humanitaire", in *Annuaire français de droit international*, 35, 1989, pp. 117-148; R. J. Hardcastle, A. T. L. Chua, "Humanitarian assistance: towards a right of access to victims of natural disasters", in *International Review of the Red Cross*, 38, 1998, pp. 589-609.

[106] UN Secretary General, *Protection of Persons in the Event of Disasters, Memorandum prepared by the Secretariat*, Doc. A/CN.4/590, 11 December 2007, para. 61.

right to humanitarian assistance *per se*, there is no question that humanitarian assistance enjoys the support of the illustrated broad human rights law which makes it possible to create a *corpus* of positive obligations linked to humanitarian assistance applicable both on the affected State and on third countries.

In general terms, the respect of those human rights – upon which the notion of humanitarian assistance is based – implies that the disaster-affected States maintain the peremptory obligation to respect, protect and fulfil all these rights, by abstaining from any discrimination founded on "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[107] More specifically, the duty to take positive action to protect the rights of the victims implies that States have the duty to ensure that the population affected by a crisis is adequately supplied with goods and services essential for its survival.[108] As a consequence, if they are unable to do so or their efforts fail, the national authorities should allow third parties to provide the required relief supplies and not refuse *bona fide* offers. Furthermore, the European Court of Human Rights has delivered some significant judgements in this respect by stating that the victims of a disaster may invoke *vis*-à-*vis* their State a right to protection deriving from the fundamental right to life.[109] Similarly, third countries would have a duty to ensure the respect of the victims' rights by responding to requests of assistance and deploying the resources that they have at their disposal in order to provide adequate support to the victims.

More broadly, some scholars have also invoked the doctrine of the Responsibility to Protect (RtoP)[110] in order to establish a duty to protect the affected population thereby implicitly pushing for the acknowledgement of a duty to seek and to provide assistance in the event of a disaster. For examples, in the aftermath of the previously mentioned Nargis Cyclone some States and commentators have invoked the RtoP doctrine in order to legitimate an external intervention to protect the affected population. However, such a possibility has been widely rejected because of, *inter alia*, the divergence of opinions on the circumstances in which the RtoP could be invoked. Including the occurrence

[107] International Covenant on Civil and Political Rights, Article 2(1); International Covenant on Economic, Social and Cultural Rights, Article 2(2).

[108] See, *ex multis*, W. Kalin, "The Human Rights Dimension of Natural or Human-Made Disasters", in *German Yearbook of International Law*, 2012, pp. 137-143.

[109] European Court of Human Rights, *Öneryildiz v. Turkey*, n. 48939/99, 30 November 2004; *Budayeva et al. v. Turkey*, n. 15339/02, 20 March 2008; *Kolyadenko et al. v. Russia*, n. 17423/05, 28 February 2012; *Hadzhiyska v. Bulgaria*, n. 20701/09, 15 May 2012.

[110] International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, Ottawa, December 2001.

of disasters within the scope of application of this doctrine currently limited to cases of genocide, war crimes, ethnic cleansing and crimes against humanity could set a precedent to legitimate undue external interventions.[111] Hence, the strict scope of application has prevented the RtoP doctrine from being considered of any help in clarifying the issue of humanitarian intervention in the event of a catastrophe.[112] Moreover, in order to justify a possible external intervention without the consent of the affected State, more than one commentator proposed to resort to the existence of *erga omne*s obligations which, according to the *Barcelona Traction* case,[113] relate to concerns of the whole international community thus legitimating States to intervene in their protection.[114] This is also revealed in the content of the Maastricht Principles on Extra Territorial Obligations of States that, while not binding by nature, represent a very important soft-law instrument to define and clarify the positive extraterritorial obligations of States on the protection of human rights.[115] One of the key conceptual foundations of the Maastricht Principles is that the human rights obligations of States are not only applicable within their own borders but also extend to extraterritorial situations. The acknowledgement of extraterritorial obligations would also be a practical way to comply with the elementary considerations of humanity that have been recognised by the International Court of Justice (ICJ) in the *Corfu Channel* case.[116]

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[111] For comments on the RtoP doctrine, see, *ex multis*, L. Boisson de Chazournes, L. Condorelli, "De la responsabilité de protéger, ou d'une nouvelle parure pour une notion déjà bien établie", in *Revue générale de droit international public*, 1, 2006, pp. 11-18; C. Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?", in *American Journal of International Law*, 101, 2007, pp. 99-120.

[112] For comments on the potential application of the RtoP on occasions of disasters, R. Barber, "The Responsibility to Protect the Survivors of Natural Disaster: Cyclone Nargis, a Case Study", cit.; T. R. Saechao, "Natural Disasters and the Responsibility to Protect: From Chaos to Confusion", in *Brooking Journal of International Law*, 32, 2007, pp. 663-706. For a general comment, L. Boisson de Chazournes, "Responsibility to protect: reflecting solidarity?", in R. Wolfrum, C. Kojima (eds), *Solidarity: a structural principle of international law*, cit., pp. 93-109.

[113] International Court of Justice, *Barcelona Traction*, note 44.

[114] For comments on the nature of the *erga omnes* obligations, *ex multis*, P. Picone, "Obblighi Erga Omnes tra passato e futuro", in *Rivista di diritto internazionale*, 98, 2015, pp. 1081-1108.

[115] Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 28 September 2011. For comments on their legal impact, see M. Salomon, "The Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights: An Overview of Positive 'Obligations to Fulfil'", in *EJIL:Talk!*, 16 November 2012.

[116] International Court of Justice, *United Kingdom of Great Britain and Northern Ireland v. Albania (Corfu Channel case)*, Judgment of 9 April 1949. See R. A. Stoffels, "Legal regulation of humanitarian assistance in armed conflict: achievements and gaps", in *International Review of the Red Cross*, 86, 2004, pp. 515-546.

In order to verify whether such a human rights-based approach has somehow remodelled the principle of State sovereignty thereby establishing duties of solidarity which translate into specific duties of assistance, it is now appropriate to go through the work of the International Law Commission (hereinafter ILC) on the protection of persons in the event of a disaster adopted on a second reading in 2016.

3.2 The work of the ILC on the "Protection of Persons in the Event of Disasters": in search of duties of solidarity

After the launch of the International Disaster Response Laws, Rules, and Principles (IDRL) Programme by the IFRC in 2001, the UN General Assembly encouraged its use as a means to improve the international cooperation in disaster relief.[117] The first proposal to study the topic at hand was recommended to the attention of the ILC in 2006 and was included within the category 'New developments in international law and pressing concerns of the international community as a whole' starting from the following year.[118] In 2007, the Commission decided to include the issue in its work programme and to appoint Mr. Eduardo Valencia-Ospina as Special Rapporteur.[119]

The plan was to elaborate a set of provisions establishing a legal framework for the conduct of international disaster relief activities, by clarifying the core legal principles and concepts and thereby creating a legal 'space' in which such disaster relief work could take place on a secure footing. However, since the beginning, the Commission has been aware that it would have proved to be an exercise *de lege ferenda*, as many aspects of disaster response are subject to different States' practices. This meant that the establishment of clear rules could be put in place not only through the strict codification of *lex lata* but also through a progressive development of the law.[120]

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[117] UN General Assembly, *Strengthening of the coordination of emergency humanitarian assistance of the United Nations*, UN Doc. A/RES/63/139, 5 March 2009*; International cooperation on humanitarian assistance in the field of natural disasters, from relief to development*, UN Doc. A/RES/63/141, 10 March 2009; *Strengthening emergency relief, rehabilitation, reconstruction and prevention in the aftermath of the Indian Ocean tsunami disaster*, UN Doc. A/RES/63/137, 3 March 2009.

[118] International Law Commission*, 2006 recommendation of the Working-Group on the long-term programme of work*, UN Doc. A/61/10, 2006, Annex C, para. 1.

[119] Report of the International Law Commission, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10*, UN Doc. A/62/10, 2007, para. 375.

[120] In the preamble, the ILC notes the role of the General Assembly in encouraging the progressive development of international law and its codification in relation to disasters and specifies that "the draft articles contain elements of both progressive development and codification of international law". International Law Commission*, Report on the Work of its Sixty-Eighth Session*, UN Doc. A/71/10, 2016, Preamble 17-18.

After about ten years of work and the adoption of a first set of articles on first reading in 2014, in August 2016 the Commission completed on second reading a full set of eighteen Draft Articles (hereinafter also DAs) with commentary on the 'Protection of Persons in the Event of Disasters' and, in accordance with article 23 of its statute,[121] recommended to the UN General Assembly the elaboration of a convention based on the draft articles thereof.[122] On 20 December 2018, the General Assembly decided[123] to include the Draft Articles in the provisional agenda of its seventy-fifth session held in November 2020 that, however, came to no avail.[124] Against this background, the work of the ILC appears relevant not only for its attempt to overcome the legal uncertainties which still characterise international disaster law by proposing elements of progressive development, but also because it could represent the concrete starting point for the elaboration of a universal flagship treaty in this field.[125]

3.2.1 Content of the Draft Articles as adopted by the ILC on second reading

The Draft Articles endeavour to provide a legal systematisation of the main issues and "to facilitate the adequate and effective response to disasters, and reduction of the risk of disasters, so as to meet the essential needs of the persons concerned, with full respect for their rights" (DA 2). In a nutshell, this provision encompasses some of the main topics addressed and challenges faced in the law-making process due to diverging perspectives.

First, the Commission had to tackle the hard task of framing the field of analysis and, thus, to identify the legal definition of the term 'disaster'.[126] Initially, it was proposed to limit the scope *ratione materiae* to natural disasters or to natural components of broader emergencies, since these are perceived as

[121] UN Doc. A/71/10, cit., para. 46.

[122] UN General Assembly, *Statute of the International Law Commission*, Resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981.

[123] UN General Assembly, *Protection of persons in the event of disasters*, Resolution 73/209 of 20 December 2018, A/RES/73/209.

[124] During the debate, multiple and divergent statements were made by the States' representatives. For details, see UN General Assembly, Summary record of the 17th meeting, 11 November 2020, UN Doc. A/C.6/75/SR.17.

[125] G. Bartolini, "A universal treaty for disasters? Remarks on the International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters", in *International Review of the Red Cross*, 99(3), 2017, pp. 1103-1137; "Thematic Section: The Draft Articles of the International Law Commission on the 'Protection of Persons in the Event of Disasters'", in *Yearbook of International Disaster Law*, 2018.

[126] G. Bartolini, "La definizione di disastro nel progetto di articoli della Commissione del diritto internazionale", in *Rivista di Diritto Internazionale*, 98, 2015, p. 156.

a more immediate need.[127] However, it was soon recognised that to establish a clear-cut distinction between natural and man-made catastrophes was both practically and logically difficult, given the lack of a generally accepted definition of the term 'disaster' in international law. Therefore, in his Preliminary Report, Mr. Valencia-Ospina proposed a broader approach by observing that, since it is not always possible to maintain a clear delineation among causal factors, it was inappropriate to distinguish among various types of disasters because of their different origins. Besides, he stressed that "the need for protection can be said to be equally strong in all disaster situations"[128] and, consequently, widening the scope of the analysis was approved by considering all different kinds of disasters, including 'complex emergencies', with the exception of armed conflicts *per se*.[129] By taking these elements into account, the definition of the term 'disaster' adopted by the ILC reads as follows: "a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society."[130]

At first sight, while encompassing only particularly significant events, this definition welcomes a very broad approach, by indicating separate but substantially all-embracing types of possible adverse effects, including environmental damage. The reference to a 'calamitous' event has then served to establish a threshold whereby only extreme events are covered, as embodied in the Resolution on Humanitarian Assistance adopted by the Institute of International Law. However, no limitation is included regarding the origin of the event, i.e. whether they are natural or man-made, thus recognizing the fact that disasters are often the product of a complex set of causes that can include both natural elements and factors deriving from human activity. Moreover, nothing is specified regarding a necessary cross-border characteristic of the event for the purpose of the Draft Articles. Therefore, the Commission wanted to avoid the limitations imposed by some treaties which are only applicable in cases of disasters due to human activities such as technological ones or, on the contrary, only in the case of natural events, as set in the South Asian Association for Regional Coopera-

127 UN Doc. A/61/10, cit., Annex C, para. 2.

128 UN Doc. A/CN.4/598 para. 49.

129 Indeed, Article 18 of the Draft Articles denies any application of the dispositions in question in case of armed conflict by laying down that "the present draft articles do not apply to situations to which the rules of international humanitarian law are applicable." For comments, G. Bartolini, "Il progetto di articoli della Commissione del diritto internazionale sulla 'Protection of Persons in the Event of Disasters'", in *Rivista di Diritto Internazionale*, 100(3), 2017, pp. 677-718.

130 UN Doc. A/71/10, Draft Article 3.

tion (SAARC) Treaty.[131] Finally, it is worth noting that the ILC includes calamitous events which do not necessarily cause human suffering, but only cause the destruction or loss of goods, property, and environmental damage. Indeed, a strictly environmental disaster also requires the protection of individuals because, as stated by the International Court of Justice, "the environment is not an abstraction, but represents the living space, quality of life and the same health of humans, including unborn generations."[132] Material and environmental losses are thus inextricably linked to human life and health so that protecting individuals is justified in the aftermath of such events.

Ratione temporis, the scope of the DAs covers not only disaster response, but also the pre- and the post-disaster phases thus paying attention to the legal dimension of the overall disaster-cycle as enshrined by the 2015 Sendai Framework for Disaster Risk Reduction (DRR) endorsed by the UN General Assembly.[133] It is not a coincidence that DA 9 identifies the obligation for each State as to "reduce the risk of disasters by taking appropriate measures", and to act primarily at the domestic level "to prevent, mitigate, and prepare for disasters". Therefore, this provision represents a cornerstone of the text, making it capable of complementing non-binding approaches pursued at the international level such as that enshrined in the Sendai Framework.

This extended temporal perspective is also visible in the scope *ratione loci* of the DAs which is not limited to the activities performed in the areas where the disaster occurs but also covers those within assisting and transit States, and more generally the international community as a whole when DDR measures must be implemented. Finally, concerning the scope *ratione personae*, the DAs do not limit their application to States, but do consider all the different actors that may be involved in the whole disaster-cycle management, such as intergovernmental organizations, NGOs and other non-State entities that have specific competences in providing relief and assistance.[134]

According to the Commentary provided by the ILC, the legal core of the Draft Articles is built on a strong human rights-based approach[135] which frames

[131] Moreover, during the 2013 Tokyo session the *Institut de droit international* decided to establish a new commission on "Natural Disasters and International Law" which still lacks a structure and a Rapporteur.

[132] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory opinion, 8 July 1996, para. 29.

[133] Sendai Framework for Disaster Risk Reduction 2015-2030, A/CONF.224/CRP.1, 18 March 2015.

[134] See International Law Commission, *Sixth report of the Special Rapporteur on the protection of persons in the event of disasters*, UN Doc. A/CN.4/662, 2013, para. 101-108.

[135] R. McDermott, "The Human Rights Approach of the International Law Commission in its

and interprets the relationship between rights and obligations according to a vertical and horizontal perspective: rights and obligations of States towards persons in need of protection on the one hand, and rights and obligations among States on the other hand.

In dealing with the vertical approach, the ILC intended to establish a general framework of reference which embodied the increasing positive tension towards the need to respect and protect some fundamental human rights.[136] Accordingly, DA 4[137] addresses the principle of human dignity as the core principle that underpins international human rights law. In the context of the protection of persons in the event of disasters, human dignity is situated as a guiding principle both in the case of any actions to be undertaken in the context of relief provision, and in the ongoing evolution of laws addressing disaster response. Its complexity is then reflected in the combined use of the terms 'respect and protect' which connote both the negative obligation to refrain from injuring the inherent dignity of the human person and the positive obligation to act to protect human dignity.

The intimate connection between human rights and the principle of human dignity resides in DA 5[138] which seeks to reflect the broad entitlement to human rights protection held by those affected by disasters. Moreover, in the Commentary to the Draft Articles it is underlined that the general reference to 'human rights' indicates the intention to refer to the broad field of human rights obligations, without seeking to specify, add to, or qualify those obligations. This is also confirmed by the inclusion of the expression "in accordance with international law", that includes those provisions set in international treaties and reflected in customary international law, as well as assertions of best practices and soft law instruments concerning the protection of human rights.[139] Last but not least, DA 6[140] conveys the rationale underpinning the Draft Articles – i.e. the protec-

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Work on the Protection of Persons in the Event of Disasters", in F. Zorzi Giustiniani *et al.* (eds), *Routledge Handbook of Human Rights and Disasters*, cit., pp. 84-97.

[136] D. Tladi, "The International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters: Codification, Progressive Development or Creation of Law from Thin Air?", in *Chinese Journal of International Law*, 16(3), 2017, pp. 425-451.

[137] Draft Article 4: "The inherent dignity of the human person shall be respected and protected in the event of disasters."

[138] Draft Article 5: "Persons affected by disasters are entitled to the respect for and protection of their human rights in accordance with international law."

[139] UN Doc. A/71/10, cit., p. 31.

[140] Draft Article 6: "Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable."

tion of persons during humanitarian assistance operations in the event of disasters – by extending the key humanitarian principles applicable to humanitarian interventions, that are the principles of humanity, neutrality and impartiality, also to disaster situations. Besides these cardinal principles, the Commission has also included the principle of non-discrimination on the grounds of ethnic origin, sex, nationality, political opinions, race, and religion[141] as already stated by the Institute of International Law in its 2003 Resolution.

In order to ensure adequate protection to the victims of a disaster according to the above-mentioned requirements, the ILC has thus introduced some specific provisions on States' duties by making international solidarity and cooperation functional elements of the whole legal architecture. As proof of this, the first and foremost duty on States enshrined in the work of the ILC is that to cooperate (DA 7).[142] Even though the identification of a specific obligation of cooperation in this area has not been welcomed by some States, the ILC did not take into account their concerns. In fact, as made evident in its Commentary, cooperation is a *conditio sine qua non* to successful relief actions because of the multiple actors involved in international disaster relief efforts, usually including several States as well as potentially numerous relief organizations.[143] Subsequently, DA 8[144] seeks to clarify the various forms of cooperation among assisting actors in the context of the protection of persons in the event of disasters by providing a non-exhaustive list of illustrative instruments. Clearly, the forms of cooperation to be deployed depend on a range of factors, including, *inter alia*, the nature of the disaster, the needs of the affected persons, and the capacities of the affected State and of the other assisting actors involved.

Such a horizontal perspective, which inextricably links all the subjects involved in disaster response, is also evident in the following provisions that, ac-

[141] According to the ILC, this list is not exhaustive as it can include other grounds of discrimination, as affirmed *inter alia* in the 1949 Geneva Conventions, common Article 3, para. 1; Universal Declaration of Human Rights, General Assembly resolution 217 (III) of 10 December 1948, Article 2; International Covenant on Civil and Political Rights, Article 2, para. 1; International Covenant on Economic, Social and Cultural Rights, Article 2, para. 2. See UN Doc. A/71/10, cit., p. 34.

[142] Draft Article 7: "In the application of the present draft articles, States shall, as appropriate, cooperate among themselves, with the United Nations, with the components of the Red Cross and Red Crescent Movement, and with other assisting actors."

[143] UN Doc. A/71/10, cit., p. 36.

[144] Draft Article 8: "Cooperation in the response to disasters includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources."

cording to a 'check and balances' structure,[145] establish duties both on the affected State and on the assisting actors.

In particular, DA 10,[146] para. 1, reflects the obligation of an affected State to protect persons and to provide disaster relief and assistance in accordance with international law and, in para. 2, entrusts the affected State with the primary role in disaster relief assistance. However, for the purposes of the present work, the most relevant provision is contained in DA 11[147] which prescribes a clear duty to seek assistance when the affected State is unable to cope with the consequences of an overwhelming disaster. In order to rebalance this strong obligation, DA 13[148] introduces the crucial requirement of consent from the affected State to external assistance thereby creating a sort of qualified 'consent regime' in the field of disaster relief operations. However, it also stipulates that consent to external assistance shall not be withheld arbitrarily thus trying to overcome the general unclear position of international law in this issue. Therefore, as specified in the ILC Commentary to the Draft Articles, a possible withholding of international assistance may be justified when the affected State is capable and willing to provide an adequate and effective response to a disaster on the basis of its own resources, when the affected State has accepted appropriate and sufficient assistance from elsewhere or, lastly, in the case of no *bona fide* offers.[149]

As a complement to the provisions concerning rights and duties of the affected State, the Draft Articles also try to clarify the position of the assisting actors. In particular, DA 12[150] introduces the opportunity for States, the United Na-

[145] G. Bartolini, "The Draft Articles on "The Protection of Persons in the Event of Disasters": Towards a Flagship Treaty?", in *EJIL:Talk!*, 2 December 2016.

[146] Draft Article 10: "1. The affected State has the duty to ensure the protection of persons and provision of disaster relief assistance in its territory, or in territory under its jurisdiction or control. 2. The affected State has the primary role in the direction, control, coordination and supervision of such relief assistance."

[147] Draft Article 11: "To the extent that a disaster manifestly exceeds its national response capacity, the affected State has the duty to seek assistance from, as appropriate, other States, the United Nations, and other potential assisting actors."

[148] Draft Article 13: "The provision of external assistance requires the consent of the affected State. 2. Consent to external assistance shall not be withheld arbitrarily. 3. When an offer of external assistance is made in accordance with the present draft articles, the affected State shall, whenever possible, make known its decision regarding the offer in a timely manner."

[149] Moreover, Draft Article 15 addresses the establishment of conditions by affected States on the provision of external assistance on their territory. It affirms the right of affected States to place conditions on such assistance, in accordance with the present draft articles and applicable rules of international and national law. The draft article indicates how such conditions are to be determined and requires the affected State, when formulating conditions, to indicate the scope and type of assistance sought. See UN Doc. A/71/10, cit., p. 61.

[150] Draft Article 12: "1. In the event of disasters, States, the United Nations, and other potential

tions, and other potential assisting actors to offer assistance. Whenever a request for help is made by the affected State, it sets the obligation to give due consideration to the request and inform the national authorities of their decision. As for the rules dealing with 'operational provisions' regarding international assistance, the subsequent DAs provide a general point of reference. Indeed, they combine the interests of affected States, with issues such as the quality of assistance[151] with the interests of the assisting actors – whose activities should be facilitated by the very affected State[152] – as well as the protection of relief personnel, equipment and goods.[153] Finally, DA 17[154] explores the termination of assistance, by improving the content of the provision adopted on the first reading, in order to favour the appropriate management of this critical phase, which might negatively affect the victims of disasters.

3.2.2 A critical assessment of the ILC Draft Articles

The ILC's project certainly represents an important contribution to the development of a corpus iuris applicable in case of disasters, either as a tool for the determination of rules of law or, possibly, as a formal source of international law. As matter of the fact, the UNGA's long-established reluctance to adopt treaties on the basis of the draft articles elaborated by the ILC discourages this possibil-

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assisting actors may offer assistance to the affected State. 2. When external assistance is sought by an affected State by means of a request addressed to another State, the United Nations, or other potential assisting actor, the addressee shall expeditiously give due consideration to the request and inform the affected State of its reply."

[151] Draft Article 14: "The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles, applicable rules of international law and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought."

[152] Draft Article 15: "1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance, in particular regarding: (a) relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and (b) equipment and goods, in fields such as customs requirements and tariffs, taxation, transport, and the disposal thereof. 2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law."

[153] Draft Article 16: "The affected State shall take the appropriate measures to ensure the protection of relief personnel and of equipment and goods present in its territory, or in territory under its jurisdiction or control, for the purpose of providing external assistance."

[154] Draft Article 17: "The affected State, the assisting State, the United Nations, or other assisting actor may terminate external assistance at any time. Any such State or actor intending to terminate shall provide appropriate notification. The affected State and, as appropriate, the assisting State, the United Nations, or other assisting actor shall consult with respect to the termination of external assistance and the modalities of termination."

ity. Moreover, not all the States are fully in agreement with the final content of the DAs which, apparently, seems to downsize the principle of State sovereignty by imposing stringent duties on States. However, even though the DAs are characterised by a great deal of positive elements, it is impossible to ignore that the very content of the DAs reveals that the traditional approach which places sovereignty at the centre of the whole legal architecture is still very strong.

The first point to be tackled concerns the definitional elements adopted by the ILC. Indeed, although it looks at already established treaty and customary law, DA 3 presents some important weaknesses. On one hand, unlike the Tampere Convention, the project adopted makes no distinction between the so-called sudden-onset emergencies, identifiable in the classic hypothesis of an earthquake or volcanic eruptions, and the slow-onset calamities such as drought and famine. The applicability of its rules to situations other than one single episode is thus left unexplored. Therefore, a more precise explanation could be useful to have a wider panorama of the circumstances the DAs apply to. On the other hand, the text of DA 3 and the Commentary do not make the meaning of the additional criterion to the simple occurrence of a catastrophe – that is the serious disruption of the functioning of the society – clear. Although it is already present in some international legal instruments, such as the notable Tampere Convention, the concept of 'society' may raise some doubts and provoke different assessments. In this regard, it should be clarified whether this term refers to the national community or, conversely, to the more restricted geographical areas and communities directly affected by the event.[155] Even though it may seem to be a detail, from a juridical and practical point of view this distinction is extremely relevant to determine when and, consequently, how to organise the intervention. It is clear that if the term 'society' refers to the entire national population, the margin of implementation of the DAs is particularly narrow.

In addition to these critical points relating to the definitions, a more careful analysis of the DAs reveals a number of shortcomings which are undoubtedly the result of the ILC's efforts to give due consideration to the positions of all the involved actors. As already pointed out, the project approved on second reading is clearly structured in a logical way, starting from a rights-based approach,

[155] G. Bartolini, "La definizione di disastro nel progetto di articoli della Commissione del diritto internazionale", cit., pp. 158-160. Moreover, see S. D. Murphy, "Protection of Persons in the Event of Disasters and Other Topics: The Sixty-Eighth Session of the International Law Commission", in *American Journal of International Law*, 110(4), 2017, pp. 718-745; J. M. Thouvenin, "La définition de la catastrophe par la CDI: vers une catastrophe juridique?", in P. Sanjuán, J. M. Thouvenin (eds), *International Law and Disasters*, Grupo Editorial Ibáñez, 2011, p. 41.

and continuing with some obligations which are strictly linked to this general standpoint. However, the Draft Articles do not seem to address all the issues that many scholars deem relevant.

Firstly, even though in the preliminary report Mr. Valencia-Ospina acknowledged the importance of the existence of a right to humanitarian assistance, the Commission – in order to preserve the long-established understanding of sovereignty and non-intervention[156] – has not mentioned it in the last version thereby missing the opportunity to reference humanitarian assistance as a right *per se*.[157] In addition, the assertion that people affected by disasters shall be protected and respected in their dignity and rights appears too vague, by remaining more of a declaration of principles than a binding rule. Indeed, it is not clear what rights are more significant than others for the ultimate purpose of the DAs that is to provide a secure legal space to ensure protection to the victims of a disaster.

There is no doubt that it is possible to identify, in general terms, a list of rights applicable in case of catastrophe from other international legal instruments. However, with an intended objective of elaborating a universal treaty on disaster law, it would have been better if the work of the ILC had been more comprehensive in illustrating the role played by human dignity and rights in a more practical way. Moreover, the drafting technique used leaves some issues unresolved, i.e. regarding human rights derogations and limitations, rights relevant in case of disaster, extraterritoriality, as well as their application *vis-à-vis* international organizations and NGOs, which could have been properly addressed in the Commentary.[158] An inevitable result of such a weakness is the lack of any indication regarding the viable consequences that may ensue from a violation of such rights, including the ability of rights holders to claim their own rights, thereby leaving this central issue completely unregulated. Therefore, although the purpose of the draft articles is to facilitate an adequate and effective response to disasters by taking in account the essential needs and rights of the victims, it cannot be said that the result follows a strictly rights-based approach or that it at least clarifies its legal implications.

With reference to the second part of the DAs concerning the horizontal

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156 UN Doc. A/CN.4/598, cit., para. 54.

157 F. Zorzi Giustiniani, "The Works of the International Law Commission on 'Protection of Persons in the Event of Disasters'. A Critical Appraisal", in A. De Guttry, M. Gestri, G. Venturini (eds), *International Disaster Response Law*, cit., p. 73.

158 G. Bartolini, T. Natoli, A. Riccardi, *Report of the Expert Meeting on the ILC's Draft Articles on the Protection of Persons in the Event of Disasters*, International Law and Disasters Working Papers Series 03, 2015.

relationship between the affected State and the assisting actors, it is worth noting the way in which the ILC balances 'the stick and the carrot'. As for the affected State, the ILC has adopted a reasoning essentially based on the principle of State sovereignty. But, alongside the primary role of the national authorities in directing, controlling, coordinating, and supervising relief assistance, DA 10 introduces a positive duty to protect the persons within the affected territory thus making sovereignty a source of duties and not just of prerogatives. Similarly, while DA 11 sets the crucial obligation to seek assistance when the disaster clearly exceeds the national response capacity of the affected State, it retains the power to refuse, even though in *bona fide*, external assistance. As for third countries and other assisting actors, they have the right to offer assistance before the affected State requires it and, at a later stage, the duty to give due considerations to the requests made by the affected State. This could apparently imply that they are only justified to not provide help in reasonable situations.

Apart from these positive innovations which mark a very important step forward in the field of international disaster law, the mentioned provisions contain some elements that should need further explanation. In the first place, despite the notable introduction of a duty to seek for assistance as primary obligation of international law, DA 11 fails to deal with three dimensions of this obligation. First of all, the criteria to establish the gravity of the disaster and whether the internal capacity of a State has been exceeded should be expounded thus avoiding just relying on a self-determinative test which excludes any potential external evaluation. On some occasions the UN agencies or relevant international organisations could be, instead, in a better position than the affected State to make such an assessment because of their technical capacity and expertise. Secondly, some kind of reference to the existence of some room for manoeuvre for the ILC to progressively argue for an implicit request or an implicit acceptance of international assistance by the affected State in some extreme cases would have been welcomed. Even more important, is the problem which arose from the human rights provision, that is the lack of legal consequences stemming from the violation of the duty to seek for assistance.

Moreover, even though the ILC has acknowledged that States' domestic spheres are by no means absolute, State consent remains a necessary requirement and prerequisite for external interventions of disaster relief. A similar provision is contained in the UN General Assembly Resolution 46/182,[159] but while it affirmed that assistance *should* be provided with State's consent, DA 12

[159] UN General Assembly, Resolution 46/182, cit.

establishes a clear requirement. Hence, the fact that State consent and discretion which may occasionally limit the provision of assistance to the victims of a disaster in countries reluctant to open the doors to external actors has not been overcome. On the contrary, it has been reinforced and set as a limit of the scope both of the duty to cooperate and of that to seek for assistance. The only restriction is contained in DA 12, para. 2, which establishes that consent to external assistance shall not be withheld arbitrarily, thereby reflecting "the dual nature of sovereignty as entailing both rights and obligations."[160] Despite the fact that in the Commentary the ILC underscores that both the refusal of assistance and the failure of an affected State in *mala fide* constitutes a violation of the DAs, major problems remain again with reference to the authority that can legitimately evaluate the arbitrariness of a refusal and, ultimately, what the possible legal consequences may be as a result of its violation. This means that, despite the events in Myanmar, the Commission has failed to go beyond the well-established construction of international law which focuses on State sovereignty.

Against this background, what the international community can do and what kind of measures it can take if the State stricken by a disaster is unable or unwilling to ask for external assistance is also doubtful. In this regard, it is necessary to stress that DA 12 is quite vague for a number of details which concern both the offer and the provision of assistance that, naturally, set themselves on two different stages. As established and described in DA 12, para. 1, the contribution of the international community in the first stage only relies on a right, exemplified by the expression "may offer", and is thus left to the discretion of the assisting actors. Moreover, the wording of para. 2 does not clarify whether they have a duty to provide assistance when requested by the affected State or not. In fact, the structure and the content of DA 12 suggest that the assisting entities continue to only have a right, or at least a moral duty, "to give due consideration" and provide for assistance. This is also substantiated by the very confused character of DA 12 with regard to the identification of the assisting entities. Indeed, not all the actors involved are on the same footing under international law, especially when the principle of sovereignty is concerned: only States and International Organizations (with legal capacity) can be responsible for unlawful acts against a State, whereas the same cannot be said for NGOs. As a consequence, it would be unrealistic to interpret DA 12, para. 2, as introducing a legal duty to provide assistance on all the aforementioned assisting actors.

[160] International Law Commission, *Draft Articles on the Protection of Persons in the Event of Disasters adopted by the Commission on first reading*, UN Doc. A/69/10, 2014, p. 124.

This conclusion confirms the asymmetric structure which characterises the whole DAs: while on the one hand, the affected State has to respect a number of obligations, including that to seek assistance, the other international subjects, and in particular third countries, only have a right to respond to the requests for assistance provided by the affected State itself. Hence, despite the introduction of a clear duty to seek for assistance as additional element of State sovereignty, it cannot be ignored that the project of the ILC reflects a strong imbalance between rights and obligations on States, which ultimately risks, in this game of consent and sovereignty, limiting the provision of an effective and adequate assistance to the affected people needing help. Whenever the draft articles were used to embark on a treaty-making process, the final outcome risked not entailing well-balanced duties of solidarity on States.

Against this uncertain international legal framework – which is still anchored in the principle of State sovereignty over solidarity – regional integration organisations, which have been included within the scope *ratione personae* of the DAs, may play a very relevant role not only from a practical, but also from a legal point of view. Indeed, as regulatory regimes based on cooperation, they might be the perfect hubs both to establish instruments of interventions in the event of a disaster, and in extreme cases of reshaping States prerogatives and introducing, *inter alia*, specific duties of solidarity among the Member States for the sake of the cooperation process. Thus, they can be examples of regimes where solidarity can play an extraordinary role not only as an interpretative tool, but also as normative content. Indeed, when a community sharing the same values and principles which creates sympathy between the partners is built, the said community can choose to be based upon solidarity thus making it a combination of *lex lata* and *lex ferenda*. Moreover, if they are in possession of adequate instruments, in the future regional organisations could play a relevant role in the field of disaster response thereby becoming themselves subject to obligations of solidarity.

3.3 Regional cooperation in responding to disasters: a stairway to solidarity?

Over recent decades, regional and sub-regional organisations have increased their role in law-making to support States as well as external actors on disaster preparedness and response. Clearly, they differ in terms of effective capacities and systems of coordination, but their contribution is becoming noteworthy with particular reference to the opportunity to establish regional mechanisms of coordination as well as specific regulatory frameworks on financial and in-kind assistance.

a) Disaster response in the Americas

There are many regional organisations in Latin America and the Caribbean focused on a variety of issues such as governance, development, health, education, and poverty alleviation, that have also long supported comprehensive disaster management policies and tools. The first one to be presented is the Organisation of American States (OAS)[161] which in 1991 adopted the Inter-American Convention to Facilitate Disaster Assistance that entered into force in 1996.[162] The Convention sets out modalities to request and offer assistance between Member States in the event of a disaster, by committing them to designate national coordinating authorities to manage humanitarian assistance within their jurisdiction, and calling on, *inter alia*, the affected States to facilitate assisting States, by easing the entry of personnel, goods and equipment, providing for their security, and shielding them and their personnel from liability in national courts.[163] Moreover, the Convention requires assisting States and their personnel to cover their own costs, respect any designated restricted areas and abide by national law.[164] The Inter-American Convention is not, however, just addressed to States but also to non-State actors, such as humanitarian NGOs: if they have an express agreement with the affected State or if they are included within the mission of an assisting State. Notwithstanding the great potentiality of this Convention, to date, just six parties (Panama, Peru, Uruguay Colombia, Dominican Republic and Nicaragua) have ratified it. Furthermore, apparently it has never been implemented, even though in 2007 the representatives of the OAS secretariat recommended States consider reviving their interest in the convention, with regard to both its ratification and implementation.[165]

At a sub-regional level, the most notable example of a normative instrument dealing with disaster management is the Agreement Establishing the Caribbean Disaster Emergency Response Agency (CDERA)[166] from the Member States of the Caribbean Community (CARICOM). The Agreement entrusts the Agency

[161] The OAS is the world's oldest regional organisation, officially established in 1948 but dating back to 1889.

[162] Additionally, the OAS General Assembly has adopted a number of resolutions related to regional cooperation in disaster response, including through the promotion of the "White Helmets Initiative" and the development of an Inter-American Emergency Fund (FONDEM) to provide support to affected States.

[163] Convention to Facilitate Disaster Assistance, Articles 5, 6, 9 and 10.

[164] Convention to Facilitate Disaster Assistance, Article 16.

[165] International Federation of Red Cross and Red Crescent Societies, *Report of the Americas Forum on International Disaster Response Laws, Rules and Principles*, 2007, points 9-10.

[166] Agreement Establishing the Caribbean Disaster Emergency Response Agency, February 26, 1991 (hereinafter "CDERA Agreement").

with building national capacities for disaster response, but also with coordinating regional assistance efforts by serving as an intermediary with other governmental and non-governmental organisations providing relief.[167] For their part, Member States commit themselves to undertake a number of steps to ensure that their national disaster response systems are adequately prepared, both institutionally and legally, to deal with disasters within their borders and also to provide external assistance upon request by CDERA's coordinator.[168] To guarantee more effective inter-State assistance, the parties are expected to reduce legal barriers to the entry of personnel and goods, provide protection and immunity from liability and taxation to assisting States and their relief personnel, and facilitate transit to third countries affected by disasters.[169] Moreover, assisting States and their personnel shall comply with national law, thus maintaining the confidentiality of sensitive information, deploying military forces only with the express consent of the affected State, and covering their own costs.[170] Finally, the 1991 agreement provides for the establishment of an Emergency Assistance Fund to finance expenses in disaster assistance. Currently, the CDERA Agreement counts sixteen Member States[171] and is comprised of a Council of heads of State, a board of directors consisting of the directors of national disaster agencies, four regional focal points, and a secretariat as a coordinating unit. In recent years, its work has turned increasingly towards disaster risk reduction and, as a result, discussions are now underway to amend the CDERA Agreement to give it a greater position in that direction.

In the same vein, in 1999, the Association of Caribbean States (ACS), adopted its own treaty for regional cooperation on natural disasters (hereinafter, ACS Agreement).[172] In comparison to the CDERA Agreement, the ACS Agreement contains a greater number of aspirations and ideal achievements than the concrete binding norms. Indeed, according to the agreement's text, Member States are encouraged to promote "the formulation and implementation of standards and laws, policies and programmes for the management and prevention of natural

[167] Ibid., Article 4.
[168] Ibid., Article 13.
[169] Ibid., Articles 22 and 23.
[170] Ibid., Articles 18, 19 and 21.
[171] The States that have ratified the Agreement are: Anguila, Antigua and Barbuda, Bahamas, Barbados, Belize, British Virgin Islands, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts and Nevis, Santa Lucia, St. Vincent and the Grenadines, Trinidad and Tobago and Turcs and Caico.
[172] Agreement between Member States and Associate Members of the Association of Caribbean States for Regional Cooperation on Natural Disasters, April 17, 1999 (not yet in force).

disasters, in a gradual and progressive manner" and identify "common guidelines and criteria", *inter alia*, on the classification and management of humanitarian supplies and donations. From a practical point of view, the agreement would assign the already existing ACS's Special Committee responsible for natural disasters with a number of tasks to facilitate information sharing and technical assistance between Member States. However, notwithstanding the encouragement to reach the necessary ratifications for its entry into force (that, according to Article of the ACS Agreement shall be seventeen), the ACS Agreement currently has fifteen ratifications and is, therefore, still lacking binding force.

b) Disaster response in Asia

Given the vastness of the Asiatic region and the tendency to suffer from devastating natural disasters there is not only one single region-wide instrument, but several important sub-regional instruments and mechanisms which have been promoted to reinforce co-operation in the area of disaster management.[173] Among others, it is first relevant to recall the Asian Disaster Reduction Centre located in Kobe that was created in 1998 with the mission to enhance the disaster resilience of the twenty-nine Member States,[174] to build safe communities, and to create a society where sustainable development is possible. Another instrument which has proved to be quite successful at a continental level is the biennial Asian Ministerial Conference on Disaster Risk Reduction (AMCDRR) which has met since 2005 and is open to participation by national governments, international interested institutions and other stakeholders, including representatives of relevant NGOs and civil society organisations. Over the years, it has been effective in promoting public awareness of the need to increase cooperation and speed up the preparation of national action plans.

At a sub-regional level, the most remarkable instruments have been developed within the Association of South-east Asian Nations (ASEAN) which in 1976 made their first joint commitment to "extend, within their capabilities,

[173] The West Asia sub-region has not been actively involved in promoting reinforced forms of cooperation at a sub-regional level, although there are ongoing efforts, especially by the Gulf Cooperation Council to create early warning mechanism, such as the Regional Early Warning system for drought monitoring and forecasting by the Arab Centre for the Studies of Arid Zones and Dry Lands.

[174] The participating countries are Armenia, Azerbaijan, Bangladesh, Bhutan, Cambodia, China, India, Indonesia, Japan, Kazakhstan, Kyrgyz, Laos PDR, Malaysia, Maldives, Mongolia, Myanmar, Nepal, Pakistan, Papua New Guinea, Philippines, Republic of Korea, Russian Federation, Singapore, Sri Lanka, Tajikistan, Thailand, Uzbekistan, Viet Nam, Yemen.

assistance for relief of Member States in distress."[175] In the same year, they adopted the Declaration on mutual assistance on natural disasters, by committing to take the necessary administrative steps to facilitate the movement of relief vehicles, personnel, goods, and equipment towards the affected State.[176] Similarly, three years later, ASEAN adopted the binding Agreement on the Food Security Reserve, committing Members to maintaining dedicated food stocks in case of emergency in another Member State.[177] In order to give more effectiveness to the 1976 Declaration, in 2003 the Committee on Disaster Management (ACDM) was created to assume overall responsibility for coordinating and implementing regional activities. One of the major results achieved by the ACDM has been the launching of an ASEAN Regional Programme on Disaster Management (ARPDM) to provide a framework for cooperation and to create a platform for collaboration between ASEAN and other relevant international organisations, such as the Pacific Disaster Centre, the United Nations Office for Co-ordination of Humanitarian Affairs, UNHCR, UNICEF and IFRC.

In July 2005, ASEAN adopted a second and more comprehensive treaty in this area, the Agreement on Disaster Management and Emergency Response (hereinafter, 'the ASEAN Agreement').[178] The ASEAN Agreement sets out six overarching principles which deserve to be mentioned because they reflect the whole international approach illustrated in the present chapter: respect for national sovereignty; the overall direction and control of relief by the affected State; strengthening regional cooperation; priority to prevention and mitigation; mainstreaming disaster risk reduction in development; and involving local communities and civil society disaster planning. Against this background, it is particularly significant that the ASEAN Agreement establishes a number of specific measures related to smoothing barriers to international response that include the identification of available assets, specific procedures to request and offer disaster assistance, provisions on the direction and control of both civilian and military assistance, as well as important new institutional measures, including the establishment of an emergency fund and a new ASEAN Coordinating Centre for Humanitarian Assistance on Disaster Management.[179] Moreover, under the Agreement, affected States commit themselves to "facilitate the entry into, stay in and departure from its territory of personnel and of equipment,

[175] Declaration of ASEAN Concord.
[176] ASEAN Declaration on Mutual Assistance on Natural Disasters, June 26, 1976.
[177] Agreement on the ASEAN Food Security Reserve, October 4, 1979.
[178] Ibid., Article 3.
[179] Ibid., Articles 10-12.

facilities and materials involved or used in the assistance"; protect assistance personnel, goods, and equipment; and provide them with other "local facilities and services for the proper and effective administration of the assistance."[180] Assisting entities – which include both States and international organisations – are committed to ensure that their relief goods "meet the quality and validity requirements of the Parties concerned for consumption and utilization;" and to refrain from "any action or activity incompatible with the nature and purpose" of the Agreement.[181] The ASEAN Agreement entered into force on 24 December 2009 and a number of measures of implementation have already begun.

Similar instruments have been adopted by the members of the SAARC which in 2006 created the Disaster Management Centre in New Delhi. Moreover, the SAARC has worked on an agreement outlining a Natural Disaster Rapid Response Mechanism which obliges the SAARC Members to take legislative and administrative measures to implement agreement provisions,[182] including the measures to request and receive assistance; conduct needs assessments; mobilise equipment, personnel, materials and other facilities; make regional standby arrangements, including emergency stockpiles; and ensure quality control of relief items. Signed in the Maldives, in November 2011, the agreement has not yet entered into force because of the scares number of ratifications.

c) Disaster response in the Pacific region

Even though it is often treated as an add-on to Asia, the Pacific is classified as a region by the United Nations and operates as an independent regional platform under the UNISDR. The pan-regional architecture is based around two principal regional organisations, the Pacific Islands Forum (PIF)[183] and the Pacific Community (known by the acronym SPC),[184] whose collaboration is promoted through the Council of Regional Organisations of the Pacific (CROP) established in 1998.[185] Whereas the former is a political body and the PIF Secretariat

[180] Ibid., Articles 12 and 14.

[181] Ibid., Articles 12 and 13.

[182] SAARC Agreement on Rapid Response for Natural Disasters (ARRND), 2011, Article IV.

[183] The Pacific Islands Forum was founded in 1971 and its work is now guided by the Framework for Pacific Regionalism, which was endorsed by Forum Leaders in July 2014.

[184] The Pacific Community, known until 2015 as the South Pacific Commission, was founded under the Canberra Agreement in 1947 by the six participating governments that then administered territories in the Pacific Islands region, i.e. Australia, France, New Zealand, the Netherlands, the United Kingdom and the United States.

[185] The CROP comprises the heads of the intergovernmental regional organizations in the Pacific: the Forum Secretariat, Pacific Islands Forum Fisheries Agency (PIFFA), Pacific Islands Development Programme (PIDP), Secretariat for the Pacific Community (SPC), Secretariat of the Pacific

plays an important co-ordinating role in the region, the latter is a scientific and technical body that supports the Pacific region in the field of sustainable economic development, natural resource and environmental management, and human and social development. However, these organisations are extremely weak in terms of competences and opportunity of integration and cooperation. This is mainly the result of the lack of a comprehensive and uniform development in the Oceanic Pacific which embraces both wealthy States, such as Australia and New Zealand, and the so-called Small Island Developing States where the economy is essentially based on tourism and fishing.

Apart from its economic and geographic challenges, the Pacific region has the highest level of natural hazards and risks globally mainly due to the exacerbating consequences of climate change, but just recently the regional cooperation has intensified. In 1992, the governments of France, Australia and New Zealand signed the FRANZ Joint Statement on Disaster Relief Cooperation in the South Pacific, with the aim of improving the exchange of information and the coordination in providing disaster relief to Pacific Island States. As for disaster management, it must be recalled that SPC is co-convener of the Pacific Platform for Disaster Risk Management established in 2008 with the UNISDR to harmonise existing regional mechanisms for disaster risk management in the Pacific. In 2016, the Platform has provided a space for increased cooperation through the newly adopted Framework for Resilient Development in the Pacific 2017-2030.[186] The PIF Secretariat is, however, the more active subject in the field by administrating, *inter alia*, the Regional Natural Disaster Relief Fund (RNDRF) which, established in 1975, provides member countries with a readily available source of financial relief in the wake of natural disasters. In addition, in 2018 the PIF adopted the Boe Declaration on Regional Security[187] that further expands the concept of security to include explicit reference and a commitment to increasing emphasis on humanitarian assistance and cooperation in building resilience to disasters. The preamble then makes specific reference to the importance of climate change and links the declaration to the global priorities agreed at the Paris Agreement thus providing a specific regional mandate in the field. Nevertheless, both the Framework for Resilient Development and the

Regional Environment Programme (SPREP), South Pacific Tourism Organization (SPTO), University of the South Pacific (USP), Pacific Power Association (PPA) and the Pacific Aviation Safety Office (PASO).

[186] Framework for Resilient Development in the Pacific. An Integrated Approach to Address Climate Change and Disaster Risk Management (FRDP) 2017-2030, 2016.

[187] Pacific Islands Forum, Boe Declaration on Regional Security, 5 September 2018.

Boe Declaration are soft-law instruments that do not intend to establish specific obligations of solidarity and proper mechanisms for assistance. Moreover, the emergence of a greater willingness on the part of the PIF States to cooperate in their approach to DDR is tempered by the commitment within the Boe declaration to "respect and assert the sovereign right of every Member to conduct its national affairs free of external interference and coercion."[188] Besides reflecting the general approach towards the balance between sovereignty and solidarity *vis-à-vis* potential or actual disasters, this reluctance to fully embrace regional cooperation reflects both the difficulties in managing the Pacific as a region capable to talk with one single voice and the continued fear of Pacific States to be exposed to unwanted intervention from non-Pacific States.[189]

d) Disaster response in the African continent

The African continent has not been very active yet in fostering regional or sub-regional legal instruments to promote a wider and deeper cooperation in the prevention and management of natural and man-made disasters. The sole exception is the Dar es Salaam Declaration on Feeding of Infants and Young Children in Emergency Situations in Africa adopted in 1999. However, the African Union and several sub-regional organisations have express mandates in their founding instruments related to developing policies on disaster issues, by focusing mainly on risk reduction and prevention. As early as 2003-2004, the first African Regional Strategy for Disaster Risk Reduction was developed by the African Union, which does not establish a regional institutional mechanism for cooperation but is rather meant to facilitate initiatives at the sub-regional and national levels.[190] After a long period of silence, a Ministerial Conference in Disaster Risk Reduction was convened in Kenya in April 2010 thus approving an Extended Programme of Action for the Implementation of the Africa Regional Strategy for Disaster Risk Reduction (2006-2015) which has been reproduced at a sub-regional level.[191]

As for cooperation specifically in the event of a disaster, the Southern African Development Community (SADC) represents an example within the African

[188] Ibid., para. IV.

[189] W. J. Hopkin, "Pacific (2018)", in *Yearbook of International Disaster Law Online*, 1(1), 2019, pp. 366-372.

[190] T. L. Field, *International Disaster Response Law Research Report: Southern African Region*, 2003, p. 10.

[191] For further details on the sub-regional instruments concerning disaster risk reduction, A. De Guttry, "Surveying the Law", in *International Disaster Response Law*, cit., p. 17 ff.

continent. Indeed, in 1999 the SADC members adopted a Community Protocol on Health, which requires participating States to "cooperate and assist each other in the coordination and management of disaster and emergency situations" including through the development of "mechanisms for cooperation and assistance with emergency services" and regional plans for risk reduction and preparation.[192] Moreover, in 2001, the SADC planned a comprehensive disaster management strategy, by recommending considering the development of regional emergency standby teams for disaster response and to develop a dedicated regional protocol on disaster response.

e) Disaster response in the Middle East

The Middle East is widely exposed to serious natural hazards but, in comparison to the other regions already illustrated, to date cooperation among neighbouring countries is ensured by the major regional institutions of the Islamic and Arab regions that have developed disaster response management strategies and implementation plans.[193] In particular, the Organization of Islamic Conference (OIC), the League of Arab States (LAS) and the Islamic Educational, Scientific and Cultural Organization (ISESCO) are working to enable countries facing similar disaster risks or affected by transboundary disasters to cooperate effectively. Yet, a structured system that guarantees dialogue, information exchange, and strategic and operational coordination among different administrative levels and across key sectors has still to emerge. In addition, this geographical area remains quite poor in terms of hard law and soft law instruments to be used when facing a serious situation of disaster.[194] In effect, the main source that can be recalled is the Arab Cooperation Agreement on Regulating and Facilitating Relief Operations[195] adopted in 1987 by the League of Arab States and updated in 2009. Pursuant to the Arab Agreement, members pledge to "coordinate their efforts to provide all the assistance and facilities required to respond to any

[192] Southern African Development Community Protocol on Health, 1999.

[193] For insights, see The International Bank for Reconstruction and Development, Natural Disasters in the Middle East and North Africa: A Regional Overview, 2014.

[194] The legal framework is characterised more by measures intended to implement Disaster Risk Reduction than Disaster Response. In 2008, the Regional Centre for Risk Reduction (RCDRR) was established as a joint initiative among the Arab Academy for Science, Technology and Maritime Transport (AASTMT), UNISDR, and the chair of both Arab and Islamic Bureau of Environment Ministers. Moreover, in 2010 an Arab Strategy for DRR 2020 was endorsed by the Council of Arab Ministers Responsible for the Environment (CAMRE) and the Fourth Islamic Conference of Environment Ministers adopted the Islamic Strategy for Disaster Risk Reduction and Management (ISDRRM).

[195] League of Arab States Decision No. 39, September 3, 1987.

natural disaster or emergency situation" as well as to take "measures required to eliminate obstacles or difficulties which may impede the rapid access of relief teams or materials to the victims."[196] Among the measures to be deployed, the agreements lay out the reduction of customs' documentation requirements, the facilitation of quick customs clearance, the exception of relief items from customs duties and other fees or taxes, the facilitation of the entry of relief transport and the provision of entry and exit visas without undue delay as well as facilities relating to communications. In 2008, a draft Arab Protocol on Cooperation was then developed to enable immediate response within Arab countries and to transfer equipment and expertise in cases of disasters and emergencies.[197] Notwithstanding these positive elements, practice shows that cooperation is still at an embryonal stage and that further regulatory interventions would be extremely necessary in order to properly respond to serious events requiring a prompt and concrete assistance.

f) Disaster response in Europe and the NATO cooperation

On the European continent other major developments concerning disaster prevention and management have occurred under the umbrella of the Council of Europe (CoE).[198] In 1987, the CoE States created the Co-operation Group for the Prevention of, Protection Against and Organisation of Relief in Major Natural and Technological Disasters better known as the EUR-OPA Major Hazards Agreement. It was intended to be a specific intergovernmental platform for cooperation in the field of research, public information, and policy dialogue against major natural and technological disasters. Despite major difficulties due to budgetary constraints,[199] EUR-OPA cooperation has led to some significant results.[200] Its activities include studies of Member States' legal and institutional frameworks for disaster response, the development of standardised damage as-

[196] Ibid., Article 3.

[197] The Arab Strategy for Disaster Risk Reduction 2020, adopted by the Council of Arab Ministers Responsible for the Environment, Resolution n. 345, 22nd session, 19-20 December 2010.

[198] As will clarified later, the European Union has been excluded from this analysis since the framework will be illustrated in the following Chapters.

[199] Suffice to recall that Turkey decided to entirely withdraw its EUR-OPA membership from the end of 2018 thus leading to a €325.000 per year from January 2019. For greater insight on the Turkish decision, K. Dzehtsiarou, D. K. Coffey, 'Suspension and expulsion of members of the Council of Europe: Difficult decisions in troubled times", in *International & Comparative Law Quarterly*, 68, 2019, pp. 443-476.

[200] For an updated list of 2018 projects, see EUR-OPA Major Hazards Agreement, Joint Meeting of the Committee of Permanent Correspondents and Directors of Specialised Centres. Meeting Report 5-6 November 2019.

sessment models and the establishment of a regional earthquake warning system that acts as a conduit of information between affected and member states on damage and needs.

Alongside this more theory-oriented cooperation forum, the role of NATO in disaster relief cannot be disregarded. Indeed, in 1953, the NATO Member States adopted their first procedures for the NATO Cooperation for Disaster Assistance in Peacetime which in 1992 were revised to allow for assistance to also be provided to non-NATO States. Moreover, in 1998 NATO ministers adopted a policy on Enhanced Practical Cooperation in the Field of International Disaster Relief, establishing the Euro-Atlantic Disaster Response Coordination Centre (EADRCC), to coordinate disaster assistance between NATO States, and a Euro-Atlantic Disaster Response Unit (EADRU), a nonstanding group of volunteer Member States available to provide military and/or civilian assets for assistance efforts outside of NATO. The EADRCC and EADRU have played important roles in organising NATO-state assistance efforts to the United States after Hurricane Katrina and to Pakistan after the 2005 earthquake.

Another positive step was realised by the adoption of a Memorandum of Understanding on the Facilitation of Vital Civil Cross Border Transport developed to avoid administrative problems by civilian components of NATO disaster response operations that are not covered by the various NATO Status of Force Agreements, and the privileges and immunities they provide to military actors.

At the sub-regional level, the 1998 Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-Made Disasters[201] shall be recalled. The agreement – drafted in a very detailed manner to be considered immediately applicable – regulates the rights and duties of States, the transit and border crossing procedures, and the export and re-import procedures should an emergency arise in the region. In particular, it sets out procedures to request assistance, commits requesting States to "ensure unobstructed receipt and distribution of goods of assistance exclusively among the afflicted population" without discrimination and calls on them to simplify and expedite customs procedures and waive customs fees and charges. In addition, the Agreement establishes a Working Group on Emergencies to ensure

[201] Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-Made Disasters, 15 April 1998.

implementation of its provisions that has been further upgraded in 2005 by the adoption of an additional Protocol establishing a Network of Liaison Officers to improve information exchange.[202]

g) General considerations

Such a brief overview of the main instruments adopted at the regional level has made it evident that, while in some cases they remain essentially political bodies for diplomatic purposes, others are becoming more operational and genuinely effective in connection with other regional organisations and the broader international system. When a disaster strikes, regional organisations are in principle better placed to support affected States. In the first place, a regional entity can provide a suitable forum to build trust and familiarity which is not possible on a global scale, as well as to develop innovative and effective forms of collaboration in prevention, preparedness and risk management actions with specific and effective response instruments. Moreover, regional mechanisms may not only respond more quickly than international ones, but their intervention may also be politically more acceptable for Member States. Regional organisations in natural disasters could thus be the effective 'bridge' between the international and national systems. However, it has to be said that, apart from the specific instruments aimed at fostering cooperation activities among the participating States, to date the regional organisations explored are not characterised by a consolidated and multi-layered system of instruments from which to derive clear duties of solidarity on Member States.

4. Aims and research plan

The present chapter presents the theoretical premises and illustrates the state of the art of IDRL as a necessary background to better frame the content of the next chapters. Thus far, it has been determined that, to this day, there is no universal treaty comprehensively regulating disaster situations even though there are certain rules that have been codified in some multilateral treaties, at the global and regional levels, and in bilateral treaties and memoranda of understanding. This fragmentation makes the current system of international law in this area

[202] Additional Protocol to the Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-Made Disasters, 20 October 2005.

dispersed and incoherent concerning the material scope of application. In particular, the thorny issue relating to the protection of individuals in the event of disasters has been tackled, by stressing the difficult relationship which exists between sovereignty and humanitarian assistance given that disaster response falls within the jurisdiction of the State in whose territory the catastrophic event has occurred. Indeed, State sovereignty is still a long-lasting principle which prevents customary international law from establishing a duty to seek assistance and a duty to provide it when requested. Moreover, the principle of cooperation is not perceived as producing a correspondent duty to cooperate among States.

The emergence of positive obligations from the human rights doctrine and of the still debated concept of humanitarian assistance in times of peace has partially remodelled the notion of State sovereignty thereby establishing a sort of duty to protect the people affected by a disaster. It has led to a change of perspective, by shifting from a State-State relationship to a vertical one based on human rights protection. Despite this and the provisional attempts made by the ILC, the Draft Articles on the Protection of Persons in the Event of Disasters adopted in 2016 clearly reflect the rigid standpoint of States that are sceptical to renounce to their prerogatives. Moreover, the comments provided by States on the Draft Articles suggest that most of them are not inclined to accept the codification of a duty to seek for assistance.[203] As a consequence, as long as the UN General Assembly does not properly discuss a universal and comprehensive treaty in the area of humanitarian assistance in situations of disaster, the opportunity to regulate the reciprocal obligations of States in these circumstances appears really problematic and subjected to the traditional principle of State sovereignty. In fact, in situations of disaster, the notion of solidarity has not yet given rise to a comprehensive set of rules of international law, but rather to disarticulated rights of States: the right to seek assistance, the right to offer and the right to provide assistance. Since the alleged existence of corresponding obligations is still harder to recognise, it is clear that the full implementation of the positive dimension of solidarity, which would require a perfect balance between rights and obligations for all the parties concerned, has definitely not been reached at an international level.

As previously introduced, the aim of this book is to address the main features of the EU legal framework concerning disaster response in the light of

[203] In this regard, G. Bartolini, "The Draft Articles on "The Protection of Persons in the Event of Disasters": Towards a Flagship Treaty?", cit.; S. D. Murphy, "Protection of Persons in the Event of Disasters and Other Topics: The Sixty-Eighth Session of the International Law Commission", GWU Law School Public Law Research Paper No. 51, 2016.

the concept of solidarity as conceived within EU law. The Union is increasingly facing the dramatic impacts of intense and unpredictable extreme weather events and earthquakes with ensuing loss of life, destruction of property and cultural heritage. Just in 2017, over 200 people were killed by natural disasters and millions of direct economic damages have been registered. Moreover, at the time of writing, several EU Member States have been facing the consequences of the COVID-19 pandemic which is bringing to light multiple challenges for the future of the Union, among which the identification of a common understanding of solidarity. In effect, the references to this notion have rapidly multiplied in different institutional forums and related documents, from those adopted by the European Commission, to the declarations of the Heads of States and Government within the European Council and the resolutions of the European Parliament.[204]

Against this background, it is thus essential to evaluate from a legal point of view the role of solidarity *vis-à-vis* situations of emergency. The book explores the legal nature of solidarity within EU disaster response law in order to offer a different reasoning regarding its normative effect by exploring the existence of specific obligations on Member States and on the Union in the event of serious disasters. Since the final goal is to challenge the legal content of solidarity within the EU legal order in this specific field, the analysis only takes into account the instruments that can be activated in cases of disasters occurring within the Union and thus in favour of its Member States. By premising that the terms 'emergency' and 'crisis' are used as synonyms of the term 'disaster', the work is organised according to the following structure.

In order to present the particular content of solidarity within the EU legal order, Chapter II focuses on the nature of this central concept within the whole political and legal structure of the EU integration process. Therefore, this chapter addresses a legal reconstruction of the concept of solidarity as conceived both within the Treaties and by the CJEU jurisprudence by also reflecting upon its

[204] For general insights on the EU reaction to the Covid-19 pandemic, see *ex multis*, J. Ziller, "Europa, Coronavirus e Italia", in *Federalismi.it*, 24 March 2020; J.-P. Jacqué, "L'Union à l'épreuve de la pandemie", in *Revue trimestrelle de droit européen*, 56, 2020, pp. 175-180; G. Di Federico, "Stuck in the middle with you… wondering what it is I should do. Some considerations on EU's response to COVID-19", in *Eurojus.it*, 16 July 2020; C. Beaucillon, "International and European Emergency Assistance to EU Member States in the COVID-19 Crisis: Why European Solidarity Is Not Dead and What We Need to Make It both Happen and Last", in *European Papers*, Vol. 5, 2020, No 1, *European Forum*, 25 April 2020, pp. 387-401; S. Bastianon, "Solidarity and the EU at the time of Covid-19: the opportunity to build a stronger social and economic Europe", in *Eurojus.it*, 8 May 2020. A detailed bibliography on the specific topics will be provided later on.

connection with the principle of loyal cooperation. Indeed, in multiple occasions loyalty and solidarity have been conceived as two sides of the same coin when they are used to affirm the general common interest over that of different EU actors. Perceived as an instrument of 'solidary integration' between Member States and as an addressee of the material solidarity enshrined in the Treaties, the Union has progressively developed a number of instruments capable of implementing such a solidarity-based approach. Hence, with particular reference to the EU's competence in the field of disaster response, this analysis proposes a preliminary overall picture of the different legal instruments that will be subsequently explored by stressing their multi-layered nature.

Chapter III is dedicated to the existing instruments providing direct financial assistance in the event of a disaster – namely the EU Solidarity Fund and the Emergency Support Instrument – and to the analysis of the recent initiatives concerning the provision of assistance to face the consequences of the COVID-19 pandemic. In addition, it addresses the EU rules concerning the adoption of State aids to support companies hit by a calamitous event. Indeed, EU solidarity in the case of disasters affecting a Member State manifests itself not only through direct financing instruments, but also through a number of derogations progressively adopted for the general legal framework concerning State aids and fiscal policies. In this chapter, particular emphasis is put on the relationship between solidarity and conditionality which comes into play when dealing with EU financial assistance instruments.

Chapter IV explores the Union Civil Protection Mechanism (UCPM) which represents the main instrument providing in-kind assistance and considering a more cooperative attitude among Member States, by rendering the EU a catalyst of solidarity. The chapter is developed around the main normative and institutional steps that have been adopted on the long path towards the creation of a more effective and functional mechanism of civil protection at the EU level. The inclusion of a specific legal basis in this field (Article 196 TFEU) as well as the adoption of Decision 1313/2013/EU and Decision (EU) 2019/420 have marked the latest steps of the 'institutionalisation' of the EU civil protection system that could be further reinforced by forthcoming revisions. The chapter ends with an overview of its main operational and legal characters by investigating the relevance of solidarity for the effectiveness of the UCPM.

The final chapter is aimed at evaluating one of the main novelties of the Lisbon revision, that is the so-called 'solidarity clause' enshrined in Article 222 TFEU which requires both the Union and the Member States to act "in a spirit of solidarity" in assisting another Member State affected by a disaster. There-

fore, its content and implementation by the Union and the EU Members are also evaluated by exploring its (unused) potential in the face of the COVID-19 emergency. Moreover, since it could be the synthesis and the link between all the examined instruments, the interactions between the solidarity clause and the illustrated solidary mechanisms are assessed. Finally, it is illustrated the real legal value of the solidarity clause and its implications in terms of duties imposed.

In the light of the previous findings, the conclusions have a double purpose. First, to draw up a final assessment of the solidarity mechanisms established to respond to emergency situations which have a symmetric or asymmetric nature, and to evaluate the effective existence of solidarity obligations within EU disaster response law. Secondly, to propose a different reading of the current status of solidarity in the EU legal order with a look at the future prospects of an ever-changing Union.

Given the constantly evolving context, it must be noted that the present work considers facts and figures which have already taken place by 31 December 2020.

CHAPTER II

THE MULTIFACETED CONCEPT OF SOLIDARITY WITHIN THE EU LEGAL ORDER

1. Mainstreaming solidarity within EU law: an introduction

The centrality of State sovereignty in international relations as described in the previous chapter has been challenged, *inter alia*, by the creation of the European Union[1] that represents an outstanding test of supranational integration.[2] As proof of this, in 1963 the Court of Justice of the European Communities (now Court of Justice of the EU) stated that the (then) European Community constituted "a new legal order of international law for the benefit of which the States have limited their sovereign rights."[3] However, it is more than an international organisation based on a treaty reflecting the full will of States to be bound by supranational obligations and to limit their own sovereignty by transferring some national competences to it. As later stated in the case *Commission of the European Economic Community v. Grand Duchy of Luxembourg and Kingdom of Belgium*, "the Treaty is not limited to creating reciprocal obligations between the different natural and legal persons to whom it is applicable but establishes a new legal order which governs the powers, rights and obligations of the said persons, as well as the necessary procedures for taking cognizance of and penalizing any

[1] For the sake of clarity, it is necessary to stress that, as a linguistic convention, the book uses the term 'European Union' in its broadest sense, by embracing all the entities the European integration process has established.

[2] For a deeper analysis on the current meaning of sovereignty, P. Layland, R. Rawlings, A. Young (eds), *Sovereignty and the Law Domestic, European and International Perspectives*, Oxford University Press, 2013. For a detailed analysis on the nature of the EU from a constitutional point of view, see P. Pescatore, "International Law and Community Law – A Comparative Analysis", in *Common Market Law Review*, 7(2), 1970, pp. 167-183; R. Shütze, *From dual to cooperative federalism, the changing structure of European law*, Oxford University Press, 2009; A. Rosas, L. Armati, *EU constitutional law. An introduction*, Hart Publishing, 2010, pp. 11-17; A. Von Bogdandy, J. Bast, *Principles of European Constitutional Law*, Hart Publishing, 2nd ed., 2011, p. 55 ff.

[3] CJEU, Case 26/62, *Algemene Transport – en Expeditie Onderneming van Gend & Loos vs. Netherlands Inland Revenue Administration*, 5 February 1963, ECLI:EU:C:1963:1.

breach of it."[4] However, it must be said that it is a constantly evolving legal order and, therefore, the best way to define the EU is to use the expression 'process of integration' wherein, *inter alia*, the single national interests should fade in favour of the common interest and, ultimately, of greater solidarity in primis among the Member States.

Over time, the notion of solidarity has seen significant developments due to the changes brought by primary and secondary law as well as by the EU Court of Justice case law. In the early years, solidarity – as a founding and existential value of the EU – was essentially conceived as an instrument to attain objectives of common interest. Indeed, the choice to delegate part of the national prerogatives for the benefit of the supranational level has implied the creation of specific allegiances which make the general interest of the Union prevailing over the single national interests.[5] This has had an impact on the different sectors of competence, and notably on the fields of action addressing elements of solidarity, which have been expanded in favour of the common interest. *A fortiori*, as will be clarified further in the following sections, the notion of solidarity should be more than the summation of national interests so as to justify, develop, and adjust such a process with the prospect of a "even closer union" that goes beyond a dimension of self-centred reciprocity.[6] As a matter of fact, in more recent years, the notion of solidarity has acquired a certain autonomy from that of general interest thereby fuelling the expansion of the scope of some existing powers when acting as an objective to be achieved. Hence, the evolving process of integration has also triggered the development of the positive dimension of solidarity thus progressively leading to the establishment of support mechanisms as well as the renewal of the Treaties from a material point of view.[7] However, there are still some important obstacles to provide a univocal and uniform definition of soli-

[4] CJEU, Joined Cases 90/63 and 91/63, *Commission of the European Economic Community v. Grand Duchy of Luxembourg and Kingdom of Belgium*, 13 November 1964, ECLI:EU:C:1964:80, p. 631.

[5] P. Pescatore, "International Law and Community Law – A comparative Analysis", in *Common Market Law Review*, cit., p. 167; P. Pescatore, "Les Objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de Justice", in *Miscellanea W. J. Ganshof van der Meersch. Studia ab discipulis amicisque in honorem egregii professoris edita*, Bruylant, 1972, p. 361; D. Simon, *Le système juridique communautaire*, PUF, 2001, p. 47; R. Bieber, F. Maiani, "Sans solidarité point d'Union européenne. Regards croisés sur les crises de l'Union économique et monétaire et du Système européen commun d'asile", in *Revue trimestrielle de droit européen*, 48, 2012, pp. 295-327.

[6] D. Simon, *Le système juridique communautaire*, cit.

[7] C. Boutayeb, "La solidarité, un principe immanent au droit de l'Union européenne", in C. Boutayeb (ed.), *La solidarité dans l'Union européenne*, cit., pp. 10-11.

darity which is thus currently characterised by a fundamental legal ambiguity. Moreover, it is rather complex to analyse the concrete and general application of this concept without considering the different fields of intervention and the heterogeneity of the competences attributed to the Union. Legal literature has attempted to propose different reconstructions of solidarity within EU law, but its legal status is still far from being clear and, as it will be stressed on multiple occasions in the present work, the centrality acquired in theory is not fully reflected into practice.[8] The following paragraphs will be dedicated to deepening such findings and to bring out the main uncertainties of the legal status of solidarity in EU law as necessary premises to propose a different reading of this concept with regard to disaster response.

2. Evolution of the concept of solidarity within the EU legal order

The idea of solidarity in European culture can be traced back for more than two centuries, when it was associated with the notion of *fraternité* among people at the time of the French revolution and explicitly included in the 1804 civil code. On this basis, classical sociologists have theorised the normative foundations of solidarity recognised as a concept driving a sense of belonging, mutuality, and a common struggle that in turn motivates the pooling of resources and joint action towards a shared objective.[9] Solidarity thus transpires as a feeling of reciprocal empathy and of responsibility among members of a more or less defined group, triggering communal assistance and support in pursuance of a higher goal.[10] The fact that this reading of solidarity belongs to the common

[8] For attempts to categorise the notion of solidarity from a legal point of view, see *ex multis*, M. Blanquet, "L'Union européenne en tant que système de solidarité : la notion de solidarité européenne", in M. Hecquard–Théron (ed.), *Solidarité(s). Perspectives juridiques*, Toulouse, Institut Fédératif de Recherche, 2009, pp. 155-195; C. Boutayeb, "La solidarité, un principe immanent au droit de l'Union européenne – Éléments pour une théorie", in C. Boutayeb (ed.), *La solidarité dans l'Union européenne*, cit.; I. Domurath, "The Three Dimensions of Solidarity in the EU Legal Order: Limits of the Judicial and Legal Approach", in *Journal of European Integration*, 35, 2013, pp. 459-475; A. Sangiovanni, "Solidarity in the European Union", in *Oxford Journal of Legal Studies*, 33, 2013, pp. 213-241; P. Mengozzi, "Note sul principio di solidarietà nel diritto comunitario", in *Il Diritto dell'Unione Europea*, 1, 2020, pp. 99-125.

[9] L. Wilde, "The Concept of Solidarity: Emerging from the Theoretical Shadows?", in *British Journal of Politics and International Relations*, 9, 2007, p. 171; W. Rehg, "Solidarity and the Common Good: An Analytic Framework", in *Journal of Social Philosophy*, 38, 2007, p. 7.

[10] D. Heyd, "Justice and Solidarity: The Contractarian case against Global Justice", in *Journal of Social Philosophy*, 38, 2007, p. 112.

heritage of European States is also confirmed by its express mention in several national Constitutions, where it assumes manifold functions. For instance, the French Constitution relies on 'systemic' solidarity as the organising rationale behind francophonie thereby highlighting the institutional, regime-related nature of solidarity that extends to the overseas territories.[11] Moreover, in Article 2 of the Spanish Constitution, solidarity is intended as a principle articulating the relationship between the different autonomous regions thereby underlining its inter-territorial or 'horizontal' dimension.[12] Finally, the Italian Constitution recognises the 'vertical' facet of solidarity applied to the relationship between the individual and the State, calling on governmental authorities to ensure adherence to the "inalienable obligations of political, economic and social solidarity."[13]

Given the solid philosophical and historical roots, solidarity has also progressively assumed an important connotation in the relations among States especially in the aftermath of the events which occurred in the first half of the twentieth century and end of the Second World War. However, at the very beginning the EU integration process was essentially planned to prevent future wars between European countries by meeting and merging the single economic interests as demonstrated by the establishment of the European Coal and Steel Community (ECSC). Yet, the founding fathers were well aware that once politics had forced common economic interests onto the European nations, these interests would form the best basis for further integration. According to the Schuman's declaration released on 9 May 1950 "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."[14] This well-known declaration has been indicated as the starting point of the integration process and the manifestation of

[11] Article 87 and the Preamble to the French Constitution: "En vertu de ces principes et de celui de la libre détermination des peuples, la République offre aux territoires d'outre-mer qui manifestent la volonté d'y adhérer des institutions nouvelles fondées sur l'idéal commun de liberté, d'égalité et de fraternité et conçues en vue de leur évolution démocratique" and "La République participe au développement de la solidarité et de la coopération entre les États et les peuples ayant le français en partage."

[12] Article 2 of the Spanish Constitution: "La Constitución se fundamenta en la indisoluble unidad de la Nación española, patria comùn e indivisible de todos los españoles, y reconoce y garantiza el derecho a la autonomìa de las nacionalidades y regiones que la integran y la solidaridad entre todas ellas."

[13] Article 2 of the Italian Constitution: "La Repubblica riconosce e garantisce i diritti inviolabili dell'uomo, sia come singolo sia nelle formazioni sociali ove si svolge la sua personalità, e richiede l'adempimento dei doveri inderogabili di solidarietà politica, economica e sociale."

[14] Declaration of 9 May 1950 delivered by Robert Schuman.

the inseparable link between such a process and the notion of solidarity.[15] In fact, it led to the conclusion that solidarity between the Member States and between the people of the European Community constituted a living aim which should be pursued and expanded continuously for the purpose of peace.[16] Later, Jean Monnet stated that "*la Communauté avait un objet limité aux solidarités inscrites dans le traités […] ces solidarités en appelaient d'autres, et de proche en proche entraineraient l'intégration, la plus large des activités humaines*."[17] Several decades later, in 2001, the presidency conclusions of the European Council held in Laeken placed solidarity, once again, in the centre stage by defining Europe as "the continent of solidarity."[18] In 2008, the European Commission claimed that "solidarity is part of how European society works and how Europe engages with the rest of the world."[19] More recently, on occasion of the 60th anniversary of the Rome Treaties, the leaders of the remaining 27 Member States, the European Council, the European Parliament, and the Commission signed the Rome Declaration by affirming their commitment to "make the European Union stronger and more resilient, through even greater unity and solidarity amongst us and the respect of common rules."[20] Accordingly, solidarity among Member States should represent the guarantee and the cornerstone of the effective European construction.[21] All these political statements seem to outline solidarity as the motor of the European construction and the element which distinguishes the

[15] M.-T. Bitsch, "Robert Schuman et la déclaration du 9 mai 1950", in *Les pères de l'Europe, 50 ans après*, Bruylant/Fondation Paul-Henri Spaak, 2001, pp. 55-68; G. Bossuat, "La déclaration Schuman, de l'Histoire au mythe", in A. Wilkens (ed.), *Le plan Schuman dans l'Histoire. Intérêts nationaux et projet européen*, Bruylant, 2004, pp. 391-420; C. M. A. McCauliff, "*Union in Europe: Constitutional Philosophy and the Schuman Declaration, May 9, 1950*", in *Columbia Journal of European Law*, 2012, pp. 441-472; A. Levade, "La valeur constitutionnelle du principe de solidarité", in C. Boutayeb (ed.), *La solidarité dans l'Union européenne*, cit., p. 44.

[16] The very Schuman Declaration opens with such a statement: "La paix mondiale ne saurait être sauvegardée sans des efforts créateurs à la mesure des dangers qui la menacent."

[17] J. Monnet, *Mémoires,* Fayard, 1976, p. 902. English translation (by the author): "the Community had a limited object to the different forms of solidarity enshrined in the Treaty […] these declinations of solidarity would lead to the integration, as the widest of the human activities."

[18] Presidency conclusions of the European Council in Laeken of 14 and 15 December 2001, *Laeken Declaration on the future of the European Union*, p. 20.

[19] European Commission, *Renewed Social Agenda: Opportunities, Access and Solidarity in 21st Century Europe*, COM(2008)412, p. 6.

[20] Declaration of the leaders of 27 member states and of the European Council, the European Parliament and the European Commission, 25 March 2017.

[21] A.-M. Oliva, "Solidarité et construction européenne", in J.-C.Beguin, P. Charlot, Y. Laidié (eds), *La solidarité en droit public*, L'Harmattan, 2005, pp. 65-96; K. Abderemane, *La solidarité: un fondement du droit de l'intégration de l'Union européenne*, 2010, p. 40.

EU and the relations among its Member States from other parts of the world.[22] In fact, even though international solidarity is also based on the foundation of shared responsibility and cooperation between individuals, groups and States,[23] the level of solidarity reached through the European integration should be far from being replicated in other international *fora* or organisations.[24] Moreover, in comparison to international law, solidarity in the EU context has a broader application as it not only informs the horizontal cooperation between Member States, but also the vertical one between the States and the Union when the latter is intended as an autonomous subject from the Member States.

Over the decades, the revised treaties have followed these political statements by progressively including more references to solidarity and matching it with more concrete and substantive provisions. The first treaty reference to solidarity can be traced in the 1951 Treaty establishing the ECSC which stated in its preamble that "Europe can be built only by concrete actions which create a real solidarity and by the establishment of common bases for economic development". It was also taken for granted that the age-old rivalries which prevailed in post-war Europe could be substituted not only by merging the essential interests of the Member States, but also by creating a broader and deeper Community among the people of the continent. Such a Community would have served as a precondition for the gradual establishment at the level of society of a psychological impetus towards a destiny to be shared henceforward.[25] Surprisingly, the 1957 Treaty did not refer to solidarity among Member States but widened it by referring to that solidarity which binds Europe and overseas countries.[26] However, while the 1986 Single European Act also only mentions solidarity in its preamble,[27] the following Treaties included many more references to

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[22] I. Hartwig, P. Nicolaides, "Elusive Solidarity in an Enlarged European Union", *Eipascope*, 3, 2003, available at http://aei.pitt.edu.

[23] UN Human Rights Council, *Human rights and international solidarity*, Doc. A/HRC/9/10, 15 August 2008, para. 6.

[24] J. M. Coicaud, "Conclusion: Making sense of national interest and international solidarity", in J. M. Coicaud, J. Wheeler (eds), *National Interest and International Solidarity: Particular and Universal Ethics in International Life*, United Nations University Press, 2008, pp. 288-301. This position had been already expressed by Pescatore in 1970, see P. Pescatore, "International Law and Community Law – A comparative Analysis", in *Common Market Law Review*, cit., p. 169.

[25] E. A. Marias, "Solidarity as an Objective of the European Union and the European Community", in *Legal Issues of Economic Integration*, 21(2), 1994, p. 87.

[26] Treaty of Rome, adopted in Rome on 25th March 1957, Preamble: "INTENDING to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations."

[27] In particular the following passage of the preamble: "AWARE of the responsibility incumbent upon Europe to aim at speaking ever increasingly with one voice and to act with consistency

solidarity such as the foundation of the European integration.[28] By following the time framework, the most important innovation with regard to the presence of solidarity in primary law is probably its multiple mentions in the context of the Treaty on European Union signed in 1992. According to the wording here enshrined, solidarity has become a legally binding task for the EU itself thus extending the requirement for solidary relations also to the people of the Member States.[29] Moreover, solidarity has been expressly included among the objectives of the European Union enshrined in Article 2 of the EEC Treaty, as a result of the amendment introduced by Article G of the Treaty of Maastricht. Under that provision, as amended, the Union had the task of promoting, through the establishment of a common market and of an economic and monetary union, and through the implementation of the common policies and actions referred to in Article 3 and 3A of the EC Treaty "a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and *solidarity among Member States*" [emphasis added]. By introducing such wording, it is likely that the drafters had taken into account the orientations of the Court of Justice of the European Communities (hereinafter Court of Justice) developed over the years in response to practical disputes in the realm of Community law.

2.1 Trends in early EU case-law

Early Court of Justice case-law citing solidarity issues can be described according to one major trend that contributes to reflect the difficulties in addressing and placing the notion of solidarity within the Community legal order. On the one hand, by proposing a teleological reading of the Treaties, the Court understood solidarity as a concept laid at the foundation of the Community; one the other hand, it expressly linked solidarity to the notion of 'common interest'.

The foremost judgement illustrating the first trend can be traced back to

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and solidarity in order more effectively to protect its common interests and independence, in particular to display the principles of democracy and compliance with the law and with human rights to which they are attached, so that together they may make their own contribution to the preservation of international peace and security in accordance with the undertaking entered into by them within the framework of the United Nations Charter."

[28] Both within the Maastricht Treaty and in the Amsterdam Treaty the word 'solidarity' has been mentioned five times.

[29] Maastricht Treaty, Article A, para. 3.

1969 on the occasion of an action brought by the Commission against France.[30] Here the Court concluded that France's non-compliance with two decisions concerning the limits to the national preferential rediscount rate on export credits constituted a breach of the duties of mutual assistance accepted by the Member States in establishing the Community. In its reasoning, the judges remarkably stated that "[t]he solidarity which is at the basis of these obligations as of the whole of the Community system in accordance with the undertaking provided for in Article 5 of the Treaty, is continued for the benefit of the States in the procedure for mutual assistance provided for in Article 108 TEEC where a Member State is seriously threatened with difficulties as regards its balance of payments."[31] A similar orientation was adopted by the Court in the case *Benzine en Petroleum* where it ruled that the absence of appropriate rules based on Article 103 (now Article 125 TFEU) of the Treaty revealed "a neglect of the principle of community solidarity which is one of the foundations of the community."[32] An even sharper approach can be observed in *Commission v. Italy*[33] wherein the Court set that solidarity requires Member States to apply the Community rules unselectively because the "failure in *duty of solidarity* accepted by Member States by the fact of their adherence to the Community strikes at the fundamental basis of the Community legal order" [emphasis added].[34] By going beyond the wording of the Treaties in force at that time, in these three mentioned judgements the Court boldly lodged solidarity within the context of the Community law according to a dual approach. First, it addressed solidarity as an express theoretical and legal foundation of the integration process thus giving concrete application *in primis* to the Schuman's words. Secondly, the judges framed solidarity as capable of establishing clear duties on the Member States because of their membership to the Community.

In other cases, the Court took a different direction on the definition of solidarity in the Community legal framework by preferring to emphasise its connection to the common interest of the Community and to the attainment of a

[30] CJEU, Case 11/69, *Commission v. France*, 10 December 1969, ECLI:EU:C:1969:68.

[31] Ibid., point 16.

[32] CJEU, Case 77/77, *Benzine en Petroleum Handelsmaatschappij BV and others v. Commission of the European Communities*, 29 June 1978, ECLI:EU:C:1978:141, point 15. On the scope of Article 125 TFEU and the relevance of solidarity in this regard, the Court ruled again in the *Pringle* case.

[33] CJEU, Case 39/72, *Commission v. Italy*, 7 February 1973, ECLI:EU:C:1973:13.

[34] Ibid., point 25. The same expression has been used in Commission v. United Kingdom and Northern Ireland, CJEU, Case 128/78, *Commission v. United Kingdom*, 7 February 1979, ECLI:EU:C:1979:32, point 12.

"ever closer union among the peoples of Europe."[35] In this regard, Court's Opinion 1/75[36] must first be recalled which, whilst not expressly mentioning solidarity, can be considered as a relevant example to evaluate the Court's extensive reference to solidarity. In replying to the questions submitted by the Commission, the Court ruled, *inter alia*, that the common commercial policy prescribed by Article 113 of the EEC Treaty (now Article 207 TFEU) was conceived for the defence of the common interests of the Community to which the particular interests of the Member States had to adapt.[37] Thus, satisfying the Member States' individual interests would have undermined the effective protection of the common interests of the Community. The Court concluded that the exercise of parallel powers by the Member States in fields covered by the common commercial policy would have resulted "in distorting the institutional framework of the very Community, calling into question the mutual trust within it and preventing the Community from fulfilling its task in the defence of the common interest."[38] These words show that the need for the common interest to prevail is not merely a theoretical one nor a mere factual assumption of the Community construction but constitutes a true foundation of the relations among Member States, as well as between the latter and the Community.

Later, in *Valsabbia*,[39] which concerned the legality of a Community intervention in price fixing in order to counter the overproduction of steel, the Court referred to solidarity among undertakings as a fundamental principle on which the anti-crisis policy measures in the iron and steel sector were based. According to the Court, the priority accorded to the common interest under Article 3 of the ECSC Treaty presupposed a duty of solidarity obliging the market actors to give up their short-term interest for the sake of the common good.[40] The Court has again read solidarity in a very concrete way by justifying the adoption of

[35] U. B. Neergaard, "In Search of the Role of 'Solidarity' in Primary Law and the Case Law of the European Court of Justice", in U. B. Neergaard, R. Nielsen, L. M. Roseberry (eds), *The Role of Courts in Developing a European Social Model – Theoretical and Methodological Perspectives*, DJOF Publishing, 2010, pp. 97-138; A. Oliva, "Solidarité et construction européenne", in J. C. Beguin, P. Charlot, Y. Laidie (eds), *La solidarité en droit public*, L'Hartmann, 2005, p. 65 ff.; see E. Küçük, "Solidarity in EU law. An Elusive Political Statement or a Legal Principle with Substance?", in *Maastricht Journal*, 23, 2016, p. 977 ff. For a deeper analysis on the interplay between solidarity and loyalty see, *infra*, para. 2.2.2.

[36] CJEU, Opinion 1/75, 11 November 1975, ECLI:EU:C:1975:145.

[37] Ibid., p. 1364.

[38] Ibid.

[39] CJEU, Joined Cases 154, 205, 206, 226–228, 263 and 264/78, 39, 31, 83 and 85/79, *SpA Ferriera Valsabbia and others v. Commission*, ECLI:EU:C:1980:81, point 59.

[40] Ibid.

measures implying sacrifices in favour of the market equilibrium. Hence, the Court appealed to solidarity in substantiating the legality of Community legislation with regard to the obligation of the market actors to undertake some responsibilities that were against their short-term interests for the subsistence of the sector as a whole. However, for the Court, the common interest does not always translate into the strong countries supporting the weak ones in the sector. In *Ferriera Padana*,[41] the applicant argued that the contested legislation introduced quota limitations in order to tackle the crisis in the steel industry without, however, exempting the small but efficient producers from the limitations. Instead, solidarity would imply that the powerful industries assist the weak ones. However, the Court revealed its concern for the sector as a whole rather than for individual affected realities by concluding that solidarity cannot be used to justify the exclusion of some subjects from the Community legislation.[42] The same view was echoed in *Klöckner-Werke*,[43] concerning a quota limitation scheme from which the applicant pledged an exemption, due to the special financial difficulties. The Court dismissed the claim, arguing that "undertakings must strive together in a display of Community solidarity so as to enable the industry as a whole to overcome the crisis and to survive. That being the aim of the system in question, no necessity consisting in the continued existence and profitability of a particular undertaking can be invoked against the application of the system it experienced."[44] This line of argumentation on the value of solidarity seems to be used for supporting the Community measures imposing production quotas as manifestation of the non-discrimination principle.[45] Indeed, as also concluded in *Spain v. Council*[46] and *Azienda Agricola*,[47] the contested measures intended to deal with the supply and demand balance in the sector, and this required the solidaristic effort of all participants in an equal manner without establishing advantages or disadvantages for the parties.

These cases demonstrate that the Court adopted a view of solidarity oriented towards the attainment of a common goal by including positive and negative obligations which mainly concern the framework of cooperation and mutual

41 CJEU, Case 276/80, *Ferriera Padana SpA v. Commission*, ECLI:EU:C:1982:57.
42 Ibid., para. 31.
43 CJEU, Case 263/82, *Klöckner-Werke*, ECLI:EU:C:1983:373.
44 Ibid., para. 19.
45 In this regard, see CJEU, Case 179/84, *Bozetti v. Invernizzi SpA*, ECLI:EU:C:1985:306.
46 CJEU, Case 203/86, *Spain v. Council*, ECLI:EU:C:1988:420.
47 CJEU, Case C-34/08, *Azienda Agricola Disarò Antonio and others*, EU:C:2009:304. See also the Opinion of Advocate General Trstenjak, Case C-34/08, *Azienda Agricola Disarò Antonio and others*, ECLI:EU:C:2009:120, para. 43.

conduct of the Member States. Indeed, as Member States gained benefits from being part of the Union, in return, they are expected to contribute to the Community's interests by making sacrifices when necessary. Additionally, as reported in more recent cases, this will also be true with regard to the accession of future candidates: "the special interests thus invoked can, in particular, be appropriately balanced against the general interest of the Community and that the considerations relating to the principles of equality, good faith and solidarity among current and future Member States."[48] Thus, solidarity has been used as a functional instrument in pursuing the collective interest. However, this reading of solidarity does not make it an independent source of positive obligations but, rather, it means it is linked to the notion of loyalty that, as a principle, requires Member States to abstain from behaving against and to act in favour of the common interest of the Community.

Although the mentioned references to solidarity in the Court's case law had partially contributed to reshaping its role in the revised Treaties, the judges' activity has not been particularly decisive in further clarifying the legal scope and the exact legal status of solidarity in the EU legal order. On the contrary, the dissimilar perspectives and arguments elaborated by the judges both with regard to the general concept of solidarity as well as its practical application in different fields of intervention has not mitigated its extremely ambiguous, and therefore hardly justiciable, character.[49]

2.2 After the Lisbon revision

In the aftermath of the failed Constitutional Treaty, the climate for a reform was described as the "least favourable and least promising moments for optimistic outbursts regarding the future of European solidarity."[50] This notwithstanding, the discussions that followed such a moment of deadlock and, finally, the entry into force of the Lisbon revision gave new impetus to solidarity by including some of the innovations proposed by the failed Constitutional Treaty. Firstly, the revision adopted in 2007 confirms and reinforces the demands for solidarity

[48] CJEU, Case C-413/04, *Parliament v. Council*, 28 November 2006, ECLI:EU:C:2006:741, point 68; CJEU, Case C-414/04, *Parliament v. Council*, 28 November 2006, ECLI:EU:C:2006:742, point 45.

[49] U. B. Neergaard, "In Search of the Role of 'Solidarity' in Primary Law and the Case Law of the European Court of Justice", cit.; A. Oliva, "Solidarité et construction européenne", cit., p. 65 ff.; see E. Küçük, "Solidarity in EU law. An Elusive Political Statement or a Legal Principle with Substance?", in *Maastricht Journal of European and Comparative Law*, 23, 2016, pp. 965-983.

[50] S. Giubboni, "Free movement of Persons and European Solidarity", in *European Law Journal*, 13, 2007, p. 360.

contained in the preamble which is also in the provision devoted to the Union's general objectives currently enshrined in Article 3 TEU as well as in Article 21 TEU concerning Common Foreign and Security Policy.[51] Thus, solidarity does inform both the internal and the external action of the Union.[52]

Furthermore, it should not be forgotten that the Charter of Fundamental Rights of the EU – which is now attributed with the "same legal value as the Treaties"[53] – not only cites solidarity as a value the Union is founded on, but it also enshrines a specific section devoted to 'Solidarity'.[54] Here, the Charter identifies a specific set of social rights and needs that both the Union and Member States must respect when implementing EU law thus understating solidarity essentially in its socioeconomic dimension.[55] This element contributes to inform solidarity as a three-dimensional concept which concerns the variable relationship between individuals, generations, and Member States.[56] In fact, many provisions in the TEU refer to solidarity between Member States and their people according to a top-down reconstruction, for example Articles

[51] Article 21 TEU states: "The Union's action on the international scene shall be guided by the *principles* which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: […] the principles of equality and solidarity […]."

[52] On the external dimension of EU solidarity, E. Neframi, "La solidarité et les objectifs d'action extérieure de l'Union européenne", in C. Boutayeb (ed.), *La solidarité dans l'Union européenne*, cit., pp. 137-154.

[53] Article 6(1) TEU. For deeper insights on the Charter, see R. Mastroianni, O. Pollicino, S. Allegrezza, O. Razzolini (eds), *Carta dei diritti fondamentali dell'Unione europea*, Giuffrè Editore, 2017.

[54] For comments on the content of solidarity within the Charter, see C. Picheral, "La solidarité dans la Charte des droits fondamentaux de l'Union", in C. Boutayeb (ed.), *La solidarité dans l'Union européenne*, cit., pp. 93-105; F. Péraldi-Leneuf, "La solidarité, un concept juridique? Étude du concept dans la Charte des droits fondamentaux de l'Union européenne", in *European Review of Public Law*, 26(1), 2014, pp. 71-96.

[55] In particular, in *Grzelczyk case*, the Court dealt with the transnational limits of social solidarity by holding that the host State had to show a certain degree of solidarity to economically inactive migrant citizens provided that they did not constitute an unreasonable burden for the host State and the situation was temporary, CJEU, Case C-184/99, *Rudy Grzelczyk*, ECLI:EU:C:2001:458, para. 44. For insights, see G. Búrca (ed.), *EU Law and the Welfare State: In Search of Solidarity*, Oxford University Press, 2005; S. Giubboni, "A Certain Degree of Solidarity? Free Movement of Persons and Access to Social Protection in the Case Law of the European Court of Justice", in *Promoting Solidarity in the European Union*, cit., p.166 ff.

[56] For more insights on this three-fold dimension of solidarity, see A. Sangiovanni, "Solidarity in the European Union", in *Oxford Journal of Legal Studies*, cit.; I. Domurath, "The Three Dimensions of Solidarity in the EU Legal Order: Limits of the Judicial and Legal Approach", in *Journal of European Integration*, 35, 2013, pp. 459-475; F. de Witte, *Justice in the EU: The Emergence of Transnational Solidarity*, Oxford University Press, 2015; C. J. Piernas, L. Pasquali, F. Vives (eds), *Solidarity and protection of individuals in E.U. Law. Addressing new challenges of the Union*, Giappichelli, 2018.

1(3), 3 (3), 24 (2) and (3), 31 (1) TEU. At the same time, Article 3(3) refers to solidarity among generations. As remarked by the Reflection Group on the future of the EU 2030,

> for the EU to become an effective and dynamic global player, it will also need to shift solidarity to the heart of the European project. Solidarity is not an unconditional entitlement – it depends on individual and collective responsibility. As such, it can and must inform EU policymaking and relations at all levels, between individuals and generations and between localities, regions and Member States.[57]

Interstate solidarity remains, however, at the core of current treaties thereby making the Union an instrument and hub of 'solidary integration' between Member States.[58] Accordingly, it could be said that solidarity is conceived according to a holistic approach which combines the horizontal and vertical dimensions by assigning the role of mediator and facilitator in the creation of collective solidarity mechanisms to the EU. In effect, while the expression "in a spirit of solidarity" together with the action of Member States was quoted just once in the Maastricht Treaty,[59] now it is cited and stressed in multiple material provisions referring to different sectors of intervention renamed by Hilpold as 'islands of solidarity'.[60]

2.2.1 Solidarity in practice: some references to the sectors wherein it intervenes

Solidarity has been embodied in a number of primary EU law provisions concerning the relationships between Member States in different areas of integration. Article 174 TFEU defines the objectives of economic, social, and territorial cohesion and requires the Union to adopt measures promoting its harmonious development. Article 177 TFEU has then provided the Union with the powers to implement the EU cohesion policy intended, *inter alia*, to reduce economic disparities between the Member States by providing additional fi-

[57] Project Europe 2030 – Challenges and opportunities, report to the European Council by the Reflection Group on the Future of the EU 2030, May 2010, pp. 13-14.

[58] For more insight, P. Manzini, "La solidarietà tra Stati membri della Unione europea: un panorama 'costituzionale'", in *Etique globale, bonne gouvernance et droit international* économique, Giappichelli, 2017, pp. 137-153.

[59] Treaty of Maastricht on European Union, Article J.1.

[60] P. Hilpold, "Understanding solidarity within EU law: an analysis of the 'Islands of Solidarity' with particular regard to Monetary Union", in *Yearbook of European Law*, 34, 2015, pp. 257-285.

nancial resources and thereby stimulating growth in less favoured regions. Solidarity herein translates as an inter-State concern for the reduction of material disparities.[61] However, solidarity takes centre-stage from a 'vertical' perspective advancing the wellbeing of the people of Europe, fostering social cohesion and social sustainability, and guaranteeing that no individual is left behind.[62] Finally, in a broader dimension, solidarity requires Member States to conduct their economic policies in such a way as to attain cohesion objectives and to give substance to the Union's policies in this field, in cooperation with EU institutions.

This multidimensional nature of solidarity is also present in the field of asylum, immigration, and external borders control. Article 67 TFEU requires the Union to frame a common policy in these fields based on solidarity between Member States, and Article 80 TFEU provides that the Union's policies – also at the financial level – shall be governed in accordance with the principle of solidarity and the fair sharing of responsibility. Hence, a strong interconnection between solidarity and responsibility sharing emerges: on the one hand, responsibility sharing is the consequence of solidarity; on the other, solidarity constitutes the motivating factor for responsibility sharing.[63] The formulation proposed in this provision suggests an understating of solidarity not only as a programmatic guideline of the general framework for political deliberations and policy decisions, but also as a central structural imperative, requiring the Union to act to guarantee suitable solidarity-proof outcomes.[64] In addition, the final outcome should be the development of a common policy on asylum. Accordingly, even though fairness and inter-State solidarity aimed at reaching a balance of efforts with regard to receiving protection seekers and granting asylum seems to be the final goal, in fact, the ultimate objective is, above all, a vertical solidarity translating in the protection of individuals. Combined with Article 78 TFEU, Article 80 TFEU provides EU institutions with the legal basis to give

[61] For further details, J. Holder, A. Layard, "Relating Territorial Cohesion, Solidarity, and Spatial Justice", in *Promoting Solidarity in the European Union*, cit., pp. 262-287; G. Butler, "Solidarity and its limits for economic integration in the European Union's internal market", in *Maastricht Journal of European and Comparative Law*, 25(3), 2018, pp. 310-331.

[62] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, Renewed social agenda: Opportunities, access and solidarity in 21st century Europe, COM(2008) 412 final.

[63] G. Morgese, *La solidarietà tra gli Stati membri dell'Unione europea in materia di immigrazione e asilo*, Caccucci Editore, 2018.

[64] P. De Bruycker, "Le traité de Lisbonne et les politiques relatives aux contrôles aux frontières, à l'asile et à l'immigration", in *Revue des affaires europeennes*, 2, 2008, pp. 223-241; V. Moreno-Lax, "Solidarity's reach: Meaning, dimensions and implications for EU (external) asylum policy", in *Maastricht Journal of European and Comparative Law*, 24(5), 2017, p. 751.

effect to measures in this area wherein solidarity is asked to modulate the quality of that action.[65] Thus, the kind of solidarity intended in Article 80 TFEU requires "a normalization of solidarity that incorporates it as a compulsory, basilar foundation of the common asylum policy and the setting aside of national self-interest."[66] The solidarity measures grounded on Article 78(3) TFEU to be activated in exceptional situations would be additional to the structural and general ones addressed to the EU and Member States in the conception and implementation of asylum policies.

Solidarity is also granted a prominent role in the energy sector in which the Union holds powers to adopt measures in situations of economic emergency (Article 122 TFEU)[67] and to attain objectives of sustainability and security in the supply of energy "in a spirit of solidarity between Member States" (Article 194 TFEU).[68] With reference to this last provision, it is interesting that the Lisbon revision has included an exact reference to solidarity thereby fully acknowledging the management of the energy sector as an issue of common concern and

[65] With reference to the principle of solidarity in the common policy on asylum, immigration and control of foreign borders, see, *ex multis*, I. Nikolakopoulou-Stephanou, "European solidarity in the areas of immigration and asylum policy: from declaration to implementation", in *Revue hellénique de droit international*, 2010, p. 271 ff.; M.-L. Basilien-Gainche, "La politique européenne d'immigration et d'asile en question: la valeur de la solidarité soumise à l'argument de réalité", in C. Boutayeb (ed.), *La solidarité dans l'Union européenne*, cit., p. 245 ff.; M. Gestri, "La politica europea dell'immigrazione: solidarietà tra Stati membri e politiche nazionali di regolarizzazione", in A. Ligustro, G. Sacerdoti (eds), *Problemi e tendenze del diritto internazionale dell'economia.* Liber amicorum *in onore di Paolo Picone*, Napoli, 2011, p. 895 ff.; L. Marin, S. Penasa, G. Romeo, "Migration Crises and the Principle of Solidarity in Times of Sovereignism: Challenges for EU Law and Polity", in *European Journal of Migration and Law*, 22(1), 2020, pp. 1-10.

[66] V. Moreno-Lax, "Solidarity's reach: Meaning, dimensions and implications for EU (external) asylum policy", cit., p. 751; A. Lang, "Commento all'art. 80 TFUE", in A. Tizzano (ed.), *Trattati dell'Unione europea*, Milano, 2014, p. 858.

[67] The application of solidarity according to Article 122 TFEU will be further clarified in the following chapter with reference to the establishment of the emergency support instrument. See, *infra*, Chapter III, para. 2. For insights on Article 222 TFEU, F. Croci, *Solidarietà tra stati membri dell'Unione europea e governance economica europea*, Giappichelli, 2020, Chapter III.

[68] For deeper insights on the role of solidarity in the energy sector, see, *ex multis*, Y. Petit, "La solidarité énergétique entre les Etats membres de l'Union européenne: une chimère?", in *Revue des affaires européennes*, 2009-2010, p. 771 ff.; N. Ahner, J.-M. Glachant, "The Building of Energy Solidarity in the EU", in J.-M. Glachant, M. Hafner, J. De Jong, N. Ahenr, S. Tagliapietra (eds), *A New Architecture for EU Gas Security of Supply*, Brussels, 2012, p. 123 ff.; M. Knodt, A. Tews, "European Solidarity and Its Limits: Insights from Current Political Challenges", in A. Grimmel, S. My Giang (eds), *Solidarity in the European Union. A Fundamental Value in Crisis*, Springer, 2017, pp. 55-58; T. M. Moschetta, "La solidarietà interstatuale nella politica energetica dell'Unione europea: note a margine della sentenza del Tribunale *Polonia c. Commissione*", in Post di AISDUE, I, Sezione "Note e commenti" n. 12, 31 dicembre 2019.

legitimising the Union to act in a unitary way in this field.[69] Since the energy sector remains subject to strong nationalistic and protectionist tendencies and the Union's action in this area is still fragmented, the role solidarity plays as an engine of integration could be extremely pertinent in inspiring a common policy on energy.[70]

In the realm of common defence and security, which represents the intergovernmental policy *par excellence*, the mutual defence clause envisaged under Article 42(7) TEU requires Members States to provide assistance to each other in the event of armed aggression. The systemic goal is to demonstrate friendship and commitment to the progressive framing of a common Union defence policy to protect the Union's values. Finally, as for the Common Foreign and Security Policy, Article 24(3) TEU imposes solidarity obligations upon Member States, requiring them to support the Union's external policy in a "spirit of loyalty and mutual political solidarity", and to comply with the Union's actions in this area.[71] Interestingly, legal doctrine has often framed interstate solidarity within the framework of the Union's external action in its operational dimension and as a value to be promoted. In particular, Neframi indicates two different categories of solidarity in the EU's external dimension: while in the first solidarity is basically conceptualised as assistance and is therefore closer to international law because it is aimed at providing help unilaterally, the second attributes to solidarity the enhanced value of *lien*, understood as the sharing of a common project.[72]

Thus, the fundamental requirement of solidarity within the Union – that was initially only requested for harmonised fields of EU law[73] – has been progres-

[69] E. Küçük, "Solidarity in EU Law. An Elusive Political Statement or a Legal Principle with Substance?, cit., p. 973.

[70] Solidarity among States acquires relevance in occasion of shortage of gas, as reported in Regulation (EU) 2017/1938 that not only embodies a number of references to solidarity but introduces also a solidarity mechanism of burden sharing for mitigating the effects of serious situations of emergency (Article 13, Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No. 994/2010, *OJ* L 280 of 28.10.2017).

[71] For deeper insights on the role of solidarity in the CFSP, see L. C. Ferreira-Pereira, A. J. R. Groom, "'Mutual solidarity' within the EU common foreign and security policy: What is the name of the game?", in *International Politics*, 2010, p. 596 ff.

[72] E. Neframi, "La solidarité et les objectifs d'action extérieure de l'Union européenne", cit., pp. 139-147. Moreover, the author stresses that, within the framework of the external action of the Union, solidarity between Member States would be justiciable as principle that is embodied in the duty of loyalty and as fundamental principle for the achievement of the Union's external objectives.

[73] I. Domurath, "The Three Dimensions of Solidarity in the EU Legal Order: Limits of the Judicial and Legal Approach", cit., p. 464.

sively applied beyond the sphere of restrictive powers granted to EU institutions by national governments to also include cooperating and coordinating their policies in fields retained by States. Enshrined in the progressive development of an "ever closer Union between peoples", the 'long term solidarity' appears to be a real engine for this rapprochement, for which 'active solidarity' impregnates the specific instruments organising 'material solidarity'.

2.2.2 In search of the legal content of solidarity

In the light of a qualitative and quantitative evaluation of the inclusion of solidarity within the mentioned provisions, according to some scholars, current treaties understand solidarity as a *"pierre angulaire du système juridique de l'Union européenne"*.[74] Notwithstanding the existence of multiple provisions where solidarity is expressly positioned making it visible and relevant, a clear proposition regarding its legal status – and thus its role in the implementation of the mentioned provisions – is still lacking.[75] In fact, from a legal point of view a question is still pendant: is solidarity a value, an objective, or a principle of the EU legal order?

a) Solidarity as a value of the European Union construction

According to the CJEU, "[The EU] legal structure is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU."[76] The list of the values that inspire the Union and whose respect notably represents one of the conditions for grating access to

[74] C. Boutayeb, "La solidarité, un principe immanent au droit de l'Union européenne", cit., p. 5 (English translation: "cornerstone of the European Union's legal system"). On the notion of solidarity within EU law, see, *ex multis*, M. Borgetto, *La notion de fraternité en droit public français. Le passé, le présent et l'avenir de la solidarité*, Bibliothèque de droit public, 1993; S. Stjernø, *Solidarity in Europe: The History of an Idea*, cit.; G. De Búrca, *EU Law and the Welfare State. In Search of Solidarity*, Oxford University Press, 2006; A. Giddens, *Europe in the Global Age*, Cambridge University Press, 2007; N. Karagiannis, *European Solidarity*, Liverpool University Press, 2007; M. Ross, "Solidarity – A New Constitutional Paradigm for the EU?", in M. Ross, Y. Borgmann-Prebil (eds), *Promoting European Solidarity in the European Union*, cit., pp. 23-45; M. Blanquet, "L'Union européenne en tant que système de solidarité : la notion de solidarité européenne", cit., pp. 155-195; A. Levade, "La valeur constitutionnelle du principe de solidarité", in C. Boutayeb (ed.), *La solidarité dans l'Union européenne : éléments constitutionnels et matériels*, cit., p. 48 ff.

[75] E. Küçük, "Solidarity in EU law: an elusive political statement or a legal principle with substance?", in A. Biondi, E. Dagilytė, E. Küçük (eds), *Solidarity in EU Law. Legal Principle in the Making*, Edward Elgar Publishing, 2018, pp. 38-60.

[76] CJEU, Opinion 2/13, *Accession to the European Convention of Human Rights (ECHR II)*, 18 December 2014, ECLI:EU:C:2014:2454, para 168.

candidate States *ex* Article 49 TEU[77] as well as starting a sanction procedure *ex* Article 7 TEU for their breach by Member States,[78] is contained in Article 2 TEU, according to which:

> 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.

The values listed in the two sentences of this provision have, however, a different status: while the first sentence speaks of values upon which the Union is constitutionally founded, the second sentence lists other values that seem to be meant to characterise an inter-individual and societal dimension rather than an institutional one. Moreover, while the former are fundamental and have a clear and uncontroversial legal content, the latter cannot be properly recognised as values such as to constitute the legal basis to activate the procedure provided *ex* Article 7 TEU.[79] Thus, the first sentence may enjoy judicial enforceability but the second does not.

Solidarity is included in this second category and thus among the elements that characterise the societies in which these values, common to the Member

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[77] Article 49 TEU states that: "Any European State which respects the *values referred to in Article 2* and is committed to promoting them may apply to become a member of the Union. […]" [emphasis added]. For insights, see M. Maresceau, "Quelques réflexions sur l'application des principes fondamentaux dans la stratégie d'adhésion de l'UE", in *Le droit de l'Union européenne en principes.* Liber amicorum *en l'honneur de Jean Raux*, Ed. Apogée, 2006, p. 69 ff.

[78] On Article 7 TEU, see L. Besselink, "The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives", in A. Jakab, D. Kochenov (eds), *The Enforcement of EU Law and Values*, Oxford University Press, 2017, pp. 128-144; G. Wilms, *Protecting Fundamental Values in the European Union through the Rule of Law*, EUI RSCAS, 2017; D. Kochenov, L. Pech, "Better Late Than Never?", in *Journal of Common Market Studies*, 24, 2016, p. 1062; C. Hillion, "Overseeing the Rule of Law in the EU: Legal Mandate and Means", in C. Closa, D. Kochenov (eds), *Reinforcing the Rule of Law Oversight in the European Union,* Cambridge University Press, 2016, p. 59 ff.; R. Bieber, F. Maiani, "Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?", in *Common Market Law Review*, 33, 2014, p. 1057 ff.; P-Y. Monjal, "Le traité d'Amsterdam et la procédure en constatation politique de manquement aux principes de l'Union", in *Revue du marché commun et de l'Union européenne*, 3, 1998, pp. 69-84; L. S. Rossi, "La «reazione comune» degli Stati membri dell'Unione europea nel caso Haider", in *Rivista di diritto internazionale*, 83, 2000, pp. 151-154.

[79] For comments on Article 2 TEU, see M. Klamert, D. Kochenov, "Article 2", in M. Klamert, M. Kellerbauer, J. Tomkin (eds), *Commentary on the EU: Treaties and the Charter of Fundamental Rights*, Oxford University Press, 2019, p. 22 ff.

States, may be found.[80] However, some argue that, while disregarding its collocation, solidarity is implicitly listed within the first sentence as an unwritten element precisely due to its extraordinary role in the creation, development, and enlargement of the Union.[81] Such a reading could then be justified by the fact that the EU Charter of Fundamental Rights lists solidarity among the "indivisible and universal values" on which the Union is founded.[82] However, this position is not fully acceptable if one consults the suggestions for amendment to Article 2 proposed during the preparation of the draft Treaty Establishing a Constitution for Europe.[83] Indeed, the majority of the States' representatives proposing amendments to the second part of the Article in question referred to those concepts as final aims or, at least, as political principles of EU society. As a result, it is questionable whether any legal consequences can be attached to solidarity based on its appearance in this provision.

b) Solidarity as an objective of the EU integration process

Solidarity as an objective to be achieved, a concrete mission of a policy to be pursued, has been included within primary law by the Maastricht Treaty.[84] And, the Lisbon Treaty has *de facto* taken back and reinforced what was previously stated by including solidarity as an objective of any kind of relationship established by virtue of the EU legal order.[85]

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[80] B. Böhm, "Solidarity and the values of Art. 2 TEU", in A. Berramdane, K. Abderemane (eds), *Union européenne, une Europe sociale et solidaire?*, Mare et Martin, 2015, pp. 67-77; H. J. Blanke, S. Mangiameli, *The Treaty on European Union (TEU): A Commentary*, Springer, 2013, p. 114; M. Dony, *Droit de l'Union européenne*, 2nd ed., Editions de l'Université de Bruxelles, 2008, pp. 36-39; T. Russo, "La solidarietà come valore fondamentale dell'Unione europea: prospettive e problematiche", in E. Triggiani, F. Cherubini, I. Ingravallo, E. Nalin, R. Virzo (eds), *Dialoghi con Ugo Villani*, Cacucci Editore, 2017, pp. 667-672.

[81] In this perspective, see B. Böhm, "Solidarity and the values of Art. 2 TEU", cit., p. 71.

[82] M. Dony, "Les valeurs, objectifs et principes de l'Union", in M. Dony, E. Bribosia (eds), *Commentaire de la Constitution de l'Union européenne*, Editions de l'Université de Bruxelles, 2005, p. 34.

[83] The European Convention, 'Proposed Amendments to the Text of the Articles of the Treaty Establishing a Constitution for Europe', 2003.

[84] After the inclusion of solidarity among the objectives of the then Community, the Court of first instance set: "the derogations from free competition in favour of regional aid under Article 92(3) (a) and (c) are based on the aim of Community solidarity, a *fundamental objective* of the Treaty, as may be seen from the preamble. In exercising its discretion, the Commission has to ensure that the aims of free competition and Community solidarity are reconciled, whilst complying with the principle of proportionality" [emphasis added]. See Court of First Instance, Case T-126/96 and T-127/96, *BFM v. Commission*, 15 September 1998, ECLI:EU:T:1998:207, point 101. For further details on the State aids regime and solidarity issues, see Chapter III of the present work.

[85] I. Domurath, "The Three Dimensions of Solidarity in the EU Legal Order: Limits of the Judicial and Legal Approach", cit., p. 460; M. Ross, "Solidarity – A new constitutional paradigm for the EU?", cit., p. 36.

First, a clear reference to solidarity as an objective is included in the sixth recital of the Treaty of the European Union by recalling Member States' desire "to deepen the solidarity between their peoples while respecting their history, their culture and their traditions". In this way, the Treaty also confirms the extension of the scope of application of solidarity to the relationship between individuals thereby stressing the concepts of EU citizenship[86] and *solidarité démocratique*.[87] However, improving interstate relations in the light of solidarity remains the key mission of the EU integration process. Indeed, as previously mentioned, Article 3 TEU refers to "solidarity among Member States". Clearly, as stressed by some authors, the requirement of solidarity has been counterbalanced with the reference to respecting the national identities of Member States as well as of their national and regional diversities by respecting the principle of subsidiarity in the interest of citizens.[88] Furthermore, solidarity as an objective works in the external dimension of the Union: Article 3(5) TEU specifies that "in its relations with the wider world, the Union shall […] contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples […]."

The inclusion of solidarity among the objectives of the Union seems particularly significant, also because the EU system, as is well known, is characterised by a strong teleological connotation. Indeed, the founding treaties have always been imbued with a purpose-driven functionalism and, generally, the objectives have played a significant role in the legal process of integration, above all in view of the distinct interpretation employed by the Court aimed at ensuring the greatest practical effectiveness of EU law.[89]

Even though the entry into force of the Lisbon Treaty has reshaped the previous interaction between objectives and competences,[90] the objectives included

[86] In this perspective, it is quite interesting the mentioned decision in the *Grzelczyk case* (cit.). For an analysis on this, C. Barnard, "EU Citizenship and the Principle of Solidarity", in E. Spaventa, M. Dougan (eds), *Social Welfare and EU Law*, Hart Publishing, 2005, pp. 161-165.

[87] A. Levade, "La valeur constitutionnelle du principe de solidarité", cit., p. 36.

[88] For further details see T. Konstadinides, "Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement", in *Cambridge Yearbook of European Legal Studies*, 13, 2011, pp. 195-218; G. Di Federico, *L'identità nazionale degli Stati membri nel diritto dell'Unione europea. Natura e portata dell'art. 4, par. 2, TUE*, Editoriale Scientifica, 2017.

[89] CJEU, Case 8/57, *Groupement des hauts fourneaux e aciéries belges v. High Authority*, 21 June 1958, ECLI:EU:C:1958:9, point 232; CJEU, Case 6/62, *Europemballage Corporation e Continental Can Company v. Commission*, 21 February 1973, ECLI:EU:C:1973:22, point 25; CJEU, Case 36/74, *Charmasson c. Ministre de l'*économie e des finances, 10 December 1974, ECLI:EU:C:1974:137, point 23.

[90] To deepen the debate on this issue, see, *ex multis*, J. Larik, "From Speciality to a Constitutional Sense of Purpose: on the changing role of the objectives of the European Union", in *International*

in Article 3 TEU still have three functions within the EU legal framework. First of all, they serve as an interpretative tool of the specific provisions enshrined in the Treaties. Second, they continue to enrich the scope of application of EU law. Finally, they establish special constraints both on the EU institutions and on Member States by conditioning – without establishing legal obligations[91] – their actions at the Union level. According to an analytical reconstruction done by Azoulai of the CJEU jurisprudence in this field,[92] there are three requirements that have to be respected by these actors, and especially by States, when acting on the basis of the mentioned objectives of the Union. Firstly, they have to be aware that acting within the framework of these objectives implies the need to respect the principles and mechanisms of control of EU law.[93] Secondly, they have to take into account the supranational dimension and context.[94] Thirdly, as pointed out by the CJEU, Member States must refrain from adopting and keeping in force any kind of measures capable of eliminating the *effet utile* of the common rules established at the Union level.[95]

Therefore, the functions attributed to the objectives of Article 3 TEU can also be extended to solidarity which, as an objective in a short- and long-term perspective, contributes to defining the purposes which justify the existence of the very Union and, moreover, to fuelling the teleological reading of the Treaties which should guide the EU institutions and the Member States.[96]

c) Solidarity as a principle of the EU legal order

In general terms, principles – due to their essentially unpublished nature and heterogeneity which distinguishes them – are particularly difficult to define in

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and Comparative Law Quarterly, 63, 2014, p. 958 ff.; E. Neframi (ed.), *Objectifs et compétences dans l'Union Européenne*, Bruylant, 2013.

[91] CJEU, Case 126/86, *Giménez Zaera c. Instituto Nacional de la Seguridad Social e Tesorería General de la Seguridad Social*, 29 September 1987, ECLI:EU:C:1987:395, point 10. According to some scholars, the violation of one of the objectives of the Union could, however, justify an action for infringement before the ECJ, see C. Blumann, "Objectifs et principes en droit communautaire", in *Le droit de l'Union européenne en principes.* Liber amicorum *en l'honneur de Jean Raux*, Ed. Apogée, 2006, p. 55.

[92] L. Azoulai, "Article I-3. Les objectifs", in L. Burgorgue-Larsen, A. Levade, F. Picod (eds), *Traité établissant une Constitution pour l'Europe*, Partie I, Bruylant, 2007, p. 73.

[93] CJEU, Case 38/69, *Commission v. Italy*, 18 February 1970, ECLI:EU:C:1970:11, point 10; Case C-11/00, *Commission v. ECB*, 10 July 2003, ECLI:EU:C:2003:395, point 92.

[94] CJEU, Case C-322/01, *Deutscher Apothekerverband*, 11 December 2003, ECLI:EU:C:2003:664, point 73.

[95] CJEU, Case C-35/99, *Arduino*, 19 February 2002, ECLI:EU:C:2002:97, point 34.

[96] M. Dony, *Droit de l'Union européenne*, cit., p. 39.

the Union's system, thus they are often marked by some vagueness.[97] According to some authors, principles may be classified as (i) axiomatic, when inherent in the very notion of a legal order and they represent the superior needs of the collective conscience; (ii) structural, when they animate and characterise a specific legal system; (iii) common, intended as the general principles of law recognised by the constituent parts of the legal system.[98] Even though such a classification may be useful, problems remain. In particular, with reference to the notion of general principles of EU law, also defined as systemic principles, from which some concrete rules may derive and that operate by transcending specific areas of law and underlying the legal system as a whole.[99] In any case, principles having a well-defined legal status are justiciable and thus may be invoked to evaluate, *inter alia*, the conformity of the EU legal acts as well as the conduct of Member States.[100]

Given its prominent position within the Treaties, solidarity is often considered a principle of the EU legal order. However, albeit over the years there have been several attempts to reconstruct its value as a principle and many hypotheses have been issued, the exact legal status of the corresponding principle remains hard to recognise.[101]

The range of definitions rendered to solidarity as a principle is quite broad. Some authors mainly focus on the role of solidarity from a relational point of view by referring to it as a principle governing and modulating the relations between the different actors of the Union.[102] In order to conceive solidarity from

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[97] For general comments on the notion of principle within EU law, see K. Lenaerts, "In the Union we trust: trust-enhancing principles of Community law", in *Common Market Law Review*, 2004, pp. 317-343; C. Blumann, *Objectifs et principes en droit communautaire*, cit.; C. Flaesch-Mougin, "Typologie des principes de l'Union européenne", in *Le droit de l'Union européenne en principes.* Liber amicorum *en l'honneur de Jean Raux*, Ed. Apogée, 2006, p. 99 ff.; J. Molinier (ed.), *Les principes fondateurs de l'Union européenne*, PUF, 2005; D. Simon, "Les principes en droit communautaire", in S. Caudal (ed.), *Les principes en droit*, Paris Economica, 2008, pp. 287-304.

[98] T. Tridimas, *The General Principles of EU Law*, Oxford University Press, 2006, p. 3.

[99] For comments on the nature of the general principles of EU law, see, *ex multis*, K. Lenaerts, J. A. Gutiérrez-Fons, "The Role of General principles of EU Law", in A. Arnull, C. Barnard, M. Dougan, E. Spaventa (eds), *A constitutional order of States? Essays in EU law in honour of Alan Dashwood*, Hart Publishing, 2011, p. 179 ff.; T. Tridimas, *The General Principles of EU Law*, cit.

[100] In this sense, see CJEU, Case C-335/09, *Poland v. Commission*, 26 June 2012, ECLI:EU:C:2012:385, point 48: "The European Union is a union based on the rule of law, its institutions being subject to review of the conformity of their acts, *inter alia*, with the Treaty and the general principles of law."

[101] E. Dagilytė, "Solidarity: a general principle of EU law? Two variations on the solidarity theme", in A. Biondi *et al.* (eds), *Solidarity in EU Law*, cit., pp. 61-90.

[102] A. Berramdane, "Solidarité, loyauté dans le droit de l'Union européenne", in C. Boutayeb, *La solidarité dans l'Union européenne - Eléments constitutionnels et matériels*, cit., p. 58.

a more autonomous perspective, some other scholars include the principle of solidarity among the founding and structural principles of the Union, by assigning it a supra-constitutional or even just a constitutional rank capable of forcing itself onto primary law.[103] However, such a n orientation is not supported by those who explicitly exclude that solidarity may rank among the founding principles due to its unclear contours.[104] Moreover, the proposal has been put forward to define solidarity as a general principle of Union law that would mean to give it a strong legal value and, mainly, the capability of establishing concrete rules across the different policies thus marking an important step forward in the EU integration process.[105] However, in regard to this opportunity the doctrine is still divided. Some scholars consider solidarity as a principle of EU law of structural nature and attribute a normative effect to it by acknowledging its constitutional dimension,[106] while others are still sceptical of its binding legal implications. The latter mainly recall that, according to the CJEU jurisprudence, a general principle of law cannot be deduced from a provision of programmatic character which does not contain a well-defined obligation.[107] Moreover, any element confirming such an orientation is apparent neither in specific areas of EU law nor in a consistent case-law of the Court.[108]

As proof of the difficulty of dealing with such a challenging issue, even after the entry into force of the Lisbon Treaty, the CJEU has adopted a general caution with regard to raising solidarity to the category of principles including in situations it could be decisive. First, it is appropriate to recall the position taken in the *Pringle* case[109] concerning the compatibility of the European Sta-

[103] With regard to the first orientation, see J. Molinier (ed.), *Les principes fondateurs de l'Union européenne*, cit., p. 250; with reference to the second one, see A. Levade, "La valeur constitutionnelle du principe de solidarité", cit., p. 51; E. Dagilyte, "Solidarity: a general principle of EU law? Two variations on the solidarity theme", in A. Biondi *et al.* (eds), *Solidarity in EU law*, cit., pp. 61-90.

[104] In this regard, see A. Von Bogdandy, J. Bast, *Principles of European Constitutional Law*, cit., p. 53.

[105] A. Berramdane, "Solidarité, loyauté dans le droit de l'Union européenne", cit., pp. 66-68. For a deeper analysis on the notion of general principles of EU law, see M. Fallon, *Droit matériel général de l'Union européenne*, 2nd ed., Academia, 2002, p. 71 ff.; T. Tridimas, *The General Principles of EU law*, cit.

[106] C. Barnard, "Solidarity and New Governance in Social Policy", in G. de Búrca, J. Scott (eds), *Law and New Governance in the EU and the US*, Hart Publishing, 2006, pp. 153-178.

[107] CJEU, Case C-149/96, *Portugal vs. Council*, ECLI:EU:C:1999:574. See, *ex multis*, C. Blumann, L. Dubouis, *Droit institutionnel de l'Union européenne*, Litec, 2007, p. 121.

[108] M. Ross, "Promoting Solidarity: From Public Services to a European Model of Competition?", in *Common Market Law Review*, 44, 2007, p. 1069.

[109] CJEU, Case C-370/12, *Thomas Pringle v. Government of Ireland*, ECLI:EU:C:2012:756.

bility Mechanism (ESM) Treaty[110] with the obligations under EU law. Indeed, albeit established as an intergovernmental institution that works in parallel to the EU, because of also Article 136 TFEU[111] it has strong linkages with the EU institutional and legal framework. Among others, Mr. Pringle here claimed that the ESM Treaty was inconsistent with Article 125 TFEU that prohibits the Union and Member States to be liable for or assume the commitments of another Member State. For her part, Advocate General Kokott acknowledged that solidarity was at the very heart of the matter by stating that a broad interpretation of Article 125 TFEU – resulting in the prohibition of any provision of financial resources to bail out a Member State which is in general budgetary difficulties – "would be incompatible with the concept of solidarity."[112] Indeed, besides the reference to solidarity enshrined in Article 3(3) TEU, "in the chapter on economic policy, Article 122(1) TFEU refers explicitly to solidarity between Member States."[113] Thus, according to the AG, it would be odd that in emergency situations, "assistance to any third State would be permitted, while emergency assistance within the Union would be banned."[114] Besides, although she simply referred to solidarity as concept, the wording of the following paragraph seems to suggest that in her view solidarity could be raised to a fundamental principle of EU law.[115]

The Court demonstrated greater rigour by concluding that "the activation of financial assistance by means of a stability mechanism such as the ESM is not compatible with Article 125 TFEU unless it is indispensable for the safeguarding of the financial stability of the euro area as a whole and subject to

[110] For insights on the European Stability Mechanism, signed on 2 February 2012, see J.V. Louis, "The revision of the Lisbon Treaty and the establishment of a European Stability Mechanism", in D. Ashiagbor, N. Countouris, I. Lianos (eds), *The European Union after the Treaty of Lisbon*, Cambridge University Press, 2012, p. 284 ff.; C. Ohler, "The European Stability Mechanism: The Long Road to Financial Stability in the Euro Area", in *German Yearbook of International Law*, 54, 2011, p. 47 ff.; F. Martucci, "FESF, MESF et MES. La mise en place progressive d'un "pare-feu" pour la zone euro", in *Revue de l'Union européenne*, 2012, pp. 664-671; F. Croci, *Solidarietà tea Stati membri dell'Unione europea e governance economica europea*, cit., p. 179 ff.

[111] Article 136 TFEU was amended by Council Decision 2011/199/EU of 25 March 2011 which added a paragraph stating that "the Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro as a whole."

[112] Opinion of Advocate General Kokott of 26 October 2012, Case C-370/12, *Thomas Pringle v. Government of Ireland*, ECLI:EU:C:2012:675, para. 142.

[113] Ibid.

[114] Ibid., para. 143.

[115] Ibid., para. 144, "Basic fundamental principles of the Treaties therefore militate against a broad interpretation of Article 125 TFEU".

strict conditions."[116] In comparison to the AG, the reasoning of the Luxemburg judges did not expressly call on solidarity but focused on two noteworthy points.[117] First of all, the Court justified the invocation of the financial assistance mechanism with the risks potentially associated to the interests of all the States of the euro area. Secondly, it stressed that the existence of a "strict conditionality"[118] represents the guarantee to ensure that the Member States follow a sound budgetary policy.[119] Interestingly, the Court then interpreted Article 122(2) TFEU in the sense that it results in the granting of financial assistance solely by the Union and not by Member States.[120] Therefore, if one intended to frame solidarity within the Court's reasoning as for financial assistance in case of an emergency, two conclusions could be reached. On the one hand, by stressing the respect of specific conditions as requirement for granting financial assistance under the EMS, it has *de facto* justified and strengthened the idea of a 'conditioned solidarity' among Member States. On the other hand, it seems that in any case solidarity should be essentially interpreted as an instrument of performance of a joint action for a common goal at EU level rather than as a principle operating between Member States whenever one of them is in real hardship.[121] Nonetheless, as will be further explained in the following section, this kind of perspective seems to dismiss the opportunity to conceptualise solidarity as an independent principle[122] while moving it closer to the realm of the principle of loyal cooperation.

The second relevant field the Court has had the opportunity to rule over

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116 CJEU, *Pringle*, cit., para. 136.

117 Ibid., paras. 134-135.

118 Ibid., para. 143.

119 Ibid., para. 135.

120 Ibid., para. 118.

121 For an analysis of solidarity in the financial context, see J. V. Louis, "Solidarité budgétaire et financière dans l'Union européenne", in C. Boutayeb (ed.), *La solidarité dans l'Union européenne: éléments constitutionnels et matériels*, cit., pp. 107-124; B. de Witte, T. Beukers, "The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: Pringle", in *Common Market Law Review*, 50(3), 2013, pp. 805-848; A. McDonnell, "Solidarity, flexibility and the euro-crisis: where do principles fit in?", in L. S. Rossi, F. Casolari (eds), *The EU after Lisbon. Amending or coping with the existing treaties?*, Springer, 2014, pp. 57-91; G. Lo Schiavo, "The European Stability Mechanism and the European Banking Union: promotion of organic financial solidarity from transient self-interest solidarity in Europe?", in A. Biondi *et al.* (eds), *Solidarity in EU Law*, cit., pp. 130-161.

122 A. Berramdane, "Solidarité, loyauté dans le droit de l'Union européenne", cit., p. 67: "Nul doute que la solidarité est un principe constitutionnel figurant dans l'article 2 TUE […]. Toutefois, il n'est pas certain qu'il ait acquis la qualité de principe général de droit, source du droit de l'Union, en raison de son contenu insaisissable et de son champ d'application imprécis."

with a view on solidarity is migration.[123] In fact, for a long time the Court's case-law has demonstrated a latent tension in citing solidarity with regard to Article 80 TFEU even though, as previously reported, it also expressly imposes an unconditional obligation of solidarity on Member States in asylum, immigration, and border check activities in ordinary situations. Significantly, in *N.S./M.E*[124] and *Halaf*,[125] the Court just mentioned solidarity in a quick way and only appealed to fundamental rights when interpreting Article 3(2) of the Dublin II Regulation[126] which allows Member States to assume responsibility to process asylum applications on humanitarian grounds.[127] Similarly, in the *Jafari*[128] and *A.S.*[129] cases, the CJEU did not go further in reading the Dublin III Regulation under the lens of solidarity, despite the courageous conclusions of the Advocate General Sharpston.[130]

More recently, the Court partially changed its cautious approach by commenting on the nature of solidarity as legal concept with regard to the establishment of an effective and overall EU-wide mechanism based on burden-sharing

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[123] For a general overview, see J. Bast, "Deepening supranational integration: interstate solidarity in EU migration law", in A. Biondi *et al.* (eds), *Solidarity in EU Law*, cit., pp. 114-132; F. Ferraro, "Il principio di solidarietà nella riforma del sistema comune di asilo", in G. Cataldi, A. Del Guercio, A. Liguori (eds), *Il diritto di asilo in Europa*, L'Orientale University Press, 2014, pp. 139-152; C. Di Stasio, "La crisi del «Sistema Europeo Comune di Asilo» (SECA) fra inefficienze del sistema Dublino e vacuità del principio di solidarietà", in *Il diritto dell'Unione europea*, 2, 2017, pp. 209-268; U. Villani, "Il meccanismo di ricollocazione obbligatoria dei richiedenti protezione internazionale e il principio di solidarietà", in *Sud in Europa*, 1, 2018, p. 3 ff.; S. Quadri, "Sovranità funzionale e solidarietà degli Stati a tutela dei diritti dei migranti", in *Diritto pubblico comparato ed europeo*, 3, 2019, pp. 663-688.

[124] CJEU, Joined Cases C-411/10 and C-493/10, *N.S. and M.E.*, ECLI:EU:C:2011:865. For a comment, see G. Morgese, "Regolamento Dublino II e applicazione del principio di mutua fiducia tra Stati membri: la pronunzia della Corte di giustizia nel caso N.S. e altri", in *Studi sull'integrazione europea*, 7, 2012, pp. 147-162.

[125] CJEU, Case C-528/11, *Zuheyr Frayeh Halaf*, ECLI:EU:C:2013:342.

[126] Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, *OJ* L 50/1.

[127] Concerning the difficulty to operationalise solidarity in the migration crisis, see C. Favilli, "L'Unione europea e la difficile attuazione del principio di solidarietà nella gestione dell'«emergenza» immigrazione", in *Quaderni costituzionali*, 3, 2015, pp. 785-787.

[128] CJEU, Case C-646/16, *Jafari*, ECLI:EU:C:2017:586.

[129] CJEU, Case C-490/16, *A.S.*, ECLI:EU:C:2017:585.

[130] Advocate General's Opinion in Cases C-490/16 and C-646/16, *A.S. v. Republic of Slovenia* and *Jafari v. Bundesamt für Fremdenwesen und Asy*, ECLI:EU:C:2017:443. For comments, see F. Ferri, "Il regolamento 'Dublino III' tra crisi migratoria e deficit di solidarietà: note (dolenti) sulle sentenze *Jafari* e *A.S.*", in *Studi sull'integrazione europea*, 2, 2018, pp. 189-198.

in the context of asylum policy.[131] Indeed, in reaction to the mass-influx of migrants registered in 2015, the Council adopted Decision 2015/1601 on the relocation of 120.000 asylum seekers from Greece and Italy to other Member States according to the Member States' relative absorption capacities.[132] However, some Member States opposed this by deciding to continue to organise their level of contribution on a voluntary basis – the so-called 'flexible or voluntary solidarity' – without receiving impositions from the outside on how to show solidarity. In this regard, the action brought by the Slovak Republic and Hungary before the CJEU to challenge the legality of the Council Decision by raising a number of substantive and procedural grounds is extremely revealing. In response to the mentioned action, both the opinion issued by Advocate General Bot[133] and the long-awaited Court judgement,[134] which rejected Slovakia and Hungary's appeal, have given an important boost to solidarity and, in specific terms, partially silenced the opposition of the so-called Visegrád Group[135] to compulsory refugee relocation.[136] In particular, the reasoning proposed by

[131] See, *ex multis*, M.-L. Basilien-Gainche, "La politique européenne d'immigration et d'asile en question: la valeur de la solidarité soumise à l'argument de réalité", cit., p. 245 ff.; G. Morgese, "Solidarietà e ripartizione degli oneri in materia di asilo nell'Unione europea", in G. Caggiano (ed.), *I percorsi giuridici per l'integrazione. Migranti e titolari di protezione internazionale tra diritto dell'Unione e ordinamento italiano*, Giappichelli Editore, 2014, pp. 365-405; C. Favilli, "L'Unione europea e la difficile attuazione del principio di solidarietà nella gestione dell'emergenza immigrazione", in *Quaderni costituzionali*, 3, 2015, pp. 785-787; J. Bast, "Deepening Supranational Integration: Interstate Solidarity in EU Migration Law", cit.; E. Kuçuk, "The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?", in *European Law Journal*, 22, 2016, pp. 448-469.

[132] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the domain of international protection for the benefit of Italy and Greece, *OJ* L 248, 24 September 2015.

[133] Opinion of the Advocate General Bot delivered on 26 July 2017, Case C-643/15, *Slovak Republic v. Council*, and Case C-647/15, *Hungary v. Council*, ECLI:EU:C:2017:618.

[134] CJEU, Joined Cases C-643/15 and C-657/15, *Slovak Republic and Hungary v. Council*, 6 September 2017, ECLI:EU:C:2017:618. For a comment see M. Di Filippo, "The strange procedural fate of the actions for annulment of the EU relocation scheme", in *Eurojus.it*, 14 March 2017; S. Peers, "A Pyrrhic victory? The ECJ upholds the EU law on relocation of asylum-seekers", in *EU Law Analysis*, 8 September 2017, eulawanalysis.blogspot.com; A. Circolo, "Il principio di solidarietà tra impegno volontario e obbligo giuridico. La pronuncia della Corte di giustizia (GS) nel caso *Slovacchia e Ungheria c. Consiglio*", in *Diritto Pubblico e Comparato Europeo on line*, 34, 2018, p. 199; L. Rizza, "La riforma del sistema di Dublino: laboratorio per esperimenti di solidarietà", in *Diritto, cittadinanza e immigrazione*, 2, 2018, pp. 1-21.

[135] For some insights on the position of the Visegrad Group on migration issues, see J. Segeŝ Frelak, "Solidarity in European Migration Policy: The Perspective of the Visegrád States", in A. Grimmel, S. My Giang (eds), *Solidarity in the European Union. A Fundamental Value in Crisis*, cit., pp. 81-95.

[136] As for the system of relocation, it must be mentioned that on 23 September 2020, the

the AG who has forcefully underlined that solidarity is not only a "founding and existential value of the Union",[137] but has a "specific content and a binding nature"[138] is noteworthy. As a result, when there is a *de facto* inequality between Member States in the face of emergency situations, effective application of specific measures having a binding nature is even more pressing "to confer a practical content on the principle of solidarity and fair sharing of responsibility between Member States."[139] Indeed, whether solidarity is conceived as a "bedrock of the European project",[140] cannot be only based on consent and the voluntary commitments of Member States.

Even if with less emphasis, the Court's judges have issued the same position not only by mentioning solidarity several times as a guiding principle in the conception of specific measures, but also – in a revolutionary way – by explicitly referring to its inherent capacity to impose binding obligations on Member States.[141] Moreover, in comparison to what was stated in *Pringle*, in this case the Court observed that the application of strict conditions for relocation would be incompatible with the imperative measures enshrined in the Council Decision in question and, significantly, with the principle of solidarity laid down in Article 80 TFEU.[142]

The Court has proposed the same orientation as the migratory emergency in the recent judgement in case *Commission v. Poland*[143] wherein the judges referred many times to the *Slovak Republic and Hungary v. Council* case. However, in this case they have also given less emphasis to solidarity than Advocate General Sharpston did in her conclusions.[144] In fact, besides dedicating a whole

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European Commission issued the Communication on a New Pact on Migration and Asylum (COM(2020) 609 final) proposing a systematisation of the management of migration at EU level. For insights, see *ex multis*, P. De Pasquale, "Il Patto per la migrazione e l'asilo: più ombre che luci", Post di AISDUE, II (2020), Focus, La proposta di Patto su immigrazione e asilo, n. 2, 5 October 2020; G. Morgese, "La solidarietà tra Stati membri dell'Unione europea nel nuovo Patto sulla migrazione e l'asilo", Post di AISDUE, II (2020), Focus, La proposta di Patto su immigrazione e asilo, n. 2, 23 October 2020.

137 Opinion of the Advocate General Bot delivered on 26 July 2017, cit., point 18.

138 Ibid., point 23.

139 Ibid., point 22.

140 B. Favreau, *La Charte des droits fondamentaux de l'Union européenne après le traité de Lisbonne*, Bruylant, 2010, p. 13.

141 CJEU, *Slovak Republic and Hungary v. Council*, cit., paras. 252-253.

142 Ibid., point 304.

143 CJEU, Joined Cases C-715/17, C-718/17, C-719/17, *Commission v. Poland*, 2 April 2020, ECLI:EU:C:2020:257.

144 Opinion of the Advocate General Sharpston delivered on 31 October 2019, Joint Cases C-715/17, C-718/17, C-719/17, *Commission v. Poland*, ECLI:EU:C:2019:917

section to solidarity,[145] she defined solidarity as a fundamental principle of EU law[146] and, in that emergency situation, as "the responsibility of both the frontline Member States and the potential Member States of relocation to make that mechanism work adequately, so that relocation could take place in sufficient numbers to relieve the intolerable pressure on the frontline Member States."[147] The position mainly taken by both the Advocates General in these latter cases could help downsize the apparent difference between values and principles: the inclusion of certain values in a legal text would in itself transform them into principles of interpretation and creation of a system. In this way, it could be possible to speak about solidarity as a principle-value of EU integration[148] or, as suggested by AG Sharpston, as the "lifeblood of the European project."[149] However, what is certain is that in these reasonings there is no clear indication concerning a reading of the principle of solidarity as a rule not to be violated by the Member States, unlike the reading by the General Court in the recent case *Poland v. Commission*.[150] Notably, here the judges supported Poland in its claim against the Commission's decision regarding the exemption from EU requirements of the rules governing the operation of the OPAL pipeline in regard to third party access and tariff regulation by offering an exhaustive interpretation of the notion of energy solidarity. Going beyond what was requested in the concrete case, they have stated that "the 'spirit of solidarity' referred to in Article 194(1) TFEU is the specific expression in this field of the general principle of solidarity […] that is at the basis of the whole Union system."[151] As such, "the principle of solidarity entails rights and obligations both for the European Union and for the Member States. On the one hand, the European Union is bound by an obligation of solidarity towards the Member States and, on the other hand, the Member States are bound by an obligation of solidarity between themselves and with regard to the common interest of the European Union and the policies pursued by it."[152] By moving from these considerations, the General Court has for the first time used the reference to the expression 'spirit of solidarity' enshrined in Article 194 TFEU as a standard to review the acts adopted

[145] Ibid., paras. 246-255.
[146] Ibid., para. 201.
[147] Ibid., para. 234.
[148] A. Berramdane, "Solidarité, loyauté dans le droit de l'Union européenne", cit., p. 57.
[149] AG Sharpston's Opinion, Joint Cases C-715/17, C-718/17, C-719/17, para. 255.
[150] General Court in Case T-883/16, *Poland v. Commission*, 10 September 2019, ECLI:EU:T:2019:567.
[151] Ibid., para. 69.
[152] Ibid., para. 70.

in the energy policy. Even more interestingly, the judges have partially reversed the traditional reading of solidarity as an instrument to attain goals of common interest. Indeed, they have concluded that "the EU institutions and the Member States are obliged to take into account, in the context of the implementation of that policy, the interests of both the European Union and the various Member States and to balance those interests where there is a conflict."[153] According to this view, solidarity would be a principle which entails obligations on the EU and Member States and applies in ordinary situations wherein the single interest must be protected and balanced with that of the EU as a whole.[154] If confirmed by the Court of Justice, this interpretation could represent a valuable paradigm to overcome the persistent tension on the application of the concept of solidarity as a principle capable of creating obligations on the different actors of the EU legal order. For the moment, as also demonstrated by recent EU case-law, the notion of solidarity remains strictly linked to that of loyal cooperation as two sides of the same coin.[155] Moreover, just the principle of loyal cooperation would be seen as a privileged instrument to establish clear duties among Member States and the EU institutions for the sake of the common interest. At this point of the analysis, it is thus necessary to deepen the investigation into the particular relationship between these concepts while also introducing a further potential reading of this interaction with regard to emergency situations.[156]

d) The interplay between solidarity and loyalty within the EU legal order

Starting with the European Coal and Steel Community, the concept of loyalty has marked – albeit with some variations – the dynamic of the EU integration process.[157] Initially coupled with the principle of conferral, for a long time it has been intended as a duty of cooperation addressed to Member States *vis-à-vis* the EU institutions without imposing mutual duties of assistance.[158] However, the

[153] Ibid., para. 77.

[154] This perspective is sharply different from that adopted by the Court of Justice in early case-law, including the mentioned Opinion 1/75 wherein the Court expressly stated that to satisfy individual interests would have undermined the common one.

[155] CJEU, *Commission v. France*, 1969, cit., para. 16.

[156] Ibid., para. 238.

[157] On the foundations of the principle of loyal cooperation, see V. Constantinesco, "L'article 5 CEE, de la bonne foi à la loyauté communaitarie", in F. Capotorti *et al.* (eds), *Du droit international au droit de l'integration :* Liber amicorum *Pierre Pescatore*, Nomos Verlagsgesellschaft, 1987, pp. 97-114; F. Casolari, *Leale cooperazione tra Stati membri e Unione Europea. Studio sulla partecipazione all'Unione al tempo delle crisi*, Editoriale Scientifica, 2020.

[158] M. Blanquet, *L'article 5 du traité CEE. Recherche sur les obligations de fidélité des Etats membres de la Communauté*, LGDJ Paris, 1994; K. Mortelmans, "The Principle of Loyalty to the Commu-

CJEU has also extended such duties to the Commission[159] thereby proving the existence of a general principle of EU law, embracing the whole scope of the Treaty provisions.[160]

The Lisbon Treaty has embodied this orientation in the so-called loyalty clause in Article 4(3) TEU wherein the first sentence clearly codifies the duty of mutual assistance between Member States and the Union by providing the obligation "to assist each other in carrying out the tasks which flow from the Treaties."[161] Hence, the scope of application of the loyalty principle, by applying it equally to the EU institutions as to its Member States in full mutual respect, concerns both a 'vertical' and a 'reverse vertical' relationship.[162] That said, however, it should also be stressed that the identification of the corresponding duties of loyalty incumbent on the EU institutions remains unclear thereby leading to a substantial imbalance between the position of the Member States and that of the EU bodies.[163] As for the specific obligations of Member States, they are requested to "ensure fulfilment of the obligations arising out of the Treaties", to "refrain from any measure which could jeopardise the attainment of the Union's objectives" and to "facilitate the achievement of the Union's tasks". Such a wording shows that the loyalty clause not only entails negative obligations, but also positive duties[164] and is capable of operating in different ways depending on the nature of the action in question. It can give rise to both the substantive positive obligation to give primacy to EU law as well as the procedural obligations which mani-

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nity (Article 5 EC) and the Obligations of the Community Institutions", in *Maastricht Journal of European and Comparative Law*, 5(1), 1998, pp. 67-88.

159 CJEU, Case 230/81, *Luxembourg v. European Parliament* (Seat and Working Place of the Parliament), 10 February 1983, ECLI:EU:C:1983:32; Case 2/88, *Imm. Zwartveld*, 6 December 1990, ECLI:EU:C:1990:440; Case C-511/03, *Ten Kate Holding*, 20 October 2005, ECLI:EU:C:2005:625.

160 M. Blanquet, *L'article 5 du traité CEE*, cit., p. 291; J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, Kluwer Law International, 2001, p. 64; M. Klamert, *The Principle of Loyalty in EU law*, Oxford University Press, 2014, pp. 10-11.

161 CJEU, Case 14/88, *Italian Republic v. Commission of the European Communities*, ECLI:EU:C:1990:165, point 20. The constitutional nature of the loyalty principle has been claimed, for example, by A. Von Bogdandy, "Constitutional principles", in A. Von Bodgandy, J. Bast (eds), *Principles of constitutional law*, Hart Publishing, 2006, pp. 3-52.

162 M. Klamert, *The principle of Loyalty in EU law*, cit., pp. 25-29; A. Berramdane, "Solidarité, loyauté dans le droit de l'Union européenne", cit., p. 72.

163 F. Casolari, "EU Loyalty After Lisbon: An Expectation Gap to Be Filled?", in *The EU after Lisbon*, cit., pp. 108-109.

164 CJEU, Case C-433/03, *Commission v. Germany*, 14 July 2005, ECLI:EU:C:2005:462; Case C-266/03, *Commission v. Luxembourg,* 2 June 2005, ECLI:EU:C:2005:341; Case C-246/07, *Commission v. Sweden*, 20 April 2010, ECLI:EU:C:2010:203.

fest themselves in a duty on Member States to cooperate with the EU institutions for the implementation of the Treaty provisions.[165] In fact, as stated by the CJEU in the *Achmea* case "the Member States are obliged, by reason *inter alia* of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU."[166] Therefore, as far as the nature of the obligations imposed by Article 4(3) TEU is concerned, it combines the procedural duty of cooperation with an obligation of results thus operating as a constitutional safeguard for the protection of the general interest of the EU, without threatening Member States' related national interests.[167]

As acknowledged more than once by the Court of Justice in stressing that solidarity is based on mutual trust among Member States, the reasons behind the interplay between loyalty and solidarity fall precisely on this complex background. In the legal literature it has often been argued that there is no difference between the legal concept of solidarity and loyalty in EU law and that, on the contrary, the latter is an expression of the former.[168] As a matter of fact, by considering the elements that characterise the principle of loyalty, one could claim to conceive it as a legal instrument to solve the natural tension between the requirement of solidarity and the respect of national interests.[169] In this regard, that is to say that the very foundations of the EU lie on the concepts of

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[165] S. Hyett, "The Duty of Cooperation: a Flexible Concept", in A. Dashwood, C. Hillion (eds), *The General Law of E.C. External Relations*, Sweet & Maxwell, 2000.

[166] CJEU, Case C-284/16, *Achmea*, 6 March 2018, ECLI:EU:C:2018:158, para. 34.

[167] CJEU, Case 54/81, *Firma Wilhelm Fromme v. Bundesanstalt für landwirtschaftliche //Marktordnung*, ECLI:EU:C:1982:142. On the interplay between loyal cooperation and protection of national interests, see C. Hillion, "Mixity and Coherence in EU External Relations: The Significance of the "Duty of Cooperation", *CLEER Working Papers*, 2009/2, p. 8; F. Casolari, "EU Loyalty and the Protection of Member States' National Interests-A Mapping of the Law", in M. Varju, *Between Compliance and Particularism-Member State Interests and European Union Law*, Springer, 2019, pp. 49-78.

[168] M. Klamert, *The principle of Loyalty in EU law*, cit., pp. 31-32.

[169] C. Vedder, "Art. I-5", in C. Vedder, W. Heintschell von Heinegg (eds), *Europäischer Verfassungsvertrag*, Nomos, 2007. For a deeper analysis on the relationship between principles of loyalty and solidarity, see A. Berramdane, "Solidarité, loyauté dans le droit de l'Union européenne", cit., pp. 54-79; P. G. Xuereb, "Loyalty and solidarity", in *European Constitutional Law Review*, 1, 2005, pp. 17-20; M. Klamert, *The Principle of Loyalty in EU law*, cit., pp. 35-41; F. Casolari, "EU Loyalty and the Protection of Member States' National Interests-A Mapping of the Law", in *Between Compliance and Particularism-Member State Interests and European Union Law*, Springer, 2019, pp. 49-78.

mutuality and States' selfishness rather than on pure altruism and solidarity.[170] Indeed, when at the beginning States agreed to constrain their prerogatives and sovereign rights in order to create a new legal framework, they acted on the basis of the principle of reciprocity by expecting the same behaviours from the other contractors.[171] Only later, has solidarity acquired a privileged role in the EU political and legal discourse.

Against this background, it is clear that the existence of mutual obligations of loyalty has proven to be of utmost importance in securing the respect of the EU legal order. In the absence of altruistic or moral underpinnings, reciprocal loyalty has revealed itself to be the only driver capable of adjusting the individual national interests in the context of the general interest which represents the *raison d'être* of the EU legal order itself. After all, as von Bodgandy has pointed out, the EU legal order still "rests on the voluntary obedience of its Member States and therefore on their loyalty",[172] including in fields wherein solidarity plays a significant role, such as in the common asylum policy. Thus, in ordinary situations the principle of loyalty is at the service of solidarity thereby establishing an inextricable *de facto* connection between the obligations flowing from the 'loyalty clause' and solidarity. In fact, while solidarity mainly reflects the ideological aspiration of Member States to forward the EU integration process, the principle of loyalty expresses the way it should effectively be implemented.[173] Such an interplay is evident in the wording of the mentioned Article 24(3) TEU that expressly combines "spirit of loyalty" and "mutual solidarity". Moreover, it is also emblematic within the EU asylum and migration policy in ordinary situations.[174] Indeed, a State's violation of EU law in this field is first of all an infringement of the mutually agreed upon code of conduct, which is the basis of

[170] P. Hilpold, "Understanding solidarity within EU law: an analysis of the 'Islands of Solidarity' with particular regard to Monetary Union", cit., p. 261.

[171] There is no consensus on the reach of European solidarity when it is not driven by self-interest. For example, J. Habermas, *The Lure of Technocracy*, Polity Press, 2015; A. Sangiovanni, "Solidarity in the European Union: Problems and Prospects", in J. Dickson, P. Eleftheriadis (eds), *Philosophical Foundations of European Union Law*, Oxford University Press, 2012, pp. 384-411; P. Pescatore, *The Law of Integration. Emergence of a new phenomenon in international relations, based on the experience of the European Communities*, Sijthoof, 1974.

[172] A. Von Bogdandy, "Constitutional principles", cit., p. 51.

[173] A. Berramdane, "Solidarité, loyauté dans le droit de l'Union européenne", cit., p. 65.

[174] I. Goldner Lang, "No Solidarity without Loyalty: Why Do Member States Violate EU Migration and Asylum Law and What Can Be Done?", in *European Journal of Migration and Law*, 22(1), 2020, pp. 39-59; A. Miglio, "Solidarity in EU Asylum and Migration Law: A Crisis Management Tool or a Structural Principle?", in E. Kuzelewska, A. Weatherburn, D. Kloza (eds), *Irregular Migration as a Challenge for Democracy*, Intersentia, 2018, pp. 23-50.

any type of burden and responsibility-sharing as a manifestation of inter-State solidarity.[175] Hence, when no prospects and guarantees of loyal cooperation are given, solidarity cannot materialise and States are left at their own devices.[176] In concrete terms, it is loyalty duties that ensure the proper functioning of the EU tools and arrangements. Again, this is evidenced by the mechanisms for early warning, preparedness and crisis management under the Common European Asylum System that comprises a number of permanent measures amounting to ordinary cooperation measures governed by the principle of loyalty.[177] In this realm, solidarity should thus be conceived *ab initio* in its multiple dimensions by translating in an institutional, procedural, and material duty of shared responsibility and loyal cooperation. In light of these considerations, it is possible to introduce the binomial 'solidarity-loyalty', operating as a synthesis between the protection of the respective national interests and the necessity to ensure the effective functioning of the Union in pursuing specific solidarity objectives. Thus, not solidarity duties, but rather duties of loyal cooperation supported by arguments of solidarity find application in ordinary situations.

As a matter of fact, the question of whether such an interplay is subject to tweaks and adaptations in times of crisis arises, especially when it is not the general interest of the entire Union but only that of one or a few Member States that is affected. Indeed, in situations of emergency (disasters, mass influx of migrants, terrorist attacks) more intense cooperation and support based on arguments of solidarity should be required rather than the traditional mutual relations between Member States. This is also confirmed by the fact that, as previously mentioned, the current EU legal framework is characterised by different TFEU provisions regulating emergency situations in the domain of EU policies which make express reference to "the spirit of solidarity". As a result, emergency tools and measures requiring additional in-kind and financial assistance should go beyond what is normally required under the principle of loyal cooperation.[178] The latter should continue to inform the interaction between the EU institutions and Member

[175] In this regard, see M. Garlick, *Solidarity under Strain: Solidarity and Fair Sharing of Responsibility in Law and Practice for the International Protection of Refugees in the European Union*, Radboud University Nijmegen, 2016.

[176] On this matter, see P. McDonough, E. Tsourdi, *Putting solidarity to the test: assessing Europe's response to the asylum crisis in Greece*, UNHCR, Research Paper n. 231, January 2012.

[177] F. Casolari, "EU Loyalty After Lisbon: An Expectation Gap to Be Filled?", cit., p. 125.

[178] F. Casolari, "EU Loyalty After Lisbon: An Expectation Gap to Be Filled?", cit., pp. 123-124; R. Bieber, F. Maiani, "Sans solidarité point d'Union européenne – Regards croisés sur les crises de l'Union économique et monétaire et du Système européen commun d'asile", cit., p. 297.

States and ensure the effectiveness of the implementing measures from a procedural point of view and reinforce the requirements of solidarity.[179] This perspective is actually evident by paraphrasing the Advocate General Sharpston's words with regard to the mentioned relocation mechanism: while the principle of loyal cooperation guarantees that Member States respect their own responsibilities in making the mechanism workable, behaviours of solidarity for mitigating the intolerable pressure on the frontline Member States represent the final goal. The present work intends not only to show that in disaster scenarios the ordinary interplay between loyalty and solidarity changes, but also to investigate the acknowledgment of specific and autonomous duties of solidarity both on the Member States and on the Union in this field of intervention.[180]

3. Solidarity in the event of a disaster within EU law: starting premises

The increase of large-scale natural or man-made disasters occurring within the European continent or originating outside but having repercussion on it has progressively convinced individual governments that disasters often do not recognise national borders. Such a keen awareness regarding the plight of disaster victims has brought attention to the importance of appropriate national and supranational rules and structures for disaster prevention, mitigation, and response.

By not being a harmonised field of law at EU level, solidarity in disaster management has always been expressed through transnational cooperation between Member States and, therefore, the European Community's early task was only to face internal and external threats in order to secure the economic system. However, the acknowledgement of a growing number of areas of common concern has assigned new tasks to the EU, usually falling within the domain of the States, such as the protection of fundamental rights.[181] Moreover, during the integration process Member States have progressively conferred to the EU some competences related to disaster response, such as the defence of the environment, social security, and civil protection. Hence, since the mid- 1990s, in

[179] M. Gestri, "La politica europea dell'immigrazione: solidarietà tra Stati membri e misure nazionali di regolarizzazione", cit., p. 922.

[180] For an opposing position, see M. Klamert, *The Principle of Loyalty in EU law*, cit., p. 35.

[181] R. A. Boin, M. Ekengren, M. Rhinard, *Functional Security and Crisis Management Capacity in the European Union*, Report, No. B 36 ACTA-series, 2006, National Defence College, Stockholm, p. 15.

a trend which has accelerated since 2000, specific arrangements and strategies aimed at effectively responding to emergencies occurring both within and outside the Union's territory have been created and the role of the European Union as a crisis manager has strengthened.

Among the worst crises that originated in Europe and in other continents, and that the Union has tackled through the instruments at its disposal, it is appropriate to recall the disaster in a chemical industrial plant in Seveso in Italy in 1976, the Chernobyl nuclear power plant disaster in 1986, the outbreak of BSE ("mad cow disease") in 1996; the flooding in Central Europe in 2002, the outbreak of Severe Acute Respiratory Syndrome (SARS) in 2003, the Avian flu in 2005; the eruption under the glacier of Eyjafjallajökull (Iceland) in 2010, the recent Ebola virus outbreak in Africa, the 2015 migration crisis in Europe, and the current COVID-19 pandemic. These represent the perfect circumstances in which the ways of tackling a crisis phenomenon have provided a new understanding of the division of competences between the Union and its Member States.

Against this background, the Lisbon Treaty has consolidated and multiplied the references to natural and man-made disasters by giving the European Union new responsibilities and instruments to respond to catastrophes and emergencies in collaboration with Member States. First of all, Article 21 TEU, requires the Union to define and pursue common policies and actions in order "to assist populations, countries and regions confronting natural or man-made disasters". Such a provision can easily be connected to the EU's humanitarian aid policy governed by Article 214 TFEU and aimed at granting "*ad hoc* assistance and relief and protection for people in third countries who are victims of natural and man-made disasters, in order to meet the humanitarian needs resulting from these different situations."

With regard to the internal dimension, *ex* Article 122 TFEU the Council may take a decision on measures to offer financial assistance during "exceptional occurrences" or "natural disasters" that may affect Member States. Thus, under this provision, solidarity does not force the Council to decide to act, but if the Member States do decide to act, they must do so in a spirit of solidarity: all the actions undertaken must be governed by this principle. The TFEU has also introduced new powers for the EU to take action to combat serious cross-border health threats, complementing national policies (Article 168 TFEU). Furthermore, Article 196 relates to the area of civil protection and emphasises the importance of "cooperation between Member States in order to improve the effectiveness of systems for preventing and protecting against natural or man-made disasters." In particular, such a new legislation on civil protection

represents an attempt to reorganise the previous variegated and heterogeneous legal regimes and move towards a pre-planned, predictable, and coordinated response through a specific operational instrument, that is the EU Civil Protection Mechanism.[182]

Last but not least, the Lisbon Treaty now enshrines a specific provision entirely dedicated to solidarity in the event of a disaster, that is Article 222 TFEU[183] known also as the 'solidarity clause'. This provision imposes an explicit and general obligation upon the Union and its Member States to act jointly, "in a spirit of solidarity", if a Member State is the object of a terrorist attack[184] or the victim of a natural or man-made disaster. Moreover, it requires the Union to mobilise all the instruments at its disposal, including the military resources made available by the Member States, and for the Member States to coordinate between themselves in the Council. Given its normative impact, as stressed by the Special Rapporteur Valencia-Ospina, "this hard-law provision sets the Union apart from other regional coordination schemes."[185] Indeed, the introduction of the solidarity clause not only represents the attempted but also the successful focus on the need to foster 'solidarization' in the management of emergencies occurring in the Union's territory thus complementing the requirements of solidarity towards third countries enshrined in Article 21 TEU.

3.1 The multi-layered nature of the EU legal instruments for responding to disasters

The wording of the above-reported provisions suggests some crucial points for the present analysis. First, the general provisions enshrined in Article 21 TEU and in Article 222 TFEU make it evident that EU law on disaster response covers events occurring both in third countries and in the EU Member States. In addition, as shall be clarified in the following chapters, over the last two years there has been an important improvement to the instruments of assistance to be deployed within the Union's territory. Moreover, it is noted that, in the event of a disaster, solidarity takes shape on a multiplicity of levels thus expressing its multidimensional and cross-cutting character which combines policies and

[182] In this regard, see Chapter IV of the present work.

[183] In this regard, see Chapter V of the present work.

[184] For further details on the application of the solidarity clause in occasion of terrorist attacks, see M. Fuchs-Drapier, "The European Union's Solidarity Clause in the Event of a Terrorist Attack: Towards Solidarity or Maintaining Sovereignty?, in *Journal of Contingencies and Crisis Management*, 19, 2011, pp. 184-197.

[185] International Law Commission, *Sixth report on the protection of persons in the event of disasters by Mr. Eduardo Valencia-Ospina, Special Rapporteur*, 2013, UN Doc. A/CN.4/662 p. 37.

goals of very different, but interacting, natures. This is the reason why, as aforementioned in Chapter I, even though the following chapters will be dedicated to analysing the instruments of EU law to be activated in favour of EU Member States affected by a disaster and, therefore, the relevance of solidarity in its internal dimension, some references to emergencies occurring outside the Union will be made for the sake of completeness.

As shall be further illustrated, the mechanisms progressively developed to respond to disasters can be activated to provide both financial and in-kind assistance. As for the financial instruments of assistance, it will be considered the EU Solidarity Fund, an early instrument of support for Member States affected by disasters, as well as the EU rules concerning the adoption of public measures by the national authorities, aimed at aiding companies hit by a calamitous event, will be considered. Indeed, EU solidarity in the case of disasters affecting a Member State manifests itself not only through direct financing instruments, but also through a number of derogations progressively adopted to general legal frameworks concerning State aids and fiscal policies. Moreover, reference will be made of the mechanism to provide immediate financial assistance to EU Members established in 2016, that is the Emergency Support Instrument. As previously mentioned, in order to indicate the legal features of such an instrument in a deeper way, analogies and differences with its 'twin mechanism', that is the humanitarian aid instrument intended for third countries, will be presented. On the other hand, the Union Civil Protection Mechanism, which is aimed at ensuring the efficient provision of assistance through the coordination of the national civil protection systems of the participating States, represents the major expression of in-kind solidarity to be provided to Member States and third countries.

Such a complexity in terms of types of interventions marks the first particularity of the disaster management system of the Union in comparison to that of other regional organisations which, as stressed in the previous chapter, so far do not have well-developed mechanisms of assistance. Although the instruments to be illustrated follow different logics and therefore parallel levels, they have to be complementary and consistent in order to guarantee full effectiveness of the interventions and, ultimately, to the concept of solidarity. This is the reason why, as will be clearly detailed in the specific analysis pursued in Chapter V, the relevant secondary law instruments mention – *inter alia* – the necessity to promote synergies among them and to maximise substantive actions of solidarity.

The multi-layered character of the mechanisms that will be explored also involves the relationship between Member States and the Union thereby shaping

different dynamics of solidarity. Indeed, except for the rules concerning State aid – which exclusively involve the European Commission –, the other instruments, albeit to varying degrees, are characterised by partnerships between the Union and Member States that can have a procedural or substantial nature. For example, while the actual activation procedure of the EU Solidarity Fund is left entirely to the Commission, a more detailed analysis suggests that States play a decisive role, not really in the provision of the funds, but in the preliminary definition of the activation criteria of the instrument itself. If conceived in its temporal complexity, such an instrument does not only require the Union, but also Member States to show a *de facto* solidarity. With regard to the Emergency Support Instrument, the centrality of States acting within the Council of the European Union will be underlined. As for the Union Civil Protection Mechanism, the resources deployed in the field are voluntarily put at disposal by Member States while, albeit with some recent improvements, the Union is basically required to guarantee coordination and send experts at the site of the occurrence. Therefore, the Member States and the Union are asked to complement and reinforce each other: in this case solidarity towards the affected State goes through both the actors simultaneously. In addition, the provision of assistance through the Emergency Support Instrument, since it is only intended for exceptional disasters, is proposed by the Commission and is collectively decided upon by Member States within the Council.

The EU disaster management system is, hence, the result of mechanisms operating in different moments, for the provision of financial or in-kind assistance from both the Union as an independent actor and Member States. The next chapters' challenge is to verify whether the so-called 'EU disaster response law' effectively regulates a coherent 'system of solidarity' which is therefore able to comply with the solidarity requirements enshrined both in EU primary and secondary law. Starting with a deep analysis of the legal value of the solidarity clause enshrined in Article 222 TFEU, we shall explore whether some duties of solidarity in the field of disaster response – specifically the duty to provide assistance in case of disaster – insist both on Member States and on the Union and have an autonomous character *vis-à-vis* the principle of loyalty exist.

CHAPTER III

TRADITIONAL FORMS OF SOLIDARITY: EU INSTRUMENTS OF FINANCIAL ASSISTANCE TO COPE WITH DISASTERS

1. Financial solidarity in case of a disaster

When a State is affected by a disaster, the immediate and more concrete form of assistance seems to be the financial one that, addressed both to the national authorities and to all the other relevant intervening actors, raises the donors' profile of generosity and solidarity. Starting with this awareness, over the years the EU institutions have developed – in compliance with the competences conferred by the Member States – multiple initiatives intended to meet the requirements of solidarity stemming from the Treaties on the Union and Member States *vis-à-vis* the affected State. *In primis*, various sources of direct financing following an emergency occurring within or outside the Union's territory have been established and progressively improved. In fact, in case of serious natural or man-made disasters, the most immediate and obvious responses are direct support measures, such as emergency services, assistance to the population as well as the securing of buildings and of natural sites. As for the internal dimension, which the present work is focused on, the main instruments intended to guarantee direct financial assistance to the affected Member States requiring their activation are the EU Solidarity Fund (see section 2.1) and the EU Emergency Support Instrument (see section 2.2). However, the overview of the existing instruments of support cannot be limited to direct forms of financial assistance. Indeed, solidarity may also go through an indirect line of intervention when resulting from the application of certain provisions allowing derogations to specific regimes to face situations of emergency. In particular, this may happen with regard to the EU rules concerning the State aid regime, that is when the national authorities are allowed to adopt public measures aimed at aiding companies hit by a calamitous event (see section 3.1), as well as those dealing with the budgetary and economic frameworks (see section 3.2). Considering that these indirect lines of interventions cannot be properly included within the instruments of disaster response, the present analysis will not address all their

particular aspects in detail but will be limited to exploring the essential elements and concerns that can be relevant to a broader evaluation of EU disaster response law. Indeed, when a disaster occurs, the financial, economic, and fiscal dimensions of solidarity deeply interact because they are not only intended to support immediate and targeted interventions, but also long-term and comprehensive measures aimed at rebuilding the whole economic and social framework of the affected territories.

2. Direct financial instruments of solidarity

2.1 The EU Solidarity Fund as an instrument for disaster recovery

The intention to place solidarity at the centre of EU disaster response law first became evident in 2002 when the EU Solidarity Fund was established (hereinafter EUSF)[1] which was aimed at helping Member States against natural disasters. Indeed, over that year, devastating and exceptional floods, caused by a period of heavy rainfall, hit Central Europe resulting in casualties and damages amounting to billions of euros. The EU and Member States responded relatively quickly to these crises, but the need to establish a financial instrument operating at EU level to show solidarity with the population of the affected regions was soon signalled. Therefore, the Commission proposed the establishment of a special fund according to Article 159 TEC (currently Article 175 TFEU), to strengthen the economic, social and territorial cohesion within the Union, with the objective of "reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions." Since its establishment, the EUSF has been used for disasters covering a range of different catastrophic events including floods, forest fires, earthquakes, storms, and drought and supported several different EU countries for an amount of over €6,5 billion.[2] Among all the cases of activation, the major support granted between August 2017 and January 2017, on the occasion of the earthquakes in Italy – and more specifically in Abruzzo, Lazio, Marche and Umbria – for which the Commission allocated a record of roughly €1.2 billion is of noteworthy mention.[3]

[1] Council Regulation No. 2012/2002 of 11 November 2002 establishing the European Union Solidarity Fund, *OJ* L 311/3, 14 November 2002.

[2] The list of all the interventions (2002-2019) is available at: https://cohesiondata.ec.europa.eu/stories/s/An-overview-of-the-EU-Solidarity-Fund-2002-2020/qpif-qzyn/ (accessed on 20 December 2020).

[3] European Commission, Decision (EU) 2017/1599 of the European Parliament and of the

2.1.1 The EU Solidarity Fund: features and early improvement attempts

The EU Solidarity Fund has the objective to contribute, in the fastest time possible, to mobilising emergency services to meet the immediate needs of the population and to rebuild, short-term, key infrastructure that has been damaged in order to facilitate the resumption of economic activities. As a consequence, this financial instrument only covers essential emergency operations: restoration of infrastructure to a functioning standard; cleaning up disaster-stricken areas; covering the costs of rescue services and temporary accommodation for the population concerned; and installing preventive infrastructure and measures for the immediate protection of the cultural heritage.[4] The EUSF may be activated in cases of major natural disasters which have serious repercussions on living conditions, the natural environment, or the economy in one or more Member States or accessing countries. The assistance takes the form of a non-reimbursable grant[5] to the beneficiary State that is fully responsible for its implementation.[6]

Despite its significant added value in addressing overwhelming emergencies within the EU – by alleviating the financial burden on States and fostering the visibility of EU action among its citizens – the functioning of the fund has more than once raised some critiques and suggestions for revision have been made. In particular, the Commission identified the need to strengthen the solidarity aspect of EU crisis management by extending the scope and improving the operation mechanisms of the EUSF. Indeed, the other existing Union programmes and funds were inadequate given that they do not include dealing with man-made disasters and major emergencies that might threaten public health, such as possible outbreaks of epidemics or nuclear accidents. Consequently, in 2005 the Commission proposed a new regulation for the EUSF containing a lot of improvements, such as lowering the thresholds for be granted assistance, more flexible criteria to be respected, and the possibility of granting advanced payments immediately after a disaster.[7]

The proposal from the Commission was addressed to the Council and the

Council of 13 September 2017 on the mobilisation of the European Union Solidarity Fund to provide assistance to Italy, *OJ* L 245/3, 23 September 2017.

[4] Council Regulation No. 2012/2002, Article 3.

[5] Except when a third party subsequently meets the cost of repairing the damage. Council Regulation No. 2012/2002, Article 8.

[6] Council Regulation No. 2012/2002, Article 6.

[7] European Commission, Proposal for a Regulation of the European Parliament and the Council establishing the European Union Solidarity Fund, COM(2005) 108 final, 6 April 2005, p. 2.

European Parliament which introduced a set of amendments. Albeit the European Parliament agreed with the need for a wider scope of the EUSF and the lowering of thresholds for applications, simultaneously it did not want to let the Commission decide on its own whether a disaster could fall within the scope of the Regulation.[8] Such a motivation was also used by the Council, where several Member States were reluctant to revise the EUSF because it could lead to other non-desirable changes and to an excessive strengthening of the EU in this area.[9] Thus, the Commission's proposal was definitely blocked due to the persistent reluctance of some Member States to favour a 'Europeanisation' of financial solidarity animated by the fear of improper use by other States. The demand for solidarity in this field risks colliding with the desire for protection not only of the EU's fortune but also, indirectly, each nation's riches.

In this *impasse*, in 2008 the European Court of Auditors made a first evaluation of the EU Solidarity Fund, by focusing on the ability to provide assistance in a rapid, efficient, and flexible manner.[10] In its findings the Court of Auditors concluded that the EUSF had not lived up to its aim of providing rapid assistance, by highlighting that it had taken an average of more than one year for the successful applicants to receive financial assistance. It was underscored that the most time-consuming phase was the Commission's assessment of the applications, due to administrative rules, the Commission's working procedures as well as the promptness and quality of the applicants' information and requests.[11]

The same shortcomings were issued by the Commission in 2011 in its Communication on the *Future of the European Union Solidarity Fund*,[12] whereby it essentially acknowledged that under the regulation in force and the budgetary rules, it was difficult to significantly shorten the time necessary to make grants available. Notably, the Commission underlined the need to find new ways of

[8] European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council on establishing the European Union Solidarity Fund, Doc. A6–0123/2006 Final, 31 March 2006.

[9] T. Åhman, C. Nilsson, "The Community Mechanism for Civil Protection and the European Union Solidarity Fund", in S. Olsson (ed.), *Crisis Management in the European Union: Cooperation in the Face of Emergencies*, Springer, 2009, p. 100.

[10] European Court of Auditors, Special report No. 3/2008, pp. 9-11; European Commission, DG Regional Policy, The European Union Solidarity Fund. For comments, see T. Åhman, C. Nilsson, "The Community Mechanism for Civil Protection and the European Union Solidarity Fund", cit., pp. 97-98.

[11] European Court of Auditors, Special report No. 3/2008, pp. 5-6.

[12] Communication from the Commission to the European Parliament, the Council of the European Union, the Economic and Social Committee, the Committee of the Regions, on the Future of the European Union Solidarity Fund, COM(2011) 613 final, 6 October 2011.

making financial aid available to Member States more rapidly by especially stressing its inability to apply equal levels of solidarity *vis-à-vis* an EU Member State as compared to a third country to which an immediate financial assistance can be granted.[13] As a result, within the updated legal framework established by the Lisbon revision, the Commission decided to submit another amending proposal to Regulation 2012/2002 which this time was adopted by both the Council and the European Parliament under the ordinary legislative procedure *ex* Article 294 TFEU.

2.1.2 Regulation (EU) 661/2014 and later amendments: a step forward in granting financial assistance under the EU Solidarity Fund

Regulation (EU) 661/2014 amending the 2002 Regulation establishing the EUSF entered into force on 15 May 2014[14] and, in response to the consequences on the Member States of the COVID-19 pandemic, it was further amended in early 2020.[15] In a great effort to make the Union more efficient and comprehensive in dealing with emergency situations, that now also includes major public health emergencies, the EU institutions made noteworthy and substantive changes to the granting procedure which deserve to be assessed for the purposes of the present work.

First of all, it must be stressed that, according to the current regulation, the EUSF can be activated both in the event of a major natural disaster[16] and in case of a major public health emergency having taken place in the territory of a Member State.[17] Moreover, it has been confirmed that a neighbouring Member State or country involved in accession negotiations with the EU, which is affected by the same disaster, can also benefit from assistance from the Fund.[18] Under

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[13] Ibid., para. 6.3. In this passage the Commission evidently referred to the Humanitarian Aid Instrument that, established in 1996, grants for financial assistance to third countries victim of disasters and other exceptional events. See, *infra*, para. 2.2.1 of the present Chapter.

[14] Regulation (EU) No. 661/2014 of the European Parliament and of the Council of 15 May 2014 amending Council Regulation (EC) No. 2012/2002 establishing the European Union Solidarity Fund, *OJ* L 189, 27 June 2014. Hereinafter, Regulation (EU) 661/2014.

[15] Regulation (EU) 2020/461 of the European Parliament and of the Council of 30 March 2020 amending Council Regulation (EC) No. 2012/2002 in order to provide financial assistance to Member States and to countries negotiating their accession to the Union that are seriously affected by a major public health emergency, *OJ* L 99, 31 March 2020.

[16] Namely whether it has resulted in damage estimated either at or over €3 billion, or more than 0,6% of its gross national income of the affected Member State **(**Consolidated text of Council Regulation 2012/2002**,** Article 2(2)).

[17] Consolidated text of Council Regulation 2012/2002**,** Article 2(1).

[18] This is the reason why the amending regulation includes two legal bases: Article 175, para. 3,

exceptional circumstances, the Fund may also be used for "regional natural disasters" involving a major part of its population and resulting in direct damages in excess of 1,5% of that region's gross domestic product.[19] As a consequence, the request for funding through the EUSF does not imply the existence of specific circumstances as was previously listed, but only the serious character of the event and a minimum threshold of damages.

Insofar as such preliminary requirements are met, according to the new procedure, national authorities of the affected State within twelve weeks – and no longer ten – after the occurrence of the damage may submit their activation request of the EUSF to the Commission by including all the "available information." These should concern: a) the total damage caused by the disaster and its impact on the population, the economy, and the environment concerned; b) the estimated cost of the operations; c) any other sources of Union funding; d) any other sources of national or international funding, including public and private insurance coverage which might contribute to the costs of repairing the damage and e) a short description of the implementation of Union legislation on disaster risk prevention and management related to the nature of the natural disaster.[20]

On the basis of the information received by the national authorities, the Commission has a maximum of six weeks to assess whether the conditions for mobilising the EUSF have been met and, if so, to determine the amount of the grant to be proposed both to the European Parliament and the Council.[21] Once the appropriations are made available, the Commission shall adopt an implementing decision and pay the grant immediately and in a single instalment to the beneficiary State. The funding has to be used within eighteen months from the date when the grant has been given and, no later than six months after this period, the beneficiary State or region shall present a report on the implementation of the financial contribution from the fund by justifying the expenditure and indicating any other source of funding received for the operations concerned.[22]

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and Article 212, para. 2, TFEU. Recourse to Article 212 TFEU is necessary to include non-Member States that are in the process of negotiating their accession to the EU.

[19] Consolidated text of Council Regulation 2012/2002, Article 2(3). In addition, the provision points out that where the region in which a natural disaster has occurred is an outermost region within the meaning of Article 349 TFEU, "regional natural disaster" means any natural disaster resulting in direct damage in excess of 1% of that region's GDP.

[20] Regulation (EU) 661/2014, Article 4(1).

[21] Regulation (EU) 661/2014, Article 4(2).

[22] Regulation (EU) 661/2014, Article 8(1).

Among the main and tangible improvements brought by the amending Regulations, emerges the possibility of granting an advance payment upon request by the affected State shortly after the application for a financial contribution from the Fund has been submitted to the Commission.[23] According to the more recent version adopted with Regulation 2020/461, the only condition is that the sum does not exceed 25% of the anticipated total amount of the financial contribution from the EUSF, capped at €100 million.[24] Such an enhancement can be explained by the interest of combining the practical need of further accelerating the process with that of respecting the demands of solidarity that has inspired the creation of the EUSF, which until 2016 was the only fund available for the immediate relief and recovery in the aftermath of a disaster.[25] The meaningful and growing idea is, indeed, that solidarity does not only imply a substantive element, but also a temporal one and, thus, should be matched with the concept of 'prompt assistance'.

The new legal framework concerning the EU Solidarity Fund is part of a growing awareness of the importance of solidarity in crisis management and in the post-emergency phase. Besides, the extension of the circumstances of activation to also include serious public health emergencies makes the Fund a suitable instrument to also give substance to the supporting EU competence in the field of protection of human health.[26] However, the Fund does still have some limitations that should be taken into account by the EU institutions.

First, the fact that – notwithstanding the calls of the European Parliament – in comparison to the 2005 Commission proposal, the regulation currently in force does not cover man-made or hybrid disasters even though the recent amendments have outstandingly allowed the inclusion of major health emergencies is questionable. In addition, the definition of the events that may trigger the activation of the EUSF, albeit extremely objective, definitely appears to be limited, such as only including the direct damage suffered, but not the loss of profit, which is certainly more difficult to assess. In parallel to this, it must

[23] Regulation (EU) 661/2014, Article 4a.

[24] Regulation (EU) 2020/461, Article 4a, para. 2.

[25] The devastating consequences of the last earthquakes in Italy have then prompted the Commission to consider the opportunity to fully fund reconstruction operations under Structural Funds programmes by amending the 2014-2020 Cohesion Policy regulation and thus supplementing EU Solidarity Fund support directly after a disaster. See Regulation (EU) 2017/1199 of the European Parliament and of the Council of 4 July 2017 amending Regulation (EU) No. 1303/2013 as regards specific measures to provide additional assistance to Member States affected by natural disasters, *OJ* L 176, 7 July 2017.

[26] Article 6(a) TFEU.

be said that the granting of financial support is based on the calculation of the damages arising from a single event, while it would be more appropriate to consider a cumulative calculation of the damages caused by disastrous events in a full calendar year.

Second, the EUSF cannot cover the more or less severe damages to the economic and productive activities of the territory (especially SMEs, farms and tourist activities) in addition to the serious consequences on the social system and on housing arising from these events. This is the reason why, when the emergency is particularly serious, it would be desirable to complement the EUSF with the establishment of additional assistance instruments aimed at reinforcing the existing national social shock absorber systems. For instance, this has been done with the establishment of the Support to mitigate Unemployment Risks in an Emergency (SURE) aimed at providing financial support to national unemployment measures that are at risk of collapsing under the weight of the economic effects of the pandemic COVID-19 and the lockdown measures.[27] Moreover, while the EUSF is based on a long-term perspective, it is not targeted at specifically addressing large and exceptional humanitarian needs of affected populations when the administrative and operational capacities of governments are limited or under stress in financial and economic terms. Such a limitation first became evident on the occasion of the massive inflow of mi-

[27] Council Regulation 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak, *OJ* L 159/1 of 20 May 2020. The Regulation sets a financial assistance granted in the form of loans from the EU to Member States of up to €100 billion in total. The instrument, based on Article 122 TFEU, is just intended to respond to the social consequences of the pandemic and thus temporary limited to the 31 December 2022 thereby demonstrating its essential emergency character. Moreover, it must be stressed that the financial assistance shall only become available after all Member States have contributed to SURE with contributions for an amount representing at least 25% of the total amount (Article 12). The most notable point of this legal instrument is, however, that it does not provide for the use of a policy of conditionality aimed at making the granting of aid, or the payment of subsequent instalments, subject to the adoption of specific structural reforms. It has been possible because, as stated by the Court of Justice in *Pringle*, the transfer of resources here takes place on the basis of Article 122 TFEU thus falling outside the limits resulting from Article 125 TFEU and, in particular, the obligation to impose a system of conditionality. For comments, see F. Costamagna, "La proposta della Commissione di uno strumento contro la disoccupazione generata dalla pandemia COVID-19 ('SURE'): un passo nella giusta direzione, ma che da solo non basta", in *SIDIBlog*, 5 April 2020; R. Baratta, "Il contrasto alla disoccupazione a fronte dell'emergenza sanitaria da COVID-19: è attuale il principio di solidarietà nell'Unione europea?", in *SIDIBlog*, 9 April 2020; A. Pitrone, "Covid-19. Uno strumento di diritto dell'Unione europea per l'occupazione (SURE)", in Sezione "Coronavirus e diritto dell'Unione", n. 8, 23 maggio 2020; F. Croci, *Solidarietà tra Stati membri dell'Unione europea e governance economica europea*, cit., pp. 340-348.

grants and asylum-seekers which has put the resources of Member States at the southern borders of the Union under unprecedented strain thereby rendering the establishment of a new instrument of emergency support in favour of the affected States necessary.[28]

2.2 The EU Emergency Support Instrument: a new tool for internal emergencies?

For a long time, the EU Solidarity Fund has been the main financial instrument to support Member States in the event of a disaster, but, as already stressed, it is mainly aimed at intervening in the phase of recovery and at a macro-financial level. On the contrary, immediate financial support has always been directed to third countries by resorting to the humanitarian aid instrument (section 2.2.1), that was the first ever tool to be created in order to cope with major disasters. Therefore, one can argue that financial solidarity as a paradigm of the EU legal order was initially more of a manifestation of the Union's external projection rather than a vehicle of internal cooperation. The introduction of an emergency support instrument (section 2.2.2) has represented an important novelty in this field thus filling an important gap with regard to financial assistance to Member States in the event of a disaster. In order to understand whether and to what extent the establishment of the emergency support instrument may impact the provision of financial assistance to EU Member States in emergency scenarios, firstly it is essential to offer a brief overview of the main legal contours of the humanitarian aid instrument which is the first useful tool in the hands of the EU to respond to crises occurring in third countries.

2.2.1 Filling the gap with the international solidarity provided by the Humanitarian Aid Instrument

The origins of the Humanitarian Aid Instrument can be traced back to the first connections with developing countries during the last years of the 60s' and, in particular, to the second Yaoundé Convention (1969) with the Association of the Associated African States and Madagascar (AASM) whose purpose was to provide emergency aid to the governments of AASM countries suffering from exceptional economic difficulties (e.g. collapsing commodity prices) or natural

[28] See European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: an European Agenda on Migration, COM(2015) 240 final, 13 May 2015. As for a comment on the "refugee crisis", see B. Nascimbene, "Refugees, the European Union and the 'Dublin system'. The reasons for a crisis", in *European Papers*, Vol. 1, 2016, No 1, pp. 101-113.

disasters (e.g. floods or famine). One decade later, the first Lomé Convention signed in 1975 with the ACP group (African, Caribbean, and Pacific countries) introduced an important innovation.[29] Humanitarian assistance started to be directly addressed to the victims and not to the national governments of the ACP countries, thus bringing the European Community's humanitarian aid policy more in line with the international humanitarian principles, by emphasising the apolitical and independent nature of humanitarian aid.[30] Based on the recommendations of a European Commission Task Force on the improvement of emergency aid activities, the Commissioners then in charge of external relations established ECHO in November 1991.[31] This new service was located within the Commission and was exclusively dedicated to the management of humanitarian assistance, but the responsibilities remained scattered among different Directorate-Generals depending on the nature of the crisis and the destination of the funds.

For a long time, such an instrument was closely associated with the activities in the field of development cooperation as stressed by the fact that the main normative instrument (still) regulating humanitarian aid, that is Regulation (EC) 1257/96,[32] was adopted *ex* Article 130W TEC 8 (now Article 209 TFEU) on development cooperation.[33] However, humanitarian aid and development cooperation have gradually been conceived as fundamentally different, both in terms of application and in terms of guiding principles.[34] In fact, while development policies are based on a long-term perspective aimed at, *inter alia*,

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[29] For deeper insights on international humanitarian assistance in disaster settings, see P. Macalister-Smith, *International humanitarian assistance: Disaster Relief Actions in International Law and Organizations*, Martinus Nijhoff Publishers, 1985.

[30] For further details, see K. E. Smith, *European Union Foreign Policy in a Changing World*, Cambridge Polity Press, 2003, pp. 97-101; M. Holland, M. Doidge, *The European Union and the Third World*, Palgrave, 2012, pp. 109-110; T. Mowjee, "The European Community Humanitarian Office (ECHO): 1992–1999 and Beyond", in *Disasters*, 22(3), 1998, pp. 250-267.

[31] European Commission, Decision to set up a European Office for Humanitarian Aid, P/91/69, 06/11/1991. For details, see U. Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal*, Cambridge University Press, 2009.

[32] Council Regulation No. 1257/96 of 20 June 1996 concerning humanitarian aid, *OJ* L 163, 2 July 1996.

[33] For greater insights on the EU development cooperation policy, see F. Cherubini, "I valori dell'Unione europea nella politica di cooperazione allo sviluppo", in E. Sciso, R. Baratta, C. Morviducci (eds), *I valori dell'Unione Europea e l'azione esterna*, Giappichelli, 2016, pp. 120-141.

[34] M. Broberg, "Legal Basis of EU Council Regulation 1257/96 Concerning Humanitarian Aid – Time for Revision?", in H. J. Heintze, A. Zwitter (eds), *International Law and Humanitarian Assistance – A Crosscut Through Legal Issues Pertaining to Humanitarianism*, Springer, 2011, pp. 71-82; F. Casolari, "The External Dimension of the EU Disaster Response", in A. De Guttry, M. Gestri, G. Venturini (eds), *International Disaster Response Law*, cit., pp.129-154.

eradicating poverty, helping people acquire competences and fostering sustainable development, interventions of humanitarian aid are basically oriented to contexts of emergency and to a short-term approach.[35] Furthermore, while the provision of humanitarian assistance is based on the principles of humanity, neutrality, impartiality, and independence,[36] development cooperation requires an in-depth political dialogue with national authorities and the civil societies, thereby doing away the essential element of independence.

During the drafting work of the European Constitution, the need to acknowledge the speciality of humanitarian aid was raised[37] thereby triggering the introduction of a specific Treaty provision exclusively devoted to this sector in order to strengthen the elaboration of a more professional and independent humanitarian aid policy at the EU level. Yet, the failure of the ratification procedure of the Constitutional Treaty in 2004 did not represent a step back in the recognition of the specificity of humanitarian aid as an instrument of EU external policy. Indeed, as with so many issues, the Lisbon Treaty re-proposed this intention by including an explicit and separate legal basis for the EU's action in the field of humanitarian aid in Article 214 TFEU. In addition, in December 2007, the European Commission, the European Parliament, the Council and the Member States jointly adopted the *European Consensus on Humanitarian Aid* (hereinafter European Consensus),[38] thus adding a solid political character to the legal framework upon which the instrument is based.[39]

As previously touched upon, even after the adoption of the Lisbon Treaty, the instrument of secondary law governing the provision of humanitarian as-

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[35] In this respect, it is worth underlining that the scope of application *ratione loci* not only covers countries affected by natural or man-made disasters, interpreted according to a *stricto sensu* logic, but more generally to war contexts.

[36] It is worth noting that while the principles of humanity, neutrality and impartiality are commonly recognised as the leading principles for humanitarian response in disaster situations, the principle of independence may be considered as a derived principle insofar as it integrates the content of the former by requiring the autonomy of humanitarian objectives from political, economic, military, or other objectives.

[37] Note from Mr Poul Nielson, member of the European Commission, on Humanitarian Assistance, doc. Working Group VII, Working Document 48, 21 November 2002.

[38] Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission, The European Consensus on Humanitarian Aid, *OJ* C 25, 30 January 2008.

[39] A similar consensus on development had been adopted in December 2005 revealing the distinction between the two policy areas. See Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: 'The European Consensus', *OJ* C 46, 22 February 2006.

sistance is Council Regulation 1257/96 under which the EU finances in the form of grants for approximately €1 billion annually and coordinates projects implemented by NGOs and international organisations, as well as by the Commission itself or specialised agencies of Member States "if necessary", in order to assist over 120 million people every year. For this purpose, Regulation 1257/96 describes a number of eligibility criteria for NGOs' grantees, which includes aspects with regard to their experience, technical and logistical capacity, willingness to cooperate with coordination structures, and empowers the Commission to set additional standards. The necessity to select the EU partners according to a strict procedure comes from the fact that the Union is obliged to respect the specific characteristics and fundamental guiding principles of the EU's humanitarian aid as revealed by the combined reading of Regulation 1257/96, Article 214 TFEU and the European Consensus which draw strength from the broader international legal framework and the so-called *acquis humanitaire*, comprising the principles of humanity, neutrality, impartiality, and independence.[40]

Besides underlining the importance of respecting some key principles as a precondition to the implementation of the EU's humanitarian activities, the Lisbon Treaty also codifies the EU's competence to act in this field, that is traditionally linked to the external policy of the States. Pursuant to Article 4, para. 4, TFEU the EU is competent "to carry out activities and conduct a common policy" in the areas of development cooperation and humanitarian aid, thus codifying the shared nature of the EU's humanitarian aid competence. Albeit listed in the provision governing shared competences, it is special given that while the Union may carry out activities and conduct a common policy in this field, Member States are not prevented from exercising their competence in this sector.[41] Hence, the EU and the Member States can act in parallel, and both can conclude international agreements with third countries and international organisations on matters related to humanitarian assistance.[42] However, the European Consensus outlines the "common vision that guides the action of the EU, both at its Member States and Community levels". Therefore, according to the

[40] For further details, see V. D. Cubie, "Clarifying the *Acquis Humanitaire*: A Transnational Legal Perspective on the Internalization of Humanitarian Norms", in D. D. Caron, M. J. Kelly, A. Telesetsky (eds), *International Law of Disaster Relief*, cit., pp. 338-360; P. Van Elsuwege, J. Orbie, F. Bossuyt, *Humanitarian aid policy in the EU's external relations. The post-Lisbon framework*, Report No. 3, Swedish Institute for European Policy, April 2016, p. 28.

[41] P. Van Elsuwege, J. Orbie, "The EU's Humanitarian Aid Policy after Lisbon: Implications of a New Treaty Basis", in I. Govaere, S. Poli (eds), *Management of Global Emergencies, Threats and Crises by the European Union*, Brill/Nijhoff, Leiden, 2014, pp. 28-30.

[42] Article 214, para. 4, TFEU.

principle of loyal cooperation, Member States have the obligation to take each other's activities into account and not create obstacles to the implementation of EU law.[43] Additionally, Article 214, para. 1, TFEU explicitly provides that "the Union's measures and those of the Member States shall complement and reinforce each other", whereas para. 6 endows the Commission with the competence to "take any useful initiative to promote coordination between actions of the Union and those of the Member States, in order to enhance the efficiency and complementarity of Union and national humanitarian aid measures". This perspective fits, *inter alia*, in one of the most evident consequences of the Lisbon Treaty innovations which grant the responsibility for cooperating with international organisations to the High Representative and the Commission.[44]

As such, the content of Article 214 TFEU read in conjunction with Article 21 TEU, which emphasises solidarity as guiding principle, seems to report the ambition of the Union as a whole not only to progressively establish itself as an independent humanitarian donor, but also to 'Europeanise' Member States' activities in this area by making the Union a facilitator and coordinator of aid and relief provision in emergency situations.[45] In this respect, it is then of utmost importance to include in Article 214 TFEU the idea to establish a European Voluntary Humanitarian Aid Corps (hereinafter, EVHC) as an expression of the European value of solidarity with people affected by disasters in third countries.[46]

The activation of the Humanitarian Aid Instrument has resulted in positive emergency relief actions to people in need during serious disasters and crises in third countries. However, for a long time Member States have been excluded from the opportunity to benefit from a similar immediate form of financial assistance, thereby creating a gap between solidarity granted for external and internal emergencies. This discrepancy was explicitly acknowledged on the oc-

[43] For comments, see E. Neframi, "The duty of loyalty: rethinking its scope through its application in the field of EU external relations", in *Common Market Law Review*, 47, 2010, pp. 329-359; C. Hillion, "Coherence et action exterieure de l'Union europeenne", in E. Neframi (ed.), *Objectifs et compétences de l'Union européenne*, Bruylant, 2012, pp. 229-241.

[44] Article 220, para. 2, TFEU.

[45] P. Van Elsuwege, J. Orbie, F. Bossuyt, *Humanitarian aid policy in the EU's external relations. The post-Lisbon framework*, cit., p. 22; M. Broberg, "EU Humanitarian Aid after the Lisbon Treaty", in *Journal of Contingencies and Crisis Management*, 22, 2014, pp. 170-171.

[46] European Commission, Communication to the European Parliament and the Council, *How to express EU citizen's solidarity through volunteering: First reflections on a European Voluntary Humanitarian Aid Corps*, COM(2010) 683 final, 28 November 2010. The EU Aids Volunteers Initiative was, then, launched in 2014 with the adoption of Regulation (EU) 375/2014 of the European Parliament and of the Council of 3 April 2014 establishing the European Voluntary Humanitarian Aid Corps ('EU Aid Volunteers initiative'), *OJ* L 122, 24 April 2014.

casion of the European Council of 19 February 2016 that, *vis-à-vis* the difficult management of the refugee crisis affecting the southern borders of the Union, called for concrete proposals from the Commission "to the put in place the capacity for humanitarian aid internally."[47]

2.2.2 When Member States need immediate assistance: main legal characters of the EU Emergency Support Instrument

On 15 March 2016, the Council adopted Regulation (EU) 2016/369 which authorises the implementation of financial assistance measures to support Member States dealing with severe humanitarian difficulties caused by natural or man-made disasters.[48] Regulation 2016/369 has been adopted by taking up as a legal basis Article 122(1) TFEU[49] that grants the Council – according to a proposal from the Commission – "in a spirit of solidarity between Member States", the power to adopt measures appropriate to the economic situation aimed at coping with emergency situations that the States are not capable to face individually, such as that deriving from the mass influx of migrants and asylum-seekers.[50]

Even though the Emergency Support Instrument (hereinafter ESI) has been adopted to provide assistance to those Member States coping with the refugee crisis, such an instrument has a more general scope. In fact, the very Regulation 2016/369 expressly urges the EU institutions to address the basic needs of disaster-stricken people within the Union through the provision of emergency support as already provided in favour of those affected by man-made or natural disasters in third countries (recital 7). *Ratione materiae*, it is thus potentially applicable to any serious disaster or exceptional situation giving rise to "severe wide-ranging humanitarian consequences"[51] which go beyond the Member State's capacity. In this regard, it is appropriate to say that the act under examination does not provide a definition of the term 'disaster', thereby implicitly referring to the broad definition contained in other EU legal texts and to the

[47] European Council Conclusions, 18-19 February 2016, EUCO 1/16.

[48] Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union, *OJ* L 70, 16 March 2016.

[49] Article 122, para. 1, TFEU: "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."

[50] For a comment on the EU Emergency Support Instrument, see A. Miglio, "The Regulation on the Provision of Emergency Support within the Union Humanitarian Assistance and Financial Solidarity in the Refugee Crisis", in *European Papers*, Vol. 1, 2016, No 3, *European Forum*, 26 September 2016, pp. 1171-1182.

[51] Council Regulation (EU) 2016/369, Article 1.

practice, so differentiating itself from other international instruments.[52] The terms 'disaster' or 'catastrophes' on the one hand, and 'emergencies' and 'crisis' on the other hand can be considered comparable given that the qualification of an event as a disaster shall not (only) be estimated on the basis of its origin but (mainly) with reference to its severe impact on people, the environment, property and cultural heritage. Otherwise, it could be very hard to justify the inclusion of migrant inflow within the category of natural or man-made disasters.

With regard to the scope of application *ratione temporis*, the Council decided to justify the activation of the ESI in case of an "ongoing or potential" disaster, so that it could be assumed that the mechanism could also be activated on a preventive basis. However, the wording of Article 1, para. 1, of Regulation 2016/369 may effectively limit the preventive use of the mechanism, where it is stated that the instrument can only be provided when the consequences of a disaster reach a certain scale of humanitarian impact. Therefore, it is highly unlikely that the measures may be authorised on the basis of an *ex ante* assessment of the likelihood of a severe impact.

With reference to the activation of the ESI, the Regulation refers to the procedures laid down by Regulation 966/2012 on the financial rules applicable to the general budget of the Union.[53] Once the Commission proposal is received, the other Member States act collectively through the Council which is asked to examine it "immediately" and to take its decision "in accordance with the urgency of the situation"[54] in order to mobilise the necessary resources coming from the EU general budget but also from contributions made by public or private donors. This framework echoes the previously mentioned instrument, that is humanitarian aid. In fact, the new act explicitly sets that the ESI may include "any of the humanitarian aid actions which would be eligible for Union financing pursuant to Regulation (EC) No. 1257/96."[55] Consequently, as with the humanitarian aid

[52] In particular, one could refer to the definition of disaster provided by Decision 1313/2013 according to which a disaster is "any situation which has or may have a severe impact on people, the environment, or property, including cultural heritage." Decision (EU) 1313/2013 of the European Parliament and the Council of 17 December 2013 on a Union Civil Protection Mechanism, *OJ* L 347/924, 20 December 2013, Article 4.

[53] Regulation (EU, EURATOM) 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, EURATOM) 1605/2002, *OJ* L 298, 27 October 2012. For the migrant emergency see European Parliament, Report on the Council position on Draft amending budget No. 1/2016 of the European Union for the financial year 2016, New instrument to provide emergency support within the Union, 11 April 2016.

[54] Council Regulation (EU) 2016/369, Article 2.

[55] Council Regulation (EU) 2016/369, Article 3, para. 2.

instrument, the eligible interventions may encompass assistance, relief and, where necessary, protection operations to save and preserve life carried out by the Commission or by partner organisations selected by the Commission itself according to specific requirements,[56] such as NGOs, specialised services of the Member States, or international agencies and organisations having the essential expertise. In addition, provided that such an instrument has been inspired by the requirements of solidarity, Regulation 2016/369 sets that it shall be granted and implemented in compliance with the fundamental humanitarian principles.

Since the entire scheme is based upon the EU funding of actions carried out by third parties, in order to guarantee the correct management of the funds, the Commission must follow certain special procedures of assessment and control. In particular, partners are expected to ensure full compliance with general visibility requirements in accordance with the applicable contractual arrangement as well as with specific visibility requirements that may include the prominent display of the EU's humanitarian aid visual identity on EU funded project sites, relief items and equipment, and the acknowledgement of the funding role of and the partnership with the EU/ECHO through activities such as media outreach and digital communication.[57] In addition, according to Article 7 of the Regulation, the Commission shall take appropriate measures ensuring that the financial interests of the Union are protected by the application of preventive measures against fraud, corruption, and any other illegal activities, by effective checks and, if irregularities are detected, by the recovery of the amounts wrongly paid and, where appropriate, by effective, proportionate, and dissuasive administrative and financial penalties. It is then enshrined that contracts and grant agreements as well as agreements with international organisations and Member States' specialised services shall contain provisions expressly empowering the Commission, the Court of Auditors, and the European Anti-Fraud Office (OLAF) to conduct such audits and investigations, according to their respective competences.

Following the entry into force of Regulation 2016/369, the Commission promptly adopted an implementing decision in mid-April 2016.[58] It provided for the financing of the mechanism for 2016, making an amount of €100 mil-

[56] The entire procedure of selection shall be based on the cooperation between the Commission and the affected Member States, see Council Regulation (EU) 2016/369, Article 3, para. 4.

[57] Further explanation of visibility requirements can be consulted on the dedicated visibility site http://www.echo-visibility.eu/.

[58] Decision C(2016) 2214 final of the Commission of 15 April 2016 on the financing of emergency

lion immediately available and authorising further expenditure from the general budget of the Union up to the overall amount of €300 million, of which €3 million are specifically dedicated to technical support for Member States.

2.2.3 Critical points and future prospects of the EU Emergency Support Instrument

Although this financial support mechanism can be considered an interesting test of application of the notion of solidarity in EU disaster response law, it is not devoid of criticism, at least two aspects are of concern: on the one hand, the chosen legal basis; and on the other, the conditions for its activation.

Concerning the legal basis, both the Commission and the Council justified the choice to rely on Article 122(1) TFEU by essentially referring to the fact that the Union was already in the position to grant support of a macro-financial nature to Member States and to express European solidarity to disaster-stricken regions through other financial instruments such as the EU Solidarity Fund. Through this new instrument the Union could be ready to promptly cope with any exceptional event causing serious humanitarian problems that could not be controlled by the national authorities. According to their perspective, the main objective was to provide support of a humanitarian nature not by simply granting financial assistance to Member States but by activating a wider range of other measures in order to address the humanitarian needs of disaster-stricken people within the Union on a sufficiently predictable and independent basis.[59] Therefore, the provision of assistance should not be subordinated to a previous calculation of the damages suffered upon request of the national authorities but should be aimed at guaranteeing protection and relief to the victims through partner organisations in the immediate aftermath of a disaster. And, in this perspective, Article 122(1) TFEU – that does not specify the kind of measures to be embraced – left plenty of room to manoeuvre in terms of measures to be implemented. However, following an attentive reading of Regulation 2016/369 and, in particular, of the scope of application of the instrument, the choice to use this provision as legal basis appears quite odd. It is more reasonable to agree with some commentators who argue that, precisely in the light of the potentially broad scope of such an act, Article 122(2) TFEU[60] rather than Article

support in favour of the affected Member States in response to the current influx of refugees and migrants into the Union to be financed from the 2016 general budget of the European Union.

[59] Council Regulation (EU) 2016/369, Recital 5.

[60] Article 122, para. 2, TFEU: "Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control,

122(1) TFEU would have been a much more suitable legal basis for the illustrated instrument. This is true for two essential reasons.[61] First, labelled as one of the innovations introduced by the Lisbon Treaty with regard to Article 122 TFEU, the provision enshrined in paragraph 2 has great potential within the EU disaster response law framework. Indeed, it authorises the Council to grant financial assistance to a Member State "in difficulties or seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control". Thus, here the reference to emergencies caused by disasters or other exceptional circumstances is explicit and, for an instrument intended to provide assistance in favour of disaster-stricken States, it would have been more reasonable to rely on that rather than on a provision mentioning, albeit by way of example, the difficulty in the supply of products in the field of energy. In addition, the very Regulation opens by labelling the large inflows of migrants and asylum-seekers as "a notable example" of disaster directly affecting Member States.[62] Second, even though the idea could be to have an instrument capable of covering a broad range of measures, the possible type of assistance described in the Regulation is only of financial nature. Indeed, nothing in the regulation seems to justify that other kind of measures, different to financial ones, could be activated thereby making Article 122(2) TFEU more suitable which expressly refers to "Union financial assistance."[63] As proof of this, despite the main objective being the mitigation of human suffering, the wording of the Regulation suggests the existence of a second goal to be pursued, that is to reduce the economic impact of the disaster upon Member States.[64] More specifically, in the Preamble of the Regulation, it is reported that "the migration and refugee situation currently affecting the Union is a notable example of a

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the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken."

[61] In this regard, see F. Casolari, "Lo «strano caso» del regolamento 2016/369, ovvero della fornitura di sostegno di emergenza all'interno dell'Unione ai tempi della crisi", in *Dialoghi con Ugo Villani*, cit., pp. 519-531.

[62] Council Regulation (EU) 2016/369, Recital 2.

[63] A. Miglio, "The Regulation on the Provision of Emergency Support within the Union Humanitarian Assistance and Financial Solidarity in the Refugee Crisis", cit. In this regard, it is interesting to stress that the European Parliament has criticised the adoption of this instrument having budgetary implications without its direct and full involvement. See European Parliament, Resolution of 13 April 2016 on the Council position on Draft amending budget No. 1/2016 of the European Union for the financial year 2016, New instrument to provide emergency support within the Union, 2016/2037(BUD).

[64] Council Regulation (EU) 2016/369, Recital 6.

situation where, despite the efforts undertaken by the Union to address the root causes located in third countries, the *economic situation* of Member States may be directly affected" [emphasis added].[65] As a matter of fact, man-made or natural disasters may be of such a scale and impact that they "can give rise to severe *economic difficulties* in one or several Member States" [emphasis added]. Furthermore, it is not a coincidence that the Regulation requires that the measures adopted are "appropriate to the economic situation", a condition that echoes a proportionality assessment, but that also specifically focuses on the economic consequences of the event justifying the granting of emergency support. Moreover, the ESI is intended to be complementary with the mechanisms of in-kind nature (such as the Union Civil Protection Mechanism)[66] as explicitly mentioned in Regulation 2016/369.[67] Thus, that assistance other than financial can be provided under this emergency mechanism is left out. In any case, the choice to identify Article 122(1) TFEU as the legal basis has two different consequences. On the one hand, the EU institutions seem to have broadened the scope of application of Article 122(1) TFEU thereby making reference to difficulties in the supply of products only as an example and leading to a potential re-interpretation by the CJEU. On the other hand, by excluding Article 122(2) TFEU, it has arguably been moved beyond the CJEU's orientation according to which "where the Treaty contains a more specific provision that is capable of constituting the legal basis for the measure in question, the measure must be founded on that provision."[68]

Besides these findings concerning the legal basis, the second point of concern of the Regulation in question refers to the activation requirements of this instrument. From the letter of the act, since no reference concerning the request of activation from the affected States is made, it seems that the ESI may be activated in any case where some conditions are respected. The first condition follows the exceptional nature of the instrument. Article 1, para. 1, of Regulation 2016/369 establishes that "it can only be provided where the exceptional scale and impact of the disaster is such that it gives rises to severe wide-ranging humanitarian consequences in one or more Member States and only in exceptional circumstances where no other instrument available to Member States and

[65] Ibid., Recital 2.

[66] The functioning of the Union Civil Protection Mechanism is detected in Chapter IV.

[67] For a deeper analysis of the interaction between in-kind and financial instruments of assistance in the event of a disaster, see Chapter V.

[68] See, *inter alia*, CJEU, Case C-490/10, *European Parliament v. Council of the European Union*, 6 September 2012, ECLI:EU:C:2012:525, point 44.

to the Union is sufficient." Therefore, it seems to be a last resort mechanism whose activation shall take into account other forms of (financial and in-kind) assistance that have already been deployed. Instead, the second requirement is strictly linked to the stance and willingness of the affected State. Indeed, as the other assistance mechanisms, the ESI also operates as a complement to the action of national authorities and of the Union, by fully respecting the principle of subsidiarity. Such a perspective is confirmed by the fact that Regulation 2016/369 clearly states that the activation of the ESI shall imply "a close cooperation and consultation with the affected Member State." Moreover, it should not be forgotten that the whole EU framework is built on a consensual *caveat* between the Union and Member States that is envisaged by Article 4, para. 2, TEU which points out that the Union "shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State." There is no doubt that the State functions also include protecting those who are under its jurisdiction as a manifestation of the principle of sovereignty, so that it is possible to presume that State consent – even tacit – is necessary for the activation of the mechanism.[69] Moreover, the very Regulation 369/2016 does not forget to underline more than once that the mechanism established is not intended to replace affected Member States' primary responsibility in addressing the consequences of the event. Accordingly, solidarity is here subordinated to the subsidiary and eventual nature of the ESI which works in relation to both the complementary instruments already at disposal and to the main role of the affected State that remains the first and foremost subject to guarantee humanitarian protection to the victims of the emergency.

The reported doubts lead to speculations regarding its effective relevance in relation to other emergencies.[70] When adopted, the application of the ESI as illustrated by Regulation 2016/369 was perceived as extremely limited to the envisaged refugee crisis rather than applicable to other future emergencies thereby assigning it a temporary character. The permanent nature of the mechanism was also deemed limited by the fact that the Commission, after the periodic monitoring, could propose to the Council the suspension of the

[69] F. Casolari, "Lo strano caso del regolamento 2016/369, ovvero della fornitura di sostegno di emergenza all'interno dell'Unione ai tempi delle crisi", cit., p. 17.

[70] L. Den Hertog, "EU Budgetary Responses to the «Refugee Crisis». Reconfiguring the Funding Landscape", CEPS Paper in Liberty and Security in Europe, May 2016.

assistance if the conditions no longer existed.[71] However, as also revealed by the Commission's assessment on the implementation and performance of the ESI,[72] facts have disproved this negative orientation. By April 2018, the European Commission granted funding of more than €604 million to Greece, implemented by three UN agencies (UNHCR, IOM and UNICEF), a pan-European consortium of Red Cross societies, and ten international non-governmental organisations to enable the delivery of primary health care, better hygiene conditions, and the construction of temporary housing for people in need.[73] Both the qualitative and quantitative evidence have shown that actions funded by the ESI have worked in a complementary way to other instruments of financial support. Moreover, in comparison to most of the EU funds related to migration, it has demonstrated to be a mechanism conceived to directly address the humanitarian needs of affected people through the direct involvement of non-governmental and independent organisations. Thus, even though it should be involved in an improvement process, the ESI can be perceived as an expression of European solidarity that should be kept on stand-by as a tool to support one or more Member States in the response to the humanitarian consequences of any future crises (not only relating to migration) of exceptional scale within their territory.

The forward-looking proposal issued by the Commission on the maintenance of the ESI has in part contributed to confronting the large-scale challenges triggered by the COVID-19 outbreak in the Union territory. Among the different measures aimed at addressing the public health emergency and supporting the healthcare sector of the EU Member States, on 2 April 2020 the Commission adopted a proposal to mobilise the ESI to

[71] Council Regulation (EU) 2016/369, Article 8.

[72] Commission Staff Working Document on the Evaluation of the operation of Council Regulation (EU) 2016/369 on the provision of emergency support within the Union Accompanying the document Report from the Commission to the Council on the Evaluation of the Regulation (EU) 2016/369 on the provision of emergency support within the Union, COM(2019) 133 final.

[73] A total of €650 million was made available as the maximum contribution of the EU for the provision of emergency support to Greece for a three-year activation period. In total, the instrument funded 29 operational actions implemented by 18 Commission's humanitarian partners covering the following fields: the provision of shelter, site management, cash assistance, distribution of non-food items, protection, education, food aid, health services, including psychosocial support. Within the European Supporting Instrument's flagship, the Emergency Support to Integration and Accommodation (ESTIA) programme provided housing to over 50.000 people, as well as pre-paid cash cards to more than 65.000 refugees and migrants. Similarly, ESI's actions contributed to building up the national reception capacity with the creation of approximately 35.000 places in camps on the mainland.

equip EU Member States with a broader toolbox to tackle the pandemic. As emphasised by the Commission in the proposal for the regulation, given the severe humanitarian consequences and the scope of the social, economic, and financial impact of the COVID-19 pandemic, the tool was also suitable to be applied in the current situation. The Council adopted the Regulation activating the instrument on 14 April 2020[74] thereby allowing the EU to deploy measures preventing and mitigating severe consequences in one or more Member States and addressing in a coordinated manner the needs relating to the COVID-19 pandemic. In particular, since contracting authorities from Member States have been facing considerable legal and practical difficulties in purchasing supplies or services, the ESI has been activated to provide financing to cover urgent needs to fund medical equipment and materials, such as respiratory ventilators and protective gear, chemical supplies for tests, as well as covering the costs for the development, production and distribution of medication, and other supplies and materials.[75] Moreover, it is significant that the instrument is retroactively applied starting from the 1 February 2020 for a period of two years within the EU budget for 2020.[76] Between April and September 2020, the ESI provided financial support for a total of €150 million to 18 Member States and the UK,[77] for the transport of essential medical items, including life-saving personal protective equipment, medicines, and medical equipment.

Ultimately, these last developments suggest that the legal vacuum concerning the provision of direct financial assistance to EU Members in situations of emergency might have been overcome thereby concretely contributing to the implementation of solidarity measures in the internal context.

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[74] Council Regulation (EU) 2020/521 of 14 April 2020 activating the emergency support under Regulation (EU) 2016/369, and amending its provisions taking into account the COVID-19 outbreak, *OJ* L 117, 15 April 2020.

[75] Regulation (EU) 2020/521, Article 3. According to the data provided by the Commission, the total amount mobilised with the Emergency Support Instrument should be of about €3 billion.

[76] Regulation (EU) 2020/521, Article 1. On 17 April 2020, the European Parliament voted the Commission's proposal for financing the ESI. Based on the Amending Budget 2/2020, the instrument was endowed with resources amounting to €2.7 billion in commitment appropriations and €1.38 billion in payment appropriations under the 2014-2020 MFF. As there were no available margins left nor possibilities for redeployment, the flexibility and last resort MFF mechanisms had to be mobilised to finance the allocation (European Parliament, Definitive adoption (EU, Euratom) 2020/537 of Amending budget No. 2 of the European Union for the financial year 2020, *OJ* L 126, 21 April 2020).

[77] The United Kingdom benefitted from the financial contribution until 31 December 2020, the end of the transition period.

3. Derogation regimes in times of emergency as an expression of solidarity

3.1 Derogations to the EU' State aid regime in the event of a disaster

European solidarity in case of disasters affecting Member States manifests itself not only through direct financing instruments, but also through a number of derogations progressively added to the general legal frameworks concerning State aids. As is well known, the granting of State measures to businesses is firmly controlled by the Union as part of the competition policy, but an analysis on the EU regulatory framework in this field may contribute to complete – albeit in an indirect and targeted way – the whole picture of the financial disaster response mechanisms. Moreover, although the regulatory framework of State aids seems unrelated to the issue concerning to the post-emergency situations, it is gradually gaining importance in the debates regarding the reconstruction and the respect of solidarity requirements in the event of an emergency.[78]

During or in the aftermath of serious emergency situations, national authorities should have to take more resolute decisions in favour of local entrepreneurship, by giving direct or indirect aid to companies and small businesses, such as the suspension of contributions and tax payments as well as the granting of social security contributions, grants, subsidies and loans. The opportunity to grant State aids to companies in difficulty is, thus, one of the instruments that national authorities have always used to support them in phases of recovery and reconstruction thereby showing national solidarity.[79] However, in general terms, according to Article 107 TFEU "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the internal market." The rationale of this provision is that a territorially limited and circumscribed market shall enable any business to welcome and attract both domestic and foreign companies without any advantage being

[78] For the overall treatise of the topic, see M. Basilavecchia, L. Del Federico, A. Pace, C. Verrigni, *Interventi finanziari e tributari per le aree colpite da calamità fra norme interne e principi europei*, Giappichelli editore, 2016.

[79] For further details and comments on this topic, see L. Del Federico, "Public Finance, State Aid and Tax Relief for Areas Struck by Natural Disasters and Pollution: An Introduction", in P. Mastellone, L. Del Federico, M. Basilavecchia (eds), *Tax Implications of Environmental Disasters and Pollution*, Kluwer, 2015, pp. 1-6.

granted through State resources.[80] To this end, Article 107 TFEU does not distinguish between measures on the basis of the causes that have triggered them or of their purposes, but according to their effect, namely producing, either directly or indirectly, a selective economic benefit to the recipient undertaking.

Albeit very rigid, even before the notion of solidarity was strongly introduced by the Lisbon Treaty, the regulatory framework on State aid permeated the general prohibition through the derogations contained in Article 87 TEC (now Article 107 TFEU) which provided a list of automatically compatible aids[81] and a list of those that can be considered compatible by the Commission at its own discretion.[82] The list of aids *ex lege* compatible also includes those directly intended to restore "the damage caused by natural disasters or other exceptional occurrences", thus limiting the discretionary power of the European Commission to authorise the aid. It has to be said, however, that it is a general 'presumption of compatibility' that does not exclude an unlawfulness in the specific case which shall be evaluated by the Commission itself. In fact, until recently, the measures had to be notified to the Commission that verified if the conditions set up by Article 107, para. 2, TFEU were met, thus leading to delays and limited effectiveness of the contributions. In addition to the time necessary to make an objective assessment, the Commission's work was also slowed down by the absence of a common EU regulatory framework containing guidelines on the possible instruments to be adopted.

To further simplify the procedure, the Council has integrated aids to compensate for damage caused by natural disasters in the new General Block Exemption Regulation applicable as from 1 July 2014[83] which broadens the categories of aid that the Commission may exempt from the *ex ante* obligation of notification. Against this new background, it is clear that Member States bear a greater responsibility for the implementation of the new rules. In fact, the new categories of aid subject to notification exemption are not exempt from an *ex-post* control by the Commission over the respect of specific conditions. In

[80] W. Schon, "Taxation and State aid law in the European Union", in *Common Market Law Review*, 36, 1999, pp. 911-936; K. Bacon (ed.), *European Union Law of State Aid*, 2nd ed., Oxford University Press, 2013; A. Biondi, P. Eeckhout, J. Flynn, *The law of State aid in the European Union*, Oxford University Press, 2004; P. Nicolaides, M. Kekelekis, M. Kleis, *State Aid Policy in the European Community: Principles and Practice*, 2nd ed., Wolters Kluwer, 2008.

[81] Article 107, para. 2, TFEU.

[82] Article 107, para. 3, TFEU.

[83] Commission Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty Text with EEA relevance, *OJ* L 187, 26 June 2014. Hereinafter, Regulation (EU) No. 651/2014.

particular, it checks whether the occurrence invoked to justify the granting of aid qualifies as a natural disaster, whether there is a direct causal link between the damage and the natural disaster and finally, if the national measure does not result in overcompensation for the damage truly suffered as a consequence of the natural disaster.

In this way, the need to streamline the monitoring procedure has been acknowledged, thus ensuring full support and offering further solidarity to Member States by giving them the opportunity to react more quickly to repair the damage suffered, without jeopardising the monitoring role of the Commission.[84] Accordingly, over the last years the Commission has taken some steps forward to support States in the reconstruction process, by acting in line with the demands of solidarity enshrined in the Treaties. Moreover, while the EU Solidarity Fund and the Emergency Support Instrument give substance both to the vertical and horizontal dimension of solidarity by requiring, to some extent, the involvement of the Member States, the illustrated set of rules concerning State aids contributes to fuel the reverse vertical solidarity between the EU institutions and Member States which underpins the EU legal order.[85]

3.1.1 Negative elements affecting solidarity in the field of State aid regime

Despite this recent positive improvement and the fact that the Commission has rarely declared an aid granted by national authorities after a disaster as incompatible, from a strictly legal point of view, current legislation is still characterised by some challenges that deserve some attention since they may risk undermining the demands of solidarity that should fuel the Union's approach towards a State in need.

First of all, it is relevant to explore to what extent the exceptions contained in the 2014 Regulation operate by reporting the meaning attributed over time to the concepts of 'natural disaster' and 'exceptional occurrences' falling within the scope of current Article 107, para. 2, TFEU which, according to both the Commission and the CJEU, should be interpreted restrictively.[86] As for the notion of 'natural disaster', the Commission prefers to demarcate the scope of application of Article 107, para. 2, point b, TFEU by specifically indicating an

[84] C. Micheau, *Droit des aides d'État et des subventions en fiscalité*, Larcier, 2013.

[85] L. Grard, "Le droit des aides d'Etat, moteur auxiliaire de la solidarité communautaire", in C. Boutayeb, *La solidarité dans l'Union européenne - Eléments constitutionnels et matériels*, cit., p. 206.

[86] CJEU, Third Chamber, Joined Cases C-346/03 and C-529/03, *Atzeni v. Regione autonoma della Sardegna*, 23 February 2006, ECLI:EU:C:2006:130; Case C-278/00, *Greece v. Commission*, 29 April 2004, ECLI:EU:C:2004:239, para. 81.

exhaustive list of events that can fall within the concept, rather than providing a more generic and objective definition.

As laid down in recital 69 of Regulation 651/2014, the list of situations that can be recognised as natural disasters comprises "earthquakes, landslides, floods, in particular floods brought about by waters overflowing riverbanks or lake shores, avalanches, tornadoes, hurricanes, volcanic eruptions and wildfires of natural origin."[87] Even though the situations covered are wide-ranging, the letter of the recital leaves no room for new types of assessments, or for the introduction of new categories of disasters, such as health emergencies. In addition, the regulation sets that the damage caused by adverse weather conditions such as frost, hail, ice, rain, or drought, which occur on a more regular basis, should not be considered natural disasters within the meaning of Article 107, para. 2, lett. b), TFEU. This exclusion seems quite curious since in the *Guidelines for State aid in the agricultural and forestry sectors and in rural areas 2014-2020*,[88] the Commission explicitly keeps the option open of considering the aids granted on the occasion of adverse weather situations which are comparable to disasters destroying more than 30% of average annual production to be compatible with EU law.[89] Moreover, the intensification of events related to climate change might require more frequent State intervention in favour of businesses that have suffered extensive damage due to extraordinary weather events. The exemption from notification without a clear definition of the concept of natural disaster could paradoxically lead to an increase in incompatible cases, and, consequently, in the proceedings to recover the aid already bestowed to companies that perhaps without such incentives would not have rebalanced their losses.

With regard to the concept of 'exceptional occurrences', there is no doubt that it may comprise a variety of defining options, since it only highlights the extraordinary nature of the event, but not other intrinsic characteristics. It could, thus, be seen as a residual category potentially including a variety of situations, such as internal disturbances, strikes, serious nuclear or industrial accidents, severe health emergencies and even terrorist acts. Over the years, the Commission has demonstrated a certain openness in this regard,[90] by determining the compatibility of State aids granted, for example, on the occasion of the Erika

[87] Regulation (EU) 651/2014, Recital 69.

[88] European Commission, European Union Guidelines for State aid in the agricultural and forestry sectors and in rural areas 2014 to 2020, *OJ* C 204, 1 July 2014.

[89] Ibid., para. 330.

[90] M. Tjepkema, "Damages Granted by the State and their Relation to State Aid Law", in *European State Aid Law Quarterly*, 3, 2013, pp. 478-492.

oil tanker accident, the Chernobyl nuclear disaster, the crisis sparked by dioxin contamination in animal feed, as well as the bovine spongiform encephalopathy (commonly known as 'mad cow disease').[91] However, Regulation 651/2014 has excluded the so-called 'exceptional events' from those situations that may be exempt from prior notification.

Prima facie, this choice is understandable since the inclusion of such a wide category would not only create some confusion about the events subject to the new regulation, but also excessive monitoring work *ex post* for the Commission. In addition, the automatic compatibility of the above-mentioned events could encourage entrepreneurs not to take precautionary measures against foreseeable occurrences to limit damages. Despite this, it is less obvious why there has been no mention of specific events whose origins are not natural, but that in certain circumstances may be regarded as natural disasters in terms of impact and need for intervention. Indeed, disasters of anthropic character like far-reaching industrial or nuclear accidents as well as health or environmental emergencies, could also have negative consequences on the functioning of society so as to require early interventions by the national authorities using measures falling under the guidelines on State aids. As a result, while on the one hand the adoption of Regulation 615/2014 represents a positive step in the procedure for granting aid, on the other hand it has contributed to accentuating some uncertainties in the defining framework.

The second criticism is linked to the requirement whereby a direct causal link between the damage suffered and the natural disaster is demonstrated in order to avoid overcompensation[92] and, consequently, incompatibility.[93] It is definitely reasonable to expect that if a company has been the beneficiary of an inappropriate advantage, the value corresponding to the facilitation obtained be paid back. This notwithstanding, it is necessary to make a further consideration.

In disaster settings it is not always a straightforward task to identify a clear

[91] Commission Decision 29 July 1999 concerning the Belgian dioxin crisis, No. sub-2.1. In addition, see Commission Decision concerning special measures relating to a dioxin contamination in Ireland, Aid No. NN 44/2009 (ex N 435/2009): "In order to be able to categorise an event as an exceptional occurrence, the said event has to distinguish itself clearly from the ordinary by its character and by its effects on the affected undertakings and therefore has to lie outside of the normal functioning of the market."

[92] In this regard, see CJEU Third Chamber, Joined Cases C-346/03 and C-529/03, *Atzeni and Others v. Regione autonoma della Sardegna*, cit., para. 79.

[93] CJEU, Fifth Chamber, Case C-303/09, *Commission v. Italy*, 14 July 2011, ECLI:EU:C:2011:483, para. 7; Court of First Instance, Case T-171/02, *Regione autonoma della Sardegna v. Commission*, 15 June 2005, ECLI:EU:T:2005:219, para. 104. For further details, see H. Hofmann, C. Micheau (ed.), *State Aid Law of the European Union*, Oxford University Press, 2016.

dividing line between the overall damage – which should also include consequential damage and loss of profits – and the amount unduly granted. In addition, the mere location of an enterprise necessarily creates economic damage that may not be evident at first sight. The context in which businesses operate after a disaster is certainly not equal to the normal operation of the market, where any government intervention can, effectively, distort competition. On the contrary, the occurrence of severe natural disasters, such as earthquakes, tornadoes, and floods, can lead to the weakening of the entire local economy where the rules of competition are undermined, and businesses (especially SMEs) must operate in a competitive situation that is distorted. Same, if not worse, problems may then arise for those businesses located in large areas affected by serious exceptional events, such as nuclear or industrial accidents, whose effects in terms of environmental and temporal impact cannot be immediately estimated. Therefore, in such circumstances, the order of recovery would further penalise the already highly injured businesses and, once again, limit the full effectiveness of solidarity in the event of a disaster and, consequently, the citizens' trust in the Union.

In this perspective, it is noteworthy to mention the fact that, in the face of the health emergency due to COVID-19, the Commission concluded that its outbreak qualifies as an 'exceptional occurrence' for the purpose of Article 107(2)(b) thus allowing Member States to adopt measures to support SMEs as well as large undertakings by way of derogations from the State aid regime. In March 2020, the European Commission issued a Communication on the *Temporary framework for State aid measures to support the economy in the current COVID-19 outbreak*[94] that was modified more than once in the following months. The last amendment, adopted on 13 October 2020, extends the provisions of the temporary framework for a further six months, until 30 June 2021, and further broadens the scope of eligible State aid measures.[95]

[94] Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, C/2020/1863, *OJ* C 91I, 20 March 2020. In particular, Member States are allowed to compensate undertakings in sectors that have been particularly hit by the outbreak (e.g. transport, tourism, culture, hospitality and retail) and/or organisers of cancelled events for damages suffered due to and directly caused by the outbreak.

[95] European Commission, C(2020) 7127 final. For the updated status of the measures approved, see European Commission, Coronavirus Outbreak – List of Member States Measures Approved Under Article 107(2)b TFEU, Article107(3)b TFEU and Under the Temporary State Aid Framework, https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html). For a comment on EU State aid law at the time of COVID-19, see A. Rosanò, "Adapting to Change: COVID-19 as a Factor Shaping EU State Aid Law", in *European Papers*, Vol. 5, 2020, No 1, *European Forum*, 7 May 2020, pp. 621-631.

3.2 Solidarity and national budget balance in the event of a disaster: some brief reflections

In 1992, the Maastricht Treaty introduced a number of legal provisions intended to regulate Member States' fiscal policies within the context of the new Economic and Monetary Union (EMU).[96] This contributed to laying the foundations to establish a system of EU public finance, at the time set up by the rules deriving from the Stability and Growth Pact (SGP)[97] and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (known as Fiscal Compact) which is a combination of balanced budget rules and economic coordination and convergence rules.[98] As is well known, the SGP constrains national fiscal policy-making among EU Member States through a set of fiscal rules which, *inter alia*, ask each country to avoid significant deviation in their annual budgets from their medium-term budgetary objective.[99] This set of instruments and their significant implications would certainly require a proper and detailed treatise, however, it is not possible to

[96] Among others, it is possible to mention the prohibition of monetary financing of deficits by the European Central Bank or national central banks (Article 123 TFEU), the no-bail-out clause (Article 125 TFEU) and the excessive deficit procedure (Article 126 TFEU).

[97] The Stability and Growth Pact was adopted in 1997 and then detailed by two following Regulations (Council Regulation 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, *OJ* L 209, 2 August 1997 and Council Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, *OJ* L 209, 2 August 1997). It was then modified twice: in 2005, when it was decided to make the goal more flexible following repeat violations of the deficit rules due to a phase of pronounced economic slowdown, and in 2011 when the 'Six-Pack' and the 'Two-Pack' were adopted to strengthen the SGP in terms of macroeconomic surveillance.

[98] The Fiscal Compact, or Fiscal Stability Treaty (formally, Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, TSCG) is an intergovernmental treaty signed on 2 March 2012 by all Member States of the European Union, except the Czech Republic, the United Kingdom and Croatia. For further insights, see L. Besselink, "Parameters of Constitutional Development: The Fiscal Compact In Between EU and Member State Constitutions", in L. S. Rossi, F. Casolari (eds), *The EU after Lisbon*, cit., pp. 21-35, A. Viterbo, R. Cisotta, "La crisi del debito sovrano e gli interventi dell'UE: dai primi strumenti finanziari al Fiscal Compact", in *Il Diritto dell'Unione europea*, 2, 2012, pp. 325-368.

[99] For more insights on this point, see S. Micossi, F. Peirce, *Flexibility Clauses in the Stability and Growth Pact: No Need for Revision*, CEPS Policy Briefs, 2014, No. 319; M. Schwarz, "A Memorandum of Misunderstanding – The doomed road of the European Stability Mechanism and a possible way out: enhanced cooperation", in *Common Market Law Review*, 51, 2014, pp. 389-424; M. Messina, "Strengthening Economic Governance of the European Union through Enhanced Cooperation: A Still Possible, but Already Missed, Opportunity", in *European Law Review*, 39, 2014, pp. 404-417; M. Hansen, "Explaining deviations from the Stability and Growth Pact: Power, ideology, economic need or diffusion?", in *Journal of Public Policy*, 35(3), 2015, pp. 477-504; L. Lionello, *The Pursuit of Stability of the Euro Area as a Whole. The Reform of the European Economic Union and Perspectives of Fiscal Integration*, Springer, 2020.

include it in the analysis. However, for the purposes of the present work, it seems sufficient to stress two points.

First of all, it must be recollected that the fiscal measures adopted by the national governments to facilitate the rebuilding of public and private facilities in the aftermath of a disaster shall be included among the items of expenditures of the national Budget Stability Act. Inevitably, in the case of major interventions, this leads to the worsening of the annual budget balance thereby affecting its capacity to comply with the rules provided in the SGP system. Secondly, the debates on how to combine the overall post-emergency costs with the need to ensure a national balanced budget in the framework of the SGP have been fuelled further by the fact that EU financial crisis rules and instruments mostly do not mention the concept of solidarity. On the contrary, as previously underlined in the analysis of the *Pringle* case, Article 125 TFEU for instance excludes the Union and Member States from being liable for or assuming the commitments of any other Member State.[100] In effect, before the outbreak of the 2009 economic and financial crisis, the financial dimension of solidarity had not emerged, while major mutual financial interdependence between Member States of the Euro area had been promoted.[101]

The 2011 Six-Pack reforms of the SGP[102] established an 'escape clause' which allows EU Member States to deviate temporarily from existing fiscal rules as a

[100] For a comment, see R. Cisotta, "Disciplina fiscale, stabilità finanziaria e solidarietà nell'Unione europea ai tempi della crisi: alcuni spunti ricostruttivi", in *Diritto dell'Unione europea*, 1, 2015, pp. 57-90.

[101] S. Fernandes, E. Rubio, "Solidarity within the Eurozone: how much, what for, for how long?", Notre Europe Policy Paper No. 51/2012; V. Borger, "How the debt crisis exposes the development of solidarity in the Euro area", in *European Constitutional Law Review*, 9, 2013, p. 11 ff.; A. McDonnell, "Solidarity, Flexibility, and the Euro-Crisis: Where do principles fit in?", in L. S. Rossi, F. Casolari (eds), *The EU after Lisbon*, cit., p. 59; G. Lo Schiavo, "The European Stability Mechanism and the European Banking Union: promotion of organic financial solidarity from transient self-interest solidarity in Europe?", in A. Biondi *et al.*, *Solidarity in EU law*, cit., p. 161 ff. For a general overview on the EU economic and monetary framework in the aftermath of the crisis, see S. Cafaro, *L'Unione economica e monetaria dopo la crisi. Cosa abbiamo imparato*, Edizioni Scientifiche Italiane, 2017.

[102] Regulation No. 1175/2011 (preventive arm of SGP); Regulation No. 1177/2011 (corrective arm of SGP); Regulation No. 1173/2011 ('sanction regulation'); Council Directive 2011/85/EU (requirements for budgetary frameworks); Regulation No. 1176/2011 ('macroeconomic imbalances procedure'); Regulation No. 1174/2011 (sanctions under macroeconomic imbalances procedure). In 2013 the SGP framework was completed by the adoption of the so-called Two Pack and the entry into force of the Fiscal Compact. Under the Two Pack, eurozone members are required to submit their draft budgets to the European Commission before they are adopted by national parliaments, and the Commission may ask for revisions if it considers that the draft breaches or is likely to breach the SGP.

response to "unusual events" outside of the countries' control.[103] In addition, the intergovernmental Fiscal Compact also entails an escape clause for exceptional circumstances, referring directly back to the SGP.[104] For this clause to be valid, such events must have a major impact on the general government's financial position in a particular Member State or, following a severe economic downturn, on all Member States. More recently, a document has been adopted containing *Specifications on the implementation of the Stability and Growth Pact and Guidelines on the format and content of Stability and Convergence Programmes* which further states that "in exceptional cases, the change in the structural balance is also adjusted to take account of large-scale unexpected events requiring a budgetary response, such as natural disaster."[105] Among examples of one-off and temporary measures there are "the sales of nonfinancial assets; receipts of auctions of publicly owned licenses; short-term emergency costs emerging from natural disasters; tax amnesties; revenues resulting from the transfers of pension obligations and assets."[106] Hence, in certain conditions, it is possible to derogate to the general rules on the balanced budget for interventions of immediate relief and assistance. So far, the escape clause has never been invoked in the event of classical natural disasters occurring in the EU Member States. However, both the Commission and the Council agreed to guarantee full flexibility for the measures linked to the outbreak of the COVID-19 pandemic that has led the national governments to adopt budgetary measures to increase the capacity of health systems and provide relief to those citizens and sectors that are particularly impacted.[107] Even though the pandemic cannot be here classified as a 'natural disaster' but as a general 'exceptional circumstance' causing a general crisis and a severe economic downturn of the euro area or the EU as a whole, the activation

[103] Regulation (EU) No. 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No. 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, *OJ* L 306, 23 November 2011, Articles 5 and 9.

[104] TSCG, Article 3(1)(c) and Article 3(3)(b).

[105] European Commission, Specifications on the implementation of the Stability and Growth Pact and Guidelines on the format and content of Stability and Convergence Programmes, 5 July 2016, p. 4. See also European Commission, Vade Mecum on the Stability & Growth Pact, Institutional Paper 101, April 2019, pp. 25-26.

[106] Specifications on the implementation of the Stability and Growth Pact, cit., p. 4, note 4.

[107] European Commission, Communication from the Commission to the Council on the activation of the general escape clause of the Stability and Growth Pact, COM(2020) 123 final, 20 March 2020. For comments, L. Bartolucci, "Le prime risposte economico-finanziarie (di Italia e Unione europea) all'emergenza Covid-19", in *Federalismi.it*, 8 April 2020; F. Croci, *Solidarietà tra Stati membri dell'Unione europea e governance economica europea*, cit., pp. 335-339.

of the escape clause represents a notable expression of both supranational and transnational solidarity in an emergency situation.[108]

One of the remaining major problems of the escape clause stems from the fact that the constraints imposed by the fiscal system, while contemplating the option to deviate from the medium-term one-off in case of exceptional events, do not provide the possibility to exclude from the deficit calculation the cost of prevention and securing of public infrastructure and buildings, and the cost of the reconstruction of private buildings and production activities. Against this background, the European Parliament has invited the Commission to introduce major flexibility in the evaluation procedure of the national deficit.[109] In particular, it has suggested considering the possibility that, in serious cases wherein there is clear intense financial pressure on the public authorities at national, regional and local levels, the investments for sustainable reconstruction and prevention – including those co-financed by the structural funds – are excluded from the calculation of the public deficit. Such a proposal might pave the way for major compliance with the requirements of solidarity between Member States and the Union. Indeed, on the one hand, the Commission should certainly expect States to act in full compliance with the criteria established in these fields in the light of the principle of loyal cooperation. On the other, it would be appropriate that the Union's obligation to provide assistance according to solidarity arguments were not limited to the stage of first intervention but that it operated in a long-term perspective, by also embracing the reconstruction and prevention phases in order to offer citizens the security and stability needed to continue living in their territories.

4. Some concluding remarks on financial instruments of assistance in the event of a disaster

The analysis concerning the financial instruments that States may rely on in order to respond (both in the immediate and in the aftermath) to a disaster has highlighted some relevant elements.

First, this investigation has described the Union's focus on the necessity to

[108] For a detailed analysis of the role of solidarity in the economic governance during the COVID-19 pandemic, see F. Croci, *Solidarietà tra stati membri dell'Unione europea e governance economica europea*, cit.

[109] European Parliament resolution on the situation in Italy after the earthquakes, 2016/2988(RSP), 23 November 2016, para. 7.

bridge the gap between EU Members and third countries in terms of immediate financial assistance. In addition, the positive premises of the new Emergency Support Instrument, as a parallel mechanism of humanitarian aid in response to internal emergencies, seem to meet the reality thus representing an attempt to show greater solidarity within the Union.

Second, this chapter has revealed an important difference in the effectiveness of solidarity between the response tools that draw power directly from the action of the Union – such as the ESI and the EUSF – and those that operate on a national level without any direct involvement from EU institutions aside from monitoring and supervision. In fact, in relation to the former, although further improvements are still desirable, the EU ensures a multi-layered support to States becoming complementary to them, while respecting the principle of subsidiarity. On the contrary, it can be argued that the overall regulatory framework concerning State aids and fiscal policy, albeit only marginally explored, is still characterised by a top-down reconstruction of the relationship between the Union and the Member States while running the risk that strict control over national financial choices could be limiting to the application of solidarity. Yet, even though the instruments illustrated give a relevant contribution to disaster response, they remain within the financial framework and, thus, subjected to 'physiological shortcomings' deriving from the necessity to secure the national and EU budgets as well as the normal market equilibrium in the European Union. Accordingly, as for the instruments of financial assistance, the interplay between solidarity and conditionality appears to be quite consolidated.

4.1 Solidarity and conditionality: two reconcilable concepts?

The analysis reported demonstrates that solidarity – even though at the basis of the improvements made in these fields after the adoption of the Lisbon Treaty – has to be balanced with specific conditions to be respected by the Member States. In this regard, the EUSF and the State aid regime are more relevant with regard to the relationship between solidarity and conditionality because they explicitly include conditions in order to be activated. Instead, the affected State is not asked to meet specific requirements to benefit from the ESI, apart from having used all the other instruments at its disposal. However, the intention to conceive ESI as a last resort instrument is justified by the necessity to guarantee coherence and complementarity with the other assistance instruments that are to be deployed in the event of an emergency. This leads to the question of how conditionality may also acquire some relevance in the field of disaster response when dealing with financial assistance. Although it is not possible to deepen the

analysis on the numerous problems raised by the application of this requirement, for the purposes of the present work it worthwhile, even only briefly, to reflect on the relationship between the latter and the concept of solidarity.

In fact, the issue of conditionality is well known with reference to the field of the EU economic governance and, mainly, to the financial assistance packages and mechanisms that have been put in place to respond to the needs of those EU Member States that suffered most from the economic crisis.[110] In order to receive the financial help, recipient States are required to adopt a set of fiscal consolidation measures aimed at halting the deterioration of their public finance position. In this context, conditionality is a preventative remedy that serves two different purposes. First, it aims to reduce moral hazard and to ensure that resources are actually used to solve the beneficiary State's problems. Secondly, conditionality is also meant to protect the whole Euro-zone against possible negative spill over by safeguarding its long-term financial stability.

The requirement of conditionality has been endorsed and confirmed by the very CJEU in the previously mentioned *Pringle case* wherein the Court, rather than calling on a principle of solidarity,[111] stressed that financial assistance is permissible under Article 125 TFEU provided that "the granting of any financial assistance under the mechanism will be made subject to strict conditionality, that the mechanism will operate in a way that will comply with EU law"[112] and that, in any case, assistance could only be granted in case of danger to the euro-zone as a whole. Such a conclusion had already presented a first debate on the reconciliation between a reasoning based on the potential danger to the whole euro area (and not to a single EU Member) and the content of solidarity. In this regard, it must be said that – on account of the very CJEU jurisprudence – solidarity has always been considered an expression of the desire to act in the

[110] For a deeper analysis on the concept of conditionality in the European economic governance see, *ex multis*, F. Costamagna, *Saving Europe 'Under Strict Conditionality': A Threat for EU Social Dimension?*, Centro Einaudi, Working Paper-LPF n. 7, 2012; M. Ioannidis, "EU Financial Assistance Conditionality after 'Two Pack'", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht – Heidelberg journal of international law*, 74, 2014, pp. 61-104; A. Baraggia, "Conditionality measures within the euro area crisis: A challenge to the democratic principle?", in *Cambridge Journal of International and Comparative Law*, 4, 2015, pp. 268-288; K. Featherstone, "Conditionality, Democracy and Institutional Weakness: the Euro-crisis Trilemma", in *Journal of Common Market Studies*, 54, 2016, pp. 48-64; V. Vita, "Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality", in *Cambridge Yearbook of European Legal Studies*, 2017, pp. 116-143.

[111] See, *supra*, Chapter II, para. 2.2.2.

[112] CJEU, *Pringle case*, cit., point 72. P.A. Van Malleghen, "Pringle*:* A Paradigm Shift in the European Union's Monetary Constitution", in *German Law Journal*, 14, 2013, p. 162.

name of the common good, thereby subjecting national interests to the more general one. However, in this specific case, the pursuit of the common goal has put Member States at a disadvantage and worsened the hardship they have suffered in the absence of assistance.[113] The economic and financial crisis has thus exposed the concept of solidarity to new challenges that the Court should have clarified and addressed in a more detailed manner. Perhaps, the serious economic consequences of the COVID-19 pandemic will bring the Court to rule over this sensitive topic whether it is called upon by the EU institutions or Member States.

Returning to the matter of the relationship between conditionality and solidarity in the field of financial assistance granted in disaster scenarios, both the EU Solidarity Fund and the State aid regime introduce some clear conditions that have to be respected by the affected Member States in order to fall within the scope of application of such instruments. With regard to the first instrument of financial solidarity, the following fact is meaningful, namely, in Article 4, para. 2, of the Regulation revised in 2014, it is set that the Commission

> *may reject* a further application for a financial contribution relating to a natural disaster of the same nature *or reduce* the amount to be made available where the Member State is the subject of infringement proceedings and the Court of Justice of the European Union has delivered a final judgment that the Member State concerned has failed to implement Union legislation on disaster risk prevention and management, which is directly linked to the nature of the natural disaster suffered [emphasis added].[114]

Such a provision shall be read in conjunction with recital 17 that underscores the importance to ensure eligible States prevent natural disasters from occurring and mitigate their effects. This should be done by fully implementing relevant Union legislation on disaster risk prevention and management and by using the available Union funding for relevant investments, such as the EU Regional Development Fund which can co-finance preventive actions, productive investments, and the rebuilding of infrastructure.[115]

In principle, such a *caveat* is acceptable because it stimulates the EU Mem-

[113] A. McDonnell, "Solidarity, Flexibility, and the Euro-Crisis: Where do principles fit in?", cit., pp. 79-82.
[114] Regulation (EU) No. 661/2014, Article 4, para. 2.
[115] European Commission, DG Regional Policy, *The European Union Solidarity Fund and European Commission*, (2008) 130 final.

bers to adequate their national structures and laws to the EU legislation on disaster risk reduction and management, as well as, ultimately, to the Sendai Framework.[116] Moreover, it confirms the Union's intention to conceive disaster management in its whole dimension by not only covering the phase of disaster response and recovery, but also that of prevention, thus creating an extensive and coherent policy in this field of action. This notwithstanding, subjecting the granting of financial assistance in the event of a serious disaster to conditions cannot be considered totally compatible with solidarity which should guide the Union's action with the ultimate purpose of providing help to the affected population as stressed in the Preamble of the very Regulation 2012/2002.

Similarly, the clear conditions set by the Commission with regard to the compatibility of the measures adopted by the Member State in favour of the local companies following a disaster seem to raise some imbalances with the concept of solidarity. After all, by reformulating the Court's statement with regard to State aid, "the derogations from free competition in favour of [aid to repair the damage caused by natural disasters or exceptional occurrences] are based on the aim of Community solidarity."[117] And, according to the CJEU, "in exercising its discretion, the Commission should ensure that the aims of free competition and Community solidarity are reconciled, whilst complying with the principle of proportionality."[118] Instead, establishing specific situations which may benefit from such derogations (to the exclusion of others) and requiring a strict and exact calculation of the damages suffered by each private entity without considering the whole economic situation, risks once again jeopardising the effective granting of aid to those who have been deeply affected by the event.

Notwithstanding that the concept of conditionality has rightly been conceived to prevent measures of financial assistance from becoming 'abused' by Member States, it actually appears quite problematic and sometimes hardly reconcilable with the final aim of these tools, that is to support the people in need according to a people-centred approach (and in this case an EU citizens-centred approach). Therefore, one can doubt considering conditionality as an expression of solidarity in its essence of principle guiding the action of the Union and the

[116] See, *supra*, Chapter I, para. 3.2.

[117] CJEU, Court of First Instance, Case T-126/96 and T-127/96, *BFM v. Commission*, cit., point 101. The expression in bracket has been inserted by the present author by substituting the following one: "it should be borne in mind that the derogations from free competition *in favour of regional aid under Article 92(3)(a) and (c)* are based on the aim of Community solidarity, a fundamental objective of the Treaty, as may be seen from the preamble."

[118] Ibid.

Member States.[119] Moreover, conditionality may also affect solidarity in its social dimension: the imposition of specific requirements to grant assistance could impinge on the respect of the fundamental economic as well as social rights, which are now part of primary law for all intents and purposes, of the affected population. From this perspective, the opportunity to make claims against the irresponsible State could be better and more adequately pursued *ex post*. On the contrary, whether too strictly and applied *ex ante*, conditionality risks becoming a justification to limit the scope of application of solidarity and to make the latter a 'conditioned solidarity'.[120]

Yet, conditionality and solidarity are not condemned to always be antithetic. Indeed, there are cases in which these notions can be reconciled in a cross-fertilisation perspective, so that conditionality could incentivise and foster solidarity. Moreover, behind the choice to include some conditions in the illustrated instruments, there is certainly the intention to increase the responsibility attributed to Member States in the management of internal crises in order to avoid moral hazard issues. Borrowing from the arguments dealing with financial and economic issues, with regard to calamitous events national authorities should also demonstrate that they are aware of their commitments and responsibilities not only in front of their own population, but also the other EU Members and the Union itself. Hence, responsibility would act as a feeder between solidarity and conditionality, and the latter would be a sort of insurance for the right balance between external solidarity and national responsibility.

[119] With reference to the application of solidarity during the economic crisis in Europe, see J. V. Louis, "Solidarité budgétaire et financière dans l'Union européenne", cit.

[120] Such an expression has already been used with reference to the EU economic governance, J. V. Louis, "Les réponses à la crise", in *Cahiers de droit européen*, 47(2), 2011, p. 356.

CHAPTER IV

THE EU CIVIL PROTECTION MECHANISM: IN-KIND ASSISTANCE TO COPE WITH DISASTERS

1. The Union as a catalyst of in-kind assistance: an introduction

When a disaster strikes, each Member State may rely on different intervention instruments at the national level (i.e., NGOs, local police forces, voluntary associations, civil protection forces) capable of working on prevention and mobilising and coordinating all national resources to provide useful assistance to the population in the case of an emergency. In particular, during the last decades national civil protection structures have been created and reinforced to deliver governmental aid in the immediate aftermath of a disaster through in-kind assistance, the deployment of specially equipped teams, and the assessment and coordination of the fieldwork by experts sent on the ground. Civil protection is thus a competence that relates to governments (local or national depending on the case) and that has a great potential in terms of disaster response including those occurring outside the national territory. This notwithstanding, it has become increasingly clear that traditional ways of coping with and managing crises were no longer sufficient. A centralised, nation-based apparatus filled with planners and risk managers is no match for threats that escalate across geographic, cultural, legal, and policy boundaries. In particular, certain transboundary threats demand transboundary crisis management capacities. Therefore, growing distress among the EU Members concerning the trans-national effects of major emergencies – such as health emergencies – has convinced them that more cooperative operational arrangements regarding disasters are a necessary prerequisite and an added value for efficient crisis management at the national level. Moreover, the individual Member States may not always be able to properly respond to serious disasters and take care of the victims due to shortages of in-kind assets. In these situations, financial assistance might not be a sufficient instrument of solidarity and should be complemented with a more practical kind of assistance.

Against this background, the EU has progressively become a political and

legal forum for discussions and the sharing of common strategies in the field of civil protection. Before the Lisbon Treaty, civil protection was not mentioned in any founding treaties and, thus, it was lacking in legal basis. Indeed, as underscored in the previous chapters, the protection of the population in the case of a calamity is traditionally conceived as one of the main responsibilities relating to State sovereignty. Therefore, a detached form of assistance such as the purely financial has been seen as more welcome and successful.[1] However, experience has shown that it is increasingly necessary to rely on international cooperation in order to tackle disasters in a more effective way. This is the reason why Member States have progressively allowed the EU institutions to play a significant role of coordination and support in the field of in-kind assistance by means of several legal instruments which have been changed and improved over time. The following paragraphs will present an *excursus* of the main rules adopted from the 1980s to the changes brought in by the Lisbon Treaty and the last normative developments in the area of civil protection (see sections 2-3) in order to evaluate how and to what extent solidarity materialises in this sector (see section 4).

2. The long road towards the creation of the EU Civil Protection Mechanism

2.1 The normative framework of civil protection: first steps within the European Economic Community

Cooperation in the field of civil protection at EU level[2] can be traced to the end of 1970s. In the beginning, this type of cooperation developed at a bilateral level with the establishment of two parallel initiatives in France and Italy dealing with disaster mitigation. Both countries, to respond to social concerns over the devastating potential of catastrophic events, initiated a highly beneficial period of cooperation. As early as 1980s, France established the *Plan d'Exposition aux Risques*,[3] a national programme to assess the geophysical environment and to

[1] See, *supra*, Chapter III.

[2] It is necessary to recall that the reference to the 'European Union' throughout the present Chapter will be used in its broadest sense as an alternative to the 'European Community' as a linguistic convention thus embracing all the moments of the EU integration process.

[3] The Risk Exposure Plan (PER) was established in 1982 by the law on compensation for victims of natural disasters (Law No. 82-600 of July 13, 1982). For further information see, http://www.developpement-durable.gouv.fr/Reglementation-et-plan-de,24012.html.

map natural and man-made hazards, examining the level of risk they posed to the public. In Italy, three groups of the National Research Council were given the task of assessing the level of risk posed by floods, landslides, volcanic activity, and earthquakes, and of developing technical policies for risk mitigation.

Given the diverse nature and extent of the risks many EU countries face, it is easy to understand the scale of the task presented to national administrations. The type of disaster hazards was largely dependent on the geography and climate of the individual nations concerned. Many southern States were especially prone to earthquakes or forest fires, while in northern Europe disasters tended to be smaller and related to technology, such as industrial or transport accidents. In some cases, countries were able to cope with these catastrophes on their own, but often emergency assistance was required from other nations. In this context the concept of EU cooperation in civil protection emerged: it was recognised that different countries had developed different areas of expertise to cope with the different types of hazards they faced, and that cooperation was necessary to gain greater benefits and improve efficiency.

The clear necessity to tackle this issue in a supranational and coordinated manner only emerged in the early 1980s, after the Seveso disaster[4] and the Chernobyl accident.[5] Indeed, the underestimation of the risks originating from the presence of production facilities on one hand, and the subsequent increase in attention toward the protection and preservation of the environment and of individuals on the other, put the issue of industrial risks at the centre of the public debate.

In April 1985, the European Commission – Directorate General Environment hosted the first meeting on civil protection and, under the impulse of the Italian Presidency, the Italian Minister of Civil Protection Giuseppe Zamberletti invited the other European Ministers for an informal summit in Rome. Indeed, Italy had already been hit by a number of natural catastrophes (i.e. the earth-

[4] The response to the Seveso disaster was widely criticised as too slow and ineffective and pushed the adoption of a new regulatory framework to be shared by all the Member States, that is Council Directive 82/501/EEC of 24 June 1982 on the major-accident hazards of certain industrial activities (Seveso I Directive), *OJ* L 230, 5 August 1982. See B. Pozzo, "The institutional and legal framework of reference: the Seveso Directives in the Community and their implementation in the Member States", in B. Pozzo (ed.) *The Implementation of the Seveso Directives in an Enlarged Europe. A look into the past and a challenge for the future*, Kluwer Law International, 2009, p. 3; T. Åhman, C. Nilsson, "The Community Mechanism for Civil Protection and the European Union Solidarity Fund", cit., p. 85; M. Kotzur, "European Union Law on Disaster Preparedness and Response", in *German Yearbook of International Law*, 55, 2012, pp. 267-268.

[5] See European Parliament, Resolution on the reaction of the Community to Chernobyl (Doc. A2-4/87), *OJ* L 125/92, 11 May 1987, para. 6.

quake in Garfagnana which had caused thousands of displaced and homeless people), and the Italian Minister had urged his European colleagues to tackle this issue together. On this occasion, Member States had agreed to coordinate their national civil protection capacities in the case of major natural disasters laying the foundations for Community cooperation in this field.[6]

As the initial agenda focused on managing large-scale natural disasters, responsibility for the European Community's activities in this area was given to the European Commission's Directorate-General for Environment. The Italian Commissioner Ripa di Meana then argued that his Directorate should do more in the wake of forest fires and heat waves in Southern Europe by working for the development of a "Europe for citizens."[7] While the general interest was directed more towards the effects of natural disasters, the 1986 explosion of the Chernobyl Nuclear Power Plant confirmed the potentially devastating effects of such disasters. Accordingly, Member States became more sensitive towards possible man-made disasters able to cause damages to the environment, to people, as well as to trade. Thus, once having seen the difficulties faced by the then European Community in tackling the different approaches of Member States, the moment arrived to provide an even more combined response to all types of calamities at the EU level.

Between 1985 and 1994, study and research programmes, and a variety of policy instruments were put into place leading to the establishment of operational tools for the preparedness of those involved in civil protection and response in the event of a disaster. It must be noted that all these Community operations were based on *ad hoc* resolutions by the Council and Member States without a legal basis. In this regard, it is of utmost importance to cite the Resolution of the Council and the Representatives of the Governments of the Member States of 25 June 1987 on the introduction of Community Cooperation on Civil Protection. In particular, such a resolution introduced a Guide for the inclusion of a list of liaison officers from the Member States and the Commission in civil protection. In addition, the Resolution encouraged regular meetings and training programmes of persons responsible for civil protection, the improved use of databases, and the exchange of available information to deal with disasters. Subsequently, the Council Resolution 89/C 44/03 on the new develop-

[6] C. Wendling, *The European Union Response to Emergencies. A Sociological Neo-Institutionalist Approach*, PhD theses, Department of Political and Social Sciences, European University Institute, 2009, p. 98.

[7] M. Ekengren, N. Matzen, M., Rhinard, M. Svantessson, "Solidarity or Sovereignty? EU Cooperation in Civil Protection", in *European Integration*, 28, 2006, p. 460.

ments in Community cooperation on civil protection was adopted, by stressing the necessity to compile a multilingual glossary on civil protection terminology to improve data exchange. In 1990, the Council Resolution 90/C 315/01 on Community cooperation on civil protection invited the Commission to undertake consultations and studies with the prospect of developing actions to improve intra-Community cooperation in order to establish basic conditions to prevent and fight calamities. Finally, just one year later, Council Resolution 91/C 198/01 on improving mutual aid between Member States in the event of natural or technological disasters represented the most important resolution adopted before the Maastricht Treaty. It set that the provision of assistance by the Member States implied the dispatch of aid teams and equipment to the affected State toe rescue and protect persons, property, and the environment. Therefore, at these first stages of the development process of an EU configuration for civil protection, it appears to be quite clear that it was essentially an intergovernmental system based on national capacities and determination. Despite this and the fact that the instruments adopted were non-binding, step by step they became more relevant up until the creation of a comprehensive system capable of facing different kinds of calamities and it helped shape the basis of the existing Civil Protection Mechanism legislation by making serious disasters an issue of common concern.[8]

2.2 The normative framework of civil protection: from Maastricht to the establishment of the Community Civil Protection Mechanism

A first timid step towards the recognition of a Community competence in civil protection was the entry into force of the Treaty of Maastricht which extended the objectives of the Community and dropped the 'economic' label to form the European Union.[9] As is well known, this Treaty introduced a new institutional structure composed of three 'pillars', and a broader umbrella, as well as new policies and forms of cooperation were created.

Article 3 of the Maastricht Treaty listed the activities that the Community was empowered to carry out for the purposes of Article 2 TEC. In particular, the European Community could create "a policy in the sphere of the environment" and "measures in the sphere of energy, civil protection and tourism." Albeit the latter recognised the competences of the Community in this field, it was not

[8] G. Vincent, "The EC Programme in Civil Protection", in A. Colombo, A. Vetere Arellano (eds) *Proceedings NEDIES Workshop — Learning Our Lessons: Dissemination of Information on Lessons Learnt from Disasters* (EC Joint Research Centre, 24-25 June 2002).

[9] Treaty on European Union (Maastricht Treaty), 7 February 1992.

accompanied by any other provision in the Treaty articulating the objectives of the measures to be adopted in the areas in question.[10] Moreover, such a reference did not constitute *per se* a legal basis for the adoption of measures in the three spheres so that the Community competence in the field of civil protection was left undetermined.[11]

As a result, actions in that area could be pursued thanks only to the flexibility provision (Article 308 TEC) or to the legal bases offered by provisions concerning other Community policies, such as those on the environment. Indeed, among the objectives of the environmental policy, Article 174 TEC included "promoting measures at international level to deal with regional or worldwide environmental problems."[12] In addition, the establishment of operational instruments dealing with the preparedness of those involved in civil protection and the response in the event of a disaster was based on the subsidiarity principle laid down in Article 3B of the Maastricht Treaty. Therefore, although the inclusion of this sector in the targets of the Union marked an important step, it was clearly a compromise based on a firm and lasting agreement among the national authorities.

In May 1993, the Commission adopted the report entitled *Community programme of policy and action in relation to the environment and sustainable development*[13] which explicitly referred to civil protection. It was expected that the Community's activities would increase in the fields of civil protection and environmental emergencies as a mirror of political and economic developments within and outside the Community. The main emphasis was on the need to press ahead with further improvements and refinements of the mutual assistance procedures and arrangements with respect to both natural and technological

[10] Treaty of Maastricht, Article 3 (k)(t).

[11] M. Gestri, "EU Disaster Response Law: Principles and Instruments", in A. De Guttry, M. Gestri, G. Venturini (eds), *International Disaster Response Law*, cit., p. 108. In the European Convention, there was a general feeling that "it was an anomaly to have subject matters mentioned in TEC Article 3 without having any corresponding Treaty article setting out the policy objectives and the competence", Final report of Working Group V on Complementary Competencies, CONV 375/1/02, 4 November 2002, p. 15.

[12] Indeed, a number of measures having a bearing on disaster management and response were adopted under the legal bases offered by the Treaty provisions concerning other policies, such as environmental protection (Article 174 TEC) and health safety or by the Euratom Treaty regarding nuclear safety. See M. Cremona, "The EU and Global Emergencies: Competences and Instruments", in Antoniadis A. *et al.* (eds), *The European Union and global emergencies. A law and policy analysis*, Hart Publishing, 2011, p. 20.

[13] European Commission, "Towards sustainability – A European Community programme of policy and action in relation to the environment and sustainable development (1993)", *OJ* C 138/5, 17 May 1993.

catastrophes, as well as to enhance coordination for the optimisation of interventions in the case of emergencies in third countries.

For these purposes, the Commission suggested to increase the range and quality of training courses and to improve information and communication systems for more rapid and efficient transmission of information, instructions, and decisions between the key players in emergency situations. Even more importantly, it advocated for the establishment of task forces to respond to different types of emergencies, shaping an embryonic Community structure for civil protection.[14] Additionally, in accordance with the procedure laid down in Article N (2) of the Treaty on European Union, the Commission was supposed to prepare a report on the opportunity to introduce a separate Title for civil protection into the Treaty.[15] For its part, the European Parliament pointed out that the Union should strengthen its existing policies but without adopting any particular stance on civil protection.[16] Instead, the Council did not specifically include civil protection in its report on the functioning of the Treaty on European Union but noted that the Community's action in the new areas of competence, including civil protection under Article 3(t) of the Maastricht Treaty, had to be specifically limited to complementary measures enabling a clearer distinction between the fields of action of the Community and the Member States.[17]

The 1995 Reflection Group's Report outlined its position concerning the possibility of including the fields of energy, tourism, and civil protection in common policies and, by considering the divergent opinions expressed by the States' representatives, the final decision was to support an increasing cooperation on civil protection, rather than extending the Community competence to this area.[18] As for the positions of Member States, the group composed of Germany, Finland, and Belgium considered civil protection to be an example of an area where the compatibility between existing Community competence and the

[14] Ibid., para. 6.3.

[15] This opportunity is recalled in the Resolution of the Council and the Representatives of the Governments of the Member States on strengthening Community cooperation on civil protection, 31 October 1994, *OJ* C 313, 10 November 1994.

[16] European Parliament, Resolution on the functioning of the Treaty on European Union with a view to the 1996 Intergovernmental Conference - Implementation and development of the Union (17 May 1995), *OJ* C 151, 19 June 1995.

[17] Intergovernmental Conference, Briefing No. 34, "Civil Protection and the IGC" – *V. Positions*, para. 3. Available at http://www.europarl.europa.eu/igc1996/fiches/fiche34_en.html.

[18] Reflection Group's Report, Official positions of the other Institutions and Organs - Council of the Union, Second Part: an annotated Agenda, Messina 2nd June 1995 - Brussels 5th December 1995, para 141. Available at http://www.europarl.europa.eu/enlargement/cu/agreements/reflex5_en.htm.

subsidiarity principle should be examined in order to achieve a clear division of responsibilities between the Union and Member States. The second one consisting of Greece, Austria, Portugal, Spain, and Italy called for a common policy on rapid reaction to natural disasters to demonstrate greater solidarity between Member States and provide the European Union with tangible means closer to European citizens. Conversely, the United Kingdom confirmed its opposition to extending Community competence to further areas and consequently to including in the Treaty new titles on energy, civil protection, and tourism.[19] Given these premises, there was no possibility to extend the scope of Article 3(t) and to create a Community civil protection force. However, from the end of 1997, the Council improved the foundations for cooperation even further and their implementation was the Commission's main priority in this field.

2.2.1 The Community Civil Protection Action Programme

Since the end of 1997, acting on the Commission's proposal and on the basis of Article 235 of the Treaty establishing the European Community, the Council adopted a Decision addressed to all the Member States establishing a Community action programme in the field of civil protection. The main objective was to support and complement Member States' activities at the national and subnational levels through different projects for the protection of persons, property, and the environment in the event of natural and technological disasters.

The Council considered that Community cooperation in the field of civil protection could help achieve the objectives of the Treaty by promoting solidarity among Member States, raising the quality of life, and contributing to preserving and protecting the environment. Even though the Decision had stated that the programme should not last for more than two years, after the first two-year Action Programme (1998-1999),[20] a new five-year Action Programme was established for the period 2000-2004.[21] In 2005, the Council adopted the Decision 2005/12/EC to cover the period extending to 31 December 2006.[22]

[19] White Paper on the 1996 Intergovernmental Conference – Volume II. Summary of Positions of the Member States of the European Union with a View to the 1996 Intergovernmental Conference, European Parliament, 18 September 1996.

[20] Council Decision of 19 December 1997 establishing a Community action programme in the field of civil protection, *OJ* L 8, 14 January 1998.

[21] Council Decision of 9 December 1999 establishing a Community action programme in the field of civil protection, *OJ* L 327, 21 December 1999.

[22] Council Decision of 20 December 2004 amending Decision 1999/847/EC as regards the extension of the Community action programme in the field of civil protection, *OJ* L 6, 8 January 2005.

The Programme covered initiatives of cooperation dealing with prevention, preparedness, and response to disasters, as well as information and awareness-raising activities through the exchange of lessons learned and best practices regarding techniques and methods of response to an emergency.[23]

The adoption of the first programme thus represented the foremost moment the European Community was inspired by a general interest-based approach in the field of civil protection. Indeed, for the first time the Council decided to endorse the Commission proposal and to adopt a Decision according to the legislative procedure involving the European Parliament, the Economic and Social Committee and the Committee of the Regions. In addition to such a long-awaited endorsement, the serious consequences of earthquakes in Turkey and Greece in 1999[24] and of the terrorist attacks in the United States on 11 September 2001 contributed to trigger the establishment of the so-called Community Mechanism for Civil Protection in 2001.

2.2.2 The establishment of a Community Civil Protection Mechanism

Encouraged by the success of the Action Programme and by the devastating earthquakes in the two Mediterranean countries, on 29 September 2000 the Commission proposed the adoption of a Decision establishing a Community mechanism for the coordination of civil protection intervention in the event of emergencies.[25] To justify this necessity, the Commission first referred to the United Nations Economic Commission for Europe (UNECE) Convention on the Transboundary Effects of Industrial Accidents entered into force on 19 April 2000, which contains provisions on matters such as prevention, emergency preparedness, public information and participation, industrial accident notification systems, response, and mutual assistance.[26] In addition, the mechanism

[23] T. Åhman, C. Nilsson, "The Community Mechanism for Civil Protection and the European Union Solidarity Fund", cit., p. 85. Moreover, see European Commission, Handbook on the Implementation of EC Environmental Legislation, Section X – Civil Protection Legislation, 2008, p. 1068.

[24] In particular, Turkey was hit by two consecutive earthquakes which caused the death of about 19.000 people and 50.000 people were injured. For further information, see B. Ramberg, "The two earthquakes in Turkey in 1999: International coordination and the European Commission's preparedness", in S. Larsson, E-K. Olsson, B. Ramberg (eds), *Crisis Decision-Making in the European Union*, A Publication of the Crisis Management Europe Research Program, 2005, pp. 93-130.

[25] European Commission, Proposal for a Council Decision establishing a Community mechanism for the coordination of civil protection intervention in the event of emergencies (2001/C 531 E/17), COM(2000) 593 final 2000/0248(CNS), 29 September 2000.

[26] The Convention was approved by the Community via the Council Decision of 23 March 1998 concerning the conclusion of the Convention on the Transboundary Effects of Industrial Accidents, *OJ* L 326, 3 December 1998.

enriched the Community Action Programme by making concrete support available in the event of an emergency and demonstrating the capacity to combine different national needs. Indeed, for the first time a reinforced Community Civil Protection structure was envisioned to facilitate coordinated assistance interventions and the mobilisation of intervention teams, expertise, and other resources, as required, through a network of Member State national contact points.

After the positive opinion of the European Parliament as well as of the Economic and Social Committee and the Committee of the Regions, on the basis of Article 308 TEC and Article 203 of the Treaty establishing the European Atomic Energy Community, the Council adopted the Decision 2001/792/EC launching the new Mechanism.[27] The Civil Protection Mechanism (hereinafter CPM), that entered into force in 2002, consisted of a number of tools that have been implemented by the later Decision 2004/277/EC,[28] namely the pre-identification of intervention resources,[29] a training programme to improve response capability,[30] a system of assessment and coordination teams,[31] a monitoring and information centre, and a common emergency communication system.[32] Furthermore, the Monitoring and Information Centre (hereinafter MIC) and the Common Emergency Communication and Information System (CECIS), managed by the DG Environment in the unit for civil protection were established as the operational core of the Mechanism. In particular, the MIC served as a communication hub by providing access to and sharing of information between the participating countries. Second, it provided early alerts and information on interventions carried out through the Mechanism as well as updates on ongoing emergencies. Third, the MIC facilitated the coordination of assistance by matching offers of assistance put forward by participating countries to the needs of disaster-stricken countries requesting help. The national contact points had to provide the MIC with informa-

[27] Council Decision establishing a Community mechanism to facilitate reinforced cooperation in civil protection assistance interventions, 2001/792/EC, Euratom, *OJ* L/297/7, 15 November 2001, Article 1.

[28] European Commission Decision of 29 December 2003 laying down rules for the implementation of Council Decision 2001/792/EC, Euratom establishing a Community mechanism to facilitate reinforced cooperation in civil protection assistance interventions, 2004/277/EC, Euratom, *OJ* L 08, 25 March 2004, Chapters III and IV.

[29] Commission Decision 2004/277/EC, Article 3.

[30] Commission Decision 2004/277/EC, Article 4(d).

[31] The Commission was asked to establish a coordination team to be immediately dispatched to the scene. This would have improved on-the-scene efficiency and coordination and enabled rapid identification of the most appropriate resources to deal with the emergency. Additionally, the teams would have also liaised with the competent authorities of the country requesting assistance.

[32] Commission Decision 2004/277/EC, Article 4(a) and (b).

tion on the availability of civil protection assistance.[33] The operational network of Member States' civil protection authorities was called the Permanent Network of National Correspondents (PNNC), while the political body overseeing the Commission's work was the Committee on Civil Protection Issues (ProCiv). These structures served to create a dense environment of institutional bodies and contacts that had to bring the Member States and European Community together on a regular basis for civil protection issues. As a result, for the first time, Member States were asked to reach a minimal level of cooperation in the field of civil protection, by making use of a single information and coordination centre instead of having to activate a whole range of bilateral contacts.[34]

During the following years, the European Community continued to work on the improvement of cooperation in the field of civil protection though the adoption, by the Council, of a number of resolutions requiring an improvement in the Mechanism.[35] From its establishment, the mechanism has been employed several times both inside and outside the European Community. Regarding calamities occurring beyond EU boundaries, it is appropriate to recall for instance the earthquakes in Algeria and in Iran in 2003, and in Pakistan in 2005, the tsunami in Southeast Asia in 2004,[36] hurricane Katrina in the USA in 2005, the explosions in the arms storages in Albania in 2008, the typhoon in Burma in 2008, and the terrorist attacks in India in 2008.[37] Crises withing the EU

[33] T. Åhman, C. Nilsson, "The Community Mechanism for Civil Protection and the European Union Solidarity Fund", cit., p. 87.

[34] M. Ekengren *et al.*, "Solidarity or Sovereignty? EU Cooperation in Civil Protection", cit., p. 461.

[35] In this regard, see Council Resolution of 28 January 2002 on reinforcing cooperation in the field of civil protection training**,** *OJ* C 43, 16 February 2002; Council Resolution of 19 December 2002 on special civil protection assistance to outermost and isolated regions, to insular regions, to regions which are not easily accessible, and to sparsely populated regions, in the European Union, *OJ* C 24, 31 January 2003; Council Resolution of 22 December 2003 on strengthening Community cooperation in the field of civil protection research, *OJ* C 8, 13 January 2004.

[36] The most devastating event was the tsunami of unprecedented scale which struck several nations in Southeast Asia in December 2004. Through the MIC, European countries sent hundreds of relief workers, including doctors, experts in victim identification, search and rescue, water purification and co-ordination, and tonnes of supplies to all the afflicted States. See European Commission, The European Commission coordinates EU civil protection support to catastrophe areas in South Asia, IP/04/1544, Brussels, 31 December 2004.

[37] About this last event, it is worth noting that the Presidency of the European Union activated the Mechanism mainly for the medical evacuation of injured EU citizens from the country and not to provide assistance to the local government. This was the first time the Mechanism was activated in order to offer consular protection to EU citizens. See M. Lindstrom, "European Consular Cooperation in Crisis Situations", in S. Olsen (ed.), *Crisis Management in the European Union: Cooperation in the Face of Emergencies*, Springer, 2009, p. 110.

include, for example, the oil spill following the Prestige accident in 2002,[38] the floods in Central and Eastern Europe in 2002,[39] 2005, and 2006, the forest fires in Portugal in 2003, 2004, and 2005, the storm in northern Europe in 2005, and the forest fires in Greece in 2007.[40] Notwithstanding the activation of the Mechanism, these cases also demonstrated the existence of several weaknesses in its efficiency and an overall lack of coordination due to the general reliance on bilateral treaties rather than on community mechanisms.

2.3 From the Community Civil Protection Mechanism to the entry into force of the Lisbon Treaty

Starting from 2004, the European Union has introduced a number of measures aimed at reinforcing the Mechanism. In March 2004 the Commission adopted a Communication entitled *Improving the Community Civil Protection Mechanism*[41] which underscored three areas for possible improvement of the whole system: preparedness of the resources to be deployed, communication with the MIC, and coordination between Member States and the Commission.

The Commission's proposal boosted the debates among Member States which, in the same year, were negotiating and drafting the Treaty establishing a Constitution for Europe. Indeed, the new Treaty was expected to contain some solutions to act together more effectively and to reinforce cooperation among Member States in the field of prevention and protection against natural or manmade disasters, by proposing to introduce an *ad hoc* provision on civil

[38] On 13 November 2002, the Prestige, a 26-year-old single hull tanker carrying heavy fuel oil sprang a leak off the coast of Galicia spilling tonnes of oil into the sea. After few days, the oil tanker broke apart and sank releasing more oil into the Atlantic. See European Commission, DG Energy and Transport, Newsletter, special edition: the Prestige accident, 21 November 2002; European Commission, 'We could have avoided the PRESTIGE oil spill' says Loyola de Palacio at the European Parliament, Press Release, IP/02/1721, Brussels, 21 November 2002.

[39] The floods in the summer of 2002 caused by the overflowing of the Oder and Neiss, Elbe, Mulde, and Danube rivers. On this occasion, the Commission launched the idea to create a new Disaster Relief Fund to assist affected regions in the Member States and in the countries that were negotiating to become Members of the Union. See Q. Schiermeier, "Central Europe Braced for Tide of Pollution in Flood Aftermath", in *Nature*, 418, 29 August 2002. In addition, see European Commission, Commission Responds to the Floods in Germany, Austria and Certain Applicant Countries, Press Release IP/02/1246, Brussels, 28 August 2002.

[40] For more information on the resources put at disposal by States, see Joint Research Centre - Institute for Environment and Sustainability, *Forest Fires in Europe 2007*, JRC Scientific and Technical Reports, Report no. 8, pp. 31-33; European Commission, *Natural disasters: update on EU civil protection activities*, IP/07/1166, Brussels, 24 July 2007.

[41] European Commission, Communication on Reinforcing the Civil Protection Capacity of the European Union, COM(2004) 200 final , 25 March 2004.

protection.[42] Furthermore, Article I-42 of the Draft Treaty calling for solidarity between Member States in cases of terrorist attacks and natural disasters provided access to the complete array of civil protection instruments in order to protect citizens and democratic institutions.[43]

The period of reflection which followed the failure of the Treaty establishing a Constitution for Europe did not stop the dialogue on the improvement of the Civil Protection Mechanism and a deeper assessment of the options to reinforce the EU disaster response started from the *Barnier Report* adopted in 2006.[44]

2.3.1 The Barnier Report: for a European civil protection force

In view of the European Council planned for June 2006, the former French Foreign Minister and European Commissioner Michel Barnier produced a report on the EU's response to major cross-border emergencies as requested by the Presidents of the Commission and the European Council, José Manuel Barroso and Wolfgang Schüssel respectively. While it was initially ignored, the idea to establish an independent EU disaster management force progressively gained popularity and to date the report is considered a landmark document in *subiecta materia*.[45]

The report centred around the reaction to major emergencies occurring outside the Union, certain that if the Member States and the EU institutions had taken up the proposals outlined in his report to improve the civil protection response, it would also have applied to disasters within the EU territory.[46] Indeed, the 2004 Asian tsunami had demonstrated that the price of a crisis management devoid of the EU was too high. Although the Community Civil Protection Mechanism was undoubtedly a step forward, the whole system continued to rely too much on spontaneous offers of help in relation to a formal request through the MIC. There were no systematic scenarios or protocols at the EU level to respond to any of seven major risks with the result being that existing resources were not always offered when needed. Furthermore, despite the fact that Member States had the capacity to organise relief and prepare for disasters, the Mechanism – lacking a European pool of existing national assets – had a reduced impact and visibility on the ground. According to Barnier, the EU response was, therefore, limited to guarantee more cost-

[42] Treaty Establishing a Constitution for Europe, 2004, Article III-184.
[43] Treaty Establishing a Constitution for Europe, 2004, Article I-42.
[44] M. Barnier, *For a European civil protection force: Europe aid*, 9 May 2006.
[45] A. Boin, M. Ekengren, M. Rhinard, *The European Union as Crisis Manager: Patterns and Prospects*, Cambridge University Press, 2013, p. 27.
[46] M. Barnier, *For a European civil protection force: Europe aid*, cit., p. 8.

effectiveness by properly organising the Member States' civil protection capabilities and consular assistance on the basis of common scenarios, and training programmes and exercises. However, "Europe is expected to show solidarity: the EU is called on to act and the Member States asked to help."[47] Hence, he suggested the creation of a primordial EU civil protection force, called Europe Aid, that had to undertake civil protection missions inside as well as outside of the EU according to some compromises.

First, the resources of people and equipment put at disposal had to be managed and maintained by the participating States and not centralised in Brussels. Secondly, the former EU Commissioner proposed a bottom-up approach consisting in the identification of precise needs listed in a 'menu' corresponding to different standard scenarios for civil protection. Participating States would have voluntarily chosen and financed one or more items on the menu maintaining them in its own country in any case. In this way, they could specialise in the handling of one or more threats, relating to the different scenarios (fires, floods, earthquakes etc.) that had been precisely identified and mapped to the resources needed to tackle them. In order to achieve a better outcome, States could also join to establish a group of countries skilled at managing a particular threat.[48]

The new force imagined by the former EU Commissioner would not have determined a real centralisation of civil protection instruments at Union level. Rather, it would have basically kept relying on some resources earmarked by States on a voluntary basis. To balance the constant reference to States' assets and capacities, the report introduced the necessity to acquire additional EU-funded resources and equipment (ships, helicopters, aircrafts). In particular this was identified as necessity in order to perform horizontal tasks (assessment, logistic, coordination) or to fill gaps in the civil protection capacities of the States. Moreover, he proposed using complementary military resources, in order to achieve maximum integration and to limit the cost of emergency deployments. Barnier's recipe focused on the opportunity to overcome State sovereignty and the inter-governmental logic in order to create a unified EU force able to respond to specific scenarios in a planned, organised, and tested way to prove the EU's added value. This argument was reinforced by the nega-

[47] Ibid.

[48] In this section, Barnier touched on the opportunity that the coastal countries of the EU might also pool their resources to set up a European coastguard. Indeed, the first initiative of a European Coast Guard Functions Forum was launched in 2009 in Warsaw during a Conference of the Heads of Coast Guards Authorities of EU Member States and Schengen Associated Countries, supported by FRONTEX.

tive results of the referendums for the European Constitution in France and the Netherlands that, according to Barnier, urged European countries to show more solidarity.[49]

Although the report introduced some relevant new ideas, it received contrasting opinions both within the European institutional framework and among Member States. As for the European institutions, the report was not given any closer notice during the Austrian Presidency, but some ideas were re-launched through, *inter alia*, a Council Decision recasting the previous one establishing the Community Civil Protection Mechanism in 2007.

2.3.2 Developments after the Barnier report

The first result of the Barnier report was the adoption of the Council Decision 2007/162/EC establishing a Civil Protection Financial Instrument[50] intended "to support and complement the efforts of the Member States for the protection, primarily of people, but also of the environment and property, including cultural heritage, in the event of natural and man-made disasters, acts of terrorism and technological, radiological or environmental accidents."[51]

Essentially, it had to support developments in the field of prevention and preparedness as well as response by funding cooperation projects on disaster risk reduction and early warning, exercises, and exchanges of modules and experts. The Instrument was immediately operational and covered a period from 2007 to 2013 amounting to approximately €190 million. Moreover, the instrument was also intended to finance up to 50% of the total transportation costs for civil protection operations, with exceptions for materials.

There is no doubt that, in adopting this instrument, the European Community recognised the importance of immediate civil protection assistance as a tangible expression of European solidarity in the event of major emergencies. However, simultaneously, without a convincing revision of the existing Mechanism, it only remained a financial tool aimed at supporting single national activities in prevention and preparedness. Such awareness led the Council to endorse the Commission proposal on a renewal and reappraisal of

[49] M. Gestri, "EU Disaster Response Law: Principles and Instruments", cit., p. 121.

[50] Council Decision of 5 March 2007 establishing a Civil Protection Financial Instrument, 2007/162/EC, Euratom, *OJ* L 71, 10 March 2007. The Commission had addressed its proposal to the Council in 2005 to provide a future legal framework for the financing of civil protection operations, see Proposal for a Council Regulation establishing a Rapid Response and Preparedness Instrument for major emergencies (COM 2005/0113 final).

[51] Council Decision 2007/162/EC, Article 1.1.

the framework of the Community Civil Protection Mechanism by adopting the Decision 2007/779/EC.[52]

One of the greatest changes brought by the new Decision was the recognition that the term 'disaster' should not only cover natural disasters but also complex emergencies, such as terrorist attacks and man-made disasters.[53] The choice to broaden the scope of the term reflected the reality of the situation since 2001 when Member States agreed that terrorist attacks are a security threat for European citizens travelling to third countries or residing there.[54] As a consequence, the Civil Protection Mechanism could support consular assistance to EU citizens in any kind of major emergencies in third countries, if requested by the consular authorities of Member States.[55]

The second main innovation was the development of the modular approach, consisting of resources of one or more Member States, and which aimed to avoid duplications of actions and to be fully interoperable depending on the type of major emergency and on the particular needs in that emergency.[56] This procedural change evoked Barnier's proposal to identify precise needs in a 'menu' corresponding to different standard civil protection scenarios in order to facilitate the deployment of resources when necessary. In this way, the Council tried to overcome the limits of a decision taken on a case-by-case basis as established in the Decision 2001/792/EC that extend the time limits to providing assistance. However, modules still were made up on a voluntary basis. Moreover, it is worth noting that, as proposed by Barnier, the 2007 Decision introduced the opportunity for Member States

[52] Council Decision of 8 November 2007 establishing a Community Civil Protection Mechanism (recast), 2007/779/EC, Euratom, *OJ* L 314, 1 December 2007. On 2006 the European Commission had adopted the Proposal for a Council Decision Establishing a Community civil protection mechanism (recast), COM/2006/0029 final.

[53] Council Decision 2007/779/EC, Article 1.

[54] Indeed, since November 2007, the EU Civil Protection Mechanism has often been activated to support consular assistance to EU citizens in times of crisis in third countries, if requested by the consular authorities of the Member States. The first operation was carried out during the 2006 Lebanon War to make additional ships and aircrafts available from the States participating in the Mechanism in order to bring humanitarian assistance to Cyprus and to repatriate nationals to their respective countries of origin. Afterwards, the Mechanism has been activated to rescue people in Mumbai (2008), Gaza (2009) and in Libya (2010 and 2011).

[55] The right of EU citizens to diplomatic and consular protection by any other Member States in a third country where the national State has no representation is conferred by Article 23 TFEU as well as by Article 46 of the Charter of Fundamental Rights of the EU. For further insights, see F. Forni, "The Consular Protection of EU Citizens during Emergencies in Third Countries", in A. De Guttry *et al.*, *International Disaster Response Law*, cit., pp. 155-174.

[56] Council Decision 2007/779/EC, Article 4.1.

to provide preventive information regarding relevant military assets and capabilities that could be used as a last resort as part of the civil protection assistance through the Mechanism, such as transportation, and logistical or medical support.[57]

The last important change was the clear division between preparedness and response. In terms of preparedness, the Council set a list of tasks for the Commission such as establishing and managing the MIC and CECIS, contributing to the development of the early warning system, establishing a way to quickly mobilise experts, and setting up a training programme. As for response, it is interesting to underline that the recasting Decision not only appointed the Commission as co-coordinator of the intervention outside the European Union, but also established a distribution of tasks between the Presidency of the Council and the Commission in order to ensure "the effectiveness, coherence and complementarity of the overall Community response."[58]

Overall, the recast decision introduced some ameliorations to the existing regulatory framework that – without however radically reforming it – reflected the progressive shift from a State-centred to a supranational approach. However, the Mechanism inaugurated by Decision 2007/779/EC had some considerable limitations in terms of effectiveness, efficiency, and coherence of the European disaster response.

The first one was that the reaction depended on voluntary and *ad hoc* offers of assistance by States Parties. The impossibility of foreseeing exactly what and how much assistance could be offered for any given emergency meant that a meaningful plan to deploy assistance could not be made for operations under the Mechanism. This could lead to a degree of improvisation and fragmentation in the immediate response phase that could undermine the intervention itself and the protection of people in need.

A past example of this ineffectiveness is the large forest fires in Bulgaria over the summer of 2007, where the request for assistance was left unanswered by other States Parties because their firefighting aircrafts were either in use in other States or on high alert to react domestically. In addition, critical response assets were often unavailable for quick mobilisation and thus the needs of the disaster victims could not be met. In particular, capacity gaps occurred with regard to assets dealing with low probability and law impact risks that refrained States from justifying investments, even though the impact could

[57] Council Decision 2007/779/EC, Article 4.5.
[58] Council Decision 2007/779/EC, Article 8.

be huge. Moreover, while such inadequacy has been repeatedly reported, the previous legal basis did not allow the Union support to fill such gaps. Therefore, it was clear that relying on States' capacities and on their willingness, occasionally, could mean failure.

Secondly, optimal responses were hindered by limited transport solutions and heavy procedures for States that had to face unexpectedly high cost for transport.[59] In fact, the 2007 Decision established that States could rely on an EU co-financing for transport or on the Commission's activation of a transport contractor to lease transport assets. However, the burdensome and long procedures as well as the maximum 50% co-financing clearly represented an obstacle in deploying assistance in a collective and coordinated way.

Third, despite the organisation and development of early warning systems as well as of preparedness projects and training courses, coordination and sharing of experience among personnel of States Parties was rather limited. This was because, despite the efforts of some civil protection structures, given the lack of a common language and of compatible operating procedures, it was easier to organise training and meetings at a national level rather than at a transnational level. As a consequence, without a direction and concrete assistance from the EU, first responders were not able to substantially raise their preparedness levels to respond to overwhelming and cross-border events.

The last shortcoming was the lack of integration of prevention policies, despite the high amount of Communication delivered by the Commission and the legislation on the necessity to improve cooperation in the area of risk assessment.[60] Indeed, given the growing complexity of emergencies, separate planning and isolated action without improved coordination were insufficient to prevent the consequences of future disasters. In addition, since Council Decision 2007/1627EC did not clearly cover the phase of prevention and the

[59] After the earthquake in Peru in 2007, offers from Germany, Luxembourg, Malta, and Slovakia consisting in the dispatch of medical equipment, medicines, and other relief items were partly not delivered because of a lack of transportation from Europe to Peru and within the area affected. Moreover, during the Japanese earthquake in 2011 many problems arose on organising storage and transport of items from the Narita airport to the affected prefectures of assistance of three helping States. For a deeper analysis on the intervention in Japan, see European Commission – ECHO, Evaluation of Civil Protection Mechanism. Case study report- Earthquake Japan 2011, ICF International, November 2014.

[60] Directives on flood risk management (2007/60/EC), on the protection of critical infrastructures (2008/114/EC), on the control of major accident hazards (Seveso-96/82/EC), on drought management (2000/60/EC), as well as other initiatives on climate change, the environment, land use policy, health, nuclear safety, and consular protection.

development of common disaster risk management plans, no activity in this field could be co-financed both at national and supranational levels through the Civil Protection Financial Instrument.

All these shortcomings can be partially explained by the fact that, despite a number of initiatives, cooperation in the area of civil protection contained certain political tensions among Member States according to the logic of a north-south division. On one hand, States in southern Europe tended to stress the importance of enhancing the EU's capacity to respond to crises and, consequently, to advocate the establishment of common EU civil protection capacities to complement the national ones. However, few would have accepted the Commission be in a 'commanding' role in the area of civil protection.[61] On the other hand, Member States of northern Europe stressed the importance for the EU to only be a driver to encourage an improved national capability regarding the ability to respond to a crisis and to carry out preventive and preparedness measures throughout financing measures. In addition, they downplayed the need for commonly owned EU resources and the EU's role as a coordinator in the area of civil protection. This north-south division also reflected different opinions concerning the balance between national responsibility and collective responsibility of the EU as well as the nature of solidarity among Member States.

At this point of the present work, one could deem that until 2007 there was no clear intention to further develop the field of civil protection within the European Community. Even though the European institutions boosted a deeper integration of practices, the intergovernmental approach prevailed over the European one and Member States maintained a significant degree of power which they were not intending to give up. Moreover, it was also apparent that in the case of serious emergencies both inside and outside the territories of Member States, national interests were stronger than the collective one. The tension between the national and supranational dimension and the lack of a shared attitude among the Member States of what the cooperation within the EU should focus on seemed to render the further development of the Mechanism uncertain.

[61] T. Åhman, C. Nilsson, "The Community Mechanism for Civil Protection and the European Union Solidarity Fund", cit., p. 103.

3. The Lisbon Treaty and the Union Civil Protection Mechanism

3.1 The new competence in the field of civil protection

The entry into force of the Lisbon Treaty in 2009 has opened the way for some common ground in the field of civil protection which, according to Article 6 TFEU, now falls within the so-called supporting competences.[62] The detailed definition of the objectives and the scope of the new EU competences regarding civil protection is spelled out in Title XXIII, Article 196 TFEU that states as follows:

> 1. The Union shall encourage cooperation between Member States in order to improve the effectiveness of systems for preventing and protecting against natural or man-made disasters. Union action shall aim to:
> (a) support and complement Member States' action at national, regional and local level in risk prevention, in preparing their civil-protection personnel and in responding to natural or man-made disasters within the Union;
> (b) promote swift, effective operational cooperation within the Union between national civil-protection services;
> (c) promote consistency in international civil-protection work.
> 2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure shall establish the measures necessary to help achieve the objectives referred to in paragraph 1, excluding any harmonisation of the laws and regulations of the Member States.

First of all, the provision refers, *ratione materiae*, both to natural and man-made disasters, even if a more specific definition is left to secondary legislation. In line with the position of the legal doctrine and with the practice consolidated over time, the complex nature of emergencies, that may have both natural and anthropogenic origins, has been clearly recognised.

Even though the EU interventions to cope with disasters occurring outside the Union's territory are not covered by the present work, it is important in any case to stress the broad scope of the new treaty provision which covers, *ratione loci*, civil protection cooperation both inside and outside the EU. In this way, it reflects the previous legal framework, but with some differences underscored by

[62] A. Rosas, L. Armati, *EU Constitutional Law. An introduction*, cit., pp.12-17; L. S. Rossi, "A new revision of the EU Treaties after Lisbon?", in L. R. Rossi, F. Casolari (eds), *The EU after Lisbon: Amending or Coping with the Existing Treaties?*, cit., pp. 3-19.

the verbs used. Indeed, if the EU action is intended to "support" and "complement" that of Member States in managing emergencies occurring within the Union, concerning the external sphere it is only called upon to "promote consistency." The issue of consistency of the EU external action has gained significant importance with the entry into force of the Lisbon Treaty, since it does not only require that there be no contradictions between the internal and the external dimension of the EU policies, but also that the actions carried out in the international arena be coherent and compatible with each other.[63] Thus, it is clear that, in order to understand how the EU can foster consistency regarding measures of civil protection adopted to respond to emergencies occurring outside the Union, Article 196 TFEU must be read in conjunction with other provisions concerning the EU external action, in particular Article 21 TEU and Article 214 TFEU on humanitarian aid.

Another positive element to be indicated is the broad scope *ratione temporis* of the new competence as for the range of actions to be carried out. It not only covers the phases of preparedness and response, but also that of prevention which, as then proposed by the Commission in its 2009 Communication,[64] should be reinforced in the light of a more comprehensive approach to disaster management.[65] This gives the Union the opportunity to have a certain room for manoeuvre to increase Member States' awareness on *ex-ante* disaster management. Indeed, before the Lisbon Treaty, there was no coherent and comprehensive system of measures for prevention in the field of civil protection. Decision

[63] See, *ex multis*, C. Hillion, "*Tous pour un, un pour tous!* Coherence in the External Relations of the European Union", in M. Cremona (ed.), *Developments in EU External Relations Law*, Oxford University Press, 2008, pp. 10-36; A. Mignolli, *L'azione esterna dell'Unione europea e il principio della coerenza*, Jovene Editore, 2009; P. Van Elsuwege, "EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance Between Delimitation and Consistency", in *Common Market Law Review*, 47, 2010, pp. 987-1019; M. Cremona, "Coherence in European Union Foreign Relations Law", in P. Koutrakos (ed.), *European Foreign Policy*. *Legal and Political Perspectives*, Elgar Publishing, 2011, pp. 55-94; L. Den Hertog, S. Stroß, "Coherence in EU External Relations. Concepts and Legal Rooting of An Ambiguous Term", in *European Foreign Affairs Review*, 18, 2013, pp. 373-388; M. Gatti, *European External Action Service - Promoting Coherence through Autonomy and Coordination*, Brill, 2016.

[64] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions - A Community approach on the prevention of natural and man-made disasters, COM/2009/0082 final, 23 March 2009.

[65] For a deeper analysis of how the European Union responds to overseas natural and man-made disasters see F. Casolari, "The External Dimension of the EU Disaster Response", cit. Moreover, see the testimony of H. Das, Deputy Head of Unit, Civil Protection, European Commission in House of Lords, European Union Committee, *Civil protection and crisis management in the European Union*. Report with evidence, 11 March 2009, HL paper 43, p. 2.

2007/779 had sidestepped to focus on prevention and early warning systems by repeating the ambivalent statement of the 2001 Decision which had just recognised its importance and the necessity of further considerations.[66] On the contrary, following the Lisbon revision, secondary legislation in the field of civil protection has adopted an entirely different approach by making prevention the new core of the Mechanism.

As for the recipients of Union action, one may suggest that, from a substantive point of view, the explicit competence in the area of civil protection essentially mirrors the practice that has developed in *subiecta materia* prior to the Lisbon Treaty. Indeed, Article 196 TFEU refers to the objective of supporting and complementing Member States' actions at all levels, by explicitly mentioning the responsibility of regional and local authorities. As a result, the new mechanism of EU civil protection should be complementary and not intended to replace nor radically transform national systems in this area.

As previously alluded to, the crucial innovation derives from the provision of an explicit legal basis for the area of civil protection. Under Article 196, para. 2, TFEU the EU measures taken in this *materia* shall be enacted in accordance with the ordinary legislative procedure. Against this background, the lack of any reference to a duty of consultation of the Committee of the Regions with respect to the legislative acts to be adopted is surprising. Therefore, the new decision-making process is a crucial step forward in comparison to the pre-existing legal framework where the legislative acts were adopted according to the flexibility clause requiring a unanimous vote within the Council. The procedure provided in the Treaty involves a strengthened legislative role for the European Parliament and undoubtedly facilitates further advances in the EU Civil Protection Mechanism.[67]

Therefore, the EU has more competence in this area than it might be thought, but there is a clear tension in the frame of the Treaty provisions between the nature of the act to be adopted and the condition of non-harmonisation. At first sight, the easiest way to achieve the objectives of the EU action to support, coordinate, or supplement the actions of the Member States without resorting to harmonisation would be to adopt soft law instruments. However, no reference to soft legislation, such as guidelines, action programmes, or recommendations is made, but the reference to the legislative procedure to be used indicates that the institu-

[66] Council Decision 2007/779/EC, Recital 7. Moreover, the word "prevention" was just mentioned twice in the entire text.

[67] M. Gestri, "EU Disaster Response Law: Principles and Instruments", cit., pp. 116-117.

tions shall select any type of legislative act. Since the Treaty does not provide any specific link between the types of acts that can be adopted and the nature of the competence to be exercised, the Union can adopt a whole range of legally binding instruments at their disposal in accordance with Article 288 TFEU.

The only requirement is that the Commission bears in mind the specific characteristics of each act, its compliance with the targets of the regulatory intervention, as well as with the principle of proportionality and, in the case of supporting competences, also the *caveat* concerning legislative harmonisation. In this case, the principle of proportionality plays a fundamental role as it establishes that the content and form of EU action must not exceed what is necessary to achieve the objectives of the EU treaties. However, the problem upstream is that the opportunity for the EU institutions to adopt binding measures in the field of civil protection may be in conflict with the prohibition of harmonisation. Any enacted binding measure may be tantamount to harmonisation of national law, even though it does not bear the imprint on the face of the measure.[68] The borderline between the adoption of *legitimate* binding acts and *illegitimate* harmonisation of national law is very narrow. It remains to be seen whether the act adopted according to Article 196 TFEU respects the prohibition of harmonisation or whether it represents a challenge for Member States' competence in this area.

3.2 The adoption of a new legislative act on a Union Civil Protection Mechanism

The changes brought by the Lisbon Treaty as well as the occurrence of events like the devastating earthquake in Haiti in early January 2010 and the floods in Pakistan in June of the same year have caused the Commission to adopt new initiatives on civil protection from an operational and legal point of view.

First, in February 2010, the Directorate-General for Humanitarian Aid (ECHO) absorbed the civil protection sector and became the Directorate for International Cooperation, Humanitarian Aid and Crisis Response by responding to the desired improvement of synergies envisioned by the Council in the mentioned Humanitarian Aid Consensus. Moreover, as acknowledged by the European Parliament, this should improve consistency of overall disaster response outside the Union according to Article 196, para. 1 lett. c) TFEU.[69] Furthermore, on the basis of the 2010 Communication *Towards a*

[68] P. Craig, *The Lisbon Treaty. Law, Politics and Treaty Reform*, Oxford University Press, 2013, pp. 173-178.

[69] European Parliament, Recommendation to the Council of 14 December 2010 on setting up EU rapid response capability, INI/2010/2096, 14 December 2010.

stronger European disaster response: the role of civil protection and humanitarian assistance,[70] the Commission urged to reinforce the effectiveness, efficiency, coherence, and visibility of the EU's response to disasters. The Commission was aware that it was still limited by a number of shortcomings mainly related to response planning and integration of preparedness and prevention actions, thus making it increasingly difficult to ensure an appropriate handling of the future challenges. As a result, in 2011 the Commission presented a proposal for a Decision of the European Parliament and of the Council on a Union Civil Protection Mechanism to replace both the Decision on the CPM and that on the Civil Protection Financial Instrument.

In December 2011, the Commission Directorate-General responsible for humanitarian aid and civil protection delivered a Working Paper on Impact Assessment to review the Civil Protection regulatory framework.[71] In particular, the paper examined EU Civil Protection cooperation policy options, including all aspects of an *ex-ante* evaluation for the future form of the Civil Protection Financial Instrument. During the assessment process, the Steering Committee consulted different stakeholders such as national civil protection authorities, international organisations, UN agencies, emergency management organisations, and the humanitarian community that supported advanced planning of preparedness and response operations under the Mechanism. Indeed, it was clear that more effective and integrated EU support for disaster management including risk management planning could have a positive impact on society and the environment.

In the light of this preparatory working paper, according to the ordinary legislative procedure, the European Commission handed over its draft proposal on a Union Civil Protection Mechanism to the European Parliament and the Council,[72] both having the possibility to amend what was delivered by the Commission. Moreover, since the field of civil protection also concerns regional and local governments, even if not expressly required by the Treaties, the Committee of the Regions was asked to present its opinion on the Commission proposal[73] in order to ensure that the position and needs of regional and local authorities

[70] Communication from the Commission to the European Parliament and to the Council - Towards a stronger European disaster response: the role of civil protection and humanitarian assistance, COM(2010) 600 final, 26 October 2010.

[71] European Commission, Staff Working Paper, Impact Assessment – 2011 review of the Civil Protection regulatory framework, SEC/2011/1632/FINAL, 20 December 2011.

[72] European Commission, Proposal for a Decision of the European Parliament and of the Council on a Union Civil Protection Mechanism, COM(2011) 934 final, 20 December 2011.

[73] Committee of the Regions, Opinion of the Committee of the Regions on the "Union civil protection mechanism", 2012/C 277/16, *OJ* C 277, 13 September 2012.

were respected. The Committee welcomed the efforts of the Commission to reinforce the existing Civil Protection Mechanism, but it wanted to be reassured on the practical impact of the Mechanism given that the first response to the emergency has to be guaranteed at the local level. Thus, the components of the Committee insisted on the fact that the establishment and management of the new Mechanism should not create parallel structures, or unclear deployment procedures at the EU level which could threaten national bodies.[74]

In the same direction but with a greater number of arguments, debates within the Council started under the Danish Presidency in the Working Party on Civil Protection (ProCiv) and continued under the Cyprus Presidency. In terms of the main innovations brought by the Commission Proposal, Member States immediately demonstrated overall support in strengthening planning and disaster prevention, as well as merging the Council Decisions on the Civil Protection Mechanism and the Civil Protection Financial Instrument into one legal document. Nevertheless, as reported in the Presidency's compromise text, diverging views remained mainly concerning the scope and extent of the obligations on Member States that did not want to lose their prerogatives. In the light of this evaluation, as it will be illustrated in the next paragraph, the Commission proposal was subjected to some modifications by the Council[75] which, however, recognised the necessity to improve the effectiveness and cost-efficiency of systems preventing, preparing for, and responding to all kinds of natural and man-made disaster. Even though both Germany and Austria voted against the Decision and the United Kingdom abstained,[76] the necessary conditions for a first-reading agreement with the European Parliament were met. Thus, the text was soon approved and on 17 December 2013 Decision 1313/2013 on a Union Civil Protection Mechanism (hereinafter UCPM)[77] was signed thereby marking the latest step of the institutionalisation of the EU civil protection mechanism representing in-kind solidarity among Member States.

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[74] Ibid., II. Recommendation for Amendments, Amendments 3-4.

[75] Council of the European Union, Press Release of the 3195th Council meeting - Justice and Home Affairs, Doc. 15389/12, 25 and 26 October 2012.

[76] Council of the European Union, Voting results on Decision of the European Parliament and the Council on a Union Civil Protection Mechanism, 3285th meeting – Agriculture and Fishing, 2011/0461(COD), Doc. 18087/13, 16 December 2013.

[77] Decision No. 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism, *OJ* L 347/924, 20 December 2013. Moreover, in 2014 the Commission adopted the implementing decision, European Commission Implementing Decision 2014/762/EU of 16 October 2014 laying down rules for the implementation of Decision No. 1313/2013/EU, *OJ* L 320, 6 November 2014.

3.3 Decision 1313/2013: old and new elements framing the Union Civil Protection Mechanism

Decision 1313/2013 represents a real improvement for the system of civil protection at an EU level. However, in some respects, it is also a sort of compromise between the Commission and the Council. Therefore, it is worth exploring the content of the Decision by underlying both aspects.

Regarding the previous legislation on civil protection, the first element to be noted is the broad meaning attributed to the term 'disaster' which is defined in Article 4 of the Decision as "any situation which has or may have a severe impact on people, the environment, or property, including cultural heritage."[78] Thus, the actual or potential severity of an emergency triggering the response is reiterated, which is not clearly determined by its transnational nature, but rather by the State's incapacity to react on its own. Secondly, the serious consequences of a disaster may also refer to those events which affect the environment, or cultural heritage without necessarily jeopardising people's lives.

So far, nothing new in comparison to Decision 2007/779; the subtle difference is enshrined in Article 1, para. 2, which establishes the scope of application of the Mechanism, that "shall cover primarily people, but also the environment and property, including cultural heritage, against all kinds of natural and man-made disasters, *including* the consequences of acts of terrorism, technological, radiological or environmental disasters, marine pollution, and acute health emergencies, occurring inside or outside the Union" [emphasis added]. As emphasised, by using the term 'including' the provision does only contain an illustrative list of situations where the Mechanism can be activated, and this leaves the door open to an even wider interpretation.[79]

As for the scope of application *ratione temporis* of the Mechanism, in line with the spirit of the Lisbon Treaty, Decision 1313/2013 reflects the classical disaster management cycle, by including prevention, preparedness, and response. As a consequence, compared to the legislation previously in force, the new instrument is meant to give much greater emphasis to disaster prevention and risk management, thus moving from a culture of reaction to a culture of prevention as an expression of long-term solidarity.[80]

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[78] Decision 1313/2013, Article 4, para. 1.

[79] By extending the analysis to situations occurring outside the EU territory, conflict areas could now be covered by the Union's action as confirmed in practice. For instance, the Union Civil Protection Mechanism has been activated to help Ukrainian citizens during the Crimea crisis which cannot be labelled as a disaster, but rather as an international conflict.

[80] Decision 1313/2013/EU, Preamble, point 8.

From an institutional point of view, the most relevant plan is the establishment of an Emergency Response Coordination Centre (ERCC) aimed at merging the two crisis rooms operating for civil protection (MIC) and humanitarian assistance (ECHO). The ERCC, built on the existing Monitoring and Information Centre, has been strengthened to be a communications platform and to ensure 24/7 operational capacity (Article 7). The breakthrough of this idea is twofold. On the one hand, it represents the opportunity to streamline existing structures and to grant the ERCC a more active role: guaranteeing operational and logistical support. On the other hand, it has become clear that the Commission is interested in ensuring close coordination between civil protection and humanitarian aid, as well as consistency with possible actions carried out under other areas of cooperation and instruments operating both within and outside the Union. It must be noted that the external projection of the Civil Protection Mechanism is reflected in the reference to the role of the European External Action Service (EEAS). Being the European Union's diplomatic service aimed at ensuring that all the different activities that the EU performs abroad are consistent and effective, it has been laid down that the EEAS is informed by the Commission of any planned intervention in the field of civil protection. This is because the Service should manage all the Union's relations with the affected country where civil protection operations have been carried out. This represents a crucial innovation for two reasons. First, the overall coordination among different capacities shall be exercised by the EEAS rather than the Presidency of the Council as set out in the 2007 Decision. In addition, it has strengthened the Commission in promoting more efficient operational coordination for the activation of the Mechanism. Secondly, it ensures s smooth relationship between relief assistance and the EU military staff: the source of military expertise within the EEAS is made available, for instance, military airlift support to humanitarian operations on the occasion of the 2011 Pakistan floods and the evacuation of third country nationals from the war in Libya. This strong civilian-military cooperation may appear to be against the civilian nature of civil protection. However, as governed by international norms – the Oslo Guidelines and the Guidelines on the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies – the military can contribute to the provision of security as well as logistical and medical support when acting outside the Union. Therefore, the Decision 1313/2013 accepts that the military forces can play a useful role in emergency relief contexts, but only as a last resort and always under civilian management.[81] The reason for this limit is

[81] Decision 1313/2013/EU, Article 9, para. 5.

twofold. On the one hand, it safeguards the already existing efforts to organise the provision of civilian assets and, on the other, it avoids possible abuses of military means especially outside the EU territory. Thusly, the image of the Union appears stronger not only as a single actor able to respond to crises in a coherent and efficient way, but also as a crisis manager committed to the civilian dimension rather than the military one.[82]

Substantially, the true quantum leap within the framework of the UCPM was represented by the Commission's bold proposal to establish the European Emergency Response Capacity (EERC).[83] The first step set out by the Commission was to improve the planning of assistance, by developing reference scenarios for the main types of disasters, mapping the assets available in the Member States, and adopting prior contingency plans for the deployment of capacities.[84] The second step was to enhance the availability of key resources by feeding the EERC with a voluntary pool of pre-committed civil protection assets from Member States to be placed on stand-by for EU disaster response operations.[85] In this context, the European Commission and Member States should have been responsible for defining the quality requirements of the capacities to be committed, and for ensuring their quality, respectively.[86] Despite the more prudent terminology, the idea underpinning the EERC's establishment was similar to the European Civil Protection Force issued by Barnier in 2006. Namely, rendering the EU response to disasters more predictable, better planned, and coordinated by overcoming the inefficient system based on *ad hoc* offers of assistance from the participating States. Although there was an attempt to compromise between general interests and national interests – underscored by the essentially

[82] For insights, see P. Müller-Graff, "The European External Action Service: Challenges in a Complex Institutional Framework", in I. Govaere, E. Lannon, P. van Elsuwege, S. Adam (eds), *The European Union in the World. Essays in Honour of Marc Maresceau*, Brill, 2014, pp. 115-127.

[83] European Commission, Proposal for a Decision of the European Parliament and of the Council on a Union Civil Protection Mechanism, Article 11. In late October 2017, the EERC included a total of 90 response capacities from 20 Participating States. http://erccportal.jrc.ec.europa.eu/getdailymap/docId/2291. For a comment on the effectiveness of the EERC, see European Commission, Report from the Commission to the European Parliament and the Council on progress made and gaps remaining in the European Emergency Response Capacity, 17 February 2017.

[84] European Commission, Proposal for a Decision of the European Parliament and of the Council on a Union Civil Protection Mechanism, Article 10.

[85] European Commission, Proposal for a Decision of the European Parliament and of the Council on a Union Civil Protection Mechanism, Article 11 (1). Moreover, it is provided that the process of registration of Member States' capacities had to be managed by the Commission (Article 11 (4)).

[86] European Commission, Proposal for a Decision of the European Parliament and of the Council on a Union Civil Protection Mechanism, Article 11 (3).

voluntary nature of the registration of the capacities from Member States – a lively debate on the Commission proposal ignited in the Council. Indeed, some Member States were determined to leave the possibility open of opting-out in the case of specific disasters thereby jeopardising the common effort to confront disasters. Accordingly, the Presidency's compromise stressed the necessity for the response capacities made available to the EERC to remain accessible for national purposes in case of compelling reasons and that the ultimate decision on their deployment be taken by the Member States who registered the response capacity concerned.[87] Hence, the final version of the Decision 1313/2013 includes amendments which further underline the voluntary nature of these commitments, thus making it clear that, even though the system is more certain and efficient given the accelerated response process, States still keep a high degree of discretion in this phase.

The pressures received from States are also evident when reading Article 12 of the Decision that should be complementary to EERC in the establishment of a European Civil Protection Force. The initial idea, previously envisaged in the 2010 Communication and endorsed by the European Parliament,[88] was indeed to develop specific EU-funded assets for civil protection. This would have guaranteed burden sharing and the common use of cost-efficient resources; however, Member States presented multiple reservations related to the potential political cost of such a step. Indeed, it could represent an incentive not only for each Member State to reduce its civil protection capacities to protect the population in its territory, but also to start relying systematically on these EU-funded assets. However, the leading reason invoked was the fear that it could lead to an unwanted command and control from the EU institutions. Indeed, in view of the primary responsibility of the States to protect their populations, it was inappropriate for the EU to develop its own assets and to pose a risk of 'crowding out' national capacities.[89] Thus, another formula was decided upon which, however, is completely different from that elaborated by the Commission in

[87] Council of the European Union, Preparation of the Council (Justice and Home Affairs) meeting on 25 and 26 October 2012, Proposal for a Decision of the European Parliament and of the Council on a Union Civil Protection Mechanism - State of play / Orientation debate, Doc. 14445/12, 8 October 2012, p. 9. Moreover, see Decision 1313/2013/EU, Article 11, paras. 6-7.

[88] European Parliament Resolution on "Towards a stronger European disaster response: the role of civil protection and humanitarian assistance", 2011/2023 INI, 27 September 2011, paras. 23-24.

[89] Council of the European Union, Discussion on the Proposal for a Decision of the European Parliament and of the Council on a Union Civil Protection Mechanism, Doc. 14445/12, cit., pp. 11-12.

its proposal. Article 12 of the Decision provides that the Commission should determine, in cooperation with Member States, the existence of gaps in the response capacities and examine whether the necessary capacities are available to the Member States outside the EERC. More precisely, Article 21(j) establishes that the development of new response assets could be eligible for financial assistance of up to a maximum of 20 % of the eligible costs. It is important to highlight the link between the co-financing and the subsequent commitment of those resources to the voluntary pool for a minimum period of two years to be given to consortia of Member States cooperating on a common risk. Despite this clause, the opportunity to develop response capacities at the Union level that, being part of the EERC, could instead serve as a common buffer against shared risks was completely deleted.[90]

All these points demonstrate the creeping in of a States stance on the role of the Mechanism in managing interventions of civil protection: it should coordinate multiple forms of assistance, but without envisaging a real and unique instrument of assistance owned, deployed, and coordinated at an EU level.[91]

3.4 Decision (EU) 2019/420: features of the new rescEU system

In the early stages after the adoption of Decision 1313/2013, the focus of the updated UCPM was on building up the quantity of capacities in the form of modules registered by participating States into the EERC: from 2013 to 2017, 16 participating States committed a total of 77 resources to the voluntary pool.[92] Notwithstanding that the capacities in the pool were of "overall good quality" and the number of modules was "above initial targets",[93] practice soon proved the existence of significant shortcomings in the UCPM. On the one hand, as

[90] European Commission, Proposal for a Decision of the European Parliament and of the Council on a Union Civil Protection Mechanism, Article 12, para. 2 (b).

[91] ECORYS, "Strengthening the EU capacity to respond to disasters: Identification of the gaps in the capacity of the Community Civil Protection Mechanism to provide assistance in major disasters and options to fill the gaps – A scenario-based approach", September 2009, p. 10.

[92] As of October 2016, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain and Sweden committed civil protection resources to the EERC. See European Commission, Report from the Commission to the European Parliament and the Council on progress made and gaps remaining in the European Emergency Response Capacity (Annex), COM(2017) 78 final. These positive results have been praised also by the European Court of Auditors in its Special Report 33/2016 on "Union Civil Protection Mechanism" published on 18 January 2017.

[93] European Commission, Directorate-General for European Civil Protection and Humanitarian Aid Operations, Interim evaluation of the Union Civil Protection Mechanism (2014-2016), COM(2017) 460 final, 30 August 2017.

reported by the Commission[94] and the Court of Auditors, climate change and other sudden-onset phenomena have exacerbated the ability of States to help each other due to the shortage of national capacities and resources. For example, in only ten out of the seventeen cases requesting help for forest fires in 2017 was assistance actually delivered and it was sometimes too slow. This was caused, *inter alia*, by the limited availability of firefighting planes because of their deployment in other affected States. On the other hand, the concrete incentives for States to offer assistance via the EERC were very low since the EU budget could only finance a share of transport costs. Yet, the operational costs covered by the States remained the highest. Hence, the transportation incentives were not enough to build a strong and effective EU civil protection capacity ready to help in the disaster response. These circumstances severely impacted the effectiveness of the relevant pre-committed capacity for a European coordinated response and showed the shortfall in means at the EU level.

These findings led the Commission to propose a new change of pace towards an even more robust and comprehensive EU disaster management capacity in order to show "European solidarity and responsibility at all levels."[95] Accordingly, resembling the initial idea, it proposed the adoption of a new Decision meant to complete the existing Mechanism by putting in place a dual system of response capacity: a dedicated reserve of response capacities under the control of the Union, to be known as rescEU; and a more effective and dynamic contribution from Member States through a European Civil Protection Pool (ECPP).[96] While the latter essentially nominally replaced EERC as a complementary instrument to the existing capacities of the Member States, the rescEU system represented the major change and improvement of the Decision. According to the Commission's proposal, this mechanism was aimed to put at the EU's disposal a set of capacities, allowing it to address the most common disasters affecting the Member States. Thus, the capacities should have encompassed aerial forest firefighting planes, high-capacity pumping, urban search and rescue, and capacity building for public health risks, such as field hospitals and emergency medical teams. Even more importantly in terms of development of a real EU

[94] Communication from the Commission to the European Parliament, the Council and the Committee of the Regions, Strengthening EU Disaster Management: rescEU Solidarity with Responsibility, COM(2017)773 final, 23 November 2017.
[95] Ibid., p. 4.
[96] European Commission, Proposal for a Decision of the European Parliament and of the Council amending Decision No. 1313/2013/EU on a Union Civil Protection Mechanism, COM(2017)772 final, 23 November 2017.

civil protection force that was independent from the will of the Member States, the Commission had proposed that rescEU be made up of capacities rented or leased via EU arrangements or acquired with full EU financing. The EU institution would have also been responsible for defining the required quality of the response capacities and for ensuring their availability. In addition, all the costs of these capacities would have been fully covered by EU financing, with the Commission retaining the operational control of these assets and deciding on their deployment. Hence, during operations, the requesting State would have ensured that activities of rescEU capacities and teams were executed in accordance with the operational deployment agreed with the Commission.[97]

It should not come as a surprise that the proposal was highly criticised by several Member States concerning the possibility for the Commission to exercise a complete control on the rescEU capacities without giving them a specific role play in the civil protection domain.[98] More specifically, they contested the fact that this kind of action would have been in contrast not only with the nature of the competence in this field but also with the principle of conferral. It was thus reminded that the action of the EU institutions under the UCPM is covered by a parallel competence attributed to the Union. As is well known, the nature of this competence means that, pursuant to Article 2(5) TFEU, the EU institutions can neither replace the Member States' action in the areas concerned nor adopt legally binding acts entailing the harmonization of Member States' laws or regulations. Indeed, the parallel competences have to be understood as domains of cooperation where the Union may only support and coordinate the action of the Member States without replacing them in the management of relevant activities in that area.[99]

After a phase of negotiation between the Council and the European Parliament, a political agreement was reached in December 2018 and Decision (EU) 2019/420[100] was adopted in March 2019, not without any changes compared

[97] Commission Proposal, COM(2017)772, Article 12(3).

[98] Concerns on the opportunity that the Commission acquired more powers than those prescribed under Article 196 TFEU had already been expressed by the United Kingdom at the time of the adoption of Decision 1313/2013 with regard to the establishment of the EERC. See House of Commons – European Security Committee, *Strengthening the EU's Civil Protection Mechanism*, Thirty-third Report of Session 2012-13, pp. 45-46; House of Commons – European Security Committee, *Establishing an EU Civil Protection Mechanism*, Fourth Report of Session 2012-2013, p. 42.

[99] F. Casolari, "Europe (2018)", in *Yearbook of International Disaster Law*, 1, 2018, p. 347.

[100] Decision (EU) 2019/420 of the European Parliament and of the Council of 13 March 2019 amending Decision No. 1313/2013/EU on a Union Civil Protection Mechanism, *OJ* L 77I, 20 March 2019.

to the Commission proposal. It suffices to say that, concerning the rescEU system, Article 12 of Decision 2019/420, which replaces Article 12 of Decision 1313/2013, significantly diverges from the original proposal. At the basis of the agreement, there is the idea that rescEU capacities shall be established to provide assistance in serious situations where the existing capacities at a national level and those pre-committed by Member States to the ECPP are not able to ensure an effective response. Hence, the rescEU system is conceived as a 'last resort tool' to be triggered only when the other capacities available at national and EU levels are not sufficient to deal with the disaster scenario. For this purpose, the Decision includes a different (and more general) catalogue of areas of intervention (aerial forest fire fighting, chemical, biological, radiological and nuclear incidents, and emergency medical response).[101] Even more importantly, the new provision mitigates the excessive powers potentially given to the Commission by dismissing the establishment of a mechanism managed and financed exclusively by the EU institution. Indeed, the rescEU capacities shall be acquired, rented, or leased not by the Union anymore but by Member States with direct grants awarded by the Commission without a call for proposals. For its part, the Commission keeps the task to define the quality arrangements and to apply the joint procurement procedure where the Commission procures the capacities on the behalf of Member States.[102] Once acquired, the rescEU capacities are hosted by the Member States that have acquired, rented, or leased them and shall be put at the disposal of UCPM operations.[103] The Decision then sets that the decision regarding their deployment and demobilisation is taken by the Commission in close coordination with the State hosting the rescEU capacities and the requesting Member State.[104] Moreover, the former is also responsible for directing response operations thus resulting in a sort of 'shared responsibility' in the intervention phase. Interestingly, it is set that rescEU capacities may only be used for the national purposes of the Member States owing the resources when they are not being used or needed in response operations under the Union Mechanism.[105] In addition, as specified in the later adopted Implementing Decision,[106] the use of rescEU capacities for national purposes should be notified to the

[101] Decision 2019/420, Article 12(2).
[102] Decision 2019/420, Article 12(3).
[103] Decision 2019/420, Article 12(5).
[104] Decision 2019/420, Article 12(6).
[105] Decision 2019/420, Article 12(5).
[106] European Commission, Implementing Decision (EU) 2019/1310 of 31 July 2019 laying down rules on the operation of the European Civil Protection Pool and rescEU, *OJ* L 204, 2 August 2019.

Commission and their availability and readiness for operations under the UCPM should be ensured in the shortest time possible.[107] To complete the picture, as for external interventions, the Member States may refuse to deploy their personnel under the rescEU system only in two particular cases: a) whenever diplomatic relations between the Member State and the requesting third country have been severed; b) where armed conflict or other equally serious grounds would result in the safety and security of the personnel being put at risk and prevent the Member State in question from fulfilling its duty of care.[108] As for the financial burden, the same Decision recognises the need to find the proper balance between "national responsibility and solidarity among Member States" through the acknowledged possibility to consider the operational costs of the deployment of rescEU capacities as "eligible for Union Financial Assistance."[109] Thus, the Decision contains provisions foreseeing a coverage by the Commission of "at least 80% and no more than 90% of the total estimated costs necessary to ensure the availability and the ability to deploy rescEU capacities under the UCPM."[110] In the absence of an independent Union capacity fully financed by the EU budget, the inclusion of this point should, to some extent, allow to better tackle the issue concerning the coverage of the costs relating to the deployment of emergency assets experienced in previous practice.

In the light of this reconstruction, it is clear that the role played by the Commission in managing the rescEU resources has been significantly limited in comparison to the original proposal. Now, it seems to have more of an ancillary than primary position in acquiring, managing, and command over assets and capacities. This notwithstanding, such a compromise does not fully deprive the Commission from enjoying a special margin of manoeuvre that, in turn, limits that of the Member States. In this sense, the fact that they have to act in close cooperation with the Commission when deploying the rescEU resources and that their use for national purposes is quite restrained, is revealing. These findings suggest two different considerations that deserve attention. On the one hand, even though diverging from the Commission proposal, the new rescEU system may represent another significant step forward in the elaboration of a supranational mechanism of civil protection based on solidarity and cooperation between the Union and Member States. On the other hand, it cannot be ignored that, by especially considering the mentioned reshaping of the role played by the Member States, the functioning of the rescEU

[107] Ibid., Article 5.
[108] Ibid., Article 6 (1).
[109] Ibid., Recital 20.
[110] Ibid., Article 12(5).

system currently in force makes it a borderline mechanism in terms of respect of the allocation of competences between the Member States and the Commission in the field of civil protection. In fact, it cannot be neglected that this area seems to be exposed to a substantial rereading in favour of the Commission which has carved out a competence wider than that prescribed. First, by introducing specific requirements to be respected when registering the modules in rescEU (as well as in the ECPP), it could be argued that the Commission has taken a leap towards a voluntary quasi-harmonisation of national legislations in this field. Indeed, while the basic idea is to have a set of compatible assets to be deployed in a more coherent and organised way, the introduction of technical requirements may indirectly result in the limitation (even though not dramatically) of the independence of the Member States in defining the standards of the single capacities. And this does not appear to fully comply with the wording of Article 196(2) TFEU which excludes any harmonisation of laws and regulations of the Member States. Second, the Commission's intervention in the selection and funding of the rescEU assets necessarily entails a significant influence over their quality, capacity, and readiness by leaving aside the Member States that, whilst respecting the principle of loyal cooperation, would remain simple 'executors' of the Commission's decision. Hence, this framework would go beyond the Union's task to "promote swift, effective operational cooperation within the Union between national civil-protection services" as established in Article 196(1) TFEU thereby opening a new breach in the labile equilibrium in terms of division of powers between the EU and the Member States. Ultimately, one could argue that the solidarity requirements – channelled by the necessity to guarantee the effectiveness to the UCPM – could appear to be a justification to reshape the contours of the supporting nature of the competence in civil protection issues.

Mindful of the tragic series of forest fires in Portugal which pushed the improvement of the UCPM, the first asset established under the rescEU system was a fleet of firefighting aircraft.[111] The second test of rescEU occurred on the occasion of the COVID-19 pandemic outbreak at the beginning of 2020 that required, *inter alia*, the activation of the UCPM.[112]

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[111] European Commission, Implementing Decision (EU) 2019/570 of 8 April 2019 laying down rules for the implementation of Decision No. 1313/2013/EU of the European Parliament and of the Council as regards rescEU capacities and amending Commission Implementing Decision 2014/762/EU, *OJ* L 99, 10 April 2019.

[112] Council of the European Union, *Conclusions on COVID-19*, 2020/C 57/04 (ST/6038/2020/INIT), *OJ* C 57, 20 February 2020. For a comment, see A. Iliopoulou-Penot, "Rapatriements en situation d'urgence lors de la pandémie de COVID-19: la solidarité européenne hors sol européen", in *European Papers*, Vol. 5, 2020, No 1, *European Forum*, 16 May 2020, pp. 469-477.

3.5 The activation of the UCPM *vis-à-vis* the COVID-19 pandemic and related initiatives

The outbreak of the COVID-19 pandemic has pushed multiple States to activate the UCPM to receive – especially Italy[113] – and provide in-kind assistance. For instance, at the very beginning, Austria delivered over 3,360 litres of medical disinfectant to Italy, gloves and disinfectant to Croatia, Bosnia and Herzegovina, North Macedonia, Montenegro, Albania, and Moldova. Moreover, doctors and nurses from Romania and Norway were dispatched to Bergamo (Italy), being deployed through, and financed by, the EU Medical Corps.[114] The UCPM was also used to support the repatriation of EU citizens from third countries: since the beginning of the pandemic, over 408 repatriation flights were facilitated and co-financed by the Mechanism, and approximately 90.000 EU citizens have been brought home. By means of example, on 28 January 2020, the European Commission announced that the UCPM had been activated at France's request to repatriate EU citizens present in Wuhan. France and Germany were able to repatriate almost 500 EU citizens with the financial support of the EU by the end of January. On 21 February 2020, Italy and the United Kingdom activated the Mechanism to repatriate EU and UK citizens held aboard the cruise ship Diamond Princess, moored in Yokohama, Japan. Austria, Denmark, and Germany equally requested assistance through the Mechanism to organise repatriations.[115] These operations show the clearly increasing demand to prepare the necessary measures for prevention, and for the evacuation of groups of EU citizens in third countries and in need of protection in an emergency situation. Moreover, they are in line with Directive 2015/637 relating to measures of coordination and cooperation to facilitate the consular protection of Union citizens.[116]

In March 2020, the European Commission decided to create a strategic rescEU

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[113] M. Massari, "Italian Ambassador to the EU: Italy Needs Europe's Help", in *Politico*, 10 March 2020.

[114] European Commission, Daily News 07/04/2020, MEX/20/617, https://ec.europa.eu/commission/presscorner/detail/en/mex_20_617). Indeed, as then recalled by the Commission, the UCPM is at disposal to implement Decision 1082/2013 on serious cross-border threats to health with regard to the transport of patients among Member States. See Communication from the Commission Guidelines on EU Emergency Assistance on Cross-Border Cooperation in Healthcare related to the COVID-19 crisis 2020/C 111 I/01, C/2020/2153, *OJ* C 111I, 3 April 2020.

[115] European Commission, Press Release, IP/20/142, 28 January 2020.

[116] Council Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC, *OJ* L 106, 24 April 2015, Article 13(4)). For a detailed overview of the repatriation flights, https://ec.europa.eu/info/sites/info/files/summary_tables_of_repatriation_flights_6_may_2020_0.pdf.

stockpile of medical equipment including ventilators and reusable masks, vaccines and therapeutics, and laboratory supplies to help EU countries. The President Von der Leyen stated that: "With the first ever common European reserve of emergency medical equipment we put EU solidarity into action. It will benefit all our Member States and all our citizens. Helping one another is the only way forward."[117] Romania and Germany were the first Member States, followed by Denmark, Greece, Hungary, and Sweden, to host the rescEU reserves and thus responsible for procuring the equipment. At the same time, the Commission has contributed to financing the assets and the ERCC has managed the distribution of the equipment to ensure it is allocated where it is needed most. The rescEU stockpile supplies have included: over 65 million medical masks and 15 million FFP2 and FFP3 masks; over 280 million pairs of medical gloves; almost 20 million medical gowns and aprons; and thousands of oxygen concentrators and ventilators.[118]

Even though the effectiveness of rescEU can only be fully assessed against a more consolidated practice, the COVID-19 pandemic has certainly represented an apt situation to test the EU capacity to mobilise this tool in cooperation with the Member States. Additionally, by considering the great impact of the COVID-19 pandemic on every level of the EU discourse, a further enhancement of the current UCPM in the near future would be reasonable, by envisaging the establishment of completely independent Union assets from Member States. In effect, on 14 April 2020 the Council could not but acknowledge that "[t]he measures provided for under the Union Civil Protection Mechanism […] are limited in scale and therefore do not allow a sufficient response or make it possible to address effectively the large-scale consequences of the COVID-19 crisis within the Union."[119]

In this regard, it deserves to be underlined that in June 2020, the Commission presented a new proposal of reform of the UPCM[120] envisaging two main issues: the allocation of increasing budgetary resources[121] and the direct

[117] European Commission, Implementing Decision (EU) 2020/414 of 19 March 2020 amending Implementing Decision (EU) 2019/570 as regards medical stockpiling rescEU capacities (notified under document C(2020) 1827), *OJ* L 82I, 19 March 2020.

[118] For a comment, see C. Beaucillon, "International and European Emergency Assistance to EU Member States in the COVID-19 Crisis: Why European Solidarity Is Not Dead and What We Need to Make It both Happen and Last", cit.

[119] Council Regulation 2020/521/EU, Recital 4. For a detailed analysis of the Emergency Support Instrument established by this Regulation, see supra, Chapter III, para. 2.2.

[120] European Commission, Proposal for a Decision of the European Parliament and of the Council amending Decision No. 1313/2013/EU on a Union Civil Protection Mechanism, 2 June 2020, COM(2020)220 final.

[121] The Commission proposed to increase the budgetary resources of the UCPM for 2021-2027 to €3,5 billion.

procurement of rescEU capacities to be deployed in situations of large-scale emergencies.[122] Concerning the first aspect, on 28 September 2020 the Court of Auditors issued its opinion[123] stressing that, while the proposal is based on a clear intervention logic, it does not contain any information on the estimated costs associated with those responsibilities and thus is not possible to estimate the appropriateness of the proposed budget. This notwithstanding, following the political agreement reached with the European Parliament negotiators, on 17 December 2020 the Council adopted the regulation establishing the EU's Multiannual Financial Framework (MFF) 2021-2027 where a financial envelope of the UCPM/rescEU at €1.106 billion is also set.[124]

With reference to the second point, during the last months both the European Parliament[125] and the Coreper[126] proposed their own amendments to the proposal, without, surprisingly, rejecting the possibility of an autonomous capacity of intervention of the Union. The Coreper only suggested allowing the Commission to address gaps in the area of transport and logistics, and to directly procure certain additional rescEU capacities only in cases of duly justified urgency thereby making the Union's independent intervention applicable in *extrema ratio*. While apparently limited in terms of scope, such a change of pace appears to be real and further reinforced by the outstanding (and unexpected) proposal of the Coreper of adopting a Regulation rather than a Decision. In the light of these considerations, at the end of the interinstitutional negotiations in the form of trilogues, the adopted instrument could represent a real opportunity for a concrete contribution to the elaboration of a system of collective response to serious and, especially, symmetric emergencies without undermining the national essential functions, as required under Article 4(2) TEU.

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[122] COM(2020)220 final, Article 12.

[123] Opinion No. 9/2020 pursuant to Article 322(1)(a) TFEU accompanying the Commission's proposal for a Decision of the European Parliament and of the Council amending Decision No. 1313/2013/EU on a Union Civil Protection Mechanism (COM(2020) 220 final), *OJ* 385/01 of 13.11.2020.

[124] Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027, *OJ* LI 433/11 of 22.12.2020.

[125] European Parliament, Amendments adopted by the European Parliament on 16 September 2020 on the proposal for a decision of the European Parliament and of the Council amending Decision No. 1313/2013/EU on a Union Civil Protection Mechanism (COM(2020)0220 – C9-0160/2020 – 2020/0097(COD)).

[126] General Secretariat of the Council, Proposal for a Decision of the European Parliament and of the Council amending Decision No. 1313/2013/EU on a Union Civil Protection Mechanism – 4 – column table, ST 13569 2020 INIT, 1 December 2020.

4. The Union Civil Protection Mechanism: right or obligation to solidarity?

As explained in the previous paragraphs, the UCPM has experienced a significant improvement over the last decades thus confirming the increasing interest in fostering cooperation to respond to serious disasters at the EU level. The current UCPM has been thought to progressively avoid *ad hoc* interventions by creating pre-planned structures and modules of intervention, that now form the ECPP. In fact, the latter is not only a strategic tool to respond more effectively and rapidly to wide-ranging disasters, but also one of the manifestations of that spirit of solidarity under which all the EU Member States should act and that underpins the process of integration. Indeed, pooling national resources for the benefit of each EU Member State means to go beyond national borders and react as if the affected territory was its own, by putting solidarity before sovereignty. Moreover, both the financing of adaptation costs and the permanent opportunity to use the resources when necessary, contribute to establishing a number of advantages for States in participating to the ECPP. Practice has demonstrated that the high technical quality of the final assets and the extensive funding received has induced an increasing number of Member States to benefit from the funding of the Union and therefore to join the voluntary pool. And, in the current political and financial context, it is more reasonable for Member States to invest and specialise in different response capacities to ensure more complementarity, as well as to jointly develop response measures that are not needed very often, but that one may need to have. Furthermore, in a wider perspective, the participation of third countries – i.e. Iceland, Montenegro, Norway, Serbia, the former Yugoslav Republic of Macedonia – in contributing to faster response to exceptional disasters by means of the UCPM encourages an extensive reading of solidarity arguments according to the objectives of Article 21 TEU. Accordingly, the opportunity to rely on more integrated, coordinated, and effective interventions via the UCPM as an in-kind instrument of assistance seems to support the concept of solidarity as broadly conceived within the Treaties. In fact, as underlined by the Commission in its interim evaluation report on the UCPM, the latter intends above all to "promote solidarity between the Member States."[127]

This notwithstanding, it is undoubtable that further improvements are needed in order to strengthen and accelerate the deployment of civil protec-

[127] Report from the European Commission to the European Parliament and the Council on the Interim Evaluation of the Union Civil Protection Mechanism for the period 2014-2016, cit.

tion assets. Moreover, a reflection that goes beyond the proper functioning of the UCPM as an expression of solidarity is essential. In fact, solidarity cannot be conceived just in its operational connotation, but – for the purposes of the present work – it should be assessed also in its effective and substantive capacity to have a bearing on the set of obligations on the Member States and the Union within EU disaster response law.

At first sight, both the wording of the acts underpinning the UCPM, and more recent practice make it quite evident that the UCPM is not meant to be framed within and supported by specific obligations on the participating actors. In fact, the whole system remains anchored to the principle of 'voluntariness' – both in the establishment and deployment phases – that has to be assessed, first of all, by focusing on State consent and discretion in responding to crisis occurring within the Union.

Beyond the basic functioning of the Mechanism, Member States have the power to decide whether or not to pre-commit a number of resources, including at the conception stage of the current ECPP. This is a key issue that was discussed at length during the debates on the adoption of the Decision 1313/3013 when, under pressure from some States, it was decided that the level of commitment required of the Member States in relation to the inclusion of national resources to the then EERC would be cut. As proof of that, the Decision repeats more than once that the identification of the means to be committed must be carried out on a voluntary basis, without creating a specific obligation. And this point has not been subjected to changes with Decision 2019/420. As a result, despite the recent proposal of a reform, it seems that State's willingness has not been jeopardised by the new Mechanism and that the classical State-centred system is not undermined.

With respect to the resource deployment phase, according to the wording of Decision 1313/2013, it is not possible to force Member States to help because, in general terms, the deployment of in-kind resources relies on the willingness of the participating States that have registered them. In particular, Article 15, para. 4, of Decision 1313/2013 states that "any Member State to which a request for assistance is addressed shall promptly determine whether it is in a position to render the assistance required and inform the requesting Member State of its decision through the CECIS, indicating the scope, terms and, where applicable, costs of the assistance it could render."[128] This means that once Member States

[128] It must be noted that the time limit within which the Member State shall in theory reply is based on the nature of the disaster and shall in any case not be less than two hours. See Implementing Decision 2014/762/EU, Article 35, para. 9.

have received a call for action from the ERCC, they can decide whether and how to provide assistance. Furthermore, the role of the affected State cannot be disregarded as is described in Decision 1313/2013. The content of Article 11 of Decision 1313/2013 is in a hurry to set "[t]he *ultimate* decision on [the] deployment [of the response capacities] shall be taken by the Member States which registered the response capacity concerned" [emphasis added]. Finally, Decision 1313/2013 is careful in underscoring that "the role of the Commission shall not affect the Member States' competences and responsibility for their teams, modules and other support capacities, including military capacities. In particular, the support offered by the Commission shall not entail command and control over the Member States' teams, modules and other support, which shall be deployed on a voluntary basis in accordance with the coordination at headquarters level and on site."[129]

In principle, this reflects not only current rules of international law concerning the chain of command, but also the division of competences enshrined in the Lisbon Treaty between the EU and Member States. Voluntariness is, therefore, also particularly strong in the deployment phase. However, it could be tempered by the wording of the first sentence of Article 11 of Decision 1313/2013 which sets out that "response capacities that Member States make available for the EERC [now ECPP] shall be available for response operations under the Union Mechanism following a request for assistance through the ERCC." The use of the modal verb 'shall' suggests that the response capacities previously committed must be used to help the requesting State. Hence, even though the participating States pool their resources by simply promising their intervention, it is a promise and a commitment which should be respected because, once the ECPP is established, it must work. In this perspective, it is not a coincidence that, concerning the buffer capacities registered in the voluntary pool, their domestic use in the Member State that co-financed the availability of the capacities is subject to some limits.[130] Indeed, prior to any domestic use, the ERCC shall be consulted to confirm that: (i) there is no simultaneous or imminent extraordinary disaster that may lead to a request for deployment of the buffer capacity; and (ii) the domestic use does not unduly hinder the rapid access of other Member States in the event new extraordinary disasters arising. These two options, on the one hand, counter the view which places singular national interests over global ones and, on the other, confirm the orientation

[129] Decision 1313/2013/EU, Article 15, para. 7.
[130] Implementing Decision 2014/762/EU, Article 25, para. 9.

to take in due consideration the requests of assistance coming from the affected States. Furthermore, the detailed exceptions to the deployment of the pre-committed resources specified in Article 11 of the Decision 1313/2013[131] – domestic emergencies, force majeure or, in exceptional cases, serious reasons – make the offer of assistance in the framework of the voluntary pool a particularly stringent commitment on all the participating Member States. It suffices to note that, if we look at the provisions of international law and in particular at the 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts,[132] the mentioned exceptions represent genuine and formal derogations to an international obligation.

According to Article 23 of the Draft Articles on the Responsibility of States, force majeure is recognised as one of the circumstances precluding wrongfulness of those conducts that, otherwise, would not be in conformity with the international obligations. In particular, it defines as 'force majeure' the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making the respect of an obligation materially impossible. Subsequently, the provision points out two circumstances where the justification of the force majeure cannot operate, namely when (a) the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or (b) the State has assumed the risk of that situation occurring.

In defining the notion of 'force majeure', the CJEU has always been very rigorous. Indeed, although Member States have more than once invoked such an excuse to justify their failure to fulfil EU obligations, the Court has regularly rejected pleas of force majeure that were clearly far from the deeper meaning of such a notion. Moreover, it has consistently ruled that "a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations."[133] The CJEU did, however, agree that force majeure could be invoked in "circumstances beyond the control of the person claiming force majeure, which are abnormal and un-

[131] Decision 1313/2013, Article 11, para. 7: "When domestic emergencies, force majeure or, in exceptional cases, serious reasons prevent a Member State from making those response capacities available in a specific disaster, that Member State shall inform the Commission as soon as possible by referring to this Article."

[132] Immediately after the establishment of the International Law Commission in 1948, State responsibility was selected amongst the first 14 topics to be dealt with by the new body. The ILC began to work in it in 1956 and, after the submission to the Governments for comments, the final version was adopted in 2001.

[133] CJEU, Case 280/83 *Commission v. Italy*, 5 June 1984, ECLI:EU:C:1984:211, para. 4; Case C-326/97 *Commission v. Belgium*, 15 October 1998, ECLI:EU:C:1998:487.

foreseeable and of which the consequences could not have been avoided despite the exercise of all due care."[134]

As for the other two exceptions, namely state of emergency and other serious reasons, it can be appropriate to equate them to the notion of 'state of necessity', included in the 2001 Draft Articles of the ILC. More precisely, Article 25 establishes that 'necessity' precludes the wrongfulness of an act when "(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole". Concerning EU law, the concept of necessity does not have an independent character but has often been conceived in relation to that of public and social security of the State, that is, by definition, linked to the national dimension of sovereignty.[135] Accordingly, this also means that the burden of proof is up to the national authorities which – in the case in question – shall demonstrate the existence of imperative circumstances preventing the deployment of resources pre-committed in the ECPP.

Despite the opportunity to put forward these proposals for a tempered reading of the envisaged provisions, the reasoning conducted so far confirms that State willingness is at the basis of the UCPM both in the phase of pre-commitment and in that of deployment. The result is that this instrument also responds to the traditional logic according to which the State has the right, rather than the duty, to provide assistance. As proof of this, more than once the Commission has reported that the reliance on voluntary (and not compulsory) offers of mutual assistance has partially limited the deployment of sufficient capacities to address the basic needs of those affected by disasters.[136] In effect, Member States have more than once retained their own assets in order to tackle an internal emergency and, as reported above, this opportunity is fully envisaged in the UCPM framework. This was then confirmed by the reluctance demonstrated by some Member States at the beginning of the COVID-19 pandemic.

Finally, Member States' conducts in the field of civil protection are not ulti-

[134] See, *inter alia*, CJEU, Case 109/86 *Ioannis Theodorakis Biomichania Elaiou AE v. The Greek State*, 27 October 1987, ECLI:EU:C:1987:460; CJEU, Case C-99/12, *Eurofit SA c. Bureau d'intervention et de restitution belge (BIRB)*, 18 July 2013, ECLI:EU:C:2013:487, points 31-32.

[135] For insights on the notion of 'necessity' in EU law, see P. Koutrakos, "The Notion of Necessity in the Law of the European Union", in *Netherlands Yearbook of International Law*, 41, 2010, pp. 193-218.

[136] Over the last two years (2016 and 2017), the Mechanism has been activated a total of 56 times both inside and outside the EU. Nonetheless, as stressed by the Commission in its Interim Report on the Civil Protection Mechanism, modules and response capacities still have to be created or at least improved. See European Commission, Interim Report, COM(2017) 460 final.

mately underpinned by an obligation of solidarity. Nonetheless, willingness is not *per se* an element which entails the distortion of solidarity in its multi-layered nature. As demonstrated by the above reasoning on the grounds of which a State could refuse to deploy the pooled assets, the participation in the ECPP expects a high level of commitment on the States part so that it can effectively operate in the light of solidarity requirements. Hence, the current absence of self-evident obligations of solidarity does not imply that some specific duties can be derived in the operational phase. Additionally, it is precisely here that one cannot underestimate the role played by the principle of loyal cooperation which might be invoked to fill the partial void left by the lack of explicit duties of solidarity in the civil protection field. Indeed, loyalty permeates the interaction between the Union and Member States by establishing four classes of mutual loyalty duties: the duty to adopt all appropriate measures to ensure the fulfilment of EU obligations, the duty to assist EU institutions and facilitate their action in carrying out EU tasks, the duty to abstain from measure jeopardising EU objectives as well as the duty of mutual assistance. Therefore, a joint reading of the EU objectives to promote solidarity among Member States (Article 3 TEU) and to promote swift, effective operational cooperation to protect against natural or man-made disasters (Article 196 TFEU), results in the obligation on Member States to comply with their loyalty duties thus fully cooperating with the EU institutions to ensure the effectiveness, in this case, of the UCPM as an emergency tool. As a result, when the deployment of the Mechanism is necessary, since the Union is not provided with its own resources, it has to rely on those put at its disposal by Member States that, in a spirit of loyal cooperation and solidarity, have to cooperate with the EU institutions in order to give substance to the tasks which flow from the Treaties. On the other hand, the Commission also has to play its part by guaranteeing the whole coordination of the assets deployed and by sharing the financial and operative burdens thus giving practical substance to its loyalty duties in its interaction with the EU Members States. As mentioned in Chapter II of the present work, the suggested elements confirm that the principle of loyal cooperation in times of crisis is capable of ensuring conducts that ultimately have a nature of solidary by guaranteeing the proper functioning of the tools at disposal which, *in primis*, reflect the requirements of solidarity envisaged in the Treaties.

A further evaluation must be reserved to the rescEU system which represents a positive manifestation of solidarity in its reverse vertical dimension, especially when Member States are affected by an emergency, like the COVID-19 pandemic, which has a symmetric impact. Conceived as an instrument quite similar

to the original project of Union Civil Protection Force because it is based on the Union's intervention, it only partially follows the mentioned structure based on the willingness of the Member States. Indeed, even though the latter are free to decide whether to acquire, rent, or lease the capacities, it is significant that ultimately the decision regarding their deployment lies with the Commission. Moreover, the rescEU capacities may only be used for national purposes when they are not being used or needed for response operations under the UCPM. This has a two-fold implication. On the one hand, once more according to the principle of loyal cooperation Member States have to collaborate with the Union and the affected country to avoid jeopardising the objective to guarantee protection and support to the requesting State. So far nothing new: the principle of loyal cooperation read in conjunction with solidarity underpins the action of the Member States that, however, are not yet constrained by an autonomous obligation of solidarity. Even in the absence of an explicit duty of solidarity, the illustrated limitations to the Member States' discretion concerning the use of the assets forming part of the rescEU system may suggest something more. Indeed, demanding that the capabilities be promptly put at disposal when requested by the Commission and envisaging, for external interventions, only two situations where a denial is admissible could overall benefit the reconstruction of indirect obligations of solidarity. Moreover, the Implementing Decision does not envisage the opportunity for States that keep the assets to veto the final decision of the Commission. While this opportunity may represent a step forward in the elaboration of duties of solidarity on Member States in the field of civil protection, it must also be reminded that these duties could come from a risky rereading of the allocation of competences between the Union and the Member States. In particular, one could wonder whether their recognition as well as the role of subordination to the Commission could affect the obligation of the EU institutions not to supersede the Member States' competences in this field.

In the expectation of further developments in the practice and in the 'legislative train' on the Proposal of the Commission to reform rescEU to verify these considerations, an interesting prospect comes to the forefront concerning the role of the Union through the Commission itself. The question becomes whether, once the affected State has made a request through the ERCC, the Commission has an obligation to deploy and demobilise the capacities retained by the host States and thus to require that they are put at the affected country's disposal. At first sight, no explicit obligation on the Union can be derived from the wording of Decision 2019/420 considering that Article 12 (as well as the proposed revised provision) does not include any elements that could imply

compulsory action of the Commission when the affected State requires assistance. This suggests that, as with the Member States, only an obligation of loyal cooperation, albeit fuelled by a spirit of solidarity, can be invoked. The next chapter intends to challenge such a conclusion by verifying, *inter alia*, whether the so-called 'solidarity clause' enshrined in Article 222 TFEU may represent the adequate provision to make the provision of assistance via the UCPM (and mainly through rescEU) an obligation of solidarity both on the Union and on the Member States when an emergency occurs.

CHAPTER V

THE 'SOLIDARITY CLAUSE': LEGAL DUTIES AND INTERACTION WITH THE EU INSTRUMENTS FOR DISASTER RESPONSE

The previous chapters have served to illustrate the main instruments the Union and Member States may rely on in order to provide financial and in-kind assistance to the victims of a severe disaster. In general terms, it has emerged that mainly in the last years there has been a number of attempts to improve the effectiveness of each instrument and to foster models of solidarity. However, as underlined more than once, no explicit duty of solidarity has emerged in the previous analysis. Rather, both the instruments of financial and in-kind assistance are essentially activated in full respect of the discretion of the States.

The present chapter aims to evaluate in a more comprehensive way the very essence of such mechanisms by wondering to what extent EU disaster response law complies with the requirements of solidarity enshrined in the Treaties. In particular, this chapter is meant to verify the role played by the 'solidarity clause' in establishing a compulsory system of intervention in situations of serious emergency. To this end, a two-fold investigation will be pursued. In the first section, we will explore in detail the content of the clause, which explicitly asks the Union and Member States to act in a spirit of solidarity in order to provide assistance to other Member States (see section 1.1). Moreover, after analysing the content of Council Decision 2014/415, that specifies the implementation arrangements to be used by the Union (see section 1.2), the specific obligations on Member States against situations of emergency deriving from Article 222 TFEU will be explored (see section 1.3). In the second part, we will evaluate the coherence and the interplay between the solidarity clause and the three instruments analysed in the previous chapters, i.e. the UCPM (see section 2.1), the Emergency Support Instrument (see section 2.2), and the EU Solidarity Fund (see section 2.3), in order to assess whether the existence of an EU system of solidarity in situations of disaster can be established.[1] Fi-

[1] On the existence of a system of solidarity at the EU level, see T. Russo, "La solidarietà come valore fondamentale dell'Unione europea: prospettive e problematiche", cit.

nally, the actual legal value of this provision of primary law *vis-à-vis* the more recent practice will be challenged (see section 3).

1. The solidarity clause: content and legal implications

1.1 The path towards the inclusion of a 'solidarity clause' within the Treaties

During the elaboration of a Convention proposing a draft Treaty establishing a Constitution for Europe, the acknowledgement of the multifunctional role of solidarity matched with the opportunity to include a provision that explicitly enshrined its binding nature against specific situations of emergency.

Gripped in the vice of the terrorist threat as a result of the events of September 11th, the Member States' representatives started to discuss this matter in the Working Group on Defence, chaired by Michel Barnier. In particular, they meant to establish whether and how the EU should develop its own instruments for collective security, by balancing subsidiarity with solidarity.[2] Yet, the Members of the Working Group on Defence were divided with regard to the value given to the notion of 'solidarity' and the situations wherein it could be invoked thereby establishing specific duties of intervention. On the one hand, there were those who considered the solidarity clause to be a complement to the mutual defence clause enshrined in Article I-41(7) and thus applicable in cases of armed aggression. On the other hand, a group of States – led by Sweden and Finland – proposed not to limit the application of the provision just to events of armed aggression, but to extend it to a range of new threats facing the EU. Indeed, a new kind of clause was needed to supplement, but not to overlap with the mutual defence clause. This latter orientation prevailed, and the embryonal version of the solidarity clause was reported in Article III-329 of the Constitution for Europe that, as is well known, never saw the light of day. Nonetheless, the preliminary work done in the aforementioned Working Group was essential during the negotiations for the treaty revision approved in Lisbon.

The Treaties now set out the solidarity clause in Article 222 TFEU, thus making it autonomous from the mutual defence clause *ex* Article 42(7) TEU as also demonstrated by its detailed content.

[2] The European Convention, Final report of Working Group VIII 'Defence', Doc. CONV 461/02, 16 December 2002, p. 21.

1. 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 Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:
(a) - prevent the terrorist threat in the territory of the Member States;
- protect democratic institutions and the civilian population from any terrorist attack;
- assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;
(b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.
2. Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.

The first point to be stressed is that the provision in question is comprised of events of emergency situations other than classical armed attacks. In greater detail, it clearly includes terrorist attacks as well as natural or man-made disasters, thus reflecting the orientation previously approved in the framework of the Constitution for Europe.

Secondly, it is essential to reflect on the wording of the provision that appears to be much more comprehensive in terms of legal implications. Indeed, the modal verb 'shall' leaves no doubt that it is a mandatory formulation, able to give practical effect to solidarity. Alongside the use of the reinforcing adverb 'jointly', Article 222 TFEU clearly makes "acting in a spirit of solidarity" an obligation on States and on the Union as a whole to intervene in the event of a disaster or of a terrorist attack and not just an inspiring principle governing EU law. According to Article 222 TFEU, solidarity does not represent a moral rule, but has been extended to categorical obligations that, being part of hard law, must be practiced by the Union – by deploying the EU's own institutional tools, mechanisms, and resources that may operate in a coherent, coordinated, and effective way – and by all and not only some Member States.[3] Thus, the solidarity clause is by far not coextensive with the institutional principles aimed at regulating the relationship between the actors of

[3] The detailed analysis on the obligations on Member States deriving from the solidarity clause is made in para. 1.3 of the present Chapter.

the EU legal order. Furthermore, in comparison to the still unclear content of the duties of loyalty incumbent on the EU institutions *vis-à-vis* the Member States,[4] as it will be seen in the next paragraph, the Union is entrusted with specific obligations of solidarity.[5]

As for the arrangements on the implementation of the solidarity clause, in paragraph 3 it is then established that:

> 3. The arrangements for the implementation by the Union of the solidarity clause shall be defined by a decision adopted by the Council acting on a joint proposal by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy. The Council shall act in accordance with Article 31(1) of the Treaty on European Union where this decision has defence implications. The European Parliament shall be informed.
> For the purposes of this paragraph and without prejudice to Article 240, the Council shall 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 Article 71; the two committees shall, if necessary, submit joint opinions.
> 4. The European Council shall regularly assess the threats facing the Union in order to enable the Union and its Member States to take effective action.

In the formulation of the implementing decision, the Council is supported by the Political and Security Committee (PSC) and by the Standing Committee on Internal Security (COSI) that, if necessary, may offer joint opinions on the issues at stake without, however, being involved in the preparation of legislation or the operations themselves.[6] On the other hand, in the decision-making process, a dialectic with the European Parliament, which needs only to be informed, is clearly missing thereby confirming that in emergency situations the need to guarantee a more rapid deployment of assets prevails over that to ensure the full involvement of all the EU institutions.[7]

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[4] See, *supra*, Chapter II, para. 2.2.2.

[5] The detailed analysis on the obligations on Member States deriving from the solidarity clause is made in para. 2 of the present Chapter.

[6] The actual function of COSI and of PSC needs further clarification: indeed, there is no real division of tasks and, moreover, it is not easy to assess how these Committees could be useful in responding to natural or man-made disasters by dealing with security issues. For further details on the COSI and PSC, see T. Åhman, *The Treaty of Lisbon and Civil Protection in the European Union*, Swedish Defence Research Agency, 2009, pp. 52-62.

[7] As already reported in Chapter III of the present work, such a criticism has been addressed

Despite the (almost) inter-governmental character of the decision-making procedure enshrined in Article 222 TFEU and the reference to cooperation between Commission, Council and High Representative as well as the Political and Security Committee, it seems curious that a provision only concerning events occurring within the territory of EU Member States is set in the Fifth Part, TFEU, relating exclusively to the EU's external action. Similarly, despite its potential relevance in the field of the Common Security and Defence Policy (CSDP), it would have hardly been appropriate to include it in Title V, Section II TEU,[8] since Article 222 TFEU stretches beyond the CSDP by also engaging with non-military instruments.[9] Instead, by referring both to terrorist attacks and natural or man-made disasters – therefore, also to non-conventional threats to peace and security –, it would have been more reasonable to include it in the Third Part, Title V, Chapter I TFEU, establishing general provisions in the Area of Freedom, Security and Justice. Moreover, it is in this section that the establishment of the Standing Committee on Internal Security is proposed in order to "ensure that operational cooperation on internal security is promoted and strengthened" within the EU[10] and that a specific legal basis for the adoption of restrictive sanctions against individuals in the framework of the EU's counter-terrorism activities is introduced.[11]

A plausible explanation of the collocation of the solidarity clause among those provisions concerning the external action by the EU could be its 'hybrid nature' due to the increasingly blurry boundaries between internal and external security as well as the reference to military resources.[12] Whatever the

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by the Parliament also with regard to the adoption of the Emergency Support Instrument. For insights on the democratic deficit in situations of emergency, see S. Blockmans, "L'union fait la Force: Making the Most of the Solidarity Clause (Article 222 TFEU)", in I. Govaere, S. Poli (eds), *EU Management of Global Emergencies. Legal Framework for Combating Threats and Crises*, Brill, 2014, p. 120. Despite this, after the entry into force of the Lisbon Treaty, the European Parliament has demonstrated to be really interested in a full implementation of the Solidarity Clause. On 31st October 2012, the European Parliament adopted the Resolution entitled "The EU's mutual defence and solidarity clauses: political and operational dimensions", 2012/2223(INI).

[8] An opposite opinion is presented in P. Koutrakos, *The EU Common Security and Defence Policy*, Oxford University Press, 2013, Chapter 3.

[9] The link between the solidarity clause and the CSDP deserves a more detailed analysis which is not possible in the present work. For more details on the issue, see T. Konstadinides, *Civil Protection in Europe and the Lisbon 'solidarity clause': A genuine legal concept or a paper exercise*, Working Paper 3, 2011, pp. 17-21.

[10] Article 71 TFEU.

[11] Article 75 TFEU.

[12] S. Blockmans, "L'union fait la Force: Making the Most of the Solidarity Clause (Article 222 TFEU)", cit., p. 120.

reasons for such a choice, it certainly appears that there is a gap between the inclusion of the provision in the Fifth Part TFEU[13] and the role that is granted to the Union as a whole in mobilising all the instruments at its disposal. In addition, it seems to be a way to give greater emphasis to the mutual response to terrorist attacks occurring within the Union – for which the clause also operates in the prevention phase – than to disasters with different origins. Apart from these critical elements, the main interest remains the content of solidarity obligations on the Union and on the Member States to which the following paragraphs are dedicated.

1.2 The implementation of the solidarity clause by the Union: Council Decision 2014/415/EU

The Council Decision on the implementation of the solidarity clause by the Union is the result of negotiations that started in 2011 and that continued over a long period of time because of the classical State reluctance to limit their sovereignty and discretion. In order to facilitate the drafting, the Presidency of the Council addressed the Member States with a document encouraging national authorities to take appropriate steps forward to give proper implementation to the clause.[14] Thus, Member States provided written contributions to the preparation of the proposal on the basis of a list of questions jointly prepared by the Commission and the EEAS and held discussions within the Political and Security Committee, the Standing Committee on Operational Cooperation on Internal Security, the Coordinating Committee in the area of police and judicial co-operation in criminal matters, and the Military Committee.

On 21 December 2012, the Commission and the High Representative presented to the Council a Joint proposal for a Council Decision on the arrangements for the implementation of the solidarity clause[15] that provided some more

[13] For more insights, M. Cremona, "External Relations and External Competence of the European Union: The Emergence of an Integrated Policy", in G. de Búrca, P. Craig (eds), *The Evolution of EU Law*, 2nd ed., Oxford University Press, 2011, pp. 217-268; M. Cremona, "Defining Competence In EU External Relations: Lessons from the Treaty Reform Process", in A. Dashwood, M. Maresceau (eds), *Law and Practice of EU External Relations – Salient Features of a Changing Landscape*, Cambridge University Press, 2008, pp. 34-69; P. Koutrakos, "The European Union's common foreign and security policy after Lisbon", in D. Ashiagabor, N. Countouris, I. Lianos (eds), *The European Union after the Treaty of Lisbon*, Cambridge University Press, 2012, pp. 185-209.

[14] Presidency of the Council of the European Union, *Solidarity Clause – the way ahead? - Orientation debate on Art. 222 TFEU*, doc. 14840/11, 29 September 2011.

[15] European Commission and High Representative of the EU for Foreign Affairs and Security Policy, Joint proposal for a Council Decision on the arrangements for the implementation by the Union of the Solidarity Clause, JOIN (2012) 39 final, 16 January 2013.

clarity about the definitional scope of Article 222 TFEU as well as its activation. On the basis of such a proposal, although with some substantial differences, on 24 June 2014 the Council adopted the final text of Decision 2014/415/EU.[16]

In order to evaluate the actual added value of the solidarity clause in its complexity, it is therefore appropriate to critically explore the arrangements of implementation as prescribed by Decision 2014/415 by addressing: i) the scope of application *ratione materiae* and *ratione temporis* of the clause; ii) the scope of application *ratione loci* of the clause and, iii) the response arrangements to be activated following the invocation of the clause.

a) Scope of application ratione materiae and ratione temporis of the solidarity clause

As a general rule, according to Article 222 TFEU, the solidarity clause applies in cases of terrorist attacks or disasters; however, such a general provision has prompted the necessity to explore what exact circumstances are covered. In particular, it was appropriate to indicate a clear definition of 'terrorist attacks' in time of peace, that so far does not exist at an international level.[17]

Article 3 of Council Decision 2014/415 distinguishes between 'disaster', 'terrorist attack' and 'crisis' in the following way:

> (a) 'disaster' means any situation which has or may have a severe impact on people, the environment or property, including cultural heritage;
> (b) 'terrorist attack' means a terrorist offence as defined in Council Framework Decision 2002/475/JHA;
> (c) 'crisis' means 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.

It is evident that each definition deserves a specific analysis as regard to content and implications.

As for the notion of 'disaster', it is first appropriate to underscore that the definition reproduces that contained in Article 4 of Decision 1313/2013 con-

[16] Council of the European Union, Council decision of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause, 2014/415/EU, *OJ* L 192/53, 1 July 2014.

[17] A. Cassese, "The Multifaceted Criminal Notion of Terrorism in International Law", in *Journal of International Criminal Justice*, 4(5), 2006, pp. 933-958; S. D. Murphy, "Terrorism and the Concept of Armed Attack in art. 51 of the Charter", in *Harvard International Law Journal*, 43, 2002, pp. 41-52.

cerning the establishment of the UCPM. As a consequence, the solidarity clause may be activated not only in response to the actual occurrence of a severe event, but also in the case of a potential disaster. In addition, as with the Mechanism, such an opportunity opens a range of issues, concerning prevention and risk assessment. Similarly, in relation to the threshold of application, the Decision refers to the notion of "severe impact" of a disaster that, in comparison to the adjective "adverse" offered in the Joint proposal,[18] appears to be less vague and more precise in terms of seriousness of the event.

In the framework of the formulation of the implementing Decision, the threshold of application was one of the most debated issues between Member States. Back in 2011, in a time when the EU was struggling to overcome the financial and economic crisis, at the meeting of the Article 36 Committee,[19] States' delegations agreed in general that "the solidarity clause should only be invoked in specific exceptional and emergency circumstances […]. The general triggering criteria to be defined would have to take account of the differences in size and capacities of Member States as well as the nature of the event."[20] Indeed, it was believed that well-equipped Member States would make little use of the solidarity clause, while disaster-prone States could rely on it much more to limit the mobilisation of national resources.[21] Accordingly, the potential problem of free-rider States pushed some governments to propose specific requirements of severity to be respected in order to request the activation of the clause. Moreover, others argued that the evaluation and verification of the application of the clause should not only be entrusted to the affected State, but also to the Council.[22] For this purposes, certain State representatives forwarded the idea to confine the use of the clause to cross-border disasters in order to reduce the risk that the system was monopolised by those

[18] Joint proposal for a Council Decision on the arrangements for the implementation by the Union of the Solidarity Clause, cit., Article 3.

[19] Article 36 Committee is a senior coordinating committee which stands between the usual working group and Coreper. Named after the provision of the EU Treaty that provides for its existence, it comprises senior officials from national ministers of justice or interior affairs.

[20] Council of the European Union, doc. 15498/11 (CATS 98), 3 November 2011, p. 3. For further details, see T. Konstadinides, "Civil Protection Cooperation in EU Law: Is There Room for Solidarity to Wriggle Past?", in *European Law Journal*, 19(2), 2013, pp. 267-282.

[21] N. Von Ondarza, R. Parkes, *The EU in the face of disaster, implementing the Lisbon Treaty's solidarity clause*, SWP comments, 9 April 2010, p. 3.

[22] The Governments which addressed such a proposal were: Denmark, Germany, Netherlands, Poland, Italy, and Great Britain. See doc. MD 5/1/13 REV1 on the position of States concerning the Join Proposal on the implementation of the solidarity clause.

who are less-prepared in terms of response.[23] In addition, certain scholars recommended a list of tools to guarantee the proper application of the clause: 1) the establishment of a level of severity under which the affected Member States should be obliged to deal with disasters themselves; 2) the recognition of a so-called 'subsidiarity baseline' providing that only Member States organs could trigger the solidarity clause; 3) an obligation for disaster-prone States to develop a certain level of capabilities to avoid unwanted European intervention; 4) the formulation of an indicative 'disaster catalogue' containing details on the crises to which the clause would apply.[24]

The compromise reached is alluded to in the wording of the Decision itself that seems to introduce the most reasonable solution to this dilemma. In fact, it prescribes that the clause may be activated when the State is unable to cope with the scale of a disaster by resorting to its own response capacities supplemented by any other tool or resource available at EU level.[25] Thus, the first and foremost subject to be called upon to assess the level of impact of a disaster is once more the affected State.

The definition of the term 'terrorist attack' does not appear exactly in the text of the Decision which, however, contains a reference to the Council Framework Decision 2002/475/JHA on combating terrorism,[26] then replaced by Decision 2017/541.[27] The latter represents the most advanced legislative act from the definition point of view. Indeed, while at the international level the States keep their own definition of terrorism, the Decision introduces a common definition at the EU level by indicating, *inter alia*, a clear list of offences that may constitute acts of

[23] S. Myrdal, M. Rhinard, *The European Union's Solidarity Clause: Empty Letter or Effective Tool? An Analysis of Article 222 of the Treaty on the Functioning of the European Union*, UI Papers, No. 2, Swedish Institute of International Affairs, 2010, p. 17.

[24] See N. Von Ondarza, R. Parkes, *The EU in the face of disaster, implementing the Lisbon Treaty's solidarity clause*, cit., p. 4.

[25] Such a conclusion, may be found both in the Explanatory Memorandum attached to the Joint Proposal, that talk about "exceptional circumstances" which may prompt a Union intervention and in Article 4(1) of the Implementing Decision 2014/415, which states as follows: "In the event of a disaster or terrorist attack, the affected Member State may invoke the solidarity clause if, after having exploited the possibilities offered by existing means and tools at national and Union level, it considers that the crisis clearly overwhelms the response capabilities available to it."

[26] Council of the European Union, Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *OJ* L 164, 22 June 2002.

[27] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, *OJ* L 88, 31 March 2017. For the sake of clarity, despite Council Decision 2014/415 making reference to the previous Council Framework Decision, the following citations will refer to the provisions of the Decision currently in force.

terrorism against a country, or an international organisation. In particular, Article 3(1) refers to those offences seriously intimidating a population, or unduly compelling a government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic, or social structures of a country or an international organisation. Therefore, in accordance with Decision 2017/541, there would be a very wide range of possible offences falling under the term 'terrorist attack' that could trigger the activation of the solidarity clause. Furthermore, it is evident that such a definition does not only cover acts of terrorism occurring abroad, but also those organised by EU citizens against Member States.

Finally, Council Decision 2014/415 introduces the notion of 'crisis', as a residual category for the application of the clause. However, it inexplicably restricts the term by only including disasters and terrorist attacks "of such" wide-ranging impact, or political significance to urge an EU action. By contrast, the Joint proposal had defined a 'crisis' as a "serious, unexpected and often dangerous situation, requiring timely action; a situation that may affect or threaten lives, environment, critical infrastructure or core societal functions, may be caused by a natural or manmade disaster or terrorist attacks."[28] Therefore, the definition contained in the Joint proposal was broader than that approved by the Council that decided to limit any potential abuse of the notion. Considering its genesis and the restrictive interpretation of Article 222 TFEU, the intention of limiting the invocation of the clause only in exceptional circumstances is perfectly in line with the original aim of the clause, but which other categories of events could be covered is less intuitive.

Apart from the said doubts concerning the definition of the circumstances that may trigger the activation of the clause, it must be highlighted that the Decision does not refer to any temporal element. Instead, it would be relevant to know whether the clause covers single and circumscribed events or, additionally, multiple and continuing situations of crisis, thus needing a long-term resolution approach. The only reference concerning the temporal extension of activation of the solidarity clause is in Article 7, where it is prescribed that "the Member State having invoked the solidarity clause shall indicate as soon as it considers that there is no longer a need for the invocation to remain active." Moreover, in Decision 2014/415 no reference is made concerning the

[28] European Commission and High Representative of the EU for Foreign Affairs and Security Policy, Joint proposal for a Council Decision on the arrangements for the implementation by the Union of the Solidarity Clause, cit., Article 3.

opportunity to invoke the solidarity clause to prevent serious events, despite Article 222 TFEU introducing this element with reference to terrorist attacks. Thus, the precise scope of application *ratione temporis* of the solidarity clause remains unsolved.

Finally, it must be said that, according to Article 4 of Decision 2014/415 the solidarity clause can be invoked by the affected State only after having exploited all the possibilities offered by existing means and tools at a national and Union level. The result is that, also in a temporal perspective, the solidarity clause is conceived as a last resort mechanism which makes the Union's intervention compulsory just as *extrema ratio*, thereby narrowing the extensive wording of the provision enshrined in Article 222 TFEU.

b) Scope of application ratione loci of the solidarity clause

The scope of application *ratione loci* of the solidarity clause as outlined in Decision 2014/415 is one of the most controversial issues that deserves attention. Currently, Article 2 of the Council Decision reads as follows:

> 1. In the event of a terrorist attack or a natural or man-made disaster, irrespective of whether it originates inside or outside the territory of the Member States, this Decision shall apply:
> (a) within the territory of Member States to which the Treaties apply, meaning land area, internal waters, territorial sea and airspace;
> (b) when affecting infrastructure (such as off-shore oil and gas installations) situated in the territorial sea, the exclusive economic zone or the continental shelf of a Member State.

From the wording of this article, a predominantly internal dimension of solidarity seems to emerge.[29] In truth, such an orientation is not in line with what was originally proposed by the Commission and the High Representative. Indeed, the version of Article 2 of the Joint Proposal affirmed, in its paragraph (b), that the decision of the Council should apply irrespective of whether the crisis originated inside or outside the EU. Therefore, it could also apply to situations affecting ships (when in international waters), or airplanes (when in international airspace), or critical infrastructures (such as off-shore oil and gas installations).[30]

[29] E. Neframi, "La solidarité dans l'action extérieure de l'Union européenne", cit., p. 149.
[30] Joint proposal for a Council Decision on the arrangements for the implementation by the Union of the Solidarity Clause, cit., Article 2(b).

In fact, as is well known, from an international law perspective, ships, airplanes, and critical infrastructures located in high sea cannot be properly considered as State territory, but wherever specific criteria are respected – flag State and official registration –, they may be under the jurisdiction of a State with which a genuine link is kept.[31]

While complying with international law, the content of the Joint Proposal was questioned by some Member States that stressed the literal content of Article 222 TFEU. Indeed, the first paragraph introduces a limitation to its geographical scope of application by making explicit reference to the territory of the Member States with regard to the prevention of the terrorist threats, and the assistance in the event of a terrorist attack as well as the protection of civilians in case of disaster. Supported by this consideration, the majority of the EU Member States finally favoured a stricter approach by limiting the scope to events occurring (a) within the territory of Member States to which the Treaties apply, meaning land area, internal waters, territorial sea and airspace; (b) when affecting infrastructures (such as offshore oil and gas installations) situated in the territorial sea, the exclusive economic zone, or the continental shelf of a Member State.

Yet, such a conclusion seems rather dubious for a number of reasons. First of all, there is a clear conceptual schizophrenia deriving from the distinction between the criterion of activation of the solidarity clause and its strict scope of application. Indeed, on the one hand, the Decision follows the Joint Proposal by setting that – in the event of a terrorist attack, or a natural or man-made disaster – the clause applies irrespective of whether it originates inside or outside the territory of the Member States. However, on the other hand, it clearly limits the geographical scope of interventions to pure internal emergencies. Moreover, the insertion of the clause under the section 'External Action of the Union' is meaningful in this context.[32] Against this background, the wording of Article 2 of Decision 2014/415 seems to suggest that Member States could invoke the application of the solidarity clause with regard to events either occurring within their formal territory or originating outside but with repercussions on their territory.

In any case, it remains to be seen how to concretely combine the op-

[31] UN Convention on the Law of Sea, Montego Bay, 1982, Article 92; Convention on International Civil Aviation, Chicago, 1944, Article 17. It must be stressed that, however, whether the consequences of a terrorist attack or of a disaster went beyond the structural limits of ships, aircraft, and infrastructures thereby contaminating also international spaces, the exact exercise of the jurisdiction with regard to a definitive intervention could be much more complex.

[32] T. Åhman, *The Treaty of Lisbon and Civil Protection in the European Union*, cit., p. 24.

portunity to intervene in response to crisis originating outside the territory of EU Member States and the strict territorial scope of application of the clause.[33] In addition, in comparison to the Joint Proposal, events occurring in international spaces – on ships, aircraft, and installations over the State who may exercise jurisdiction – have been *de iure* excluded thereby significantly limiting the cases of application of the clause.[34] Furthermore, it could be useful to understand why the Council decided to mention, as examples of infrastructures to be protected, only offshore oil and gas installations by leaving to one side other kinds of infrastructures having a 'civilian' rather than 'economic' character, such as embassies, that, although located in third countries, are an extension of the State. Such a vacuum is important, *a fortiori*, in comparison to the content of Article 222 TFEU that appears to refuse any restriction to the territory of Member States when the Union has to "protect democratic institutions and the civilian population from any terrorist attack". Indeed, practice shows that the Union has often intervened by organising the evacuation of EU nationals in third countries following a terrorist attack.[35]

In any case, it is safe to say that the circumstances of activation of the solidarity clause have been greatly narrowed by the Council Decision, thus keeping to a minimum the extraterritorial application of this provision.

c) Instruments of application of the solidarity clause

According to Article 4 of the implementing Decision 2014/415, whenever national authorities – on a high political level[36] – of the affected Member State consider that the crisis clearly overwhelms the response capabilities available, they may address the invocation of the solidarity clause to the Presidency of the Council.[37] In addition, it is prescribed that the invocation shall also be addressed

[33] M. A. Martino, "The "Solidarity Clause" of the European Union – dead letter or enabling act?", in *SIAK-Journal – Zeitschrift für Polizeiwissenschaft und polizeiliche Praxis*, 2, 2015, p. 44.

[34] M. Gestri, "La risposta alle catastrofi nell'Unione europea: protezione civile e clausola di solidarietà", cit., p. 55.

[35] One of the most known interventions is that performed in India following the terrorist attack in Mumbai on 26 November 2008. For further details, see G. H. Winger, *In the Midst of Chaos. The European Union and Civilian Evacuation Operations*, Paper presented at the European Union and World Politics: The EU, its Member States, and International Interactions. University at Buffalo (SUNY), October 2012. Moreover, see M. Lindström, "EU Consular Cooperation in Crisis Situations", cit.

[36] From the wording of the implementing decision, it seems that it is not possible to rely on political authorities lower than the central ones to invoke the activation of the solidarity clause.

[37] In this regard, it is appropriate to report that the Joint Proposal refers to the possibility of

to the President of the European Commission. Interestingly, the text of the Joint Proposal presented another order of appearance: the affected State should address the request of activation of the clause first to the President of the European Commission and then to the President of the Council. Hence, the original idea was to attribute a steering role to the Commission and the High Representative thereby only leaving to the Council a marginal role following the decision of the Presidency of the Council to activate all the necessary arrangements to respond to the crisis.[38] Clearly, Member States showed their full disagreement with such a proposal by noting that in Article 222 TFEU there is no reference to the Commission, but just to the Council that, therefore, deserved to have the power to guarantee the strategic management of the EU response. As a result, currently, the primary role is conferred to the Council that "shall ensure the political and strategic direction of the Union response to the invocation of the solidarity clause", even though it has to respect the Commission's and the High Representative's competences.[39]

To mobilise the instruments at disposal, the Council shall rely on the EU Integrated Political Crisis Response (IPCR) arrangements approved by the Council on 25 June 2013[40] and then codified in the 2018 Council Implementing Decision 2018/1993.[41] Designated to replace the Crisis Coordination Arrangements, the IPCR arrangements shall provide the Council with the necessary tools and flexibility to decide on the handling of the Union's response.[42] For this purpose, IPCR consists of the supporting elements that are essential to ensuring informed decision making and an effective high-level political coordination when a serious crisis occurs.[43] Indeed, such a system is driven by the Presidency, which ensures the coherence of handling in the Council and of the overall re-

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invoking the clause also in case of *imminent* terrorist attack or of a natural or manmade disaster. Such a reference has, however, been deleted despite Article 222 TFEU clearly also including, in the scope of application of the solidarity clause, prevention activities against terrorism.

[38] Joint Proposal for a Council Decision on the arrangements for the implementation by the Union of the Solidarity Clause, Article 6.

[39] Implementing Decision 2014/415/EU, Article 5.

[40] Council of the European Union, 3251st Council meeting – General Affairs, 25 June 2013, doc. 11442/13, p. 17.

[41] Council Implementing Decision 2018/1993 of 11 December 2018 on the EU Integrated Political Crisis Response Arrangements, *OJ* L 320, 17 December 2018.

[42] P. Minard, *The IPCR arrangements: a joined-up approach in crisis response?*, European Union Institute for Security Studies, Brief Issue, no. 38, December 2015.

[43] According to Article 2 of Decision 2018/1993, 'crisis' means "a situation of such a wide-ranging impact or political significance, that it requires timely policy coordination and response at Union political level." For insights, see A. Nimark, "Post-Lisbon Developments in EU Crisis Management: The Integrated Political Crisis Response (IPCR) Arrangements", in D. O'Mathuna,

sponse at the Union political level, and supported by the General Secretariat of the Council, the European Commission, the EEAS and, in the case of terrorist attacks, the EU Counter-Terrorism coordinator, acting in accordance with their respective roles and responsibilities. Moreover, it is a flexible and tailor-made instrument able to respond to any kind of crisis by including different levels of reaction: from information exchange managed through a specific crisis web platform[44] to political coordination and adoption of proper decisions.[45] Despite the fact that IPCR is designed to also work independently, implementing Decision 2018/1993 clearly sets that IPCR should support the arrangements for the implementation of the solidarity clause. In fact, under Article 4, "where the solidarity clause has been invoked, the Presidency shall activate the IPCR immediately in full mode." Moreover, whenever the solidarity clause has not been invoked, before deciding to activate, the Presidency shall consult the affected Member States as well as the Commission and the High Representative. In fact, the implementing arrangements confer a steering role on the Council in responding to an invocation of the solidarity clause, while respecting the role and competences of the other EU institutions and services. The intention was, indeed, "to develop a coherent, integrated and effective system and to avoid the compartmentalized approach", namely towards a very early involvement of the Council from a political point of view, but without hindering the work of the other institutions at an operational level.[46]

As proof of that, Article 5, para. 2 of implementing Decision 2014/415 sets that, once the Council has activated the IPCR arrangements, the Commission and the High Representative shall identify all the relevant measures under their competences. Among other things, they could identify military capabilities that can best contribute to the crisis response with the support of the EU Military Staff.[47] Therefore, it is clear that, from an operational point of view, the role of these two institutions is not marginal. Indeed, on the one hand most of the re-

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I. de Miguel Beriain, *Ethics and Law for Chemical, Biological, Radiological, Nuclear & Explosive Crises*, Springer, 2019, pp. 75-91.

[44] Implementing Decision 2014/415/EU, Article 6.

[45] See M. Beriain, E. Atienza-Macías, E. A. Armaza, "The European Union Integrated Political Crisis Response Arrangements: Improving the European Union's Major Crisis Response Coordination Capacities", in *Disaster Med Public Health Preparedness*, 9(3), 2015, pp. 234-238.

[46] G. Bonacquisti, *The solidarity clause: one of the most unacknowledged innovations of the Lisbon Treaty. The European Parliament debates its implementation but also its ambiguities*, EU-logos, by citing Uldis Mikuts, Chair of the Friends of the Presidency Group on the EU Integrated Political Crisis Response arrangements and the solidarity clause implementation under the Latvian Presidency.

[47] Implementing Decision 2014/415/EU, Article 5, para. 2.

sponse instruments existing at the Union level are, directly or indirectly, under the responsibility of the Commission, and on the other the High Representative keeps a decisive role in reference to crises requiring military interventions or originating outside the Union, thus implying a diplomatic dimension. Furthermore, where appropriate, the Commission and the High Representative shall submit proposals to the Council concerning decisions on exceptional measures not foreseen by existing instruments, requests for military capabilities going beyond the existing arrangements on civil protection, or measures in support of a swift response by Member States.[48] In order to guarantee further coherence and coordination among the different interventions, the ERCC shall act as the central 24/7 contact point at the Union level for Member States' competent authorities and other stakeholders in order to facilitate the production of reports, in collaboration with the EU Situation Room and other Union crisis centres.[49]

The well-structured framework described above confirms the purpose of the Council Decision 2014/415 to regulate the reverse vertical dimension of solidarity that should be shown by the Union to face a disaster, or a terrorist attack.[50] However, the reverse vertical dimension of solidarity necessarily meets the horizontal one. Indeed, it must be noted that according to Article 222 TFEU, Member States are asked both to coordinate between themselves in the Council, and to directly intervene in an autonomous way when another Member State is affected by a serious emergency. Accordingly, after having illustrated in detail the content of the Council Decision establishing implementing arrangements by the Union, it is essential to evaluate further which specific obligations on Member States may emerge from the content of Article 222 TFEU when it comes to manage a large-scale disaster or a terrorist attack.

1.3 The solidarity clause: implications for Member States

Article 222 TFEU does not exhaustively address the duties of EU Member States when another is the object of a terrorist attack or of a disaster. However, a more attentive reading of the provision, alongside the procedure of activation and the material scope of application of the clause designed in the Implementing Decision 2014/415, may serve as point of reference to also derive some Member States' obligations.

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[48] Implementing Decision 2014/415/EU, Article 5, para. 3.

[49] Implementing Decision 2014/415/EU, Article 5, para. 6.

[50] For an assessment on the interplay between the solidarity clause and the instruments at disposal for responding to disaster scenarios, see, *infra*, para. 2.1 of the present Chapter.

a) Member States shall jointly act with the Union

Article 222(1) TFEU requires Member States to act jointly with the Union thus merging all the instruments that are at disposal at national and supranational levels when another EU Member is in serious difficulty. This implies that, even though the Member States may also act independently from the Union, once it has mobilised instruments that expect States' contributions, they are forced to act, mainly when an effective mobilisation of the Union depends on the resources made available by the Member States themselves. In a broader perspective, such an obligation discredits the traditional argument according to which solidarity in the EU mainly refers to the relations *among* the Member States, and not to the relation between the Member States and the Union.[51] Therefore, the Union obligation to intervene necessarily becomes intertwined with the States' duties according to the principle of sincere cooperation.[52]

Such a perspective is further strengthened by the intrinsic nature of the event that shall be confronted when the clause is invoked, that is an exceptional situation and not an 'ordinary' one. Since wide-ranging crises are usually cross sectoral, the engagement of a broad range of stakeholders and instruments requiring horizontal cooperation, networking, and coordination between different actors, both at Member State and EU levels, is needed.

Consequently, once the solidarity clause is activated, the response cannot be limited to the Union, but also to those Member States which are able to provide for additional measures to be deployed, according to a sort of subsidiarity basis. Ultimately, from the reading of Article 222 TFEU, it is possible to deduce both negative and positive Member States obligations that are also strictly linked to the duties of loyalty *vis-à-vis* the Union. The negative obligation requires States to avoid limiting the mobilisation of the Union instruments in response to exceptional circumstances while, on the flip side, the positive duty is to actively participate in the deployment of EU and national resources. Hence, contrary to what a superficial reading of Article 222 TFEU could suggest, it is not a separation of interventions but rather a positive synergy between the EU institutions and Member States that is requested. Indeed, as it has been observed, the solidarity clause is marked by a "supranational intent […] making it more than an intergovernmental obligation that characterizes the mutual defence clause."[53]

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[51] M. Klamert, *The Principle of loyalty in EU law*, cit., p. 35.

[52] S. Myrdal, M. Rhinard, "The European Union's Solidarity Clause: Empty Letter or Effective Tool? An Analysis of Article 222 of the Treaty on the Functioning of the European Union", cit., p. 17.

[53] S. Myrdal, M. Rhinard, "The European Union's Solidarity Clause: Empty Letter or Effective

b) Member States shall assist the affected State

Besides requiring joint action with the EU institutions, Article 222(2) TFEU reinforces the role of the Member States by prescribing that they shall make assistance available to another State in the case its political authorities request the activation of the clause. In general terms, that is to say that, whether according to Council Decision 2014/415 the invocation of the solidarity clause to activate the Union's instruments may only occur in *extrema ratio*, by analogy with the evaluations made by the Member States in its elaboration, it is possible to state that the alleged interventions of the other EU Members must also be conceived as acting as a last resort.

In any case, providing assistance constitutes a formal obligation on all EU Member States and is not just a concept operating in the political dimension. In this regard, EU primary law represents the unique legal framework at the international level that has introduced a clear obligation on sovereign States to offer assistance in the event of a large-scale disaster or of a terrorist attack, at least for those events occurring in the Member States territory. Furthermore, it seems even more relevant that Article 222 TFEU is under the jurisdiction of the CJEU that potentially could be asked to interpret the correct scope of application of the clause or to assess the compliance with the deriving obligations by both the Union and Member States.[54]

Such a mandatory tone is yet mitigated by the softer language used in Declaration n. 37 attached to the Lisbon Treaty which traces back to that adopted with the Constitution for Europe:

> Without prejudice to the measures adopted by the Union to comply with its solidarity obligation towards a Member State which is the object of a terrorist attack or the victim of natural or man-made disaster, 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.[55]

Therefore, it prescribes that States keep their procedural autonomy in establish-

Tool? An Analysis of Article 222 of the Treaty on the Functioning of the European Union", cit., p. 10.

[54] Indeed, the control by the Court is only limited with reference to the Common Foreign and Security Policy, see Article 275 TFEU. It is not, however, excluded that the solidarity clause could be activated within CSFP matters thereby limiting the CJEU jurisdiction.

[55] Declaration n. 37 on Article 222 of the Treaty on the Functioning of the European Union.

ing which resources to put at the affected State's disposal in order to provide assistance. Regarding the potential implications that the content of such a Declaration could have with respect to the scope of the solidarity clause, it is thus appropriate to provide a deeper evaluation of its legal effect.

As reported by some influential scholars[56] the mere fact that the Declaration is annexed to the Lisbon Treaty does not imply that it is an integral part of EU primary law; moreover, Article 51 TFEU clearly establishes that just "the Protocols and Annexes to the Treaties shall form an integral part thereof", without citing Declarations. Therefore, Declaration n. 37 seems to have a strong political rather than legal value. However, it is part of that 'context' that should be used for the interpretation in good faith of the Treaty itself, according to Article 31 of the Vienna Convention on the law of Treaties.[57]

For a detailed assessment of the legal effect of the Declaration, it is also necessary to refer to the annexed Protocol on the concerns of the Irish people on the Lisbon Treaty.[58] Indeed, Article 3 of the Protocol states that "it will be for Member States – including Ireland, acting in a spirit of solidarity and without prejudice to its traditional policy of military neutrality – to determine the nature of aid or assistance to be provided to a Member State which is the object of a terrorist attack or the victim of armed aggression on its territory." In comparison to the Declaration concerning Article 222 TFEU, the content of the Protocol is binding as part of EU primary law and, surely, it aims at protecting the *status* of those Member States that follow a policy of military neutrality. Thus, it clearly interacts with the solidarity clause, thereby limiting its scope, at least in reference to those military resources to be deployed in cases of terrorist attacks.

In any case, the general language used by the Declaration leads to an interpretation of Article 222 TFEU according to which each Member State, in the presence of a request from one victim State, is invested with a legal obligation – even if as a last resort – to provide assistance but retains the right to choose the appropriate measures. However, in exercising this choice, the State

[56] *Ex multis* M. Gestri, "La risposta alle catastrofi nell'Unione europea: protezione civile e clausola di solidarietà", in M. Gestri (ed.), *Disastri, protezione civile e diritto: nuove prospettive nell'Unione Europea e in ambito penale*, Giuffrè Editore, 2016, p. 37.

[57] Vienna Convention on the law of Treaties, 23 May 1969, Article 31.

[58] European Council Decision 2013/106/EU of 11 May 2012 on the examination by a conference of representatives of the governments of the Member States of the amendment to the Treaties proposed by the Irish Government in the form of a Protocol on the concerns of the Irish people on the Treaty of Lisbon, to be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and not to convene a Convention, *OJ* L 60, 2 March 2013.

in question is obliged to act in good faith and in a spirit of sincere cooperation as prescribed in Article 4, para. 3, TEU.[59] In other words, States keep the freedom to decide how to show solidarity, but there is no doubt that some solidarity has to be shown thus limiting their discretion in choosing the most appropriate and favourable response instruments. A different interpretation could be in contrast with the principle of the *effet utile* and result in an unmotivated breach of an obligation because of arbitrary denial of assistance.[60]

c) Member States shall coordinate between themselves

The third obligation on States arising from Article 222 TFEU concerns the coordination between themselves within the Council and represents an interesting point of analysis in several respects.

Generally, the Treaties request the Commission, or other EU institutions, to facilitate the coordination between Member States in order to reach the same goal. Instead, the solidarity clause sets that Member States themselves shall adopt a coordinated approach thus operating independently from the Union, but through an EU institution, that is the Council. It is not just about giving appropriate implementation to the principle of loyal cooperation or to a formal duty to cooperate with one another,[61] but about a clear and substantial obligation to be coordinated. In addition, it complements the obligation to render assistance as prescribed by Article 222 TFEU itself, thus contributing to the creation of a specific framework on States' obligations in disaster response.

According to a broader perspective, introducing an obligation to provide a coordinated response leads to a clear overcoming of the logic of State-to-State in disaster management in favour of an integrate strategy aimed at limiting diverse (and diverging) actions. Furthermore, an appropriate application of the duty to coordinate[62] assumes that Member States are bound by an obligation to cooperate among themselves. Moreover, the requirement to be coor-

[59] Article 4(3) TEU: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties." For further comments, see T. Konstadinides, *Civil Protection in Europe and the Lisbon 'solidarity clause': A genuine legal concept or a paper exercise*, cit.

[60] P. Hilpold, "Filling a Buzzword with Life: The Implementation of the Solidarity Clause in Article 222 TFEU", in *Legal Issues of Economic Integration*, 42(3), 2015, p. 219.

[61] General Assembly resolution 2625 (XXV) of 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, Annex.

[62] It must be underlined that in this case, the term "duty" is used as synonym of "obligation" even though their thrusts are slightly different, as explained in the first Chapter of the present work.

dinated within an established institution strengthens the validity and gravity of such an obligation that does not only remain a well-intentioned initiative with vague content. Hence, the clause heightens the profile of cooperation concerning crisis and disaster issues within the Union and according to EU law given that national governments have to take a more principled (and thus a high level) stance on such issues.

In this way, the contribution of EU law in shaping the legal framework concerning disaster management is twofold: on the one hand, it challenges the position of the overwhelming majority of States that, within international fora, stress the voluntary nature of cooperation[63] and, on the other, it underpins the added value of the EU in fostering major cooperation and coordination between States.

2. The Union shall mobilise all the instruments at its disposal: the interplay between the solidarity clause and the instruments of disaster response

Since the solidarity clause establishes a duty – reinforced by the content of Council Decision 2014/415 – to mobilise the resources and mechanisms existing at the Union level, the present analysis cannot forgo exploring how the instruments illustrated in the previous chapters could interact with the content of the mentioned Decision.

As a matter of the fact, Article 222 TFEU – by establishing that the Union shall mobilise all the instruments at its disposal, including military assets[64] – is quite vague with regard to what exact kind of mechanisms may be activated in order to assist an EU Member affected by a disaster or a terrorist attack. The implementing Decision has partially contributed to clarifying this point by specifying that the Union should rely on the existing instruments to the extent possible to avoid the adoption of additional resources[65] and by referring explicitly to some relevant instruments that could be used.

According to recital 5 of the implementing Decision, "[r]elevant instru-

[63] As reference about such a debate, see the States' comments to the inclusion of a duty to cooperate in the Draft Articles on the Protection of persons in the event of a disaster elaborated by the ILC, Chapter I of the present work.

[64] The reference to "military resources made available by Member States" suggests a mobilisation of military assets, either such assets that have already been registered for use in civilian disasters, or a much wider range of resources including, for example, troops for crowd control or equipment for large-scale disaster clean-up.

[65] Council implementing Decision 2014/415, Recital 4.

ments include the European Union Internal Security Strategy, the European Union Civil Protection Mechanism established by Decision No. 1313/2013/EU of the European Parliament and the Council (1) ('the Union Mechanism'), Decision No. 1082/2013/EU of the European Parliament and of the Council (2) and the structures developed in the framework of the Common Security and Defence Policy (CSDP)." Since the UCPM is explicitly mentioned in the implementing Decision, it is first necessary to understand how it can interact with the solidarity clause by being a useful instrument for deployment. In addition, even though it is not mentioned due to its recentness and its uncertain future, even the new Emergency Support Instrument could be concerned by such a provision. Finally, whenever the expression "all the instruments at disposal" used in Article 222 TFEU could be interpreted as also including those mechanisms that may intervene in the recovery phase, few words – as for the interplay between the solidarity clause and the EU Solidarity Fund – are essential.

2.1 The interplay between the solidarity clause and the Union Civil Protection Mechanism

One of the modalities to give effect to the Member States' obligation to act jointly with the Union could be to give proper execution to the EU Civil Protection Mechanism that seems to be one of the most likely instruments to be used in relation to the solidarity clause.[66] Indeed, there is no doubt that a connection between these two instruments is established because of the ERCC, that has been gradually developing into a crisis platform and a central EU hub where all the information comes together in the case of a crisis. As previously reported, whenever the solidarity clause is invoked, the ERCC acts as a 24/7 contact point at the EU level, as the entry point for any requests to the President of the Commission and as an information collection point able to develop a common picture of the emergency. As a result, although the activation of the solidarity clause has, in its first stage, a political and inter-governmental dimension that overshadows the Union's, at an operational level the ERCC plays a relevant role in the implementation and coordination phases thereby rebalancing the general framework of action.

Actually, the fact that Decision 2014/415 only concerns the application of the solidarity clause from the Union presages that the intervention of the Union cannot be particularly incisive but rather limited to making available the coordi-

[66] P. Konstadinides, "Civil Protection in Europe and the Lisbon 'solidarity clause': A genuine legal concept or a paper exercise", cit., p. 20.

nation and monitoring infrastructures at its disposal holding monitoring or early-warning functions, such as the ERCC and the CESIS. As a result, at first glance it does not seem possible to argue that the combination of Decision 1313/2013 and Decision 2014/415 may lead to the recognition of an obligation to activate the Civil Protection Mechanism for disasters occurring within the EU territory.[67] However, it does not mean that the clause could not acquire a certain relevance in reinforcing the procedural obligations of loyal cooperation deriving from the participation to the Mechanism and in creating political constraints on Member States. Indeed, from a legal point of view, despite the lack of a perfect coincidence between the scope of application of the solidarity clause and that of the UCPM – that is broader in terms of severity of the event –, the Council Decision seems to introduce some elements that may reinforce the functioning of the Mechanism itself and establish intervention obligations on States.

First, according to a long-term perspective, the solidarity clause could re-frame the issue concerning the costs of assistance. Indeed, although Article 39 of Decision 2014/762 on the implementation of the UCPM states that any Member State providing assistance may offer its assistance entirely or partially free of charge and that it may waive all or part of the reimbursement of its costs at any time, in general they are borne by the requesting State. Evidently, such a provision could be easily questioned in the light of the concept of solidarity: Indeed, even though practice shows that some Member States generally offer assistance without requiring the receiving country to pay, it remains a voluntary decision of the responding State. In theory, an accurate reading of Article 222 TFEU could lead to elaborating new financing arrangements when a massive intervention is necessary – at least in relation to events occurring within the EU – by imposing that Member States refrain from requesting the reimbursement of the costs of deployment.

Secondly, on the occasion of the debates concerning the scope of the clause, Member States meant to stress that Article 222 TFEU can only be invoked after having exploited all the possibilities offered by existing means and tools at the national and Union levels. These means also include the UPCM, which, at the same time, could be one of the mobilised instruments following the activation of the clause.

At first sight, one could wonder how to merge these two moments and

[67] F. Casolari, "La dimensione esterna dell'azione dell'Unione europea nella risposta a disastri naturali ed antropici: quale coerenza?", in M. Gestri (ed.) *Disastri, protezione civile e diritto: nuove prospettive nell'Unione Europea e in diritto penale*, Giuffrè Editore, 2016, pp. 82-83.

which additional measures could be triggered within the UCPM that have not already been deployed. In fact, such a procedure confirms the voluntary nature of the Mechanism at its basic level that, however, can be challenged by the solidarity clause itself thereby creating an obligation to offer assistance when a crisis clearly needs a stronger intervention. As a result, those States that did not answer the request for assistance from the affected State or that did not put at its disposal sufficient resources would be obliged to intervene within the framework of activation of the solidarity clause. However, this is not the only consequence of the interaction between the UCPM and the solidarity clause in terms of obligations of intervention. Indeed, as suggested in the previous Chapter, the new rescEU system – albeit subject to the *ex ante* and voluntary States' commitment in renting and leasing capabilities – is essentially in the hands of the Commission. Indeed, once the request for assistance is received, it is up to the Commission to make the decisions concerning the deployment of the capabilities in coordination with the Member States. Hence, even though in full respect of the Council's prerogatives to activate the necessary arrangements for the implementation of the solidarity clause under Decision 2014/415, the Commission could be forced to provide assistance through rescEU in order to comply with those obligations enshrined in Article 222 TFEU. Admittedly, being itself a last resort instrument to be activated when the other capacities available at national and EU levels are not sufficient to deal with the disaster scenarios, the rescEU system could represent an adequate way to guarantee the effectiveness of the solidarity clause, as for in-kind assistance. Moreover, it is also significant to stress that, by considering that the Union intervention must be coordinated with the Member States, the obligation of intervention on the Commission would imply a cascade effect on the Member States which detain the assets concerned. In a broader perspective which takes into account the allocation of competences between the Union and the Member States, according to this reading, the solidarity clause would also have the effect of justifying (and amplifying) the constraint of Member States' prerogatives in a field which is covered by a competence of parallel nature.

2.2 The solidarity clause and the EU Emergency Support Instrument

As explicated in Chapter III,[68] the Emergency Support Instrument (ESI) represents one of the instruments – the only one having a financial nature –

[68] See, *supra*, Chapter III, para. 2.2.

to be activated to help an EU Member in the phase of an emergency occurring in the Union's territory. Notwithstanding Regulation 2016/369 quite unexpectedly does not cite the solidarity clause, the ESI might represent a way to complement the implementation of the very clause by the Civil Protection Mechanism. Furthermore, the interaction between the solidarity clause and the instrument in question would establish specific obligations on the Commission that should carry out the actions reported in the Council Regulation 2016/369. In this way, in comparison to the humanitarian aid instrument whose activation relies on the Commission's discretion, the provision of financial assistance to EU Members would become compulsory.

In this regard, however, it must be noted that both the solidarity clause and the ESI have been conceived as *last resort mechanisms*. Indeed, while on the one hand the solidarity clause may only be activated when the affected State has already exploited all the resources at its disposal, on the other the instrument providing immediate financial assistance may intervene just in exceptional circumstances when no other mechanism is sufficient. Clearly, this strict overlapping may create some problems both from a legal and operational point of view.[69] As a matter of fact, the very Article 122 TFEU sets that the eventual measures adopted under such a provision should not cause prejudice to any other procedure provided for in the Treaties. One could thus interpret such a *caveat* exactly in relation to the solidarity clause, thereby implying that assistance measures towards the States decided *ex* Article 122(1) TFEU strictly speaking must give precedence to other solidarity mechanisms foreseen by primary law, including, of course, those incorporated in the solidarity clause. However, given the exceptional nature of the solidarity clause as conceived in the implementing Decision, it is not to be excluded that the ESI could be activated before the invocation of the solidarity clause thereby creating a sort of hierarchy between instruments of last resort. This interpretation appears to be in line with practice, since the provision of financial assistance to Greece by means of the instrument established by Regulation 2016/369 was not preceded by any request by the national authorities to activate the solidarity clause. However, in this case, the risk exists that, since the affected States are always provided with new instruments of assistance, the clause in question is never activated.

[69] In this regard, see F. Casolari, "Lo «strano caso» del regolamento 2016/369, ovvero della fornitura di sostegno di emergenza all'interno dell'Unione ai tempi della crisi", cit., p. 23.

2.3 The solidarity clause and the EU Solidarity Fund: the prospect of an obligation?

Albeit no reference to the EU Solidarity Fund (EUSF) is made in implementing Decision 2014/415, its potential relevance cannot be disregard. In effect, on the one hand, the common proposal of the Commission and the High Representative for implementing arrangements of the solidarity clause had already underlined the role of the Fund as one of the key Union instruments in applying this provision of the Treaty.[70] However, clearly, such an option has been eliminated in the approval phase by the Council. On the other hand, the very Commission, in its amendment proposal for the EUSF, made a reference to the potential value of the solidarity clause in this field. But, it also made a point of highlighting the reasons that have prevented Article 222 TFEU to be used as legal basis for the new regulation on the Solidarity Fund. First of all, the solidarity clause is reserved for the most serious crisis situations whereas the criteria for the activation of the EUSF are defined in a way that leads to the use of the Fund several times a year. Secondly, under the legislative procedure foreseen by Article 222 TFEU, the European Parliament is informed but not actively involved, and this would not be in line with the provisions of the Fund which fully involves the Parliament in raising the appropriations for financial aid. Finally, the EUSF could be used for certain non-Member States that are not covered by Article 222 TFEU.

Notwithstanding these objections, the theoretical interest of the Commission to link the very objective of the EUSF with the content of Article 222 TFEU cannot be ignored. Therefore, the possibility that these two instruments may somehow interact is not inconceivable, considering that, as reported in the previous paragraphs, the scope *ratione temporis* of the solidarity clause in the event of a disaster has not been completely clarified.

The solidarity clause, when activated to respond to exceptional emergencies, could indeed operate in an extensive way thereby covering all the response and post-disaster phases. In this case, the obligation imposed on the Union could also be extended with reference to the deployment of instruments intervening in the recovery phase, including the EU Solidarity Fund that – as reported in Chapter III – is not activated on the basis of a specific obligation of the Union. Against this background, for the Civil Protection Mechanism as well, the solidarity clause could really represent the instrument capable of establishing duties to provide assistance both on the Union and on Member States by means of the already existing instruments.

[70] Joint Proposal for a Council Decision on the arrangements for the implementation by the Union of the Solidarity clause, JOIN/2012/039 final, 12 December 2012, point 3.

3. Evaluating the real legal value and the banding nature of the solidarity clause

The previous analysis has underlined the potential of the solidarity clause both in legal and practical terms. In fact, it introduces a number of obligations on the Union, but especially on Member States, that are laid down in and arise directly from EU primary law. Moreover, it could be the link and trigger of the very mechanisms for disaster response and assistance. Thus, national governments should consider their solidarity obligations more carefully and respect them by virtue of the principle of *bona fide* that is central in treaty law.[71] That represents a breakthrough in comparison to the current and still uncertain legal framework governing disaster relief at the international level. Moreover, one of its added values is the institutional and the procedural transparency able to ensure an effective coordination in times of crisis response. From a systemic point of view, it highlights that some of the most basic security challenges for the Union can only be tackled through a solidary approach.

Notwithstanding the overall positive theoretical value of Article 222 TFEU, practice shows that the reality is quite different. In particular, as for its application by Member States, it does not contain any unequivocal details on the procedure thus leaving it open to different interpretations regarding its scope, the possible measures to be decided, what circumstances shall be covered, and the respective areas of competence of the Member States and the Union, as well as of the other subjects involved.[72] In addition, the analysis of the content of the implementing Decision makes it evident that there has been an important rereading and downsizing of the provision contained in primary law, mainly in terms of scope of application, that limits the objective circumstances of invocation of the very clause. Finally, so far the solidarity clause has never been clearly

[71] S. Myrdal, M. Rhinard, "The European Union's Solidarity Clause: Empty Letter or Effective Tool? An Analysis of Article 222 of the Treaty on the Functioning of the European Union", cit., p. 17. In addition, it deserves to be stress that with reference to third States the solidarity clause is *a res inter alios acta tertio neque nocet neque prodest*, since that clearly does not apply when a disaster occur outside the Union.

[72] In this regard, see *ex multis*, M. Gestri, "La clausola di solidarietà europea in caso di attacchi terroristici e calamità (art. 222 TFUE)", in *Studi in onore di Luigi Costato*, Jovene Editore, 2014, pp. 537-552; A. Alì, "Art. 222", in F. Pocar, M. Baruffi (eds), *Commentario breve ai Trattati dell'Unione europea*, II ed., CEDAM, 2014, pp. 1214-1217; J. Jeller-Noeller, "The Solidarity Clause of the Lisbon Treaty's", in Fabry (ed.), *Think Global – Act European: The Contribution of 16 European Think Tanks to the Polish, Danish and Cypriot Trio Presidency of the European Union*, June 2011, pp. 328-333.

activated, despite the occurrence of a number of favourable opportunities, including the multiple terrorist attacks which instead the French government decided to respond to by activating for the first time the clause of mutual defence according to Article 42, para. 7, TEU.[73]

Despite terrorist attacks and armed conflicts being explicitly left out from the scope of the present research work,[74] in order to provide a better understanding of the practical obstacles that the application of the solidarity clause faces, it is necessary – even if only briefly – to report the main legal elements which differentiate the content of Article 222 TFEU from the provision *ex* Article 42, para. 7, TEU.[75] In fact, although both introduce binding commitments amongst Member States to intervene to the aid of another Member State, this similarity should not overshadow the differences between the two clauses.

First of all, one must underline the positive decision to differentiate the scope of application of the two clauses, by distinguishing between international and regional, and civil and military forces. As is well known, Article 222 TFEU applies in cases of terrorist attacks or natural/man-made disasters, while Article 42(7) TEU applies only in cases of 'armed aggression' against the territory of a Member State. As such, the mutual defence clause constitutes a reminiscence of the traditional concept of collective self-defence in line with the content of Article 51 of the UN Charter and a form of closer cooperation in comparison to that provided by NATO.[76]

The choice to separate the two clauses and, in particular, to include terrorist attacks within the solidarity clause and not in Article 42(7) TEU can be

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[73] Council of the European Union, "Defence", Outcome of the 3426th meeting, 16-17 November 2015, p. 6. For comments on the France's choice, see A. Alì, "L'attivazione della clausola UE di mutua assistenza a seguito degli attacchi terroristici del 13 novembre 2015 in Francia", in *SIDIBlog*, 21 December 2015; C. Moser, "Awakening dormant law – or the invocation of the European mutual assistance clause after the Paris attacks", in *Verfassungsblog*, 18 November 2015; M. Gestri, "Tutti per uno? La Francia invoca la clausola europea di difesa", in *Affari internazionali*, 23 novembre 2015, www.affarinternazionali.it; G. L. Tosato, "Interrogativi sul ricorso della Francia alla clausola di difesa collettiva ex art. 42.7 TUE", in *Aperta contrada*, 3 dicembre 2015; E. Cimiotta, "Le implicazioni del primo ricorso alla c.d. 'clausola di mutua assistenza' del Trattato sull'Unione europea", in *European Papers*, Vol. 1, 2016, No 1, *European Forum*, 16 April 2016, pp. 163-175.

[74] For comments on the relevance of the solidarity clause in situations of terrorism, see M. Gestri, "La clausola di solidarietà in caso di attacchi terroristicio di calamità (art. 222 TFUE)", cit.

[75] Article 42, para. 7, TEU: "If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States."

[76] North Atlantic Treaty, Article 5.

founded on specific legal considerations concerning the still debated nature of terrorist aggressions. Indeed, following the attacks of September 11th, discussions on the question of whether a terrorist attack of that magnitude qualifies as 'armed attack' in the sense of Article 51 of the UN Charter have proliferated. Despite the 2001 events, the legal evaluation of attacks by non-State actors is still controversial by their lack of international personality in the sense of international law which requires the imputability of the attack to a foreign State.[77] As a result, the separation is perfectly in line with the concerns addressed at the international level.

Secondly, Article 42(7) TEU – that does not presuppose the necessary request from the affected State – reflects in its entirety an intergovernmental device and does not foresee for the involvement of the Union. Conversely, Article 222 TFEU requests Member States to coordinate between themselves in the Council and provides the EU with the power to mobilise all instruments at its disposal in order to protect and assist them in the event of a terrorist attack or a natural or man-made disaster.

Thirdly, it is possible to argue that, while Article 42(7) TEU represents a mere obligation to assist the victims of an armed attack, Article 222 TFEU can be used alongside other legal bases to justify new legislative acts that will foster solidarity between Member States in the fight against serious crime and disaster response. Indeed, within the whole system of primary law, such a provision is not suited to serve as the sole or the primary point of reference for a definition of this concept, but rather it deals with a segment of solidarity, that must find concrete application by interacting with a broader range of norms that pursue similar aims.

However, Hollande's proposal to resort to the mutual defence clause rather than to the solidarity clause gained unanimous support and the preparation for concrete actions started swiftly and smoothly. Hence, despite the uncertain definition of the events as an armed aggression, Article 42(7) TEU was chosen over the solidarity clause for a number of reasons.

Firstly, it was meant to underline that the crisis did not clearly overwhelm the response capabilities available to France, but rather conveyed the idea that it was an attack on the EU as a whole. Secondly, the type of expected solidarity related to external operations rather than to an internal response to the conse-

[77] For further details on such a question see S. D. Murphy, "Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter", cit.; M. Bothe, "Terrorism and the Legality of Pre-emptive Force", in *European Journal of International Law*, 14, 2003, pp. 227-240.

quences of the attacks. That pushed more reluctant Member States towards an enhancement of the coalition against the ISIL by supporting its military campaigns in Iraq and Syria, as well as in Mali and in the Central African Republic.[78] Thirdly, it was preferred to manage the situation according to an interstate logic, rather than to trigger the Union's intervention.

In any case, the French decision, besides raising questions about both the scope of Article 42(7) TEU and what it might mean for the Union as a security actor given that it has been completely excluded in favour of an intergovernmental logic, represents a missed opportunity to empower the solidarity clause. As matter of fact, regardless of the ultimate interests of the French and the fact that Decision 2014/415 specifies that it shall not have defence implications, what happened in Paris could be traced, in the abstract, to Article 222 TFEU and it would have been much more appropriate in terms of material scope and practical effects. In addition, the simultaneous use of the two clauses could have not been excluded since a terrorist attack involves aspects concerning both defence and internal security. Nevertheless, France opted for the most sovereign and least institutionalised form of cooperation.[79]

By looking at the material scope of the solidarity clause previously illustrated, the spread of COVID-19 represents another significant and concrete case wherein, given the widespread impact, the clause could be invoked. In effect, on 28 January 2020, the Croatian presidency decided to activate the EU's IPCR arrangements in information sharing mode, in order to facilitate the development of a common understanding of the situation among Member States and the EU institutions. Considering the deteriorating situation and the different sectors affected, on 2 March 2020 the EU presidency strengthened the activation of the IPCR mechanism to 'full mode'.[80] This has allowed for the organisation of weekly presidency-led round-table meetings to facilitate the exchange of information and coordination of crisis response with the participation of the Commission, the EEAS, the office of the President of the European Council, affected Member States, relevant EU agencies, and experts.[81] Thus, IPRC arrangements have been essentially organised to guarantee the discussion on common issues

[78] T. Tardy, "Mutual defence – one month on", *European Union Institute on Security Studies*, 55, December 2015.

[79] C. Hillion, S. Blockmans, "Europe's self-defence: Tous pour un et un pour tous?", *Centre for European Policy Studies Commentaries*, 20 November 2015.

[80] Decision 2018/1993, Article 7.

[81] Croatian Presidency activates EU's Integrated Crisis Response in relation to Corona virus, available at the Croatian Presidency website: https://eu2020.hr/Home/OneNews?id=160.

and to take common decisions, but not to propose potential compulsory measures to be taken by the States or the Union. As a matter of fact, notwithstanding the exceptional situation and the activation of IPCR arrangements, the solidarity clause was not invoked. Certainly, in an indirect way, one could read the performed arrangements through the lens of the solidarity clause by noting that the proactive Croatian stance has given substance to the obligation of coordination among Member States in the Council. However, neither the Union nor the Member States were asked to respect more than this basic obligation which is closer to the content of the principle of loyalty than to that of solidarity.

The lack of a concrete application and the continued reluctance of States to invoke the solidarity clause including in the aforementioned situations lead to wonder when it could be effectively activated and what its real capacity is to embrace the whole system of assistance in the event of an overwhelming emergency. Against these conditions, the content of Article 222 TFEU risks to solely be a political stance, therefore, having scarce legal value in terms of obligations mainly for Member States. Moreover, the content of Declaration n. 37 raises doubts that remain objectively unresolved concerning the extent to which States are obliged to maintain a certain level of preparedness or to have specific capacities in order to meet the requirements forwarded by the very solidarity clause. Finally, to what extent Member States are free to decide what instruments are to be put at disposal once the arrangements are activated by the Council has not been established. Accordingly, it will be interesting to see in the future whether the EU institutions or Member States will refer the matter to the CJEU and, if the occasion arises, whether the Court will be less reluctant to deal with politically sensitive issues by scrutinising Member States' compliance with the solidarity clause.[82] In conclusion, the actual legal relevance of the solidarity clause will only be able to be assessed in a very long-term perspective, because at the moment it risks remaining a dead letter rather than representing an enabling clause capable of imposing both on the EU institutions and on the Member States a clear duty of solidarity in the event of a disaster.

[82] T. Åhman, *The Treaty of Lisbon and Civil Protection in the European Union*, cit., pp. 28-29.

CONCLUSIONS

1. Solidarity within the EU legal order: a play of lights and shadows

Over the years, the concept of solidarity has played the role of the engine of the functional integration process, by representing the paradigm of reference of the structural configuration of the EU legal order. Indeed, the EU system responds to a strong integration dynamic fuelled, *inter alia*, by the notion of solidarity which – both as an objective and as an "*esprit constitutif*"[1] of the EU legal order – justifies, develops, and adjusts the exercise of public authority in favour of a common interest, separate and separable from the sum of the individual interests.[2] As Pescatore stressed, "*le resserrement progressif des liens entre États membres au sein de la Communauté permettra, dans la réalité des faits autant que dans les raisonnements juridiques, de mettre davantage en valeur cette idée de solidarité dans ses diverses expressions*."[3] Hence, perceived as corrective element of the tension between a high degree of supranational integration and a simultaneous heterogeneity of interests between the Member States,[4] it should be more than the sum of the different national interests and it should not just be an arena used to ensure national advantages. Or, as suggested by Jacques Delors, if it is not based on pure generosity, it should be built on an "enlightened self-interest."[5]

The Lisbon Treaty has certainly contributed to giving impetus to the legal

[1] A. Levade, "La valeur constitutionnelle du principe de solidarité", cit., p. 17.
[2] R. Bieber, F. Maiani, "Sans solidarité point d'Union européenne", cit., p. 295.
[3] English translation (by the author): "the progressive strengthening of the links between Member States within the Community will make it possible, in reality as well as in the legal reasoning, to give greater prominence to this idea of solidarity in its various expressions." P. Pescatore, "Les Objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de Justice", cit., p. 351.
[4] J. Bast, "Deepening Supranational Integration: Interstate Solidarity in EU Migration Law", in A. Biondi *et al.* (eds), *Solidarity in EU law*, cit., p. 115.
[5] S. Fernandes, E. Rubio, *Solidarity within the Euro-zone: how much, what for, for how long?*, Notre Europe Report, cit., p. 10.

concept of solidarity by assuring it a special position as a notion with a variable capacity serving as *core value*, *objective,* and *principle* to be respected and pursued in some specific sectors. This particular character renders solidarity a concept that permeates the whole EU legal order thus informing the action of both the EU institutions and the Member States. However, this has not spared it from being object of multiple discussions and evaluations from a legal point of view concerning its real status and value. Indeed, the different expressions solidarity acquires at the same time make it an amorphous concept whose contours change radically depending on the actors and the legal areas involved thus rendering it a weak concept from a legal perspective.[6] In particular, the structure of the current EU legal framework makes it difficult to understand solidarity as a general principle of EU law because of some unfavourable points which can be attributed to its performative character.[7] In particular, while general principles of EU law have an overreaching effect which makes them generally applicable to all the areas of EU law and thus binding in their entire essence, solidarity remains pigeonholed in a case-by-case approach and thus limited in terms of judicial enforcement. In truth, to expect that its normative force must necessarily coincide with the status of a general principle of EU law seems far from being not only legally adequate but also realistic. Solidarity is indeed designed to have special relevance in the so-called 'solidarity islands of EU law' where it may have binding implications if intended to transform the general requirements into positive obligations both on the Union and on the Member States. Solidarity is meant to cover, *ratione materiae*, just those areas of EU law in need of major cooperation and burden-sharing due to the exceptional nature of the events they concern. In this perspective, solidarity should not be understood as a principle generally regulating the basic functioning of the EU and the relations among the EU institutions and the Member States as is the case for the principle of loyal cooperation. If one were to go beyond the classical categorisation made by the doctrine of principles, one could say that solidarity is a 'specialised' and 'autonomous' principle operating in those situations which risk creating distortive effects and fuelling the existing structural asymmetries either for the Union as a whole or for just one Member State. In the field of migration, solidarity is openly acknowledged as a principle capable of imposing obligations on Member States thereby transforming the Union legislature into operational policy espe-

[6] S. De la Rosa, "La transversalité de la solidarité dans les politiques matérielles de l'Union", in C. Boutayeb (ed.), *La solidarité dans l'Union européenne*, cit., pp. 165-190.

[7] A. Berramdane, "Solidarité, loyauté dans le droit de l'Union européenne", cit., pp. 66-68.

cially when a State is affected by a major influx of migrants. *Mutatis mutandis*, also disaster response should be driven by arguments of solidarity which imply not only moral but also compulsory interventions aimed at counterbalancing the negative consequences of a crisis. Thus, it is in these specific areas that solidarity must progressively express its capacity to result in conducts of solidarity, to establish clear obligations on the actors as well as to be the grounds for judicial interpretation of the EU law norms and review of the emergency measures incompatible with EU law.

In addition, the scarce judicial activism or, at least, the more prudent positions assumed over time by the CJEU concerning the content of solidarity from a strict legal point of view have certainly slowed down the process of clarification. As such, the conclusions reached by the CJEU in the recent *Slovak Republic and Hungary v. Council* case are extremely relevant for the future perspectives since they contribute to making the legal contours of solidarity a sharper and more concretely applicable principle.[8] Nonetheless, as stressed by Lang,[9] it would be unrealistic to expect that the EU judiciary overtakes the role of the EU legislator and affects the willingness of the Member States in addressing solidarity arguments. Indeed, the current difficulties in moving forward in this process are also linked to a plurality of views on solidarity in EU law which make today's legal and political climate extremely uncertain. As a matter of fact, the legal dimension of solidarity has essentially suffered from the fact that it is also a politically loaded concept thus often being an element of friction in the latent and evident conflicts among Member States on the opportunity to show or not major solidarity, including in exceptional situations. While some tend to criticise the Union for its excessive softness in attributing responsibilities to the Member States, others see it as still showing too little solidarity in comparison to what is required in the Treaties.

As it has been demonstrated by the findings of the present book, the so-called EU disaster response law is partially characterised by the aforementioned elements of uncertainty. One could argue that solidarity, like the moon, is a concept animated by an enlivened play of lights (see section 1.1) and shadows (see section 1.2) which allegedly makes its contours blurry and obscure. However, especially in the field of disaster response, solidarity actually appears brighter than what is first perceived if it is read according to a

[8] See, *supra*, Chapter II, para. 2.2.2.

[9] I. Lang, "No Solidarity without Loyalty: Why Do Member States Violate EU Migration and Asylum Law and What Can Be Done?", cit., p. 43.

different standpoint (see section 1.3) and this may offer the opportunity to present a general reflection on the future prospects of the health status of the EU integration process (see section 2).

1.1. The bright side of solidarity in EU disaster response law: the establishment of mechanisms of solidarity

The EU institutions have progressively shaped EU disaster response law according to a significant and ambitious plan by endowing it with new legal instruments and improving the existing ones to respond more adequately to severe emergencies occurring within the EU territory (Chapter II, para. 3). In this regard, it must be said that, initially, the lack of specific legal basis affected the opportunity to adopt specific instruments of solidarity capable of covering all the needs of the affected population in a comprehensive way. Rather, at the EU level as well such a field of intervention developed in a transversal and, therefore, quite fragmented way due to, *inter alia*, the absence of a unique specific EU competence concerning disaster management. On the contrary, the latter is based on a mix of shared and supporting competences and thus on different degrees of intensity regarding interventions to be performed and measures to be adopted at the supranational level. Yet, the entry into force of the Lisbon Treaty has introduced a number of novelties in terms of references to solidarity and legal bases in the field in question. As underscored by the wording of the preambles of all the instruments of secondary law, the Lisbon revision has guided the EU institutions and Member States towards significant improvements with respect to the instruments to be deployed within the Union's territory to provide financial and in-kind assistance. That has given rise to a complex EU disaster management system that – despite some remaining inconsistencies and gaps that have been explored in detail – is based on a high level of cooperation and solidarity.

As for the instruments of financial assistance, it is undoubtable that they have experienced positive improvements (Chapter III). More in detail, both the enhancements of the EU Solidarity Fund as well as the establishment of the Emergency Support Instrument shall be considered remarkable. As for the EU Solidarity Fund, Regulation 661/2014 has, among other things, introduced the possibility of granting an advance payment shortly after the application for financial contribution from the Fund has been submitted to the Commission by the affected State. In addition, it is noteworthy that – following the spread of COVID-19 – its scope *ratione materiae* has been widened in order to also include health emergencies thereby overcoming the initial limitation just to

natural disasters. The Emergency Support Instrument is another appreciable mechanism that might fill the gaps concerning the provision of immediate financial assistance to EU Members when facing particularly exceptional events, as demonstrated by its activation against both the huge influx of migrants in 2015 and the current health emergency. If it is further improved, it could represent a proper way to avoid that financial assistance just remains the manifestation of an '*ex-post* solidarity' implemented by the EU Solidarity Fund and the derogations applied to the State aid regime that, in any case, demonstrate the intention to go beyond the logic of the fast emergency response. With regard to the latter, the flexibility granted by the Commission in terms of notification could be seen as a way to facilitate Member States in the reconstruction process thereby giving substance to the reverse vertical dimension of solidarity. Indeed, the new reformulations in terms of time limits and flexibility seem to go hand in hand with the requirement of solidarity thus rebalancing the trade-off between solidarity and competition as well as allowing national authorities to implement national solidarity.[10]

Regarding the provision of in-kind assistance, one the most notable novelties provided by the Lisbon revision has undoubtedly been the inclusion of a specific legal basis on civil protection which has enabled the strengthening of the existing Union Civil Protection Mechanism (Chapter IV). As repeatedly stressed throughout the analysis, it embodies the operational side of solidarity thus conferring on the Union and Member States the positive capacity to protect both EU citizens and third-country nationals in the event of a disaster. In addition, a new impulse to solidarity among Member States has been provided by means of the establishment of the EERC, now the European Civil Protection Pool, which reflects the timid intention to create a more predictable and permanent system of civil protection resources capable of a better and more timely response to disasters. Accordingly, since solidarity also passes through the effectiveness of the interventions performed by the instruments activated, it can be affirmed that cooperation in civil protection issues could create a virtuous cycle of solidarity. Indeed, the Union Civil Protection Mechanism inaugurated in 2014 and further improved in 2019 is not limited to support and cooperation among national civil protection services but is aimed at progressively 'federalising' them under the helm of the European Union. Additionally, such a potentiality is evident from the decision to strengthen the current Mechanism by establishing the

[10] C. Boutayeb, "La solidarité, un principe immanent au droit de l'Union européenne", cit., pp. 35-37.

rescEU system, composed of response capacities to be rented by the Member States and directly activated by the Commission itself when those in the voluntary pool are insufficient to respond to a disaster (Chapter IV, para. 3.4).

In the light of all these findings, it is impossible not to acknowledge that the instruments established and improved over the course of time represent the bright side of solidarity. Indeed, while they mean to comply with the requirement to act in a spirit of solidarity, they fuel the idea that the occurrence of serious disasters is an issue which needs a common response. Such a perspective has been clarified further by the recent developments following the COVID-19 outbreak that has allowed to partially reshape and improve the functioning of most of the aforementioned mechanisms. Indeed, besides being a reason for reinforcing the existing instruments, the situation represents an occasion which has allowed the activation of all the instruments that have been explored in the present work. Significantly, all these instruments have been activated in favour of a large number of Member States thus making it evident that they are capable of demonstrating their effectiveness. This has indirectly contributed, *inter alia*, to challenging the existence of 'selective solidarity' due to the apparent lack of coherence with regard to the material scope of application of these instruments and the different thresholds to be respected for their activation. In fact, it should be seen as the demonstration of a 'multilevel solidarity' capable of intervening by taking into consideration the actual needs of the affected States. This is also confirmed by the fact that all the instruments analysed respond to different time frames and arrangements of assistance: the EU Solidarity Fund operates in the recovery phase and provides for financial assistance to the national authorities of the affected State; the Emergency Support Instrument intervenes during the emergency to guarantee financial support to partner organisations in the field; the exception rules in the field of State aid are essential for facing the rebuilding phase; and finally, the Union Civil Protection Mechanism may be activated in order to immediately respond to a critical event and also in the rebuilding phase. The existence of multiple instruments to be deployed both in the proper response and recovery phases also represents a way to establish a comprehensive and long-term system of *de facto* solidarity.

1.2 The dark side of solidarity in EU disaster response law: the lack of clear duties of solidarity

The growing importance of solidarity in the EU discourse is visible not only as an interpretative canon in the elaboration of the response instruments that have been progressively strengthened in order to comply with the solidarity

requirements enshrined in the Treaties. As reported in the present work, the provisions of primary law governing crisis scenarios often also entails specific solidarity duties that bind both the Member States and the Union to responding to crises and emergencies. In particular, the existence of a provision of primary law which explicitly sets a duty of solidarity in situations of emergency cannot be ignored. The solidarity clause contained in Article 222 TFEU is a breakthrough treaty provision in the supranational context which, more than other provisions, imposes an explicit duty to assist another EU Member affected by a disaster (Chapter V). Moreover, while States keep the procedural autonomy in defining which resources to put at the affected State's disposal and thus how to show solidarity, there is no doubt that it imposes the provision of assistance in favour of the affected State. Furthermore, Article 222 TFEU entails a kind of solidarity which operates in its reverse vertical dimension by applying not only to the interstate relations but also to those between the Union and Member States. For its part, the Union is thus asked to activate all the instruments available to support the affected EU Member as well as to guarantee the positive synergy among them thereby rendering the solidarity clause the link and trigger of the illustrated mechanisms of financial and in-kind assistance (Chapter V, para. 2). In an even more decisive manner, the activation of those instruments which usually just rely on a mere right of deployment could become compulsory when operating according to Article 222 TFEU. For instance, from an operational point of view, its activation could be extremely relevant with regard to the deployment of the assets of the rescEU system which represents the closest instrument to the idea of an autonomous force of civil protection. Indeed, already intended as a last resort instrument, it could be compulsorily activated whenever the solidarity clause is invoked thus resulting in an obligation of assets deployment on the Commission and, consequently, on the Member States that keep them. Accordingly, whenever the solidarity clause was activated, the practical implications of the solidarity duties incumbent on the EU bodies (in the broad sense) and on the Member States would be brought to light and their behaviour potentially scrutinised. Therefore, it is clear that this clause would be prone to making the concept of solidarity experience a step up with regard to its substantive effectiveness over the action of the EU institutions and the Union as a new legal order of international law. Nevertheless, a closer and comprehensive legal investigation which considers both the implementing Decision and the practice suggests that the specific content of the solidarity clause is still characterised by a general and very vague scope, which undermines its legal significance at the

implementing level. Firstly, with regard to the extent of the specific duties deriving from this provision, there is a number of critical issues concerning its interpretation, mainly on their scope of application *ratione loci*. Secondly, the maximum threshold to be reached before invocating the activation of the solidarity clause and when and with what result the affected EU Member may actually request the Union and other Member States to intervene according to this provision remains unclear. Thirdly, despite the occurrence of favourable situations to invoke the clause most recently during the COVID-19 pandemic, no Member State has ever requested its activation thus clearly demonstrating not only the unclear nature of this clause but also the existing fear of opening Pandora's box. In any case, the risk of these undoubtable shortcomings is to make the clause a dead letter rather than an enabling act.

The resistance in prescribing duties of solidarity can also be detected with regard to the mechanisms to be activated in times of crisis. Indeed, despite the arguments of solidarity being very pronounced and *de facto* applied, none of the legal instruments at the basis of the explored tools – be they the EU Solidarity Fund, the Emergency Support Instrument, or the Union Civil Protection Mechanism – reflect a compulsory character in their early activation thus establishing duties of solidarity (in the form of a duty to provide assistance) in favour of the affected State. Rather, the provision of financial and in-kind assistance remains in the sphere both of the rights of the States and of the Union and, therefore, subjected to their final will and discretion. Accordingly, within the mechanisms provided to respond to internal emergencies, the voluntary element and the creeping logic of State discretion are predominant over compulsory rules. Such an orientation is significantly due to the objective differences between Member States – in terms of risk, vulnerability, and resources at their disposal – which open disagreement over compulsory interventions. Southern States, more often affected by natural disasters in particular, question to what extent the others are prepared to act in a spirit of solidarity, while the less affected northern countries tend to emphasise national responsibilities in preventing and managing disasters.[11] Such a structural imbalance, that makes some States lastingly stronger than others, placing them permanently in the role of 'givers' and others as 'takers' seems to limit the desire of full implementation of solidarity in its legal di-

[11] T. Åhman, *The Treaty of Lisbon and civil protection in the European Union*, cit.; A. Boin, M. Ekengren, A. Missiroli, M. Rhinard, B. Sunderlius, *Building societal security in Europe: the EU's role in managing disasters*, EPC Working Paper, n. 27, 2007.

mension *stricto sensu*.[12] Ultimately, one could argue that the structural limits and uncertainties that prevent the provisions of primary law from clearly defining the content of solidarity duties and, on the other hand, the extreme reliance on the voluntariness of the actors involved may have a negative effect on the final evaluation of solidarity in the EU context. Indeed, it demonstrates that this concept is still characterised by a dark side which prevents it from expressing all its potential and its overriding trait as a specialised principle operating in the field of disaster response.

1.3 Reading the dark side and the bright side for a new paradigm of solidarity

As suggested at the beginning of the present conclusions, solidarity within EU disaster response law (even though it can also be extended to all the other emergency situations) can be thought of as the moon, characterised by a 'bright side' and a 'dark side'. While the former manifests itself in the existence of specific instruments for disaster response, the latter is linked to the fact that their functioning is not supported by specific duties of solidarity. In the absence of clear duties of intervention, the illustrated instruments could thus appear to be hostage to the voluntary character of the entire structure. However, limiting the essence of solidarity in the field of disaster response to a negative observation of the interaction between these two sides would not be fair. Indeed, the presence of a 'dark side' is not prone to jeopardise the effectiveness of solidarity *lato sensu* that must be read in a comprehensive way considering the reflection of these two sides on the ground.

As previously stressed, solidarity has demonstrated to be an essential starting point in the process of elaboration of the assistance instruments. As a matter of fact, solidarity manifests itself mainly in the pre-established pooling of resources and burden-sharing measures to be activated when necessary, thus bypassing the emergency logic in favour of a predicted system of intervention. Moreover, solidarity has proven to be the end point of the activation of the illustrated instruments, and this should not be underestimated in the general evaluation. Indeed, albeit room for improvement exists, the voluntary nature of the assistance instruments has not undermined the final outcome and the general (and increasing) intention to rely on this kind of supranational instruments rather than on spontaneous offers. Accordingly,

[12] See, *inter alia*, J. Vignon, *Solidarity and responsibility in the European Union*, Notre Europe Policy Brief, No. 26, June 2011.

inasmuch as solidarity is a multifaceted notion which (sometimes secretly) permeates the action of the EU institutions and the Member States, its effectiveness can be sought through a way that actually goes beyond the classical search for pure obligations and that is made by those instruments leading to overall results of solidarity. This is not a mere comforting conclusion. It is the awareness that real and desirable solidarity does not necessarily go through an obligation of assistance but certainly through the development of a complex and structural system of assistance mechanisms that have a permanent character. Effectively, the constant update with a prospect of optimisation and expansion of the scope of those mechanisms confirms that, while mobilised in situations of emergency, they are thought to be permanently available and not established 'on the spot' according to a case-by-case approach. Furthermore, the illustrated instruments are meant to operate in a coordinated and coherent way not only from a temporal point of view but also in terms of substance as demonstrated by the multiple interlinked references in the instruments of secondary law. Thus conceived, solidarity would no longer be a circumstantial requirement but a structural one, it would no longer be the contingent assistance offered to the single affected State but a paradigm for building a wide-ranging model of intervention that is intended to support the whole EU system. The emergency logic would give way to a structural logic that is beneficial for all the Member States whenever situations of crisis occur.

With this long-term perspective in mind, the idea which underpins the inclusion of conditions for the activation of some instruments of assistance also seems more justifiable. Certainly, one could argue that the inclusion of some strict requirements for the activation of the financial instruments of assistance in applying the concept of conditionality (Chapter III, para. 4.1) cannot be favourable because, whether too strictly applied or not, it would be prone to make solidarity a 'conditioned solidarity'. Similarly, the fact that some instruments have a last resort character (consider, for example, the Emergency Support Instrument and those to be activated under the solidarity clause) could apparently be intended as an indirect condition to diminish the scope of application of solidarity thereby limiting it to just very exceptional situations. However, the fact that the illustrated instruments to respond to situations of emergency are supported by conditioning elements could respond to the necessity of guaranteeing a model of co-responsibility among the Member States and between them and the EU institutions especially when they are experiencing a symmetric crisis. Indeed, besides being

the reflection of the content of the 'national identity clause', which requires the Union to respect the essential State functions thereby reinforcing the responsibility of the State in taking care of those under its jurisdiction, it is meant to have the purpose of complying with the principle of equality of the Member States.[13] By entailing that, *inter alia*, all Member States equally comply with all the common rules, when applied to the field of disaster response, this structural principle of EU law requires that the same opportunities of supranational assistance be guaranteed and that the same rules apply for all. Conditionality thus becomes a link between European solidarity and national responsibility, reflecting, in turn, the ultimate necessity of ensuring equality among the Member States for the EU's general interest. Respect of national identities and equality is then coupled with loyal cooperation that, as already stressed, has a special interplay with the notion of solidarity in situations of emergency (Chapter II, para. 2.2.2). Indeed, while solidarity underpins the measures of assistance and entails the sharing of financial and operative burdens, the loyalty principle ensures that they effectively are implemented by informing the interaction between the EU institutional actors and the Member States. Furthermore, the principle of loyalty plays an essential role in establishing a framework that balances the implementation of solidarity conducts of the actors involved with the need to guarantee that all the Member States comply with the rules in the same way, including in the event of emergencies. Accordingly, it seems that solidarity should be (fairly) read in conjunction with another requirement, that is the respect of the rules by the Member States. In the end, it is due to these elements which *prima facie* seem to limit the scope of solidarity that it is actually possible to think about a sustainable system of solidarity at the disposal of all the Member States.

The picture just described can be seen as a real step forward in the meaning of solidarity at the EU level in comparison to other supranational realities because it is no longer a question of being loyal to each other according to the classical perspective. This concerns the building of a system with a deeper nature and that, once consolidated, will make it easier to create a legal framework for the configuration of true and proper obligations to be ancillary to the further improvement of the existing system.

[13] L. S. Rossi, "The Principle of Equality Among Member States of the European Union", in L. S. Rossi, F. Casolari (eds), *The principle of equality in EU law*, Springer, 2017, pp. 3-42.

2. A change of paradigm needs a change of pace in the EU integration process

The complexity and multiple faces of solidarity in the EU legal order have repeatedly put it in a demanding position in terms of expectations. In particular, it had to confront the Member States' inclination to preserve their prerogatives and to avoid unfair or opportunistic behaviours.[14] Nonetheless, the multiplication of references to solidarity in the provisions of the Treaties and the continuous rereading and reinterpretation of the very norms of EU law according to a teleological approach will hopefully lead to a progressive increase in the application of this *sui generis* principle. Like the EU integration process, solidarity experiences a slow process of creation and is now certainly at an evolutionary stage towards its full accomplishment and potential. The crises the EU has been confronting over recent years (the economic, migration, and terrorist attacks) offer a major opportunity to ponder what solidarity implies with regard to concrete problems, rather than in an abstract theoretical vacuum.

The serious health emergency the EU is still facing, at the time of writing, is highlighting the existence of a common fate of the world's population and revealing the need of urgent political, health, and economic decisions not only at the national but also at the supranational level. The pandemic is putting the single national structures and models to the test by shining a light on the multiple strengths and weaknesses as well as requiring new strategic choices to be made that have a long-term perspective. Within the EU framework, the COVID-19 pandemic has generated a variety of reactions, from the unilateral closure of borders by Member States to emotional national reactions. The initial hesitation of some Member States – underlined also in the course of the present treatise – to respond to requests for assistance by others has been replaced by new opportunities of cooperation and solidarity both in operational and financial terms. Whilst not being an object of the present work as it goes beyond its circumscribed scope, in these last considerations, the robust measures already adopted by the European Central Bank (ECB) deserve to be mentioned. In the meeting of 18 March 2020, the Governing Council of the ECB decided to launch the Pandemic Emergency Purchase Programme (PEPP), a new temporary asset purchase programme of private and public sector securities to counter the serious risks to the monetary policy transmission mechanism and to the out-

[14] U. Steinvorth, "Applying the idea of solidarity to Europe", in A. Grimmel, S. My Giang (eds), *Solidarity in the European Union. A Fundamental Value in Crisis*, cit., p. 12.

look of the euro area posed by the outbreak and escalating diffusion of the coronavirus, COVID-19.[15] Moreover, following the Commission proposal,[16] in July 2020 the Members of the European Council[17] reached an agreement concerning the new instrument called 'Next Generation EU', that is a €750 billion recovery effort to help the EU tackle the crisis caused by the pandemic.[18] Clearly, there is no shortage of shortcomings, inconsistencies, belated responses, and doubts on the capacity to react to the emergency in a collective and satisfactory way. Additionally, this can also be motivated by the fact that the system of collective solidarity for responding to threats capable of affecting a wide range of States is not completely mature. Moreover, the alleged absence of 'moral hazard' due to the symmetric nature of the emergency cannot conceal the existence of political difficulties which were also revealed during the multiple meetings of the European Council. However, the construction of a system of solidarity capable of coping with similar crisis situations is all the more necessary and the political (in)capacity for adaptation and solidarity that the Member States and the EU institutions have shown so far should not be underestimated.

In a broader perspective, the COVID-19 crisis is not 'just' a major health

[15] European Central Bank, Decision (EU) 2020/440 of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17), *OJ* L 91, 25 March 2020. For comments, see L. Lionello, "La BCE nella tempesta della crisi sanitaria", in *SIDIBlog*, 28 March 2020; C. D'Ambrosio, "Dal Meccanismo Europeo di Stabilità ai "Corona Bonds": le possibili alternative per fronteggiare la crisi dell'eurozona a seguito dell'emergenza Covid-19", in *Eurojus.it*, *L'emergenza sanitaria Covid-19 e il diritto dell'Unione europea. La crisi, la cura, le prospettive*, 2020, pp. 115-127.

[16] European Commission, Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Europe's moment: Repair and Prepare for the Next Generation, COM(2020) 456 final, 27.05.2020. The plan was part of a comprehensive package of instruments to be included in the long-term EU budget for the recovery of the EU economy. For comments, F. Costamagna, M. Goldmann, "Constitutional Innovation, Democratic Stagnation? The EU Recovery Plan", in *Verfassungsblog*, 30 May 2020; M. Verwey, S. Langedijk, R. Kuenzel, "Next Generation EU: A recovery plan for Europe", in voexu.org, 9 June 2020, pp. 115-127.

[17] Conclusions of the Special meeting of the European Council 17-21 July 2020. For comments, see F. Croci, *Solidarietà tra Stati membri dell'Unione europea e governance economica europea*, cit., pp. 349-370.

[18] The total of €750 billion is split in loans in favour of the Member States and expenses, respectively for €360 and €390 billion. The centrepiece of the Next Generation EU programme is the Recovery and Resilience Facility with €672.5 billion in loans and grants available to support reforms and investments undertaken by EU countries. Moreover, the Recovery Assistance for Cohesion and the Territories of Europe (REACT-EU) includes €47.5 billion and additional budget is allocated to other European programmes or funds such as Horizon2020, InvestEU, rural development or the Just Transition Fund. The European Union Recovery Instrument (Next Generation EU) has been established by Council Regulation (EU) 2020/2094 of 14 December 2020, *OJ* L 433I of 22 December 2020.

emergency single Member States must confront. It has called for urgent action not only on health matters but mainly concerning structural economic and financial issues. Moreover, the COVID-19 crisis is putting to the test some other core values the EU is founded on, such as the rule of law, respect for individual rights, and protection of democracy. Thus, it is not just a matter of change of paradigm of solidarity. It asks for a change of pace in the EU integration process and the current emergency represents the yardstick against which the whole Union's failure or success will be measured[19]. In effect, the health status of the EU has not always been encouraging, but there is no doubt that the current emergency is something different to past occurrences because it is a crisis which involves the whole international community. Accordingly, it implies the necessity to rethink the resilience of the EU project and the role the EU wants to play in the constitution of a new international equilibrium that will follow this period of global crisis. The word 'crisis', even though slightly different in the official EU languages, has the same Hellenic etymology, that is *krisis*. It means 'decision' and, as further specified in the early 17th century, 'decisive point'. In the past, the EU Member States have postponed too many times the necessity to embark on a new path. However, 70 years after the Schuman Declaration, this 'decisive point' could be the occasion for the EU Member States to decide to start evolving in terms of values and objectives towards a new generation of the EU integration process.

[19] C. Amalfitano, M. Condinanzi, "Chi ha (ancora) paura dell'Europa? Qualche riflessione alla luce anche della pandemia da Covid-19", in C. Amalfitano, M. Codinanzi (eds), *Paura dell'Europa. Spunti di razionalizzazione*, Giappichelli, 2020, p. 1 ff.

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