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**THE CONCEPT OF SOLIDARITY  
WITHIN EU DISASTER RESPONSE LAW:  
A LEGAL ASSESSMENT**

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|               |   |
|---------------|---|
| <b>AASM</b>   | Association of the Associated African States and Madagascar                       |
| <b>ACS</b>    | Association of Caribbean States   |
| <b>AMCDRR</b> | Asian Ministerial Conference on Disaster Risk Reduction                           |
| <b>ASEAN</b>  | Association of Southeast Asian Nations  |
| <b>CDERA</b>  | Caribbean Disaster Emergency Response Agency                                      |
| <b>CECIS</b>  | Common Emergency Communication and Information System                             |
| <b>CFSP</b>   | Common Foreign and Security Policy  |
| <b>CJEU</b>   | Court of Justice of the European Union  |
| <b>COSI</b>   | Standing Committee on Internal Security   |
| <b>CSDP</b>   | Common Security and Defence Policy  |
| <b>DA(s)</b>  | Draft Article(s)  |
| <b>DRR</b>    | Disaster Risk Reduction   |
| <b>EMC</b>    | European Medical Corps  |
| <b>ECHO</b>   | Directorate-General for European Civil Protection and Humanitarian Aid Operations |
| <b>ECSC</b>   | European Coal and Steel Community   |
| <b>EEAS</b>   | European External Action Service  |
| <b>EEC</b>    | European Economic Community   |
| <b>EERC</b>   | European Emergency Response Capacity  |
| <b>ERCC</b>   | Emergency Response Coordination Centre  |
| <b>EU</b>     | European Union  |
| <b>EUSF</b>   | EU Solidarity Fund  |
| <b>EVHC</b>   | European Voluntary Humanitarian Aid Corps   |
| <b>ICRC</b>   | International Committee of the Red Cross  |
| <b>IDRL</b>   | International Disaster Response Law   |
| <b>IFRC</b>   | International Federation of Red Cross and Red Crescent                            |
| <b>ILC</b>    | International Law Commission  |
| <b>IPCR</b>   | EU Integrated Political Crisis Response   |
| <b>MIC</b>    | Monitoring and Information Centre   |
| <b>NGO</b>    | Non Governmental Organisations  |
| <b>OAS</b>    | Organisation of American States   |
| <b>OCHA</b>   | United Nations Office for the Coordination of Humanitarian Affairs                |
| <b>PSC</b>    | Political and Security Committee  |

|               |   |
|---------------|---|
| <b>SAARC</b>  | South Asian Association for Regional Cooperation  |
| <b>SADC</b>   | Southern African Development Community            |
| <b>TFEU</b>   | Treaty on the functioning of the European Union   |
| <b>TEU</b>    | Treaty on the European Union                      |
| <b>UCPM</b>   | Union Civil Protection Mechanism                  |
| <b>UNISDR</b> | United Nations Office for Disaster Risk Reduction |
| <b>UN</b>     | United Nations                                    |

# INTRODUCTION

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

*Robert Schuman, 9 May 1950*

Disasters have always been an important part in the history of the human species, as the eruption of Vesuvius in 79 A.D., the plague occurred during the Middle Ages or the recent tsunami in Asia. Imperatives of humanity have created moral interventions to assist victims of disasters and solidarity in response to calamities. On this occasion, it is worth recalling that some orders of chivalry, such as the Knights of Malta, founded in 1080, provided relief to those in need, including those affected by disasters. With the rise of the modern nation State and international law, in 1758 the Swiss diplomat and lawyer Emer de Wattel wrote the following passage:

“...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”<sup>1</sup>.

The creation of the International Committee of the Red Cross (ICRC) and the adoption of the Geneva Convention of 22 August 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field resulted from the concerns expressed over the protection of those wounded in the field during armed conflicts as form of a disaster. Equal recognition of the needs of those affected by other disasters began to come about in the second half of the nineteenth century. In

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<sup>1</sup> See, E. de Wattel, *Le droit des gens, ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains*, London, 1758, p. 114.

accordance with their mandate<sup>2</sup>, national Red Cross and Red Crescent societies provide assistance and relief in disasters which may afflict peoples during peacetime as a condition of their vigorous development and a useful preparation for their wartime work; in peacetime, they devote themselves to humanitarian work that corresponds to their wartime duties, that is, giving relief in case of public calamity which, like war, demands immediate and organised assistance. Nevertheless, the provision of international assistance to victims of disasters other than armed conflict has only positioned itself as a major issue on the agenda of the international community since the beginning of the twentieth century. The importance attached to disaster relief gained further recognition over the course of the past century as the frequency, intensity and complexity of disasters increased. With the formation of the International Red Cross and Red Crescent Movement and the establishment of the International Relief Union, international disaster relief began to make its way into the realm of international law. Since then, whereas mutual self-interest has driven States to conclude instruments concerning their conduct in war, international cooperation in the area of protection and assistance in the event of disasters seemed to take on a wider dimension.

## **1. Methodological premises of investigation**

### *1.1 Objective of the research and investigation plan*

The present work is aimed at exploring and evaluating the functional and normative impact of solidarity as conceived within the EU legal order and, in particular, within the so-called EU disaster response law, that is the set of legal instruments dealing with disaster response both within and outside the Union's territory. Indeed, on the one hand solidarity – to which the Lisbon revision has contributed to give impetus – represents the paradigm of reference of the structural and normative configuration of the very EU integration process. On the

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<sup>2</sup> See, Resolution no. 3 of the Second International Red Cross Conference, *Compte rendu des travaux de la Conférence internationale tenue à Berlin du 22 au 27 avril 1869 par les délégués des gouvernements signataires de la Convention de Genève et des Sociétés et Associations de secours aux militaires blessés et malades*, Berlin, 1869, p. 251.

other hand, the adoption of a common strategy addressing disaster response could be privileged field for extensive solidarity in the relationship between Member States and between them and the Union. Therefore, attempts will be made in answering the following questions: to what extent do the instruments of EU law intervening in the event of a disaster respond to the requirements of solidarity as expressed by the Treaties? What is the legal nature of solidarity within EU disaster response law? Does the principle of solidarity have a normative effect thus establishing solidarity obligations on Member States and on the Union in the event of a disaster? In order to respond these questions, the research work will be developed in the following way.

Chapter I starts from the finding that the growing number of disasters and subjects involved has recently forced the international community to consider the opportunity of elaborating a specific regulatory framework concerning the international response to such situations. Indeed, at present there is no universal and comprehensive legally binding set of regulations governing international response to large-scale disasters and prescribing specific obligations of solidarity upon States. Moreover, it illustrates and assesses the content of the Draft Articles on the *Protection of Persons in the Event of Disasters* on which the International Law Commission has worked on since 2008. The chapter ends with a brief report of the main instruments of regional cooperation that could foster better coordination among interventions and potentially establish specific obligations of solidarity upon States participating in those arrangements.

Chapter II serves as a sort of feeder between the international and EU law frameworks by focusing on the notion of solidarity as central principle and keystone of 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 dwelling also on its relationship with the principle of loyal cooperation. Perceived as instrument of ‘solidary integration’ between Member States and as addressee of the material solidarity enshrined in the Treaties, the Union has progressively developed a number of instruments capable to implement such a solidarity-based

approach. Hence, with particular reference to the EU competence in the field of disaster response, the analysis proposes a preliminary overall picture of the different legal means that will subsequently be explored by stressing their multilayered nature.

Chapter III is dedicated to the instruments providing for financial assistance – namely the EU Solidarity Fund and the emergency support instrument – as well as to the EU rules concerning the adoption of public measures State aids for supporting companies hit by a calamitous event. Indeed, EU solidarity in case of disaster 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. In this chapter, particular emphasis will be made on the relation between solidarity and the principle of conditionality which comes in when dealing with EU instruments of financial assistance.

Chapter IV explores the Union Civil Protection Mechanism which represents the main instrument providing for in-kind assistance and envisaging a more cooperative attitude among Member States, by rendering the EU catalyst of solidarity. The chapter develops around the main normative and institutional steps that have been adopted in the long way towards the creation of a more effective and functional Mechanism of civil protection at EU level. The inclusion of a specific legal basis (Article 196 TFEU) within the Lisbon Treaty and the adoption of the Council Decision 1313/2013/EU have marked the latest step of the ‘institutionalization’ of EU civil protection and the establishment of the Union Civil Protection Mechanism. The chapter ends with an overview of its main operational and legal characters by investigating the relevance of the principle of solidarity for the effectiveness of the very Mechanism and its interaction to the principle of loyal cooperation in this regard.

Chapter V, as 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. Therefore, its

content and implementation by the Union and the EU Members will be evaluated. Moreover, since it could be the synthesis and the link amongst all the examined instruments, it will be evaluated what are the interactions between the solidarity clause and the illustrated solidary mechanisms. Finally, it will be illustrated the real legal value of the solidarity clause and its implications in terms of duties imposed.

## **2. Theoretical premises of investigation**

Given the extension of the issue at stake and the broad variety of instruments that could be covered in the course of the whole work, it is firstly necessary to address some theoretical premises. Since the analysis is entirely based on the notion of solidarity within the EU legal order and aims at evaluating how it shapes the instruments to be activated in the field of disaster response and whether it can establish specific duties on the Member States and on the Union, it is above all crucial to explore the notion of solidarity according to the international legal theory in order to better assess the peculiarity of the EU legal framework. In addition, considering that to research or discuss the consequences of any phenomenon it is indispensable to have a clear idea of what that phenomenon is, an initial clarification of the term ‘disaster’ is required in order to elucidate what is in and what is outside of the field of investigation of the present work.

### *2.1 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 to the creditor the whole debt. Over the centuries, this definition of solidarity has assumed a sociological dimension by becoming expression of the sameness of individuals who share a common interest. It is akin to the notion of *fraternité* which requires individuals identify themselves with others and are bound together by a feeling of common identity thus allowing them

to receive mutual support when needed. As a consequence, at micro level and from a sociological point of view, solidarity includes not only philanthropic or altruistic evaluations, but also a reciprocal (or self-interest) dimension institutionalised and normalised through the establishment of citizenship rights<sup>3</sup>. Thus, solidarity reflects also in the preparedness to pool and share resources with others, as well as in the readiness for collective action<sup>4</sup>. However, according to the classic theory pioneered by Durkheim, in homogeneous societies such as the 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 supranational level, the heterogeneous construction based on diversity and legal plurality makes solidarity inspired more by the *do ut des* formula, as there is not the same perception of others<sup>5</sup>. When the notion of solidarity entails elements of reciprocity and interdependence, it departs from the notion of *fraternité* thus creating societies in which, more likely, individuals engage in solidarity when they expect a future return from their actions.

Solidarity is, therefore, a very complex notion since, unlike other principles that find legitimacy from universal rights, a moral dimension and philanthropic-based aspirations are generally attributed to it, even though hardly measurable and observable<sup>6</sup>. For the purposes of the present work, the first main problem is to

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<sup>3</sup> See, A. Somek, *Solidarity decomposed – being and time in European citizenship*, University of Iowa Legal Studies Research Paper, 2007, pp. 7-13.

<sup>4</sup> See, 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, *Promoting solidarity in the European Union*, OUP, 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*, OUP, 2005, pp. 19-20.

<sup>5</sup> See, E. Durkheim, *The division of Labor in Society*, Mcmillan Publishers Ltd., 1984.

<sup>6</sup> See, 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*, Vol. 19, 2006, pp. 611-632. Generally, solidarity refers to relationships between human beings belonging to the same community, group or society. The idea of solidarity as object of sociological research was initially theorized in France by Durkheim who distinguished between “mechanical solidarity” (*solidarité mécanique*) – based on resemblances

frame the concept and to explore its effective scope within the international legal framework and according to the international legal theory.

International law is not characterised by a longstanding tradition of solidarity, but rather by the idea of sovereignty, consolidated with the rising nation-States and empires after and against the previously united theological and imperial framework. Instead, solidarity as principle of international law was first assumed in the mid-eighteenth century by Emer de Wettel who argued that States have a duty to mutual assistance in order to improve their general situation and relations<sup>7</sup>. Hence, he considered solidarity as the essential and imperative condition for the existence of a community of States. 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 crashing 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 made clear the necessity to bring international law legislation beyond old frontiers and to meet new fields of application by increasing the necessity of major multilateral cooperation.

The Charter of United Nations represents the first piece of evidence of the operation of 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 resolutions of the UN General

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between individuals – and “organic solidarity” (*solidarité organique*) – based instead on the integration of different groups of individuals through the division of labour.

<sup>7</sup> See, E. de Wettel, *Le droit des gens, ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains*, cit.

Assembly – namely resolution 56/151 of 19 December 2001<sup>8</sup> and resolution 57/213 of 18 December 2002<sup>9</sup> – 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 supposed anarchical international system lacking a supreme authority and the tensions between the national realm and solidarity desires, the progressive introduction of ethical and moral concerns in the development process of the international legal system has thus contributed to reinforce the broader idea of a world community of interdependent States. At level of practice, 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<sup>10</sup>. Indeed, States have progressively perceived that acting in a manner that preserves the good of the whole community also preserves their own interests. Progressively, strict voluntarism and sovereignty have thus been challenged and the fundamental transformation in 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 level<sup>11</sup>. In this sense, current international framework would be characterised by a shift from an “essentially negative code of

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<sup>8</sup> See, UN General Assembly, Resolution on the Promotion of a democratic and equitable international order, A/RES/56/151 of 19 December 2001.

<sup>9</sup> See, UN General Assembly, Resolution on the Promotion of a democratic and equitable international order, A/RES/57/213 of 18 December 2002.

<sup>10</sup> These obligations, which have *erga omnes* character, have been articulated in the well-known Barcelona Traction case, in which the International Court of Justice has drawn a distinction between the obligation of the State towards the international community as a whole and those *vis-à-vis* another States. See, ICJ, *Barcelona Traction case*, Belgium v. Spain, 1970.

<sup>11</sup> This new theory of international law has been proposed by Professor Friedman, see W.G. Friedman, *The Changing Structure of International Law*, Stevens and Sons ed., 1964.

rules of abstention to positive rules of cooperation”<sup>12</sup>. This means to take the notion of solidarity in the theoretical discourse concerning the nature of international law and to make it one of the facets of cooperation *lato sensu*<sup>13</sup>. 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”<sup>14</sup>.

In such a broad meaning, solidarity thus becomes synonymous with cooperation which, certainly, is nowadays part of a number of international normative instruments. Nevertheless, this use of solidarity is not particularly incisive and clarifying also because solidarity does not perfectly equate cooperation, but rather contain it. Therefore, from the international law perspective the main problem is how to frame the concept of solidarity: what does it exactly mean? Is it an idea, a value or a principle? Or is it all of these? Actually, no clear answer has been proposed so far, but it appears necessary to evaluate whether solidarity can be

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<sup>12</sup> *Ibid.*, p. 62.

<sup>13</sup> 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 and 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. The term ‘cooperate’ comes from the Latin *cooperari* which is formed by *co-* and *operari* which means “work together”, easily reflecting the very essence of the term ‘solidarity’. For deeper insights on 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.

<sup>14</sup> See, 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.

addressed as notion independent from that of cooperation and to what extent it can be said more than the general concept of ‘neighbourness’.

What reported above leaves no doubt on solidarity as a value or a moral attitude to be pursued within the international community<sup>15</sup>. In this sense, the concept does not have a legal content, but 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 the definition 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”<sup>16</sup>.

From such a perspective, solidarity would be – albeit its relevance – just a universal value of the international community which arises only from international treaty law. Hence, the tendency to establish constitutions and to favour forms of integration at international level is probably the highest expression of solidarity as project to create a ‘community’<sup>17</sup>. This ‘constitutional’ role played by solidarity is particularly evident in regional contexts, where the concept acts as a cornerstone for supranational integration. Apart from the

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<sup>15</sup> See, B. Simma, A. Paulus, “The ‘International Community’: Facing the Challenge of Globalization”, in *European Journal of International Law*, Vol. 9, 1998, pp. 266-277.

<sup>16</sup> See, L. Boisson de Chazournes, “Responsibility to Protect: Reflecting Solidarity”, cit., pp. 94–95.

<sup>17</sup> See, J.H.H. Weiler, “The political and legal culture of European integration: an exploratory essay”, in *I-Con*, Vol. 9, 2001, pp. 678- 694.

European Union experience, the constitutional side of solidarity also appears in other regional realities. The African Charter on Human and Peoples' Rights<sup>18</sup> 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 preamble of the Charter of the Association of Southeast Asian Nations (ASEAN)<sup>19</sup> 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 and 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<sup>20</sup>. According to this viewpoint, solidarity is thus a multifaceted notion which can offer different declinations according to the different sectors and the approaches considered. First of all, solidarity as principle implies assistance and collaboration for achieving a goal as well as for recovering from a critical situation. At 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 (directly) 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

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<sup>18</sup> The African Charter on Human and Peoples' Rights has been adopted on 27 June 1981 and entered into force on 21 October 1986.

<sup>19</sup> The ASEAN Charter was adopted on 20 November 2007 and entered into force on 15 December 2008.

<sup>20</sup> In this regard, a very detailed overview is 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.

take into account the interests of others and provide them with assistance, often on a spontaneous basis<sup>21</sup>.

Rüdiger Wolfrum has, however, made a step forward in this regard by describing the principle of solidarity as that consideration which “*makes a joint action mandatory*” wherever there exists a community of States based upon common values and common interests, and that calls for balancing obligations in joint actions<sup>22</sup>. In this perspective, solidarity has thus a constitutional dimension that, when interacting with norms of positive international law, is more than a ‘simple’ driving principle and implies extra-legal obligations. It is, indeed, core and interpretative tool of many relevant primary and secondary international rules which have been constituting the “*natural habitat for the creation of solidarist primary rules*”<sup>23</sup>. In this way, the principle of solidarity has become trigger and cornerstone of both a normative and an operational dynamic in a number of branches of international law by affecting also 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 a common good<sup>24</sup>. 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 to be perfectly balanced. Such combination of, respectively, negative and positive dimensions completes the process of ‘constitutionalisation’ of the principle thereof and confirms the transformation of international law into a

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<sup>21</sup> This definition is driven by that provided by L. Boisson de Chazournes in “Responsibility to Protect: Reflecting Solidarity?”, cit., p. 93.

<sup>22</sup> 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*, Vol. 49, 2009, pp. 8-20.

<sup>23</sup> See, 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.

<sup>24</sup> See, A.G. Koroma, “Solidarity: Evidence of an Emerging International Legal Principle”, cit., p. 103.

value based international legal order<sup>25</sup>. Furthermore, the multifunctional character of solidarity makes it one of the constituent element of the concept of justice in public international law. The principle of solidarity has, hence, reached different stages of development in the theoretical discourse. But, such a perspective – which makes solidarity both value and constitutional principle of international law – encounters some obstacles and doubts.

First of all, from the perspective of legal experience, the whole range of qualifications of solidarity illustrated above comes into a less sharp focus. Solidarity as a fact is present, but relatively insignificant in its implications as legal principle because in its practical application it needs to be balanced against other applicable principles, especially that of sovereignty and consent. The emerging character of the principle of solidarity is inevitably linked to the recognition that the “*international law of solidarity is progressively realising*”<sup>26</sup>, but also that it is “*bound to create conflict*” with the idea of State sovereignty<sup>27</sup>.

Secondly, the characterisation of solidarity as a key principle of international law does not appear to be leading to clear implications in terms of normative quality. As a matter of fact, there is still a lot of scepticism among scholars about the autonomous normative character of solidarity in international law. Despite many rules in international law express some aspects of solidarity and it is used as parameter of interpretation, at present there is not any rule expressly prescribing solidarity *per se* as a legally binding norm. Moreover, as underlined by the very Wolfrum, solidarity may be a principle inherent in some regimes, but not in every regime: it lacks universality<sup>28</sup>. It is too abstract and indefinite in contours and contents to become a normative concept that produces steering effects on State’s behaviour in international relations. It is a mechanism for inspiring and

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<sup>25</sup> See, R. Wolfrum, “Solidarity amongst States: An Emerging Structural Principle of International Law”, in *Indian Journal of International Law*, cit., p. 8.

<sup>26</sup> See, 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*, Vol. 10, 2008, p. 196.

<sup>27</sup> See, E. Jouannet, “What is the use of International law? International law as a 21<sup>st</sup> century guardian of welfare”, in *Michigan Journal of International Law*, Vol. 28, 2008, p. 818.

<sup>28</sup> See, R. Wolfrum, “Concluding remarks”, in R. Wolfrum, C. Kojima (eds.), *Solidarity: A Structural Principle of International Law*, cit., p. 228.

interpreting 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 complex<sup>29</sup>.

In the absence of clear obligations of solidarity, as stressed 350 years ago by Emer de Wattel, no rights of solidarity may exist, but merely legitimate expectations, which not necessarily result in effective interventions<sup>30</sup>. Bridging moral values into the realm of law, where State sovereignty and the principle of subsidiarity characterise the interdependence-based structure of international law, can be a limit to the acknowledgment of duties and rights of solidarity. And when rights and duties do not balance, solidarity cannot prevail.

Even though the arguments addressed limit the acknowledgment of the existence of solidarity duties of customary law, specific obligations of solidarity can be negotiated between States through a treaty or even decided upon by an international organisation. In particular, regional contexts – and above all the EU which is so far a unique integration project at international level – are perfect examples of regimes where solidarity can play an extraordinary role not only as interpretative tool, but also as normative content. Indeed, when a community sharing same values and principles which grow sympathies between the partners is created, the said community can choose to be based upon solidarity thus making it a combination of *lex lata* and *lex ferenda*.

This is exactly what may happen in the field of disaster relief, that is an area of international law where the actors endeavour to act in favour of another State not for immediate profit, but rather because motivated by what could be called solidarity. Indeed, situations of disaster as those described in the following paragraph trigger not only individuals, but also States, NGOs and other international actors to provide for immediate assistance to local communities because of primarily driven by empathy and proximity.

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<sup>29</sup> See, E. Jouannet, “What is the use of International law? International law as a 21<sup>st</sup> century guardian of welfare”, cit., p. 815.

<sup>30</sup> 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.

## 2.2 Defining the term 'disaster': a complex issue

The root of the word 'disaster' derives from Latin *dis astrum* and can be translated as 'evil star'. In general, it implies a sudden overwhelming and unforeseen event. However, a disaster is not a single material reality, but a concept by which qualifies various events that can go from the derailment of a train in an earthquake, the explosion of a chemical plant, the epidemic affecting entire populations to a landslide that intersects a highway.

In the minds of many, hazardous events which may cause disasters are divided into those originating either from forces of nature or from the effects of humans, but actually the classification is much more complex. As a result, even though the following sections will follow the traditional categorisation, it will be also clear that, given the amount of phenomena which have a hybrid origin, the strict separation between natural and man-made catastrophes represents just one aspect of a larger differentiation among disasters which may include also health emergencies.

### *a) Natural disasters*

Natural disasters are naturally occurring physical phenomena caused either 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). A widely accepted definition characterizes natural hazards as "those elements of the physical environment, harmful to man and caused by forces extraneous to him"<sup>31</sup>. Notwithstanding the term 'natural', a natural hazard has an element of human involvement. A physical event, such as a volcanic eruption, that does not affect human beings is a natural phenomenon but not a natural hazard. A natural phenomenon that occurs in a populated area is a hazardous event. A hazardous event that causes unacceptably large numbers of

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<sup>31</sup> See, I. Burton, R. W. Kates, G. F. White, *The Environment as Hazard*, Oxford University Press, New York, 1964, p. 413.

fatalities and/or overwhelming property damage is a natural disaster<sup>32</sup>. In areas where there are no human interests, natural phenomena do not constitute hazards, nor do they result in disasters. This implies that the calamitous consequences of such an event concern just the human and/or material dimension, but not the environmental one. Actually, in case of natural calamity the environment is able to recreate a new equilibrium.

The catastrophes of non-human origin must be divided into those which have a sudden character and those which are durable or creeping. In the first circumstances, humans are generally seen as having no responsibility in creating natural hazards and impotent to do anything, or very little, to mitigate them, as these are events marked by suddenness and unforeseeability. In the second one, a series of hazards which can strike along a continuum, from instantaneous impact to the gradual or long prolonged effects of the so-called creeping disasters. For instance, drought offers a typical case of natural calamity recorded starting from the origins of human history and it is linked to the natural cycle. When pushed, however, this narrow definition begins to expand and it appears clear the human responsibility in the existence or extent of the catastrophe: a voluntary deforestation or an excessive use of the soil may quicken drought. According to this view, disasters such as famine and global climate change could be considered 'slow-onset' disasters.

As observed by former UN Secretary-General Kofi Annan, "the term 'natural disasters' has become an increasingly anachronistic misnomer. In reality, it is human behaviour that transforms natural hazards into what should be called unnatural disasters"<sup>33</sup>. Indeed, from a legal point of view, it is fundamental to understand that human intervention can increase the frequency and severity of natural hazards. In some circumstances, disasters arising from natural hazards would not have occurred or would have had a smaller impact on communities had it not been for actions by people: deforestation for firewood or building materials has resulted in landslides during heavy rainfall in Central and South America;

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<sup>32</sup> For a more specific explanation of the terminology used, see D. Alexander, *Confronting catastrophe: new perspectives on natural disasters*, Oxford University Press, 2000, pp. 14-29.

<sup>33</sup> See, UN Secretary General, Report to the United Nations General Assembly on the Work of the Organization, U.N. Doc. No. A/54/1, 1999, para. 11.

overgrazing of cattle has allowed desertification in the Sahel; uncontrolled housing construction close to beaches increases risks from tsunamis and storms; removal of wetlands has eliminated a natural mitigating factor for the damage caused by tropical storms. In addition, human intervention may reduce the mitigating effect of natural ecosystems. Destruction of coral reef, which removes the shore's first line of defence against ocean currents and storm surges, is a clear example of an intervention that diminishes the ability of an ecosystem to protect itself.

As a consequence, for some events classified as natural disasters, the potential risks could be dramatically reduced through a careful planning of construction codes for reducing loss from earthquakes; food security programmes to protect against food crises; social programmes for reducing vulnerability to disasters which otherwise could not be controlled. Besides, human responsibility rises for what concerns the realization of early warning systems providing information on an emerging dangerous circumstance where that information can enable action in advance to reduce the risks involved. For instance, alerting costal populations of approaching tsunamis can give populations time to be evacuated from danger areas. Similarly, zoning codes, where enforced, can keep populations from building in flood-prone areas and a responsible land use can reduce the risk of landslips caused by unchecked felling of trees<sup>34</sup>. As a result, a deep knowledge of the risk of the natural event is essential to mitigate the extent of harm which may follow a calamitous event.

#### *b) Anthropogenic disasters*

Though weather and geologically-related disasters are considered to have generated the greatest number of deaths and economic loss, disasters deriving by human activities are increasing in importance. Anthropogenic disasters are

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<sup>34</sup> See, 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. In addition, 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.

heterogenic and collect different types of events which have some peculiar elements.

The first group of disasters caused by human beings have technological or industrial nature. The Chernobyl affair, which is considered the world's worst nuclear power plant accident in the history in terms of costs and casualties, represents the typical example of technological disaster<sup>35</sup>. Of course, technological risks can be further aggravated when combined with the risks of natural disasters, as demonstrated by the more recent Fukushima Daiichi nuclear disaster resulting from an earthquake and a subsequent tsunami<sup>36</sup>. The impact of a natural disaster on a facility storing or processing chemical substances can result in the release of hazardous materials with possibly severe off-site consequences through toxic-release, fire or explosion scenarios. Experts refer to this as a 'synergistic' disasters or Na-Techs<sup>37</sup>. One of the main problems of Na-Tech accidents is that, considering the simultaneous occurrence of a natural disaster and a technological accident, both require simultaneous response efforts in a situation in which lifelines needed for disaster mitigation are likely to be unavailable, as they may have been downed by the natural disaster.

The second group of catastrophes to be mentioned in this section are the so-called 'complex emergencies' which represent the worst disasters that may affect a population not only because they are complex combinations of both natural and anthropogenic causes, but also because there is an intentional component. In fact, in this category it is possible to include civil or international conflicts, as well as

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<sup>35</sup> For further information on the Chernobyl accident, see Report of the United Nations Scientific Committee on the Effects of Atomic Radiation, *Health effects due to radiation from the Chernobyl accident*, 2008, available at [http://www.unscear.org/docs/reports/2008/11-80076\\_Report\\_2008\\_Annex\\_D.pdf](http://www.unscear.org/docs/reports/2008/11-80076_Report_2008_Annex_D.pdf).

<sup>36</sup> See, H. Funabashi, "Why the Fukushima Nuclear Disaster is a Man-made Calamity", in *International Journal of Japanese Sociology*, Vol. 12, 2012, pp. 65-75.

<sup>37</sup> The expression "Na-techs" (natural and technological disasters) has been adopted during the Yokohama Conference on Natural Disaster Reduction held in Japan in 1994. In particular the technical committee on "Natural disaster reduction: interrelationships between technological and natural hazards" affirmed that the concept of Na-techs should be fully recognized and that it should be fully included in environmental aspects of disasters. See, Report of the World Conference on Natural Disaster Reduction, Yokohama, Japan, 23-27 May 1994, A/CONF.172/9 [P], pp. 36-37.

terroristic attacks which provoke humanitarian catastrophes resulting from deliberate violence. Actually, for what concerns armed violence in the form of conventional warfare, for a long time it has not been equated to natural or industrial disasters. These were ‘horrors of war’ that could not approximate traditional catastrophic events because they were conceived as inevitable products of a major political and social phenomena. However, some core principles of action invoked in case of natural and industrial disasters have progressively been extended to humanitarian catastrophes caused by conflicts as outbreaks of war not only determine civilian casualties, but they may pose also large-scale medical problems such as epidemics, lack of water, accumulation of rubbish, displaced persons, refugees, food shortage and hunger. In addition, the effects of a conflict continue for decades as a result of the remaining landmines and displaced populations, as well as of the economic consequence to the countries affected and the entire region. Moreover, as with natural or technological disasters, both internal and international conflicts have consequences not only on the local population, but also on the surrounding environment and on cultural heritage<sup>38</sup>. However, it is worth to underline that, notwithstanding such evaluations, yet there is not any international consensus on the potential inclusion of armed conflicts and terrorist attacks within the concept of ‘disaster’ as such.

### *c) Health emergencies*

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,

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<sup>38</sup> Theft, war, civil disorder, terrorism, neglect and vandalism are human factors in the accidental or wilful destruction of heritage. International community has experienced more than once how shocking the effects of a violent struggle can be on the heritage of countries such as the former Yugoslavia, Afghanistan and Iraq. Statues are blown up because they are considered an insult to the “only and right religion”, archaeological sites are occupied by foreign troops and destroyed in the process, and archives are deliberately obliterated as part of an ethnic cleansing policy. For further information, see *Managing Disaster Risks for World Heritage. World Heritage Resource Manual*, UNESCO, 2010.

injury, illness or other health impacts, property damage, loss of livelihoods and services, social and economic disruption, or environmental damage. Examples of biological disasters include outbreaks of epidemic or pandemic diseases, plant or animal contagion, insect or other animal plagues and infestation. While the term 'epidemic' is generally used to indicate the occurrence of a disease affecting a disproportionately large number of individuals within a population, a community, or a region at a particular time, such as Cholera or Ebola, pandemics are epidemics that spread across a large region, a continent, or even worldwide, such as the influenza H1N1 (Swine Flu). The United Nations have contributed to include health crises as emergencies able to jeopardise the functioning and the stability of the affected societies. In this regard, it is noteworthy the position adopted in 2014 with reference to the Ebola outbreak which was defined by the General Assembly as a public health crisis of international concern<sup>39</sup> and by the UN Security Council as a threat to international peace and security<sup>40</sup>.

Even though these phenomena have generally a natural origin, since human being is involved just in the phase of transmission of the disease, there are some cases in which human agency may be the trigger element, it is the so-called bioterrorism. A biological attack is the deliberate release of germs or other biological substances that can make people sick. The three basic groups of biological agents that would likely be used as weapons are bacteria, viruses and toxins. These agents are typically found in nature, but it is possible that they could be changed to increase their ability to cause disease, make them resistant to current medicines, or to increase their ability to be spread into the environment. Biological agents can be spread through the air, through water, or in food. Terrorist groups may use biological agents because they can be extremely difficult to detect and do not cause illness for several hours to several days. The contribution of human activity can be, hence, particularly relevant mainly in the phase of prevention.

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<sup>39</sup> See, UN General Assembly, *Measures to contain and combat the recent Ebola outbreak in West Africa*, Resolution A/RES/69/1, 19 September 2014.

<sup>40</sup> See, UN Security Council, *Peace and Security in Africa*, Resolution S/RES/2177, 18 September 2014.

### 2.2.1 The definition of ‘disaster’ in some international legal instruments: what clarity?

The realities described above vary so widely because the notion of ‘disaster’ is understood in the different ways depending on whether one is a geologist, physician, politician, sociologist, economist or a lawyer<sup>41</sup>. Such a complexity is also the reason why so far the term ‘disaster’ lacks a univocal and generally accepted legal definition at international level<sup>42</sup>.

Indeed, as it will be clear after the reading of the following definitions provided by 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.

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<sup>43</sup>.

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<sup>41</sup> 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.

<sup>42</sup> See, UN Special Rapporteur Eduardo Valencia Ospina, *Preliminary report on the protection of persons in the event of disasters*, cit., p. 16; C. Focarelli, “Duty to Protect in Cases of Natural Disasters”, in *Encyclopaedia of Public International Law*, Oxford University Press, 2013.

<sup>43</sup> See, 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. The full text is available at <http://www.ifrc.org/Docs/idrl/I260EN.pdf>.

According to Article 1(d) of the Agreement establishing the Caribbean Disaster Emergency Response Agency (CDERA)<sup>44</sup>,

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 of “disaster”, 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<sup>45</sup>.

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

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<sup>44</sup> See, Agreement establishing the Caribbean Disaster Emergency Management Agency, 1991. The full text is available at [http://www.caricom.org/jsp/secretariat/legal\\_instruments/agreement\\_cdera.jsp](http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_cdera.jsp).

<sup>45</sup> See, ASEAN Agreement on Disaster Management and Emergency Response Vientiane, 2005, Article 1(3). Available at <http://www.asean.org/communities/asean-political-security-community/item/asean-agreement-on-disaster-management-and-emergency-response-vientiane-26-july-2005-4>.

environment, considerable material loss and disruption of vital activities of people<sup>46</sup>.

For what concerns 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:

“Catastrophe” : 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<sup>47</sup>.

In the second place, it is worth to analyse 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,

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<sup>46</sup> See, Agreement between Governments of Member States of Shanghai Cooperation Organization on Cooperation in Delivery of Assistance for Emergency Liquidation, 2005, Article 1. The text of the agreement is available at <http://www.ifrc.org/Global/Photos/Asia%20Pacific/201412/AGREEMENT%20between%20Governments%20of%20Member%20States%20of%20Shanghai%20Cooperation%20Organization%20on%20Cooperation%20in%20Delivery%20of%20Assistance%20for%20Emergency%20Liquidation.pdf>.

<sup>47</sup> See, 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. The full text is available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000208367>.

whether developing suddenly or as the result of long-term processes, but excluding armed conflict<sup>48</sup>.

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<sup>49</sup>.

For what concerns the EU context, Decision 1313/2013/EU of the European Parliament and the Council on a Union Civil Protection Mechanism labels a disaster as:

any situation which has or may have a severe impact on people, the environment, or property, including cultural heritage<sup>50</sup>.

Besides, the *Institut de Droit International* has adopted a very broad definition<sup>51</sup>:

“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).

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<sup>48</sup> See, Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance, Definitions. The full text is available at <http://scm.oas.org/pdfs/2010/CEPCD02642e.pdf>

<sup>49</sup> See, International Strategy for Disaster Reduction (ISDR), UNISDR Terminology on Disaster Risk Reduction, available at [www.unisdr.org/eng/library/UNISDR-terminology-2009-eng.pdf](http://www.unisdr.org/eng/library/UNISDR-terminology-2009-eng.pdf).

<sup>50</sup> See, 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).

<sup>51</sup> See, Resolution of the Sixteenth Commission on Humanitarian Assistance, Institut de Droit International, 2 September 2003, Article 1.2. The text of the Resolution is available at [http://www.idi-iil.org/idiE/resolutionsE/2003\\_bru\\_03\\_en.PDF](http://www.idi-iil.org/idiE/resolutionsE/2003_bru_03_en.PDF).

At the same time, it is worth to highlight 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)”<sup>52</sup>.

Finally, the International Law Commission confirms the trend by affirming in the Draft Articles on Protecting People in the Event of Disasters 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<sup>53</sup>.

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 making reference to the impact on people as well as on property, cultural heritage and environment that a disaster may have, there is no convergence on the origins of the disaster<sup>54</sup>. In particular, as made evident in the definitions of the *Institut de Droit International* and of the International Law Commission, an important distinction resides on the inclusion or not of armed conflicts and violence as examples of disaster. Secondly, 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

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<sup>52</sup> See, Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters, 2005, p. 1, footnote 2. Available at <http://www.unisdr.org/2005/wcdr/intergover/official-doc/L-docs/Hyogo-framework-for-action-english.pdf>

<sup>53</sup> See, International Law Commission, *Protection of persons in the event of disasters*, Draft Articles 1-5, Document A/CN.4/629, Article 3.

<sup>54</sup> See, C. Leben, “Vers un droit international de catastrophes?”, in *International Aspects of Natural and Industrial Catastrophes*, cit.

Commission recognise that calamitous events may be the result of complex and long-term processes<sup>55</sup>. In addition, both the Hyogo Framework and the EU Decision 1313/2013 cover also those events that can even potentially provoke severe damages. Despite all these distinctions find their source on the different areas of application of each instrument reported, they also make clear the difficulty to outline a univocal and comprehensive definition of the term ‘disaster’ without raising some critical issues.

### **3. The scope of investigation of the present work: some clarifications**

The survey on the diverse definitions of ‘disaster’ that it is possible to encounter within the main international legal instruments serves not only as demonstration of the complexity of *subjecta materia*, but also as starting point for specifying the field of investigation of the present work.

The multiplicity of elements and variables that the concept of ‘disaster’ may encompass makes essential a clarification of what kind of situations the present work covers and what it excludes. First of all, on the basis of what established in the main legal instruments of disaster response law and specified by the International Law Commission<sup>56</sup>, it has been decided to consider just those instruments to be activated in the event of man-made (intended as technological, nuclear and industrial) or natural disasters thereby excluding other situations of emergency such as the migration crisis as well as armed conflicts. Therefore, despite over the years at the EU level the notion of ‘disaster’ has been quite extended and the instruments that will be illustrated may be activated also in other

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<sup>55</sup>Long-term processes include the so-called “creeping disaster” which are formed by the accumulation of partial damaging effects but that in the long term can lead to major and irreversible damage; as well as by those durable phenomena that hit some regions in a repeated and constant way. Into this question, some scholars have doubts on the opportunity to consider progressive deforestation in some parts of the world, the extension of drought, soil depletion, flooding and other phenomena like air pollution by discharge of carbon dioxide from factories and traffic can lead, in the long term, the upheavals of the most fundamental balance of “ecosystems” of the planet raising fears of possible occurrence of “global disasters”. See, D. Alexander, “The Study of Natural Disasters, 1977 - 1997: Some Reflections on a Changing Field of Knowledge”, in *Disasters*, Vol. 21 (4), 1997, pp. 284-304.

<sup>56</sup> See, *infra*, Chapter I, para. 3.

kinds of emergency<sup>57</sup>, neither the instruments established according to Article 80 TFEU, nor the tools that are part of the Common Foreign and Security Policy (CFSP), nor those aimed at responding to the financial crisis will be taken into account. However, it has been chosen to use also terms like ‘emergency’ and ‘crisis’ as synonyms of the term ‘disaster’.

Secondly, as made evident by the investigation plan, the research will be limited to the instruments designed to immediately (or almost) respond to the effects of onset disasters, thereby leaving aside those operating in the prevention and long-term recovery phases. Moreover, since for the purposes of the present work it is not relevant the transnational character of the emergencies to be tackled, it is essential to stress that the analysis will focus in general on all those situations that go beyond the capabilities of the affected State and that, therefore, require an external response. With regard then the specific scope of application of the present work, it will be dedicated to explore the impact of solidarity in the instruments of EU law dealing with the occurrence of disasters within the territory of the EU Member States. Having specified that, some references to the external dimension of the EU intervention in this field will be made in order to complete the whole framework of analysis.

Thirdly, given the heterogeneous and complex nature of the legal tools that will be analysed as well as of the very concept of solidarity as conceived within the EU legal order, the present work will not be limited to underline the impact of solidarity at interstate level, but will consider its legal effectiveness also in the relations between the Union and Member States.

Finally, it is necessary to underline that, with regard to the Union Civil Protection Mechanism, in the present work some references to recent legislative developments have been included, but not deeply analysed because they concern a Commission proposal currently under examination of the Council and the European Parliament.

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<sup>57</sup> In this regard, it is suffice to say that armed conflicts and terrorist attacks may be considered as specific situations triggering the activation of the Union Civil Protection Mechanism. Moreover, it is remarkable that the emergency support instrument has been established exactly to provide for financial assistance to those Member States seriously affected by the migration crisis even though it could be used also on occasion of other calamitous events strictly speaking.

# CHAPTER I

## REVISITING SOLIDARITY IN INTERNATIONAL DISASTER RESPONSE LAW

### 1. Preliminary remarks

In the last century, imperatives of humanity and solidarity have prompted massive international interventions to assist the victims of disasters. But, in recent times, the need for a framework that clearly addressed the responsibilities of States and of other international actors in disaster settings emerged for responding to the increasing requirements of international solidarity.

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<sup>58</sup>. Unfortunately, it has never become effective and, ultimately, failed due to a lack of funding. The next effort to create a comprehensive international legal regime for international disaster assistance did not come until fifty years later, when the Office of the United Nations Disaster Relief Coordinator<sup>59</sup> proposed a Draft Convention on Expediting the Delivery of Emergency Assistance to the UN Economic and Social Council. Despite such a Draft Convention sought to solve a number of crucial issues, it was never taken up

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<sup>58</sup> The International Relief Union was designed to be a centralized operational agency aimed at channelling international funds and support in disaster settings, coordinating other actors, and promoting study and research on disaster management. However, it was never able to effectively carry out its mission, due mainly to the crippling lack of funds incident and to its inability to command regular contributions from participating States. For further information on the International Relief Union, see, P. Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Action in International Law and Organization*, Martinus Nijhoff Publishers, 1985.

<sup>59</sup> The Office of the United Nations Disaster Relief Coordinator was the predecessor to the present-day Office for the Coordination of Humanitarian Affairs (OCHA).

by the United Nations General Assembly<sup>60</sup>. Notwithstanding these failures, international law on disaster management has developed at the global level on separate ways in many treaties dealing with different branches of international law<sup>61</sup>, as well as in a number of soft law instruments, such as resolutions, declarations, codes, models, and guidelines, that are not formally binding but that are evidence of an overall international consensus<sup>62</sup>. Besides these, in recent decades, a number of universal, regional, and even bilateral treaties strictly related to disaster response have been adopted.

At universal level two different trends have emerged. On 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 universal treaties which regulate general issues, such as the transport of goods by sea or air, customs, health regulations, human rights,

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<sup>60</sup> The Draft Convention on Expediting the Delivery of Emergency Assistance was proposed in 1984. See, UN Doc. A/39/267/Add.2. See also, 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. For further information see, 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.

<sup>61</sup> It is relevant to underline the strong relationship between international disaster response law and some other branches of public international law that contribute to shape its form and substance. In particular, international humanitarian law stipulates how persons in need of assistance are to be treated according to the fundamental principles governing humanitarian assistance, namely humanity, impartiality and neutrality. International human rights law, as corpus of basic rules applying to all situations, provides a catalogue of binding rights. International environmental law and international law on health contribute to the avoidance of health emergencies and environmental harm, by stating State obligations regarding public health and environmental protection. 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.

<sup>62</sup> There is a significant number of non-binding documents dealing with various aspects of International Disaster Response Law (IDRL) and adopted by International Organisations, the IFRC, NGOs, groups of experts and technical bodies. It is appropriate to recall some examples of soft law instruments such as the Declarations of principles on cooperation in case of disasters, the Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief, 1995 and the International Federation of the Red Cross, Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, 2007. For further information, see A. De Guttry, “Surveying the Law” in A. De Guttry, M. Gestri, G. Venturini (eds.), *International Disaster Response Law*, cit., pp. 3-44.

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<sup>63</sup>. At regional (and sub-regional) level there are then numerous treaties regulating in a comprehensive manner all the relevant issues related to disaster prevention, mitigation, management and early recovery<sup>64</sup>. Finally, the international community has more recently assisted to an impressive accumulation of bilateral treaties regulating disaster management and enshrining generic commitments to cooperate in fields of common interest, as well as more detailed rules concerning the rights and duties of State when a major natural or man-made disaster occur<sup>65</sup>.

The combination of soft and hard law instruments has led to the emergence and significant development of the so-called International Disaster Response Law (hereafter IDRL), that is a *corpus* of international rules and standards describing the role of States and other relevant actors in the response to (and recovery from) natural or man-made disasters, as well as in the area of disaster management<sup>66</sup>.

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<sup>63</sup> Sectoral multilateral treaties contain norms concerning the prevention of and response to certain specific kinds of disasters, such as Convention on the Early Notification of a Nuclear Accident and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (both 26 September 1986) and the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (29 November 1969). Besides, they can include norms concerning specific aspects of disaster assistance, like the Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (18 June 1998). For further information, see A. De Guttry, “Surveying the Law”, cit., pp. 33-38.

<sup>64</sup> Regional and sub-regional agreements and arrangements have been concluded in different continents and have a similar structure. In many cases, *ad hoc* institutional mechanisms and bodies have been established to foster cooperation and to implement the provisions of the treaties. For a brief overview see paragraph 4 of the present Chapter.

<sup>65</sup> 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 (26 April 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 (8 September 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 (19 March 2007). For further information, see A. De Guttry, “Surveying the Law”, cit., pp. 11-17.

<sup>66</sup> For a complete list of disaster-related agreements, see the UN Treaty Collection (<http://treaties.un.org/>); the International Federation of Red Cross website <http://www.ifrc.org/en/what-we-do/idrl/publication/>); the websites of the national authorities in

However, such a *corpus* of norms has not yet been universally codified nor any of the mentioned legal instruments has the universal scope to which the 1984 Draft Convention aspired, thereby making IDRL pertaining more to soft law and conventional law rather than to international customary law. Moreover, a closer investigation of the existing international legal instruments makes it clear that they are far from being uniform and coherent in regulating the various aspects of disaster response<sup>67</sup>. Accordingly, the absence of a comprehensive and centralised legal framework has contributed to the fragmentation of international law on disaster relief<sup>68</sup>. As such, it is not contributing as much as might be hoped to the many legal problems that arise in the operations in the field, but, instead, is likely to limit, from a practical point of view, the effectiveness of the response to the suffering of disaster-affected populations.

But, for the purposes of the present work, the most relevant gap is that, apart from what prescribed by bilateral and multilateral specific treaties, customary international law fails to properly regulate the very general responsibilities of the affected State and those of the potential assisting actors. This is due to, *inter alia*, the centrality that the principle of State sovereignty has traditionally had thus

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charge of disaster management like for example the data bank of Italian Civil Protection Department listing the bilateral agreements signed by Italy: [http://www.protezionecivile.gov.it/jcms/it/accordi\\_internazionali.wp;jsessionid=97F26DEA445C2A38A66A20869F891FE1](http://www.protezionecivile.gov.it/jcms/it/accordi_internazionali.wp;jsessionid=97F26DEA445C2A38A66A20869F891FE1)); the ECOLEX Databank, operated jointly by FAO, IUCN and UNDEP, providing the most comprehensive, global source of information on environmental law which lists most of the relevant emergency management treaties (<http://www.ecolex.org/start.php>), including those related to the management of forest fire.

<sup>67</sup> In particular, it has to be stressed that existing treaties have a limited scope of application both from a geographical and material point of view and that they do not coherently regulate the various aspects of transboundary disaster management and humanitarian assistance. 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, 2003, Geneva, 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.

<sup>68</sup> See, 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.

justifying, on the one hand, the affected State's reluctance to seek for external assistance and, on the other hand, the occasional third countries' inaction for providing for assistance beyond that put at disposal by NGOs and other international organizations thereby *de facto* limiting the effective "operationalisation" of solidarity in disaster response.

## **2. States' responsibilities in responding 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 been given 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 been often invoked to corroborate the understanding of sovereignty as absolute power. The new international order formed with the Peace of Westphalia has 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, perceived in two different ways: internally, sovereignty implies the exercise of a supreme jurisdiction over its territory and its population; outside, it denotes the *status* of equality among States<sup>69</sup>. 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.

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<sup>69</sup> See, G. Nolte, "Sovereignty as Responsibility?", in *American Society of International Law, Proceedings of the 101<sup>st</sup> Annual Meeting*, Vol. 99, 2005, pp. 389-392.

Against this background, State sovereignty has gradually grown stronger and soon it has become synonymous, on the one side, of State's independence from and legal impermeability in relation to foreign powers, and of State's exclusive jurisdiction and supremacy over its territory and inhabitants on the other<sup>70</sup>. 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"<sup>71</sup>. Such an orientation has been then confirmed by the concept of *domain réservé* enshrined in Article 2, par. 7, of the Charter of the United Nations, according to which: "Nothing contained in the present Charter shall authorize the United Nations 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"<sup>72</sup>.

As part of the international case law, the influence of the position expressed by the Permanent Court of International Justice in *Wimbledon* and the *Lotus Case* is evident<sup>73</sup>. In 1949 the International Court of Justice also noted that "between independent States, respect for territorial sovereignty is an essential foundation of international relations"<sup>74</sup> and forty years later, in the historic *Nicaragua* judgment, the International Court of Justice ruled that "matters which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is

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<sup>70</sup> See, A. Cassese, *International Law*, Oxford University Press, 2004, pp. 71-81.

<sup>71</sup> See, R. Jennings, A. Watts KCMG QC (eds.), *Oppenheim's International Law*, Oxford University Press, 2008, p. 428.

<sup>72</sup> This approach has been repeated also 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. The text is available at <http://www.un.org/documents/ga/res/46/a46r182.htm>.

<sup>73</sup> See, Permanent Court of International Justice, *United Kingdom and ors 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 at point 44 of the *Lotus* judgement, the Court stated "that restrictions upon the independence of States could not be presumed".

<sup>74</sup> See, International Court of Justice, *The Corfu Channel Case*, Decision of 9 April 1949, p. 35.

the choice of a political, economic, social and cultural system, and the formulation of foreign policy”<sup>75</sup>.

Such a perspective is valid also, and especially, for what concerns the management of post-disaster situations. In the absence of an universal legal framework for international disaster response, the point of reference on this topic is represented by customary international law which suggests that, on the basis of the principle of State sovereignty, disaster response falls within the jurisdiction of the State in whose territory the catastrophic event has occurred and that, *par contre*, third States have just the right to provide assistance to the affected territory upon request or approval of the concerned State.

### *2.1 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”<sup>76</sup>. It is interesting to note that in this quote the General Assembly used two different terms in order to explain the different 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, that means to attribute to the victim State the 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<sup>77</sup>.

The General Assembly confirmed this orientation in two following Resolutions where it asserted that the affected States have the “primary role in the initiation, organization, co-ordination and implementation of humanitarian assistance within

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<sup>75</sup> See, 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.

<sup>76</sup> See, UN General Assembly, A/RES/46/182, cit., Article 1.4.

<sup>77</sup> See, J. Kokott, “States, Sovereign Equality”, in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law*, Oxford University Press, 2007.

their respective territories”<sup>78</sup>. 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”<sup>79</sup>.

Even though there has been an increasing trend for self-management in many recent disasters, sometimes it may be highly demanding for the State to react to a severe catastrophe by using just 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 for nor a duty to accept international assistance have been so far established at level of customary international law which, instead, regulates the external access to the territory of a disaster-affected State just by stressing the necessity to respect its sovereignty and primacy. Accordingly, as stated again in Resolution 46/182, international humanitarian assistance should be provided just “with the consent of the affected country and in principle on the basis of an appeal by the affected country”<sup>80</sup>. Hence, assuming that disaster response falls within the jurisdiction of the State in whose territory the catastrophic event has occurred and that the exercise by a State of any form of sovereignty in the territory of a foreign State is a wrongful act<sup>81</sup>, whenever assistance from foreign States or international organizations is needed, it has to be requested or at least consented. Consent – as expression of State’s willingness – is thus *conditio sine qua non* for the initiation

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<sup>78</sup> See, 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.

<sup>79</sup> See, *Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operation*, 18 June 1998, p. 5.

<sup>80</sup> See, UN General Assembly, A/RES/46/182, cit., Annex – Guiding Principles, para. 3. In addition, see Ki Gab Park, *La protection des personnes en cas de catastrophe*, Recueil des cours, 2013, p. 348.

<sup>81</sup> See, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Fifty-third session, 2001, Article 20.

of a humanitarian operation and the territorial State should always manifest its agreement in some way<sup>82</sup>.

Consequence of the affected State's sovereignty is, moreover, the freedom to select the legal framework governing the provision of assistance: after the admission to the territory of the affected State, the national authorities determine extension and termination of the interventions by selecting those who can access to the territory as well as by specifying the goods and services required<sup>83</sup>.

Furthermore, State sovereignty is reflected not only 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 could appear odd, there have been cases where national authorities have refused external intervention, albeit the needs clearly outstripped domestic capacities. Generally, this may happen when the affected State wants to preserve its image of national pride<sup>84</sup> or to avoid potential interferences in their 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 scale of the emergency, the government of Myanmar imposed severe restrictions on humanitarian interventions and refused international offers of aid, insisting that only national authorities were supposed to guarantee assistance<sup>85</sup>.

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<sup>82</sup> 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.

<sup>83</sup> See, M. Costas Trascasas, "Access to the Territory of a Disaster-Affected State", in A. De Guttry, M. Gestri, G. Venturini, *International Disaster Response Law*, cit., p. 225.

<sup>84</sup> For instance, after the 2004 tsunami and a severe South Asian Earthquake in 2005, the Indian government decided to refuse external intervention because of its long history of reluctance to request it. Similarly, three days after Hurricane Katrina struck the United States in August 2005, President George Bush decided to reject financial donations and other forms of assistance, including medical supplies, despite the hurricane had been defined as an 'ultra-catastrophe' and the US government at all levels was failing to adequately prepare for and respond to this tragedy.

<sup>85</sup> 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*, Vol. 14, No. 1, 2009, pp. 3-34.

Notwithstanding it is legally reasonable that the affected State is the first and leading handler in ensuring protection since disaster response falls within its jurisdiction, a disproportionate State discretion risks, however, to increase the uncertainty on the 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 on how to establish a duty to seek for external assistance for States in the context of disasters has thus been at the centre of the legal debates without, however, finding wide and deep consensus neither among the scholars nor among the States.

Albeit the extreme discretion of the affected State acquires special relevance since the population to be protected is present in its territory, it cannot be neglected that some negative consequences may rise also because of the absence also of a clear duty to provide for assistance on the States of the international community once external aid is requested.

## *2.2 Providing for assistance as a right of the States*

The principle of State sovereignty shapes not only the prerogatives of the national authorities of the affected State by establishing the mere right to seek for external assistance, but also those of third countries. Indeed, according to current customary international law, the latter do not have any duty to offer or provide for assistance when their intervention is requested by the affected State. Rather, they may freely decide whether or not to intervene without any constraint: ultimately, by excluding other international actors' activities, the provision of international assistance is essentially based on the will of the States. Hence, for framing the present reasoning in the State sovereignty–international solidarity scheme, the concept of solidarity has not been so far translated into a legal obligation to intervene when a serious disaster occurs, but just into a right, or at least a moral duty, which cannot be legally challenged<sup>86</sup>.

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<sup>86</sup> See, 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*, Vol. 86, 2004, pp. 853-878.

From a practical point of view, the absence of a duty to provide for 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 resources to be put at disposal of the affected State. From a legal point of view, the lack of a well-established duty to offer and to provide for assistance is indicative of the sovereignty-centred, rather than solidarity-centred, perspective adopted at 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 instrument to regulate the international community by imposing some obligations on a State *vis-à-vis* another State to which is attributed a corresponding right in a perspective 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 from acknowledging the existence of a legal duty to help another State following a natural disaster. It is, however, evident that this approach based on complementary 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 to be 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 the national authorities seek for external assistance, States do generally provide for aid either for reasons of humanity or to advance their own national interests. It is, therefore, quite rare that potential assisting actors other than international organisations and NGOs do not intervene when the situation requires an immediate intervention. Besides, from a perspective of international law, it is worth underling the increasing acknowledgment of the liable nature of inter-States relations and the consolidated principle of cooperation enshrined also in the

Charter of the United Nations and in the declaration on Friendly Relations<sup>87</sup>. And, according to some authors, exactly the principle of cooperation which translates into a duty to cooperate with the authorities of the affected State could pave the way for the progressive establishment of a legal obligation to offer and to provide for 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 (hereinafter ILC) has questioned on 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<sup>88</sup>. In fact, as Paolo Picone suggests, in some branches of international law – such as in international environmental law – the duty to cooperate already exists and contains some ‘instrumental’ obligations<sup>89</sup>. However, there is to say that such a result appears quite unrealistic because the duty to cooperate in the event of a disaster could establish not a proper duty to deliver assistance, but rather a set of secondary obligations on those States that have already decided to provide for assistance, such as the obligation 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 for reframing the principle of State sovereignty by placing at the centre the necessity to provide for urgent humanitarian assistance to the victims of a disaster.

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<sup>87</sup> See, *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.

<sup>88</sup> See, 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.

<sup>89</sup> See, for example, the ASEAN Agreement of 2005, Art. 4 (a): “In pursuing the objective of this Agreement, the Parties shall co-operate in developing and implementing measures to reduce disaster losses including (...) early warning systems (...)” and Art. 7 on *Disaster Early Warning*. 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.

### 2.3 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, *inter alia*, to human rights instruments<sup>90</sup>. 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”<sup>91</sup>. As a consequence, as strongly stressed by 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”<sup>92</sup>.

The Covenant on Civil and Political Rights states that no one shall be arbitrarily deprived of his life and notes that this right may not be suspended even in case of a “public emergency that threatens the life of the nation” – which has been recognised to include “a natural catastrophe”<sup>93</sup>. The Human Rights Committee has thus interpreted the right to life as having both a positive and negative dimension, implying that States have an obligation to respect and above all to ensure respect for the right to life of all the individuals within their territory and subject to their jurisdiction<sup>94</sup>.

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<sup>90</sup> See, J. Delbruck, “International Protection of Human Rights and State Sovereignty”, in *Indiana Law Journal*, Vol. 57, Issue 4, 1982, pp. 567 – 578.

<sup>91</sup> See, Institute de Droit International, *Sixteenth Commission Resolution – Humanitarian Assistance*, Bruges Session, 2 September 2003, para. 2.

<sup>92</sup> See, UN General Assembly, Resolution A/RES/45/100, cit., Preamble, para. 5.

<sup>93</sup> See, International Covenant on Civil and Political Rights, Art. 6(1), 16 December 1966 and Human Rights Committee, *General Comment No. 29*, art. 4, 24 July 2001. The obligation is also established in other international legal instruments, as the Preamble to the 1948 Universal Declaration of Human Rights; the 1989 Convention on the Rights of the Child (Article 6); the 1953 European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 14); the 1981 African Charter on Human and People’s Rights (Article 1) and the 1969 American Convention on Human Rights - “Pact of San José” (Articles 1 and 2).

<sup>94</sup> The obligation to respect and above all to ensure respect of the right to life of all the individuals is also established in other international legal instruments, as the Preamble to the 1948 Universal Declaration of Human Rights; the 1989 Convention on the Rights of the Child (Article 6); the 1953 European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 14); the 1981 African Charter on Human and People’s Rights (Article 1) and the 1969

For what concerns 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”<sup>95</sup>. 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 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”<sup>96</sup>.

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 discuss 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.

A number of international humanitarian organizations, like the Red Cross Movement, have struggled for its recognition, by affirming that “the right to receive humanitarian assistance, and to offer it, is a fundamental humanitarian

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American Convention on Human Rights - “Pact of San José” (Articles 1 and 2). In addition, see, W. Kalin, R. C. Williams, K. Koser and 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.

<sup>95</sup> See, International Covenant on Economic, Social and Cultural Rights, Arts. 11 and 12, 16 December 1966.

<sup>96</sup> See, 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.

principle which should be enjoyed by all citizens of all countries”<sup>97</sup>. 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*<sup>98</sup>, to the Principles on Humanitarian Assistance adopted by the San Remo International Institute of Humanitarian Law in 1992<sup>99</sup>, the 1994 Code of Conduct for International Red Cross and Red Crescent Movements<sup>100</sup> and the 2003 Bruges Resolution on Humanitarian Assistance<sup>101</sup>. In particular, the latter proposed a definition of the concept 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”<sup>102</sup>. 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<sup>103</sup> which does affirm a right for internally displaced persons to seek humanitarian assistance and protection, and the African Charter on the Rights and

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<sup>97</sup> See, 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.

<sup>98</sup> See, 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.

<sup>99</sup> See, San Remo International Institute of Humanitarian Law, “Principes Directeurs Concernant le Droit à l’Assistance Humanitaire”, in *International Review of the Red Cross*, No. 804, 1993, pp. 548-554.

<sup>100</sup> See, 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.

<sup>101</sup> See, Institute de Droit International, *Sixteenth Commission Resolution – Humanitarian Assistance*, cit., Art. 2.

<sup>102</sup> See, Institute de Droit International, *Sixteenth Commission Resolution – Humanitarian Assistance*, cit., Art. I.1.

<sup>103</sup> See, United Nations Convention on the Rights of Persons with Disabilities, UN Doc. A/RES/61/106, 13 December 2006, Art. 11.

Welfare of the Child ensures humanitarian protection to internally displaced children in the wake of a disaster<sup>104</sup>.

Nonetheless, the number of multilateral treaties making explicit reference to a right to humanitarian assistance is very limited and, with reference to customary law, despite States practice shows their willingness to render assistance, the existence of a right for victims of natural disasters to receive humanitarian aid is still far away. Thus, the *de lege lata* existence of a right to humanitarian assistance within international disaster law is not supported by general treaty or customary recognition and still remains unclear<sup>105</sup>. 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 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”<sup>106</sup>. 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 those victims of disasters in times of peace. Even in the absence of a 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 fulfill all these rights, by

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<sup>104</sup> See, 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*), Art. 9.2(b).

<sup>105</sup> For a further analysis of the debate on the right to humanitarian intervention, see M. J. Domestici-Met, “Aspects juridiques récents de l’assistance humanitaire”, in *Annuaire français de droit international*, Vol. 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*, Vol. 38, 1998, pp. 589-609.

<sup>106</sup> See, 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.

abstaining from any discrimination founded on “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”<sup>107</sup>. In a more specific way, the duty to take positive actions to protect the rights of the victims implies that States have a duty to ensure that the population affected by a crisis is adequately supplied with goods and services essential for its survival<sup>108</sup>. By 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. The European Court of Human Rights has also 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<sup>109</sup>. 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 disposal in order to provide adequate support to the victims.

In a broader perspective, some scholars have also invoked the doctrine of the Responsibility to Protect (RtoP)<sup>110</sup> in order to establish a duty to protect the

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<sup>107</sup> See, International Covenant on Civil and Political Rights, Art. 2(1); International Covenant on Economic, Social and Cultural Rights, Art. 2(2).

<sup>108</sup> 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.

<sup>109</sup> See, European Court of Human Rights, *Öneriyildiz 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.

<sup>110</sup> See, International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, Ottawa, December 2001. The full text of the Report is available at [www.iciss.ca/pdf/Commission-Report.pdf](http://www.iciss.ca/pdf/Commission-Report.pdf). The Responsibility to Protect doctrine sets on the one hand that each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity, and on the other one that the international community, through the United Nations, has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity when the national authorities manifestly fail in their responsibilities of protection. In the aftermath of the Nargis Cyclone some States and commentators have invoked the RtoP doctrine in order to legitimate an external intervention for protecting 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: to include the occurrence of disasters within the scope of application of this doctrine could set a precedent for legitimating undue external interventions. For comments on the RtoP, 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*, no. 1,

affected population thereby implicitly pushing for the acknowledgement of a duty to seek and to provide for assistance, but its limited scope of application has prevented RtoP from being considered of any help in clarifying the issue of humanitarian intervention in the event of a catastrophe. Moreover, in order to justify a possible external intervention without the consent of the affected State, more than one commentator has proposed to resort to the existence of *erga omnes* obligations which, according to the *Barcelona Traction* case<sup>111</sup>, relate to concerns of the whole international community thus legitimating States to intervene in their protection<sup>112</sup>. This is also revealed in the content of the Maastricht Principles on Extra Territorial Obligations of States that, despite having a not binding nature, represent a very important soft-law instrument to defining and clarifying the positive extraterritorial obligations of States on the protection of human rights<sup>113</sup>. One of the key conceptual foundation of the Maastricht Principles is that the human rights obligations of States are not applicable only within their own borders but extend also to extraterritorial situations. The acknowledgement of such extraterritorial obligations would be as well a practical way to comply with

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2006, pp. 11-18; C. Stahn, “Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?”, in *American Journal of International Law*, Vol. 101, 2007, pp. 99-120. For comments on the potential application of the RtoP on occasions of disasters, see 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*, Vol. 32, 2007, pp. 663-706. For a general comment, see L. Boisson de Chazournes, “Responsibility to protect: reflecting solidarity?”, in Wolfrum R., Kojima C. (eds), *Solidarity: a structural principle of international law*, cit., pp. 93–109.

<sup>111</sup> See, International Court of Justice, *Barcelona Traction, Light and Power Company Ltd* (Second Phase), ICJ Report 3, 1970.

<sup>112</sup> For comments on the nature of the *erga omnes* obligations, see *ex multis*, P. Picone, “Obblighi Erga Omnes tra passato e futuro”, in *Rivista di diritto internazionale*, Vol. 98, 2015, pp. 1081-1108.

<sup>113</sup> See, 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*, 2012, available at <https://www.ejiltalk.org/the-maastricht-principles-on-extraterritorial-obligations-of-states-in-the-area-of-economic-social-and-cultural-rights-and-its-commentary-an-overview-of-positive-obligations-to-fulfil/>.

the elementary considerations of humanity that have been recognised by the ICJ in the *Corfu Channel* case<sup>114</sup>.

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 second reading in 2016.

### **3. 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 has encouraged its use as means able to improve the international cooperation in disaster relief<sup>115</sup>. The first proposal to study the topic at issue was recommended to the attention of the ILC in 2006 and included within the category ‘new developments in international law and pressing concerns of the international community as a whole’ starting from the following year<sup>116</sup>. In 2007, the

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<sup>114</sup> See, International Court of Justice, *United Kingdom of Great Britain and Northern Ireland v. Albania (Corfu Channel case)*, Judgment of 9 April 1949, p. 22: “Such obligations are based, not on The Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognised principles, namely: elementary considerations of humanity, even more exacting in peace than in war”. In addition, see R. A. Stoffels, “Legal regulation of humanitarian assistance in armed conflict: achievements and gaps”, in *International Review of the Red Cross*, Vol. 86, 2004, pp. 515-546.

<sup>115</sup> See, 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.

<sup>116</sup> See, 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.

Commission decided to include the issue in its programme of work and to appoint Mr. Eduardo Valencia-Ospina as Special Rapporteur<sup>117</sup>.

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 well aware that it would have proved to be an exercise *de lege ferenda*, as many aspects of disaster response are subject to dissimilar practice by States. This meant that the establishment of clear rules could be put in place through a progressive development of the law, and not only by the strict codification of *lex lata*<sup>118</sup>.

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<sup>119</sup>, recommended to the UN General Assembly the elaboration of a convention based on the draft articles thereof<sup>120</sup>. Consequently, 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 represents the concrete starting point for the elaboration of a universal flagship treaty in this field.

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<sup>117</sup> See, 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.

<sup>118</sup> 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”. See, International Law Commission, *Report on the Work of its Sixty-Eighth Session*, UN Doc. A/71/10, 2016, preamble 17-18.

<sup>119</sup> See, 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.

<sup>120</sup> See, UN Doc. A/71/10, cit., para. 46.

### 3.1. Content of the Draft Articles as adopted by the ILC on second reading

The Draft Articles endeavour to provide a legal systematization 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 of all, the Commission had to tackle the hard task to frame the field of analysis and, thus, to identify the legal definition of the term ‘disaster’<sup>121</sup>. Initially, it was proposed to limit the scope *ratione materiae* to natural disasters or to natural components of broader emergencies, since perceived as more immediate need<sup>122</sup>. 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”<sup>123</sup> and, as a consequence, it was approved to widen the scope of the analysis, by considering all different kinds of disasters, including ‘complex emergencies’, with the exception of armed conflicts *per se*<sup>124</sup>. By taking into account these elements, the definition of the term ‘disaster’ adopted by the ILC reads as follows: “a calamitous event or series of events resulting in

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<sup>121</sup> See, G. Bartolini, “La definizione di disastro nel progetto di articoli della Commissione del diritto internazionale”, in *Rivista di Diritto Internazionale*, Vol. 98, 2015, p. 156.

<sup>122</sup> See, UN Doc. A/61/10, cit., Annex C, para. 2.

<sup>123</sup> See, UN Doc. A/CN.4/598 para. 49.

<sup>124</sup> 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, see 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*, Vol. C, Fasc. 3, pp. 667-719.

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”<sup>125</sup>.

At first sight, while encompassing only particularly significant events, this definition welcomes a very broad approach, by indicating separated 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, by referring to the nature of the event, 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 caused by a complex set of causes that can include both natural elements and contributions of human activities. Moreover, nothing is said about the necessity that the event has a cross-border character for the purpose of the Draft Articles. The Commission, therefore, wanted to avoid the limitations imposed by some treaties applicable only in cases of disasters due to human activities such as technological ones, or, on the contrary, just in case of natural events, such as the South Asian Association for Regional Cooperation (SAARC) Treaty<sup>126</sup>. It is then relevant to note that the ILC comprises also those calamitous events which do not cause necessarily human suffering, but also just destruction or loss of goods, property and environmental damage. Indeed, also a strict environmental disaster 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”<sup>127</sup>. Material and environmental losses are thus inextricably linked to human life and health so that protection of individuals is justified following the occurrence of such events.

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<sup>125</sup> See, UN Doc. A/71/10, Draft Article 3.

<sup>126</sup> 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. See, [http://www.idi-iil.org/FR/navig\\_commissions.html](http://www.idi-iil.org/FR/navig_commissions.html).

<sup>127</sup> See, International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory opinion, 8 July 1996, para. 29.

*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<sup>128</sup>. It is not a coincidence that DA 9 identifies the obligation for each State 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”. This provision represents therefore a cornerstone of the text, rendering it capable of complementing non-binding approaches pursued at the international level such as the very Sendai Framework.

Such an 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 States and transit States, and more in general the international community as a whole when DRR measures must be implemented. Finally, concerning the scope *ratione personae*, the DAs do not limit their application to States, but do take into account also all the different actors that may be involved in the whole disaster-cycle management, such as intergovernmental organizations, as well as NGOs and other non-State entities which enjoy specific competences in providing relief and assistance<sup>129</sup>.

According to the Commentary provided by the ILC, the legal core of the Draft Articles is built on a strong human rights-based approach which frames 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 has intended to establish a general framework of reference which embodied the increasing positive tension towards

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<sup>128</sup> See, Sendai Framework for Disaster Risk Reduction 2015-2030, A/CONF.224/CRP.1, 18 March 2015.

<sup>129</sup> In this regard it is noteworthy the outstanding role played by the EU which, from its very first comments, insisted on and obtained the explicit inclusion of the expression ‘other assisting actors’ to identify those international bodies offering assistance in the aftermath of a disaster alongside States. 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.

the need to respect and protect some fundamental human rights. Accordingly, DA 4<sup>130</sup> 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 for any action to be taken in the context of the provision of relief, 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 take action to protect human dignity.

The intimate connection between human rights and the principle of human dignity resides in DA 5<sup>131</sup> which seeks to reflect the broad entitlement to human rights protection held by those persons 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<sup>132</sup>. Last but not least, DA 6<sup>133</sup> conveys the rationale underpinning the Draft Articles, i.e. the protection 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,

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<sup>130</sup> See, Draft Article 4: “The inherent dignity of the human person shall be respected and protected in the event of disasters”.

<sup>131</sup> See, Draft Article 5: “Persons affected by disasters are entitled to the respect for and protection of their human rights in accordance with international law”.

<sup>132</sup> See, UN Doc. A/71/10, cit., p. 31.

<sup>133</sup> See, 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”.

nationality, political opinions, race, and religion<sup>134</sup> 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)<sup>135</sup>. Even though the identification of a specific international obligation in this area has not been welcomed by some States that have challenged the very existence of a duty to cooperate under international law, the ILC did not take into account their concerns. In fact, as made evident in its Commentary, cooperation, as well-established principle of international law, 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<sup>136</sup>. Draft Article 8<sup>137</sup> seeks then to clarify the various forms which cooperation among assisting actors may take 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 other assisting actors involved.

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<sup>134</sup> It is worth to underline that, according to the ILC, this list is not exhaustive as can include other grounds of discrimination, as affirmed *inter alia* in the 1949 Geneva Conventions, common Art. 3, para. 1; Universal Declaration of Human Rights, General Assembly resolution 217 (III) of 10 December 1948, Art. 2; International Covenant on Civil and Political Rights, Art. 2, para. 1; International Covenant on Economic, Social and Cultural Rights, Art. 2, para. 2. See, UN Doc. A/71/10, *cit.*, p. 34.

<sup>135</sup> See, 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."

<sup>136</sup> See, UN Doc. A/71/10, *cit.*, p. 36.

<sup>137</sup> See, 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".

Such a horizontal perspective, which inextricably links all the subjects involved in disaster response, is evident also in the following provisions which, according to a ‘check and balances’ structure<sup>138</sup>, establish duties both on the affected State and on the assisting actors.

In particular, DA 10<sup>139</sup>, 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. But, for the purposes of the present work, the most relevant provision is contained in DA 11<sup>140</sup> which prescribes on the affected State a clear duty to seek for assistance when it is unable to cope with the consequences of an overwhelming disaster. In order to rebalance this strong obligation, DA 13<sup>141</sup> introduces the crucial requirement of consent of the affected State to external assistance thereby creating a 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, an eventual withholding of international assistance may be justified when it is exercised in good faith, i.e. whether 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

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<sup>138</sup> See, 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, available at <https://www.ejiltalk.org/the-draft-articles-on-the-protection-of-persons-in-the-event-of-disasters-towards-a-flagship-treaty/>.

<sup>139</sup> See, 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.”.

<sup>140</sup> See, 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”:

<sup>141</sup> See, 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.”

accepted appropriate and sufficient assistance from elsewhere or, lastly, in case of no *bona fide* offers<sup>142</sup>.

As a complement to the provisions concerning rights and duties of the affected State, the Draft Articles try also to clarify the position of the assisting actors. In particular, DA 12<sup>143</sup> introduces the opportunity for States, the United Nations, and other potential assisting actors to offer assistance and, whenever a request of help is made by the affected State, the obligation to give due consideration to the request and inform the national authorities about their decision. As for the rules dealing with ‘operational provisions’ regarding international assistance, the subsequent DAs provide general points of reference. Indeed, they combine the interests of affected States, with regard to issues such as the quality of assistance<sup>144</sup> with those of the assisting actors, whose activities should be facilitated by the very affected State<sup>145</sup>, as well as in terms of the protection of relief personnel, equipment and goods<sup>146</sup>. Finally, DA 17<sup>147</sup> explores the

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<sup>142</sup> 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.

<sup>143</sup> See, Draft Article 12: “1. In the event of disasters, States, the United Nations, and other potential 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.”

<sup>144</sup> See, 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.”

<sup>145</sup> See, 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.”

<sup>146</sup> See, 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.”

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 A critical assessment of the ILC Draft Articles*

The project of the ILC 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. However, the future outcome of the DAs is difficult to predict and everything will depend on the comments that will be received by States in view of the 2018 UN General Assembly sessions. 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 possibility. 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. But, even though the DAs are characterised by a great deal of lights and 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 with the so-called sudden-onset emergencies, identifiable in the classic hypothesis of an earthquake or volcanic eruptions, as well as with the slow-onset calamities such as drought and famine. It is thus left unexplored the applicability of its rules to situations other than one single episode. Therefore, a more precise explanation could be useful to

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<sup>147</sup> See, 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."

have a wider panorama of the circumstances the DAs apply on. On the other hand, nor the text of DA 3 nor the Commentary make clear the meaning of the additional criterion to the simple occurring of a calamity, that is the serious disruption of the functioning of the society. Although already present in some international legal instruments, such as the notable Tampere Convention, the concept of ‘society’ may arise some doubts and 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<sup>148</sup>. Even though it could seem just 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.

Besides these critical points relating to the definitions, a more attentive analysis of the DAs reveals a number of shortcomings which necessarily are 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 and going through 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 deemed as relevant.

First of all, despite in its preliminary report, Mr. Valencia-Ospina acknowledged the importance of the existence of a right to humanitarian assistance, in order to preserve the long-established understanding of sovereignty and non-intervention<sup>149</sup>, the Commission has not mentioned it in the last version thereby missing the opportunity to make reference to humanitarian assistance as a right

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<sup>148</sup> See, G. Bartolini, “La definizione di disastro nel progetto di articoli della Commissione del diritto internazionale”, cit., pp. 158-160. Moreover, see, Murphy S. D. (2017), “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*, Vol. 110, Issue 4, 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*, 2011, p. 41.

<sup>149</sup> See, UN Doc. A/CN.4/598, cit., para. 54.

*per se*<sup>150</sup>. 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 a declaration of principles than a binding rule. Indeed, it is not clear which kind of rights are more significant than others for the ultimate purpose of the DAs that is to provide a secure legal space for ensure protection to the victims of a disaster.

There is no doubt that, as stressed in para. 2.3 of the present chapter, it is possible to deduce, in general terms, a list of rights applicable in case of catastrophe from other international legal instruments. But, with a view to the intention 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 adopted drafting technique 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 be properly addressed in the Commentary<sup>151</sup>. An inevitable result of such a weakness is the lack of any indication about the viable consequences that may flow 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, despite the purpose of the draft articles is the facilitation of an adequate and effective response to disasters by taking in account the essential needs and rights of the persons concerned, it cannot be said that the result follows a strictly rights-based approach or that at least it clarifies its legal implications.

With reference to the second part of the DAs concerning the horizontal relationship between the affected State and the assisting actors, it is noteworthy the way found by the ILC for balancing ‘the stick and the carrot’. As for the affected State, the ILC has adopted a reasoning essentially based on the principle

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<sup>150</sup> See, 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.

<sup>151</sup> See, 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.

of State sovereignty but perceived according to another perspective. Indeed, 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 source of duties and not just of prerogatives. Similarly, while DA 11 introduces the crucial obligation to seek for assistance when the disaster manifestly 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, while they have the right to offer assistance before the affected State requires for it, at a later stage they have to give due considerations to the requests made by the affected State thus apparently implying that just in reasonable situations they are justified not to provide help.

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. On 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 rely just on a self-determinative test which excludes any potential external evaluation. In 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, it would have been welcomed some kind of reference to the existence of a room of manoeuvre for the ILC to progressively argue for an implicit request or implicit acceptance of international assistance by the affected State in some extreme cases. Even more important, it turns out the problem arisen with regard to the human rights provision, that is the lack of some elaboration on the legal consequences stemming from the violation of the duty to seek for assistance.

Moreover, even though the ILC has acknowledged that States' domestic sphere is 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<sup>152</sup>, but while it affirmed that assistance *should* be provided with State's consent, DA 12 establishes a clear requirement. Hence, the problem of State consent and discretion, that in principle is justifiable and understandable but that may *de facto* 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 put as limit to the scope both of the duty to cooperate and of the duty 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"<sup>153</sup>. Despite 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 who can legitimately evaluate the arbitrariness of a refusal and, ultimately, what may be the possible legal consequences arising out from 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, it is doubtful also what the international community can do and what kind of measures can take if the State stricken by a disaster is unable or unwilling to ask for external assistance. 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 relies just 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 or not a duty to provide assistance when requested by the affected State. Actually, the structure and the content of DA 12 suggest that the assisting entities continue to

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<sup>152</sup> See, UN General Assembly, Resolution 46/182, cit.

<sup>153</sup> See, 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.

have just a right, or at least a moral duty, “to give due consideration” and provide for assistance. This is also substantiated by very confused character of DA 12 with regard the identification of the assisting entities. Indeed, not all the actors involved are on the same foot under international law, especially when the principle of sovereignty is concerned: only States and International Organizations could be responsible for unlawful acts against a State, whereas the same could not 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 mentioned assisting actors.

This conclusion confirms the asymmetric structure which, actually, characterises the whole DAs: while on the one hand, the affected State has to respect a number of obligations, including that to seek for assistance, the other international subjects, and in particular third countries, have just a right to respond to the requests of 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, to limit the provision of an effective and adequate assistance to the affected people needing help. Whenever the draft articles were used to embark in a treaty-making process, the final outcome would not entail well-balanced duties of solidarity on States.

Against this uncertain international legal framework which is still anchored to the principle of State sovereignty over solidarity, regional integration organisations, which have been included, by the way, 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 perfect hubs both for establishing instruments of interventions in the event of a disaster, and in extreme cases for reshaping States prerogatives and introducing, *inter alia*, specific duties of solidarity among the Member States for the sake of the very cooperation process. Moreover, if they are in possession of adequate instruments, regional organisations could play in the future a relevant role in the

field of disaster response thereby becoming themselves subjected to obligations of solidarity.

#### **4. Regional cooperation in responding to disasters: a stairway to solidarity?**

Over recent decades, regional and sub-regional organisations have increased their role in lawmaking for supporting 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)<sup>154</sup> which in 1991 adopted the Inter-American Convention to Facilitate Disaster Assistance that entered into force in 1996<sup>155</sup>. The Convention sets out modalities for requests and offers of 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 for, *inter alia*, the affected States to provide a number of

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<sup>154</sup> The OAS is the world's oldest regional organisation, officially established in 1948 but dating back to 1889.

<sup>155</sup> Inter-American Convention to Facilitate Assistance in Cases of Disaster, June 7, 1991, available at <http://www.oas.org/legal/intro.htm>. In addition to the Inter-American Convention, the OAS General Assembly has adopted a number of resolutions related to regional cooperation in disaster response, including through promotion of the "White Helmets Initiative" and the development of an Inter-American Emergency Fund (FONDEM) to provide support to affected state governments. In 2006, the General Assembly charged the Committee with a coordinating role under the Inter-American Convention and with regard to the Inter-American Emergency Fund.

facilities to assisting States, including easing the entry of personnel, goods and equipment, providing for their security, and shielding them and their personnel from liability in national courts<sup>156</sup>. Moreover, the Convention requires assisting States and their personnel to cover their own costs, respect any designated restricted areas and abide by national law<sup>157</sup>. The Inter-American Convention is not, however, addressed just 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<sup>158</sup>. Furthermore, apparently it has never been implemented, despite in 2007 the representatives of the OAS secretariat recommended the States to consider reviving their interest in the convention, with regard to both its ratification and implementation<sup>159</sup>.

At sub-regional level, the most notable example of normative instrument dealing with disaster management is the Agreement Establishing the Caribbean Disaster Emergency Response Agency (CDERA)<sup>160</sup> from the Member States of the Caribbean Community (CARICOM). The Agreement entrusts the Agency to build national capacities for disaster response, but also to coordinate regional assistance efforts by serving as intermediary with other governmental and non-governmental organisations providing for relief<sup>161</sup>. 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

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<sup>156</sup> *Ibid.*, Articles 5, 6, 9 and 10.

<sup>157</sup> *Ibid.*, Article 16.

<sup>158</sup> On the status of ratification visit the webpage of the OAS at: <http://www.oas.org/juridico/english/sigs/a-54.html>

<sup>159</sup> See, 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.

<sup>160</sup> See, Agreement Establishing the Caribbean Disaster Emergency Response Agency, February 26, 1991 (hereinafter “CDERA Agreement”), available at <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

<sup>161</sup> *Ibid.*, Article 4.

request by CDERA's coordinator<sup>162</sup>. 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<sup>163</sup>. 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<sup>164</sup>. Finally, the 1991 agreement provides for the establishment of an Emergency Assistance Fund for use to finance the expenses in disaster assistance. Currently, the CDERA Agreement counts sixteen Member States<sup>165</sup> 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 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 orientation also 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)<sup>166</sup>. In comparison to the CDERA Agreement, the ACS Agreement contains much more aspirations and ideal achievements rather than concrete binding norms. Indeed, according to the text of the agreement, Member States are encouraged to promote "the formulation and implementation of standards and laws, policies and programmes for the management and prevention of natural disasters, in a gradual and progressive manner" and identify "common guidelines

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<sup>162</sup> *Ibid.*, Article 13.

<sup>163</sup> *Ibid.*, Articles 22 and 23.

<sup>164</sup> *Ibid.*, Articles 18, 19 and 21.

<sup>165</sup> 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 Turks and Caico.

<sup>166</sup> See, 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), available at [http://www.acs-aec.org/Summits/Summit/English/AgrmtNatDesas\\_eng.htm](http://www.acs-aec.org/Summits/Summit/English/AgrmtNatDesas_eng.htm).

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. But, 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, therefore, it is still lacking binding force.

*b) Disaster response in Asia*

Given the vastness of the Asiatic region, which includes also the Pacific, and the tendency to suffer from devastating natural disasters there is no a 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<sup>167</sup>. Among the others, it is firstly relevant to recall the Asian Disaster Reduction Centre located in Kobe that have been created in 1998 with the mission to enhance disaster resilience of the twenty-nine Member States<sup>168</sup> to build safe communities, and to create a society where sustainable development is possible. Another instrument which has proved to be quite successful at continental level is the biennial Asian Ministerial Conference on Disaster Risk Reduction (AMCDRR) which meets since 2005 and is open to participation by national governments, international interested institutions and other stakeholders, including representatives of relevant NGO and civil society organizations. Over

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<sup>167</sup> In this part it has to be noted that the West Asia sub-region has not been actively involved in promoting reinforced forms of cooperation at 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.

<sup>168</sup> 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.

the years, it has been effective in promoting public awareness of the need for increased cooperation and speeding up the preparation of national action plans.

At 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, assistance for relief of Member States in distress”<sup>169</sup>. 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<sup>170</sup>. 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<sup>171</sup>. In order to give more effectiveness to the 1976 Declaration, in 2003 the Committee on Disaster Management (ACDM) has been created for assuming 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 (ARPD) to provide a framework for cooperation and to create a platform for collaboration between ASEAN and other relevant international organizations, 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’)<sup>172</sup>. The ASEAN Agreement sets out six overarching principles which deserve to be mentioned because 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;

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<sup>169</sup> See, Declaration of ASEAN Concord, available at <http://www.aseansec.org/1216.htm>.

<sup>170</sup> See, ASEAN Declaration on Mutual Assistance on Natural Disasters, June 26, 1976, available at <http://www.aseansec.org/1431.htm>.

<sup>171</sup> See, Agreement on the ASEAN Food Security Reserve, October 4, 1979, available at <http://www.aseansec.org/1315.htm>.

<sup>172</sup> *Ibid.*, Article 3.

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 for requests and offers of 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<sup>173</sup>. 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, facilities and materials involved or used in the assistance”; protect assistance personnel, goods and equipment; and provide them other “local facilities and services for the proper and effective administration of the assistance”<sup>174</sup>. 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<sup>175</sup>.

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 have created the Disaster Management Centre in New Delhi. Moreover, the SAARC has worked on an agreement outlining a Natural Disaster Rapid Response Mechanism that has been signed in the Maldives, on November 2011, but that has not yet entered into force.

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<sup>173</sup> *Ibid.*, Articles 10-12.

<sup>174</sup> *Ibid.*, Articles 12 and 14.

<sup>175</sup> *Ibid.*, Articles 12 and 13.

### *c) Disaster response in the African continent*

The African continent has not yet been very active 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 organizations 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 actually does not establish a regional institutional mechanism for cooperation but is rather meant to facilitate initiatives at the sub-regional and national level<sup>176</sup>. 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 have been reproduced at sub-regional level<sup>177</sup>.

As for cooperation specifically in the event of a disaster, the Southern African Development Community (SADC) represents an example within the African 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<sup>178</sup>. Moreover, in 2001, the SADC planned a comprehensive disaster management strategy, by recommending that the development of regional emergency standby

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<sup>176</sup> See, T. L. Field, *International Disaster Response Law Research Report: Southern African Region*, 2003, p. 10.

<sup>177</sup> For further details on the sub-regional instruments concerning disaster risk reduction, see A. De Guttry, “Surveying the Law”, in *International Disaster Response Law*, cit., p. 17 ff.

<sup>178</sup> See, Southern African Development Community Protocol on Health, 1999, available at <http://www.sadc.int>.

teams for disaster response were taken into consideration and that a dedicated regional protocol on disaster response was developed.

Such a brief overview of the main instruments adopted at regional level has made 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 for building that trust and familiarity which is not possible on a global scale, as well as for developing innovative and effective forms of collaboration in prevention, preparedness and risk management actions with specific and effective instruments of response. 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. It has, however, to be said that, apart from the specific instruments illustrated aimed at fostering cooperation activities among the participating States, to date the regional organisations explored are not characterised by a consolidated and multilayered system of instruments from which to derive clear duties of solidarity insisting on Member States.

## **5. Concluding remarks**

This chapter meant to compose an introductory overview and to describe the state of the art of current IDRL in order to present the evolution on the subject. It was thus found that so far 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 level, and in bilateral treaties and memoranda of understanding. This fragmentation makes the current system of international law in this area dispersed and incoherent for what concern the material scope of application. In particular, it was tackled the thorny issue relating to the protection of individuals in the event of disasters, by stressing the hard

relationship between sovereignty and humanitarian assistance in the awareness 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 for assistance and a duty to provide it when requested. Moreover, also the principle of cooperation is not perceived as producing a correspondent duty to cooperate among States.

The emergence of positive obligations from 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 a change of perspective, by shifting from a State-State relationship to a vertical one based on a 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 a disaster” adopted in 2016 clearly reflect the rigid standpoint of States which 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<sup>179</sup>. As a consequence, as far as the UN General Assembly will not discuss a universal and comprehensive treaty in the area of

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<sup>179</sup> For example, Austria, France, Indonesia, Malaysia, Russia and the United Kingdom all expressed the view that no such duty existed. Other states, including Austria, Poland and Russia queried as to what would be the consequences of a breach of this duty. China suggested that the Commission avoid the term ‘duty’ and Iran suggested rephrasing the draft article to read that the affected state “should” seek assistance. Moreover, early comments made by States at the last session of the UNGA Sixth Committee show mixed attitudes to the final form of these DAs. First, several States (Egypt, Germany, Indonesia, Ireland, Italy, Japan, Korea, Peru, the Philippines, Romania, Slovakia, Slovenia, Spain and Thailand) made generally positive evaluations of the content of the DAs without, however, expressing themselves regarding future perspectives. Other States have already demanded a treaty, such as Argentina, Brazil, Chile, Colombia, Ecuador, El Salvador, Mexico, Portugal, Sri Lanka, or were ready to discuss this possibility (the Nordic Countries, Algeria). More cautiously, States such as Austria, France, Iran, New Zealand and Poland preferred to allow time for States and practice to approve this text before eventually moving forwards. Conversely, doubts about a potential treaty were raised by Belarus, the Czech Republic, Israel, Malaysia, the Netherlands, Russia, Vietnam, the United Kingdom and United States, even if several of these States evaluated the content positively. See, 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.

humanitarian assistance in situation of disaster, the opportunity to regulate the reciprocal responsibilities of States in these circumstances appears really problematic and subjected to the traditional principle of State sovereignty.

In situations of disaster, the principle of solidarity illustrated in the introduction of the present work has not yet given rise to a comprehensive set of rules of international law, but rather to disarticulated rights on States: the right to seek for assistance, the right to offer and the right to provide assistance. Since the alleged existence of corresponding obligations is still of harder recognition, 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 not been definitely reached at international level.

Against this background, regional organisations could represent the more concrete starting point for reframing such incoherent international legal framework by establishing regional *corpora* of rules dealing with the most debated issues and establishing specific legal instruments capable of imposing clear and balanced duties of solidarity on States. In this perspective, the European Union, that has not been voluntarily included in the previous examination on the regional organisations because it will be the focus of the next chapters, represents a *unicum* in this field. Indeed, it has a number of instruments which enable the very Union and its Member States to react in the event of serious disasters. Moreover, the new legal framework inaugurated with the adoption of the Lisbon Treaty has introduced some important novelties which could render the response to disasters more effective and making the so-called EU disaster response law evidently based on solidarity. The challenge is to verify whether, in legal terms, theory meets reality and whether the EU Member States and the Union can be considered bound by specific obligations of solidarity.

## CHAPTER II

### THE MULTIFACETED CONCEPT OF SOLIDARITY WITHIN THE EU LEGAL ORDER

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<sup>180</sup>. In 1963 the European Court of Justice (hereinafter, CJEU) 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”<sup>181</sup>. Moreover, as stated by the CJEU in *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 breach of it”<sup>182</sup>. However, there is to say that it is a legal order constantly evolving and, therefore, the best way to define the European Union is the expression ‘process of integration’. And, as will be clearer from the following paragraph, it is a process

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<sup>180</sup> For sake of clarity, it is necessary to stress that, for linguistic convention, the present study will use the term ‘European Union’ (EU) as well as ‘Court of Justice’ (CJEU) in their broadest sense, by embracing all the entities the European integration process has take place. For a deeper analysis on the current meaning of sovereignty, see 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*, Vol. 7, Issue 2, 1970, pp. 167–183; 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, 2<sup>nd</sup> ed., 2011, pp. 55 ff; R. Shütze, *From dual to cooperative federalism, the changing structure of European law*, Oxford University Press, 2009.

<sup>181</sup> See, 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.

<sup>182</sup> See, 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.

fuelled, *inter alia*, by the notion of solidarity which justifies, develops and adjusts the powers of the EU institutions and those of the Member States with a view to an “even closer union”<sup>183</sup>.

The present chapter serves as a sort of ‘feeder’ between the international and European law frameworks by presenting the main characters, the legal nature and the effectiveness of the notion of solidarity as pivotal and multifunctional concept of the EU integration process. Indeed, as central notion and keystone of the whole political and legal structure of the EU project, solidarity represents the parameter of reference for the following analysis on the instruments of disaster response progressively developed within EU law.

## **1. Mainstreaming solidarity within EU law**

The idea of solidarity in the European culture can be traced back for more than two centuries, when it was associated with the notion of *fraternité* at the time of the French revolution and explicitly included in the 1804 Code Civil. Given such solid and historical roots, solidarity has always been an important and inspiring idea of the European integration movement since the very beginning when, however, the unification of Europe was planned to pursue just economic interests and, therefore, to prevent future wars between European countries. Yet, the founding fathers were well aware that once politics had forced common economic interests on the European nations, these interests would form the best basis for further integration.

According to the Schuman’s declaration “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”<sup>184</sup>. Moreover, Jean Monnet stated that “*la Communauté avait un objet limité aux solidarités inscrites dans les traités [...] ces solidarités en appelaient d’autres, et de proche en proche entraîneraient*

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<sup>183</sup> See, D. Simon, *Le système juridique communautaire*, PUF 2001, pp. 146-147.

<sup>184</sup> See, Declaration of 9th May 1950 delivered by Robert Schuman, available at <http://www.robert-schuman.eu>.

*l'intégration, la plus large des activités humaines*"<sup>185</sup>. In 2001, the presidency conclusions of the Laeken European Council placed solidarity on centre stage by defining Europe as "the continent of solidarity"<sup>186</sup>. Besides 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"<sup>187</sup>. More recently, on occasion of the 60<sup>th</sup> 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"<sup>188</sup>.

In the EU, solidarity has thus been always seen as fuel of the European construction and principle which distinguishes the EU and its members from other parts of the world and international organisations where solidarity is value and principle for sovereign and independent States<sup>189</sup>. Despite also international solidarity is based on the foundation of shared responsibility and cooperation between individuals, groups and States<sup>190</sup>, the level of solidarity reached through the European integration seems far from being replicated in other international *fora* or organisations<sup>191</sup>. Indeed, the choice to delegate part of the national prerogatives for the benefit of the supranational level has implied the creation of

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<sup>185</sup> See, J. Monnet, *Mémoires*, Fayard, 1976, p. 902.

<sup>186</sup> See, 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.

<sup>187</sup> See, European Commission, *Renewed Social Agenda: Opportunities, Access and Solidarity in 21<sup>st</sup> Century Europe*, COM(2008)412, p. 6.

<sup>188</sup> See, Declaration of the leaders of 27 Member States and of the European Council, the European Parliament and the European Commission, 25 March 2017.

<sup>189</sup> See, I. Hartwig, P. Nicolaides, "Elusive Solidarity in an Enlarged European Union", *Eipascope*, 2003/3, available at <http://aei.pitt.edu>.

<sup>190</sup> See, UN Human Rights Council, *Human rights and international solidarity*, Doc. A/HRC/9/10, 15 August 2008, para. 6.

<sup>191</sup> See, P. Pescatore, "International Law and Community Law – A comparative Analysis", in *Common Market Law Review*, cit., p. 169: "Because of [the] absence of solidarity international law is fundamentally a law of conflicts, equilibrium and co-ordination. In the areas where it has had most success it is a law of inter-State co-operation. Community Law is more than that; it is a law of solidarity and integration".

specific allegiances which make the general interest of the Union prevailing over the single national interests<sup>192</sup>. Accordingly, as autonomous concept, solidarity among Member States represents the guarantee and the cornerstone of the effective European construction<sup>193</sup>. However, in comparison to international law, the principle of solidarity in EU law has a broader application as it represents the foundation not only of the horizontal cooperation between Member States, but also of the vertical one between the States and the very Union.

In the course of time, the notion of solidarity has been interested by a significant evolution due to the changes brought by primary and secondary law as well as by the CJEU case law. Despite the role of solidarity as founding and existential value had been already stressed by the Treaty of Rome, in the early years, solidarity was conceived mainly in its negative essence, that is at the institutional level, thereby integrating and overlapping the principle of loyalty within the distribution of powers between EU institutions and Member States. But, the evolving process of integration has triggered also the develop of the positive dimension of solidarity linked to the notion of general interest thus progressively leading to the establishment of mechanisms of support as well as to a renewal of the Treaties from a material point of view<sup>194</sup>. This has impacted on the different sectors of competence, and notably on fields of action addressing elements of solidarity, which have been expanded in favour of the common interest. In more recent times, the notion of solidarity has then acquired a certain autonomy from that of general interest thereby fuelling itself the expansion of the scope of some existing

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<sup>192</sup> See, 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*, 1972, Bruylant, p. 361; D. Simon, *Le système juridique communautaire*, cit., 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*, Vol. 48, 2012, pp. 295-327.

<sup>193</sup> See, 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.

<sup>194</sup> See, 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.

powers when acting as objective to be achieved. However, there are still some important obstacles in providing for a univocal and uniform definition of solidarity 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 taking into account the different fields of intervention and the heterogeneity of the competences attributed to the Union. The legal literature has thus 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 it acquires in abstract is not fully reflected into practice<sup>195</sup>. The following paragraphs will be dedicated to deepening such findings and to bring out the main uncertainties on the legal status of solidarity in EU law.

### *1.1 Evolution of the concept of solidarity within the EU legal order*

On May 9<sup>th</sup>, 1950 the French Minister of the foreign affairs, Robert Schuman delivered the well-known declaration that has been indicated as the starting point of the integration process and the manifestation of the indivisible link between such a process and the notion of solidarity<sup>196</sup>. In fact, it led to the conclusion that solidarity between the Member States and between the peoples of the European

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<sup>195</sup> 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, 2009, Institut Fédératif de Recherche, 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*, Vol. 35, 2013, pp. 459-475; A. Sangiovanni, “Solidarity in the European Union”, in *Oxford Journal of Legal Studies*, Vol. 33, 2013, pp. 213–241.

<sup>196</sup> See, 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.

Community constitutes a living aim which should be pursued and expanded continuously for the purpose of peace<sup>197</sup>.

By following such a path, the 1951 Treaty constituting the European Coal and Steel Community (ECSC) 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 European States, but also by creating a broader and deeper Community among the peoples 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<sup>198</sup>. Interestingly, the 1957 Treaty did not refer to solidarity among Member States, but widened it by referring to the solidarity which binds Europe and overseas countries.

These few references to solidarity in the preambles of the founding Treaties have been progressively matched to more concrete and substantive provisions. In particular, while also the Single European Act just mentions solidarity in its preamble<sup>199</sup>, both the Maastricht Treaty and then the Amsterdam Treaty included much more references to solidarity as foundation of the European integration<sup>200</sup>. By following the time framework, the most important innovation with regard to the principle 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

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<sup>197</sup> 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”.

<sup>198</sup> See, E. A. Marias, “Solidarity as an Objective of the European Union and the European Community”, in *Legal Issues of Economic Integration*, Vol. 21, Issue 2, 1994, pp. 85–114, p. 87.

<sup>199</sup> See, 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 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”.

<sup>200</sup> Both within the Maastricht Treaty and in the Amsterdam Treaty the word ‘solidarity’ has been mentioned five times.

wording enshrined in the new Treaty, solidarity has become legally binding task not only for the European Community, but also for the European Union itself thus extending the requirement for solidary relations also to the peoples of the Member States<sup>201</sup>. Moreover, solidarity has been expressly included among the objectives of the (then) European Community 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 Community 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 very 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].

As a result, solidarity has been included within the new Treaties both as *raison d'être* and as final purpose of the very European Union. In introducing such a wording, it is likely that the drafters had taken into account the jurisprudence of the Court of Justice of the European Communities which, as will be reported in the following paragraph, between the end of the sixties and the following decade, has acknowledged the centrality of solidarity within the European construction.

*a) (following) in the jurisprudence of the CJEU*

The CJEU was established in 1951 with the purpose of interpreting the Treaty of Rome and, since then, the Court has constantly refined and expanded its parameters, thereby becoming an important catalyst for the integration process of the European Community. The Court's case law is a manifestation of its creative and extensive interpretation of the Treaties and has created two of the most influential legal concepts within the history of the Community, the doctrine of

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<sup>201</sup> See, Maastricht Treaty, Article A, para. 3.

direct effect and the notion of supremacy of EU law<sup>202</sup>. The CJEU's jurisprudence has thus had a privileged role also in shaping and clarifying the scope of legal ideas and principles such as the notion of solidarity which has been approached in different ways substantially mirroring its negative and interstate dimension.

In the first place, the early relevant judgement can be traced back to 1969 on occasion of an action brought by the Commission against France<sup>203</sup>, which was accused of not complying with two decisions concerning the limits to the national preferential rediscount rate on export credits. In its reasoning, the CJEU concluded 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 where a Member State is seriously threatened with difficulties as regards its balance of payments”<sup>204</sup>. Accordingly, France behaviour constituted a breach of the duties accepted by the Member States when they had established the Community itself. A similar approach to solidarity can be observed in *Commission v. Italy*<sup>205</sup> wherein the Court set that solidarity required the Member States to apply the Community rules unselectively, even though it was against their national interest<sup>206</sup> 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”<sup>207</sup>.

It is clear from these decisions that the Court regarded solidarity as a cooperative action that was essential for the functioning of the Community system. Such a

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<sup>202</sup> For deeper insights on the role played by the ECJ in the integration process, see, *ex multis*, A. Arnall, *The European Union and its Court of Justice*, 2<sup>nd</sup> edition, OUP, 2006; B. De Witte, “Direct Effect, Primacy and the Nature of the Legal Order”, in P. Craig and G. De Burca (eds.), *The Evolution of EU Law*, 2<sup>nd</sup> edition, OUP, 2011; T. Horsley, “Reflections on the role of the Court of Justice as the ‘motor’ of European integration: Legal limits to judicial lawmaking”, in *Common Market Law Review*, Vol. 50, Issue 4, 2013, pp. 931–964.

<sup>203</sup> See, CJEU, Case C-11/69, *Commission v. France*, 10 December 1969, ECLI:EU:C:1969:68.

<sup>204</sup> *Ibid.*, point 16.

<sup>205</sup> See, CJEU, Case 39/72, *Commission v. Italy*, 7 February 1973, ECLI:EU:C:1973:13.

<sup>206</sup> *Ibid.*, point 24.

<sup>207</sup> *Ibid.*, point 25.

perspective has then been used and reinforced in some following judgements. Among these, it is relevant the orientation of the Court in the case *Commission v. United Kingdom*<sup>208</sup> whereby it confirmed that the non-compliance with the provisions of instruments of secondary law undermined the Community solidarity which had been included within the foundations of the Community in a previous judgement<sup>209</sup>. Besides fixing solidarity within the “constitutional” context of the Community law, such a position is particularly significant in view of the following well-known creative role played by the CJEU with reference to the non-written principles of EU law in the context of its hermeneutic activity. Indeed, these first reasoning expressed by the Court almost seem to address solidarity not only as theoretical foundation of the integration process, but also as principle capable of establishing clear duties of mutuality on the Member States because of their membership to the Community.

Starting from these premises, the CJEU has then applied such a notion to more practical situations by linking solidarity to that of “common interest”. In this regard, it ought to be firstly recalled Opinion 1/75<sup>210</sup> which, albeit it does not contain an explicit reference to solidarity, has been considered by many scholars as a relevant example for evaluating the Court’s extensive reference to solidarity. In replying to the questions submitted to it by the Commission, the Court held, *inter alia*, that the common commercial policy prescribed by Article 113 of the EEC Treaty, was conceived for the defence of the common interests of the Community to which the individual interests of the Member States had to adapt<sup>211</sup>. As a result, Member States could not satisfy their own interests separately via unilateral actions and accordingly undermine the effective defence 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

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<sup>208</sup>See, CJEU, Case C-128/78, *Commission v. United Kingdom*, 7 February 1979, ECLI:EU:C:1979:32.

<sup>209</sup>See, CJEU, Case C-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.

<sup>210</sup> See, CJEU, Opinion 1/75, 11 November 1975, ECLI:EU:C:1975:145.

<sup>211</sup> *Ibid.*, p. 1364.

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”<sup>212</sup>. These words show that the need the common interest prevails is not merely a theoretical one, nor a mere factual assumption of the same Community construction, but constitutes a true originating principle for the relations between Member States, as well as between the latter and the Community. Furthermore, it would be a principle capable of affecting the most relevant areas of such relations and, mainly, the division of competences between Member States and the Community, that is, one of the most delicate and sensitive issues from the perspective of national interests. However, it is also evident that solidarity as here conceived was not an autonomous source of positive obligations, but rather of negative duties requiring Member States to abstain from behaving against and to act in favour of the common interest of the Community.

Such an orientation has then been confirmed by the following Opinion 1/76 concerning a draft agreement establishing a EU laying-up fund for inland waterway vessels where the Court has recalled the necessity to comply with the requirements of *unity* and *solidarity* already emphasized in previous cases<sup>213</sup>. Moreover, in early cases under the ECSC Treaty, 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. Late, in *Valsabbia*, 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<sup>214</sup>. According to the Court, the priority accorded to the common interest under Article 3 of the ECSC Treaty presupposed that the market actors had to give up their short-term interest for the

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<sup>212</sup> *Ibid.*

<sup>213</sup> See, CJEU, Opinion 1/76, 26 April 1977, ECLI:EU:C:1977:63, point 12.

<sup>214</sup> See, 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.

sake of the common good<sup>215</sup>. In general terms, the Court has usually read the solidarity principle in a very concrete way by justifying the adoption of measures implying sacrifices in favour of the market equilibrium. In the view of the CJEU, the principle of solidarity operated according to reciprocity: Member States gained benefits as part of the Union, and in return, they were expected to contribute to the Community interest by making sacrifices when needed. Solidarity was thus used as a functional instrument in pursuing the collective interest. And, as reported in more recent cases, this will be valid 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”<sup>216</sup>. Hence, solidarity is founded on mutual trust among the Member States thus creating an equilibrium for the Member States between rights and obligations. And, this led to introduce the last expression of solidarity as conceived by the CJEU in its jurisprudence, that is its legal dimension.

In this regard, there is to say that the Court has never expressly referred to solidarity *per se* in its compulsory dimension, but rather has linked it to other kinds of duties governing both the interstate relations and those between the Community and its Member States. Positive solidarity is expressed as the adoption of measures that ensure solidarity among the Member States and promote the objectives of the Community and, therefore, it is strictly connected to the duty to cooperate. In *France v. the United Kingdom*<sup>217</sup>, the Court held that when the Member States acceded to the Community they assumed, under Article 5 of the Treaty, the respect of the duty of cooperation whose performance was necessary especially in cases where it was not possible to establish a common policy. Negative solidarity, instead, has been expressed by referring to the

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<sup>215</sup> *Ibid.*

<sup>216</sup> See, 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.

<sup>217</sup> See, CJEU, Case C-141/78, *France v. United Kingdom*, 4 October 1979, ECLI:EU:C:1979:225.

principle of loyal cooperation<sup>218</sup>. In this regard, in the well-known case *Commission v. Council*<sup>219</sup>, the Court held, *inter alia*, that again under Article 5 of the EEC Treaty the Member States were required on the one hand to take all appropriate measures in order to fulfil their Treaty obligations and on the other hand to abstain from adopting measures which might jeopardize attaining the aims of the Treaty<sup>220</sup>. Solidarity is, therefore, a complex of positive and negative procedural obligations which mainly concern the framework of cooperation and mutual conduct of the Member States.

Despite the present work cannot report the whole CJEU jurisprudence citing solidarity issues, there is to say that, following the entry into force of the Maastricht Treaty, this principle has not been applied in a large number of cases. Rather, the CJEU has started referring to solidarity in a more indirect way by using many other concepts and expressions of the same general importance, such as loyal cooperation, integration, unity and “ever closer union among the peoples of Europe”<sup>221</sup>. As a result, one can argue that the Court has not been particularly devoted to further clarify the legal scope of this complex notion thereby negatively contributing to rise some doubts concerning the exact legal status of such a concept which, albeit the adoption of the Lisbon Treaty, continues to be extremely ambiguous and therefore hardly justiciable<sup>222</sup>.

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<sup>218</sup> For a deeper analysis on the relation between solidarity and loyal cooperation, see, *infra*, para. 1.4.

<sup>219</sup> See, CJEU, Case C-22/70, *Commission v. Council*, 31 March 1971, ECLI:EU:C:1971:32, point 263.

<sup>220</sup> It is true that in this case the Court did not mentioned solidarity expressly, but in its Opinion 1/76 the Court referred to Case C-22/70 as a case where it had emphasized the requirement of solidarity. See, Opinion 1/76, *cit.*, p. 758.

<sup>221</sup> See, 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*, Vol. 23, 2016, p. 977 ff. For a deeper analysis on the interplay between solidarity and loyalty see, *infra*, par. 1.4.

<sup>222</sup> See, 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

## 1.2 Solidarity after the Lisbon revision: a manifold notion

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”<sup>223</sup>. But, the discussions that followed such a moment of deadlock and, finally, the entry into force of the Lisbon revision have given new impetus to solidarity by including some of the innovations proposed by the failed Constitutional Treaty.

In comparison to the previous treaties, the Lisbon Treaty has attributed particular prominence to the concept of solidarity by citing the term in numerous provisions and by valuing, *inter alia*, the expression “in a spirit of solidarity” that was quoted just once in the Maastricht Treaty<sup>224</sup>. Besides confirming and reinforcing the demands for solidarity contained in the preamble to the Treaties also in the provision devoted to the Union’s objectives currently enshrined in Article 3 TEU as well as within the framework of the Common Foreign and Security Policy, the revision has also inserted this principle in many specific provisions<sup>225</sup>. Furthermore, one could argue that the attribution of the “same legal value as the Treaties” to the Charter of Fundamental Rights of the EU has elevated to the rank of primary law also the references to solidarity contained in the Charter, with particular reference to preamble and Title IV, entitled ‘Solidarity’ where the principle is clearly understood in its social dimension<sup>226</sup>.

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Substance?”, in *Maastricht Journal of European and Comparative Law*, Vol. 23, 2016, pp. 965-983.

<sup>223</sup> See, S. Giubboni, “Free movement of Persons and European Solidarity”, in *European Law Journal*, Vol. 13, 2007, p. 360.

<sup>224</sup> See, Treaty of Maastricht on European Union, Article J.1.

<sup>225</sup> See, *infra*, para. 1.3.

<sup>226</sup> In this regard, 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*, 2014, pp. 71-96.

Within current treaties, solidarity has been officially recognised “*pierre angulaire du système juridique de l’Union européenne*”<sup>227</sup> and has experienced a semantic evolution and a normative ascension that has made it value, objective and principle of the EU integration process. In the following sub-paragraphs, therefore, attempts will be made to distinguish as much as possible between these different meanings of solidarity and then to briefly discuss the various areas in which it is expressly mentioned in the Treaties for introducing the second part of the present chapter concerning solidarity in EU disaster response law.

*a) Solidarity as value of the European Union construction*

Despite solidarity is at the basis and engine of the European integration process as demonstrated by the early references to the main political statements, to frame its exact connotation as value within the Lisbon Treaty is a hard task.

A list of the values that inspire the Union and whose respect notably represents one of the conditions for granting access to candidate States *ex* Article 49 TEU<sup>228</sup>, is contained in Article 2 TEU, according to which:

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<sup>227</sup> See, C. Boutayeb, “La solidarité, un principe immanent au droit de l’Union européenne”, in C. Boutayeb, *La solidarité dans l’Union européenne - Eléments constitutionnels et matériels*, cit., p. 5. 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*, Cambridge University Press, 2005; 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.

<sup>228</sup> 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. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account. The conditions of admission and the adjustments to the Treaties on which the Union is founded which such admission entails shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.” [emphasis added].

“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”.

Even if at first sight such a provision is clear, its wording contributes to make the definition of solidarity as a value in the Union system more complex. Indeed, it is not explicitly mentioned among the values on which the Union is founded, but only among the elements that characterize the societies in which these values common to the Member States may be found<sup>229</sup>. Moreover, as stressed by some scholars, while the values reported in the first sentence are really fundamental and have a clear and uncontroversial legal content, the second ones cannot be properly consecrated as values such as to constitute the legal basis for activating the procedure provided *ex* Article 7 TEU in case of a serious and persistent breach by a Member State of the values referred to in Article 2<sup>230</sup>. On the other side, there is however who argues that solidarity would be implicitly listed within the first sentence as unwritten element exactly because of its extraordinary role in the creation, development and enlargement of the Union<sup>231</sup>. Such a reading could be then 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<sup>232</sup>.

Actually, such an ambiguity concerning the enlist of solidarity within the values the European Union is based on could appear solvable by taking into account

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<sup>229</sup> See, 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*, 2<sup>nd</sup> ed., ULB, 2008, pp. 36-39.

<sup>230</sup> In this regard, see, *inter alia*, 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*, 1998, Vol. 3, pp. 69-84; L.S. Rossi, “La «reazione comune» degli Stati membri dell’Unione europea nel caso Haider”, in *Rivista di diritto internazionale*, 2000, Vol. 83, pp. 151-154.

<sup>231</sup> In this perspective, see B. Böhm, “Solidarity and the values of Art. 2 TEU”, *cit.*, p. 71.

<sup>232</sup> See, M. Dony, “Les valeurs, objectifs et principes de l’Union”, in M. Dony, E. Bribosia (ed.), *Commentaire de la Constitution de l’Union européenne*, Editions de l’Université de Bruxelles, 2005, p. 34.

what previously mention with regard to the CJEU jurisprudence which has recognised that solidarity is at the basis of the (then) Community system. But, even in this regard, some issues may rise with particular reference to the distinction between values and funding principles which does not appear so clear-cut. Indeed, while Article 2 TEU seems to include solidarity as value, Article 21 TEU conceives it as principle by stating that:

“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: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law”.

The contradiction can be explained, according to some authors, by downsizing the apparent difference between values and principles by considering that the inclusion of certain values in a legal text would transform them into principles of interpretation and creation of a system. In this way, it could be possible to speak about solidarity as principle-value of the European construction<sup>233</sup> or, as suggested by Levade, as *esprit constitutif*<sup>234</sup>.

#### *b) Solidarity as objective of the EU integration process*

As already reported in the previous paragraph, solidarity as objective to be achieved, a concrete mission of a policy to be pursued, has been included within primary law by the Maastricht Treaty<sup>235</sup>. And, the Lisbon Treaty has *de facto*

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<sup>233</sup> See, Berramdane, “Solidarité, loyauté dans le droit de l’Union européenne”, cit., p. 57.

<sup>234</sup> See, 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.

<sup>235</sup> See, Berramdane, “Solidarité, loyauté dans le droit de l’Union européenne”, cit., p. 56. It is moreover interesting that, after the inclusion of solidarity among the objectives of the then Community, the Court of first instance had referred to solidarity in one of its judgements concerning State aids in the following terms: “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

taken back and reinforced what previously stated by including solidarity as objective of any kind of relation established by virtue of the EU legal order<sup>236</sup>.

In the first place, a clear reference to solidarity as objective is included in the sixth recital of the Treaty of the European Union (TEU) 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 confirms the extension of the scope of application of solidarity also to the relations between individuals thereby consecrating the concepts of European citizenship<sup>237</sup> and *solidarité démocratique*<sup>238</sup>. To improve interstate relations in the light of solidarity remains, however, the key mission of the EU integration process. Indeed, as already mentioned, Article 3 TEU refers to "solidarity among Member States". Clearly, as stressed by some authors, the requirement of solidarity has been balanced with the reference to the respect of the national identities of the Member States as well as of their national and regional diversities by respecting the principle of subsidiarity in the interest of the citizens<sup>239</sup>. Furthermore,

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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.

<sup>236</sup> See, 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.

<sup>237</sup> In this perspective, it is quite interesting the early CJEU decision in *Grzelczyk* where it dealt with the transnational limits of social solidarity and held that the nationals of the host State had to show a "certain degree of solidarity" to economically inactive migrant citizens. Hence, on the basis of the Union citizenship, individuals of the host State were expected to show solidarity to their fellow EU citizens who were in need of assistance, provided that this person did not constitute an unreasonable burden on her host and the situation was temporary. See, CJEU, Case C-184/99, *Rudy Grzelczyk*, 20 September 2001, ECLI:EU:C:2001:458, para. 44. For an analysis on this, See, C. Barnard, "EU Citizenship and the Principle of Solidarity", in E. Spaventa and M. Dougan (eds.), *Social Welfare and EU Law*, Hart Publishing, 2005, pp. 161–165.

<sup>238</sup> See, A. Levade, "La valeur constitutionnelle du principe de solidarité", cit., p. 36.

<sup>239</sup> See, Lisbon Treaty, Preamble: "DESIRING to deepen the solidarity between their peoples while respecting their history, their culture and their traditions (...)". In this regard, it has to be stressed also the formal inclusion of the so-called "national identity clause" enshrined in Article 4, para.2, TEU according to which: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order

solidarity as objective works also 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 European Union seems a particularly significant step towards its consecration, also because the EU system, as well-known, is characterized by a strong teleological connotation. Indeed, the founding treaties have been always 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 distinctly interpretation employed by the Court aimed at ensuring the greatest practical effectiveness of EU law<sup>240</sup>.

Despite the entry into force of the Lisbon Treaty has reshaped the previous interaction between objectives and competences<sup>241</sup>, the objectives included in Article 3 TEU still have three functions within the EU legal framework. First of all, they serve as interpretative tool of the specific provisions enshrined in the Treaties. In the second place, 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<sup>242</sup> –

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and safeguarding national security. In particular, national security remains the sole responsibility of each Member State”. 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*, Vol. 13, 2011, pp. 195-218.

<sup>240</sup> See, CJEU, Case C-8/57, *Groupement des hauts fourneaux e aciéries belges v. High Authority*, 21 June 1958, ECLI:EU:C:1958:9, point 232; CJEU, Case C-6/62, *Europemballage Corporation e Continental Can Company v. Commission*, 21 February 1973, ECLI:EU:C:1973:22, point 25; CJEU, Case C-36/74, *Charmasson c. Ministre de l'économie e des finances*, 10 December 1974, ECLI:EU:C:1974:137, point 23.

<sup>241</sup> For deepening 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 and Comparative Law Quarterly*, Vol. 63, 2014, p. 958 ff.; E. Neframi (eds.), *Objectifs Et Compétences Dans L'Union Européenne*, Bruylant, 2013.

<sup>242</sup> See, CJEU, Case C-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*, Rennes, Ed. Apogée, 2006, p. 55.

their actions at the Union level. According to a reconstruction made by Azoulai of the CJEU jurisprudence in this field<sup>243</sup>, there are three requirements that have to be respected by these subjects, and especially by States, when acting on the basis of the mentioned objectives of the Union. In the first place, they have to be aware that acting within the framework of those objectives implies the need to respect the principles and mechanisms of control of EU law<sup>244</sup>. Secondly, they have to take into account the supranational dimension and context<sup>245</sup>. Thirdly, as pointed out by the CJEU, Member States must refrain from adopting and maintaining in force any kind of measure capable of eliminating the *effet utile* of the common rules established at the Union level<sup>246</sup>.

The functions attributed to the objectives of Article 3 TEU can be thus extended also to solidarity which, as objective in a perspective of short and long term, contributes to define the purposes which justify the existence of the very Union and, moreover, to fuel the teleological reading of the Treaties which should guide the EU institutions and the Member States<sup>247</sup>.

### *c) Solidarity as principle of the EU legal order*

In general terms, principles, because of their essentially unpublished nature and heterogeneity which distinguishes them, are particularly difficult to define in the Union's system so that are often marked by some vagueness<sup>248</sup>. According to

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<sup>243</sup> See, 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.

<sup>244</sup> See, CJEU, Case C-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.

<sup>245</sup> See, CJEU, Case C-322/01, *Deutscher Apothekerverband*, 11 December 2003, ECLI:EU:C:2003:664, point 73.

<sup>246</sup> See, CJEU, Case C-35/99, *Arduino*, 19 February 2002, ECLI:EU:C:2002:97, point 34.

<sup>247</sup> See, M. Dony, *Droit de l'Union européenne*, cit., p. 39.

<sup>248</sup> 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*, 2005, p. 99 ff.; J. Molinier (ed.), *Les principes*

some authors, principles may be classified in (i) axiomatic, when inherent in the very notion of a legal order and 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<sup>249</sup>. Despite such a classification may be useful, problems remain in particular with reference to the notion of general principles of EU law, defined also 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<sup>250</sup>. In any case, principles having a well-defined legal status are justiciable and thus may be invoked for evaluating, *inter alia*, the conformity of the EU legal acts as well as of the conduct of the Member States<sup>251</sup>.

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

The range of definitions rendered to solidarity as principle is quite wide. Some authors focus mainly on the role of solidarity from a relational point of view by referring to it as principle governing and modulating the relations between the different actors of the Union<sup>252</sup>. In this context, States are asked to find a synthesis between their respective national interests in order to ensure the effective

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*fondateurs de l'Union européenne*, 2005, PUF; D. Simon, "Les principes en droit communautaire", in S. Caudal (ed.), *Les principes en droit*, Paris Economica, 2008, pp. 287-304.

<sup>249</sup> See, T. Tridimas, *The General Principles of EU Law*, Oxford University Press, 2006, p. 3.

<sup>250</sup> 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. Arnall, C. Barnard, M. Dougan, E. Spaventa (eds.), *A constitutional order of States? Essays in EU law in honour of Alan Dashwood*, Oxford, 2011, p. 179 ff.; T. Tridimas, *The General Principles of EU Law*, cit.

<sup>251</sup> 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".

<sup>252</sup> See, 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.

functioning of the Union thereby focusing on the dimension of “solidarity-loyalty” as elaborated by the CJEU jurisprudence<sup>253</sup>. In order to conceive solidarity from a more autonomous perspective, some other scholars include the principle of solidarity among the founding and structural principles of the Union, by attributing to it a “supra-constitutional” or even just a constitutional rank capable of forcing itself on primary law<sup>254</sup>. However, such an orientation is not supported by those who explicitly exclude that solidarity may rank among the founding principles because of its unclear contours<sup>255</sup>. Moreover, it has been put forward the proposal to define solidarity as general principle of Union law<sup>256</sup>, but about this the doctrine is still divided: some scholars consider solidarity as principle of EU law of structural nature and attribute a normative effect to it by acknowledging its constitutional dimension<sup>257</sup>, while others are still sceptical about its bounding legal implications by recalling 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<sup>258</sup>. Moreover, any element confirming such an orientation is apparent neither in the case-law of the Court nor in specific areas of Union law<sup>259</sup>. In effect, there is to say that ranking solidarity among the general principles of EU law would mean to attribute to it a strong legal value and, mainly, the capability of establishing

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<sup>253</sup> See, *supra*, para. 1.1.

<sup>254</sup> 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.

<sup>255</sup> In this regard, see, A. Von Bogdandy, J. Bast, *Principles of European Constitutional Law*, cit., p. 53.

<sup>256</sup> See, M. Fallon, *Droit matériel général de l'Union européenne*, 2<sup>nd</sup> ed., Academia, 2002, p. 71 ff.

<sup>257</sup> See, T. Hieronymi, *Solidarität Als Rechtsprinzip in Der Europäischen Union*, Peter Lang, 2003; C. Barnard, “Solidarity and New Governance in Social Policy”, in G. de Búrca and J. Scott (eds.), *Law and New Governance in the EU and the US*, Hart Publishing, 2006, pp. 153-178.

<sup>258</sup> See, 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.

<sup>259</sup> See, M. Ross, “Promoting Solidarity: From Public Services to a European Model of Competition?”, in *Common Market Law Review*, Vol. 44, 2007, p. 1069.

concrete rules across the different policies thus marking an important step forward in the EU integration process<sup>260</sup>.

Bearing in mind that principles are often deduced by a process of interpretation on the basis of the legislative text from the CJEU, the recent caution of the very Court in using solidarity arguments and engaging in any debate around the legal nature of this notion is symptomatic of the difficulty to deal with such a challenging issue. For instance, in *Pringle*, dealing with the competence of the Member States to adopt the European Stability Mechanism in response to the sovereign debt crisis, solidarity was at the very heart of the matter<sup>261</sup>. Unlike Advocate General Kokott – who stated that, however, it cannot be inferred from the concept of solidarity that there exists a duty to provide financial assistance of the kind that is to be provided by the European Stability Mechanism<sup>262</sup> – the Court did not stress on solidarity in its reasoning. In its judgment it preferred to emphasise the risk for the euro area as a whole rather than explicitly invoking the principle of solidarity in the interpretation of Article 125 TFEU<sup>263</sup>. In this case, the Court has thus been unclear over its position on solidarity as principle capable of extending the benefits of crisis mechanisms. Similarly, the Court has refrained from citing solidarity in several occasions in which Article 80 TFEU – which imposes a clear and unconditional obligation of solidarity on the Member States in asylum, immigration, and border check activities – could have been used. For instance, in *N.S./M.E*<sup>264</sup> and *Halaf*<sup>265</sup>, the Court mentioned the principle just in a quick way and appealed only to fundamental rights when interpreting Article 3(2)

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<sup>260</sup> See, 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 T. Tridimas, *The General Principles of EU law*, cit.

<sup>261</sup> See, CJEU, Case C-370/12, *Thomas Pringle*, cit.

<sup>262</sup> See, View of Advocate General Kokott in *Pringle*, cit., para. 142–143.

<sup>263</sup> For an analysis on solidarity in the Euro-crisis, 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; 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.

<sup>264</sup> See, CJEU, Joined Cases C-411/10 and C-493/10, *N.S. and M.E.*, ECLI:EU:C:2011:865.

<sup>265</sup> See, CJEU, Case C-528/11, *Zuheyra Frayeh Halaf*, ECLI:EU:C:2013:342.

of the Dublin II Regulation<sup>266</sup>, which allows Member States to assume responsibility for processing asylum applications on humanitarian grounds<sup>267</sup>.

In any case, as it will be clearer in the following paragraph, from a constitutional perspective, solidarity is not just a moral or political imperative<sup>268</sup>. Indeed, although in many cases both the CJEU and the Treaties have omitted to qualify solidarity as principle *per se*, within the Lisbon Treaty there are multiple references to the idea of solidarity as inspiring principle of the policies and actions performed by the Union and Member States in specific areas of intervention, renamed by Hilpold as ‘islands of solidarity’<sup>269</sup>.

In the following paragraph, the references to solidarity as explicitly mentioned in the Treaty of the Functioning of the European Union (TFEU) will be briefly examined with regard to specific policies in order to provide for an overview which, albeit not exhaustive, will be useful to introduce the relationship between solidarity and disaster response within the EU legal order. Therefore, in this first reconstruction, it will be voluntarily left out Article 222 TFEU, that is the so-called “solidarity clause”, which will be deeply explored in the following section.

### *1.3 Solidarity in practice: some references to the sectors wherein it intervenes*

As already reported, with the Lisbon revision solidarity has been embodied in many primary EU law provisions. For instance, Article 174 TFEU defines the objectives of economic, social, and territorial cohesion and requires the Union to adopt measures promoting its harmonious development for reducing disparities.

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<sup>266</sup> See, 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.

<sup>267</sup> On 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*, Vol. 3, 2015, pp. 785-787.

<sup>268</sup> See, M. Blanquet, “L’Union européenne en tant que système de solidarité : la notion de solidarité européenne”, *cit.*, pp. 155-195.

<sup>269</sup> See, 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*, Vol. 34, pp. 257-285.

The objective of the promotion of solidarity is then underlined with reference to asylum, immigration, and external borders control: Article 67 TFEU requires the Union to frame a common policy in these fields based on solidarity between the Member States and Article 80 TFEU provides that the Union policies – also at the financial level – shall be governed in accordance with the principle of solidarity and the fair sharing of responsibility. Even though Article 80 TFEU has not so far constituted a legal basis *per se* for the enactment of solidary instruments, it has been interpreted as provision requesting the EU institutions to give effect to the solidarity principle when legislating in these areas<sup>270</sup>.

Solidarity is also accorded a prominent role in the energy sector in which the Union holds powers to adopt measures in situations of economic emergency (Article 122 TFEU)<sup>271</sup> and to attain objectives of sustainability and security in the supply of energy “in a spirit of solidarity between Member States” (Article 194 TFEU)<sup>272</sup>. With reference to this last provision, it is interesting that the reference to solidarity has been included exactly by the Lisbon revision thereby fully acknowledging the management of the energy sector as an issue of common

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<sup>270</sup> 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.

<sup>271</sup> On the application of the principle of solidarity in the field of the EU economic governance, see F. Croci, *Il ruolo del principio di solidarietà tra Stati membri dell’UE nell’ambito della governance economica europea*, PhD Thesis, 2017. The application of solidarity according to Article 122 TFEU will be better clarified in the following chapter with reference to the establishment of the emergency support instrument. See, *infra*, Chapter III, para. 2.

<sup>272</sup> 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*, Bruxelles, 2012, p. 123 ff.; M. Knodt, A. Tews, “European Solidarity and Its Limits: Insights from Current Political Challenges”, in A. Grimm, S. My Giang (eds.), *Solidarity in the European Union. A Fundamental Value in Crisis*, Springer, 2017, pp. 55-58.

concern and legitimising the Union to act in a unitary way in this field<sup>273</sup>. Since the energy sector remains subjected to strong nationalistic and protectionist tendencies and the Union's action in this area is still fragmented, the role played by solidarity as engine of integration could be extremely relevant in the inspiration of a common policy on energy.

In the realm of security, the mutual defence clause envisaged under Article 42(7), TEU requires the Member States to provide for assistance to each other in the event of armed aggression. Finally, as for the Common Foreign and Security Policy (CFSP), Article 24(3) TEU imposes solidarity obligations upon the 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<sup>274</sup>. 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 external dimension: while in the first one solidarity is conceived basically as assistance, and therefore closer to international law because aimed at unilaterally provide for help, the second one attributes to solidarity the enhanced value of *lien*, understood as sharing of a common project<sup>275</sup>.

The fundamental requirement of solidarity within the Union – that was initially requested just as for harmonised fields of EU law<sup>276</sup> – has been thus progressively applied beyond the sphere of restrictive powers attributed to EU institutions by compelling national governments to cooperate and coordinate their policies also in

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<sup>273</sup> See, E. Küçük, "Solidarity in EU Law. An Elusive Political Statement or a Legal Principle with Substance?", cit., p. 973.

<sup>274</sup> 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.

<sup>275</sup> See, 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. 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.

<sup>276</sup> See, I. Domurath, "The Three Dimensions of Solidarity in the EU Legal Order: Limits of the Judicial and Legal Approach", cit., p. 464.

fields retained by States. Enshrined in the progressive development of an “ever closer Union between peoples”, the ‘long term solidarity’ appears, hence, as a real engine for this rapprochement, for which ‘active solidarity’ impregnates the specific instruments organising ‘material solidarity’<sup>277</sup>.

As already anticipated, the Lisbon Treaty has, moreover, strengthened the three-fold internal dimension of solidarity which concerns not only the relationship between Member States<sup>278</sup>, but also that between Member States and individuals as well as that between the Union and Member States<sup>279</sup>. Accordingly, it could be said that also solidarity is characterised by a horizontal and vertical dimension. The former regulates obligations of solidarity between Member States, by attributing to the EU the role of mediator and facilitator for an “even closer union” and for the creation of collective solidarity mechanisms. Instead, the latter focuses on a top-down reconstruction of the solidary relationship between the Union and Member States: the EU institutions shall demonstrate solidarity and Member States shall bear co-responsibility and prove to be actively involved and willing to play their part. 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

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<sup>277</sup> See, C. Boutayeb, “La solidarité un principe immanent au droit de l’Union européenne, élément pour une théorie”, cit., p. 9.

<sup>278</sup> Article 24 TEU mentions “mutual political solidarity among Member States” and Article 31 TEU notes “spirit of mutual solidarity” regarding external actions under Common Foreign and Security Policy; Article 67 TFEU mentions “solidarity between Member States”, upon which a common policy on asylum, immigration and external border control is based; Article 122(1) TFEU anticipates the EU institutions should act “in a spirit of solidarity between Member States” should there be shortage of supply of energy or similar products; the “spirit of solidarity between Member States” is mentioned in Article 191(1) TFEU as regards the need to preserve and improve environment in the internal market; the Union’s policy on energy, according to Article 194(1) TFEU, will also be performed “in a spirit of solidarity between Member States.”

<sup>279</sup> Even though its relevance will be better explained in the course of the work, it is appropriate to mention Article 222 TFEU which states that “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”.

relations at all levels, between individuals and generations and between localities, regions and Member States”<sup>280</sup>.

As a consequence, in this perspective, the Union shall be, on the one hand, instrument of ‘solidary integration’ between Member States and, on the other one, addressee of the material solidarity enshrined in the Treaties which shall permeate also the action of the EU institutions.

#### *1.4 The interplay between solidarity and loyalty as engines of integration*

Alongside solidarity, the concept of loyalty has marked – and continues to mark – the dynamic of the EU integration process<sup>281</sup>, and has been revisited by the Lisbon Treaty in a very significant way. Indeed, it has been decided to export it from the Treaty establishing the European Community into Title I, TEU on common provisions to be applied to all EU policy areas and, more precisely, into Article 4 TEU completely dedicated to the interaction between Member States and the EU itself<sup>282</sup>. In this way, loyal cooperation has fallen within the normative category of general principles of EU law as natural consequence of the pre-existing legal framework and the CJEU’s case law which has expanded the boundaries of this concept<sup>283</sup>. The principle of sincere cooperation is thus ‘of general application’ in the EU legal order: as constitutional principle, it does not depend on whether the EU’s competences are exclusive or shared and equally applies with regard to the EU institutions as to its Member States. More specifically, Article 4(3) TEU –

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<sup>280</sup> See, 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, available at <https://www.consilium.europa.eu>.

<sup>281</sup> On the foundations of the principle of sincere cooperation, see V. Constantinesco, “L’article 5 CEE, de la bonne foi à la loyauté communautaire”, in F. Capotorti et al (eds.), *Du droit international au droit de l’intégration: Liber amicorum Pierre Pescatore*, Nomos Verlagsgesellschaft, 1987, pp. 97-114.

<sup>282</sup> In this regard, it is appropriate to stress that the Court of Justice back in 1989 has held that loyalty was a principle of Community law, see 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 Bogdandy – J. Bast (eds.), *Principles of constitutional law*, Hart Publishing, 2006, pp. 3- 52.

<sup>283</sup> See, M. Klamert, *The Principle of Loyalty in EU law*, Oxford University Press, 2014.

which embodies the so-called ‘loyalty clause’ – codifies the mutual legal obligation for the EU and its Member States “to assist each other in carrying out the tasks which flow from the Treaties” and sets that the Member States “shall refrain from any measure which could jeopardise the attainment of the Union’s objectives” and should “facilitate the achievement of the Union’s tasks”.

At first sight, the loyalty clause could be described as analogous to the *bona fide* typical of international law, but at EU level it actually entails not only negative obligations, but also positive duties the infringement of which is penalised by the Court<sup>284</sup>. Such a legal concept is, indeed, capable of operating in different ways depending on the nature of the action at issue: it can give rise both to a substantive positive obligation to give primacy to EU law and to procedural obligations which manifest themselves in a duty on Member States to cooperate with the EU institutions for the implementation of the Treaty provisions<sup>285</sup>. In addition, the CJEU has suggested that the scope of application of the loyalty principle should guide also the conduct of the EU institutional actors in a full mutual respect<sup>286</sup>. But, such a principle does not operate just in the relationship between the Union and its Member States, but also horizontally, as the latter have to cooperate with each other for ensure the realisation of the Union objectives. 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 result thus operating as constitutional safeguard for the protection of the general interest of the European community<sup>287</sup>.

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<sup>284</sup> See, CJEU, Case C-433/03, *Commission v. Germany*, ECLI:EU:C:2005:462; Case C-266/03, *Commission v. Luxembourg*, ECLI:EU:C:2005:341; Case C-246/07, *Commission v. Sweden*, ECLI:EU:C:2010:203. For details on the principle of sincere cooperation see, F. Casolari, “EU Loyalty After Lisbon: An Expectation Gap to Be Filled?”, in *The EU after Lisbon*, cit., pp. 93-133; M. Klamert, *The principle of Loyalty in EU law*, cit.

<sup>285</sup> See, S. Hyett, “The Duty of Cooperation: a Flexible Concept”, in A. Dashwood and C. Hillion (eds.), *The General Law of E.C. External Relations*, Sweet & Maxwell, 2000.

<sup>286</sup> See, F. Casolari, “EU Loyalty After Lisbon: An Expectation Gap to Be Filled?”, cit., pp. 106-107.

<sup>287</sup> See, CJEU, Case 54/81, *Firma Wilhelm Fromme v Bundesanstalt für landwirtschaftliche //Marktordnung*, ECLI:EU:C:1982:142.

The interplay between loyalty and solidarity exactly falls within such a perspective thus making them the two sides of the same coin and as principles taking part to the same function: the EU integration process<sup>288</sup>. This intrinsic connection is certainly not a novelty in the EU framework not just because it has been found more than once by the Luxemburg judges that have elaborated the expression ‘solidarity-loyalty’, but also because the very foundations of the European solidarity are based on a stronger reciprocal and selfish character rather than on pure altruism<sup>289</sup>. Indeed, as States agreed at the beginning to constraint their prerogatives and sovereign rights in order to create a new legal framework, they acted on the basis of the principle of reciprocity and loyalty by expecting same behaviours on the part of the other contractors<sup>290</sup>. The significant degree of cohesion gained within EU law, its extension to further areas and the influence acquired by Union citizens as actors and subjects of rights have mitigated the predominant reciprocal side of solidarity, but its implementation rests within and relies on the Member States. Moreover, to borrow from economics, some national governments fear free-rider behaviours from other Member States benefitting from integration without contributing to it.

Against this background, the existence of mutual obligations of loyalty are of utmost importance on two grounds. First of all, in the absence of altruistic or moral underpinnings, reciprocal loyalty is the only driver of solidarity thereby ensuring major predictability and certainty of actions. Instead, when no perspective and guarantees of long-term sincere cooperation is given – such as in

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<sup>288</sup> In this regard, it is significant the fact that Article 24, par. 3, TEU combines them by requiring Member States to support the CFSP “in a spirit of loyalty and mutual solidarity”. 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*, Vol. 1, 2005, pp. 17-20; M. Klamert, *The Principle of Loyalty in EU law*, cit., pp. 35-41.

<sup>289</sup> See, P. Hilpold, “Understanding solidarity within EU law: an analysis of the “Islands of Solidarity” with particular regard to Monetary Union”, cit., p. 261.

<sup>290</sup> There is no consensus on the reach of European solidarity when it is not driven by self-interest. See, for example, J. Habermas, *The Lure of Technocracy*, Polity Press, 2015; A. Sangiovanni, “Solidarity in the European Union: Problems and Prospects”, in J. Dickson and 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.

the field of asylum and refugee policy – solidarity does not materialise and States are left at their own devices<sup>291</sup>. Secondly, loyalty allows to adjust the single interests in the light of the general one thereby achieving that European solidarity which represents the *raison d'être* of the EU legal order itself. As a result, both the principles are able to regulate the implementation of all the competences, be they exclusive, shared or supporting, by acting on three levels: between States, between States and EU institutions and between EU institutions<sup>292</sup>. Indeed, while solidarity, as unwritten constitutional principle, mainly reflects the aspiration to advance in the European integration process, the principle of loyalty expresses the way such a process should effectively be implemented. So here, at institutional level, 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 the principle of solidarity.

This notwithstanding, there is to say that, by reformulating the words used by the CJEU, the Lisbon Treaty is more than an agreement which merely creates mutual obligations between the contracting States. As a consequence, there are some circumstances where reciprocity cannot be valid and a more intense cooperation is required regardless of the traditional mutual relations between Member States. In particular, this may happen in situations of emergency when such an ordinary interplay between loyalty and solidarity makes way for actions based on solidarity, and autonomous duties of solidarity can be derived. Indeed, despite legal literature suggests that the obligations potentially deriving from the requirement to act in a spirit of solidarity in times of crisis are actually meant to reinforce the cooperation required under the loyalty principle, some scholars argue that it is not enough to conclude that only Article 4(3) TEU govern their functioning from a procedural point of view<sup>293</sup>. On the contrary, in emergency scenarios (mass influx of migrants, economic crises, disasters, terrorist attacks) specific obligations of solidarity could exist thus making the principle of loyalty

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<sup>291</sup> 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.

<sup>292</sup> See, A. Berramdane, "Solidarité, loyauté dans le droit de l'Union européenne", cit., p. 72.

<sup>293</sup> See, M. Gestri, "La politica europea dell'immigrazione: solidarietà tra Stati membri e misure nazionali di regolarizzazione", cit., p. 922.

just functional for ensuring the effectiveness of the relative implementing measures<sup>294</sup>. Accordingly, one of the purposes of the present work will be to evaluate whether, in disaster scenarios, duties of loyal cooperation may leave room to specific duties of solidarity on Member States and on the EU institutions.

## **2. 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 often they do not recognise national borders. Such a keen awareness about the plight of disaster victims has called the attention to the importance of appropriate national and supranational rules and structures for disaster prevention, mitigation and response.

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 just to face internal and external threats in order to secure the economic system. But, the acknowledgement of a growing number of areas of common concern has assigned to the Union new tasks usually falling within the domain of the States, such as the protection of fundamental rights, the right to life and the people as such<sup>295</sup>. 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- '90s, in a trend which 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.

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<sup>294</sup> See, 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.

<sup>295</sup> See, 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.

Among the worst crises that originated in Europe and in other continents, and that the Union has tackled through the instruments at disposal, it is appropriate to recall the disaster in a chemical industrial plant in Seveso in Italy 1976; the Chernobyl nuclear plant disaster 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; the eruption under the glacier of Eyjafjallajökull (Iceland) in 2010; the recent Ebola virus outbreak in Africa and the current migration crisis in Europe. These have represented the perfect circumstances in which the ways taken to tackle with crisis phenomena have afforded 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 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 provision can be easily related 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, under the provisions of 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 the principle. The Treaty on the Functioning of the European Union (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 cleaning up the previous variegated and heterogeneous legal regimes and moving towards pre-planned, predictable and coordinated response through a specific operational instrument, that is the EU Civil Protection Mechanism<sup>296</sup>.

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 known also as ‘solidarity clause’. This article 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<sup>297</sup> 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 to 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”<sup>298</sup>. Indeed, the introduction the solidarity clause represents not only the attempt, but also the success, to 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.

### *2.1 The multilayered nature of the EU legal instruments for responding to disasters: an introduction*

The wording of the above-reported provisions suggests some crucial points for the present analysis. In the first place, the general provisions enshrined in Article 21

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<sup>296</sup> In this regard, see Chapter IV of the present work.

<sup>297</sup> 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*, Vol. 19, 2011, pp. 184-197.

<sup>298</sup> See, 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.

TEU and in Article 222 TFEU make evident that EU law on disaster response should not cover events occurring in third countries, but implies some actions of solidarity also towards the very EU Member States. And, as it will be clearer from the following chapters, over the last two years there has been an important improvement as for the instruments of assistance to be deployed within the Union's territory. Moreover, there is to anticipate 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 goals of very different, but interacting, nature. This is the reason why, as anticipated in the introduction of the present work, albeit the following chapters will be dedicated to analyse 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 sake of completeness.

As it will be better illustrated, the mechanisms progressively developed for responding to disasters can be activated to provide both financial and in-kind assistance. As for the first group, it will be considered the EU Solidarity Fund as 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. Indeed, EU solidarity in case of disaster 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, it will be made reference to the mechanism for providing immediate financial assistance to EU Members established in 2016, that is the EU emergency support instrument. As anticipated, 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 side, 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 peculiarity 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 such instruments 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 principle of solidarity. This is the reason why, as it will be clear 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 multilayered character of the mechanisms that will be explored involves also the relationship between Member States and the Union thereby shaping different dynamics of solidarity. Indeed, except for the rules concerning State aid – which involve exclusively 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 procedure of activation of the EU solidarity fund is entirely left to the Commission, a more detailed analysis suggests that States play a decisive role not really for the provision of the funds, but for the preliminary definition of the activation criteria of the instrument itself. If conceived in its temporal complexity, such an instrument thus requires not only the Union, but also Member States to show a *de facto* solidarity. With regard then the emergency support instrument, it will be underlined the centrality of States acting within the Council of the European Union. As for the Union Civil Protection Mechanism, the resources deployed in the field are voluntarily put at disposal by Member States while the Union is required to guarantee coordination and send experts at the site of the occurrence. Therefore, the Member States and the Union are asked to be complement and reinforce each other: in this case solidarity towards the affected State goes through both the actors simultaneously. Finally, the provision of assistance through the emergency support instrument, since intended only for

exceptional disasters, is proposed by the Commission and decided collectively by Member States within the Council. In this field, the Union provides assistance by complementing States and without impacting on their individual actions.

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 independent actor and Member States. The challenge of the next chapters will be to verify whether the so-called 'EU disaster response law', that embodies all the legal instruments which will be reported, effectively regulates a coherent 'system of solidarity' able, therefore, to comply with the solidarity requirements enshrined both in EU primary and secondary law. Finally, starting from a deep analysis of the legal value of the solidarity clause enshrined in Article 222 TFEU, it will be explored whether in the field of disaster response some duties of solidarity, specifically the duty to provide assistance in case of disaster, insisting both on Member States and on the Union and having 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**

In the EU, the *ad hoc* solidarity enshrined in the Treaties is understood above all in terms of economic and financial support. Indeed, when a State is affected by a major 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 intervening relevant actors, raises the donors' profile of generosity and solidarity.

Starting from such an awareness, various sources of direct financing following an emergency occurring within and outside the Union's territory have been established and progressively improved in order to meet the increasing needs of solidarity stemming from the Treaties. The overview on these instruments, however, cannot be limited to direct forms of financial assistance which are made available in accordance with the general budget of the Union, but it shall be extended also to other sectors of EU law that become relevant in the event of a disaster. In particular, it will be given an account of the EU rules concerning the adoption of public measures by the national authorities aimed at aiding companies hit by a calamitous event in order to evaluate whether the solidarity expressed by the Union towards Member States in this field reflects or differs from that embedded by the other financial instruments. Indeed, even though such a discipline falls in issues of competition law by implying a control rather than a provision of financial assistance, it is strictly linked to the whole regime of EU disaster response law that shall not comprise just immediate and targeted interventions, but also long-term and comprehensive measures aimed at rebuilding the whole economic and social framework of the affected territories.

## **1. Making good the damage: support instruments for affected Member States**

### *1.1 The EU Solidarity Fund as instrument for disaster recovery*

The multilevel dimension of solidarity within the EU legal order has been firstly made evident in 2002 when it was established the EU Solidarity Fund (hereinafter, EUSF)<sup>299</sup> aimed at helping Member States against natural disasters. Indeed, over that year, devastating and exceptional floods, caused by a period of heavy rains, hit Central Europe resulting in casualties and damages amounting to billions of euro. The EU and Member States responded relatively quickly to these crises, but it was soon signalled the need to establish a financial instrument operating at EU level to show solidarity with the population of the affected regions. The Commission, therefore, proposed the establishment of a special fund according to Article 159 TEC (currently Article 175 TFEU), on the strengthening of economic, social and territorial cohesion within the Union, for “reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions”<sup>300</sup>.

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<sup>299</sup> See, Council Regulation No 2012/2002 of 11 November 2002 establishing the European Union Solidarity Fund, *OJ L 311/3*, 14 November 2002.

<sup>300</sup> The Lisbon Treaty did not change the content of the previous Article that currently reads as follows: “Member States shall conduct their economic policies and shall coordinate them in such a way as, in addition, to attain the objectives set out in Article 174. The formulation and implementation of the Union's policies and actions and the implementation of the internal market shall take into account the objectives set out in Article 174 and shall contribute to their achievement. The Union shall also support the achievement of these objectives by the action it takes through the Structural Funds (European Agricultural Guidance and Guarantee Fund, Guidance Section; European Social Fund; European Regional Development Fund), the European Investment Bank and the other existing Financial Instruments. The Commission shall submit a report to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions every three years on the progress made towards achieving economic, social and territorial cohesion and on the manner in which the various means provided for in this Article have contributed to it. This report shall, if necessary, be accompanied by appropriate proposals. If specific actions prove necessary outside the Funds and without prejudice to the measures decided upon within the framework of the other Union policies, such actions may be adopted by the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions.”.

The Fund has the objective to contribute, in the shortest time possible, in mobilizing emergency services to meet the immediate needs of the population and to reconstruct short-term damaged key infrastructures in order to facilitate the resumption of economic activities. As a consequence, this financial instrument covers only essential emergency operations, such as the restoration of infrastructures to working order, the cleaning up of disaster-stricken areas and the costs of rescue services and temporary accommodation for the population concerned and the securing of preventive infrastructures and measures of immediate protection of the cultural heritage<sup>301</sup>. The EUSF may be activated in cases of major natural disasters with serious repercussions on living conditions, the natural environment or the economy in one or more Member States or accession countries. Therefore, the assistance takes the form of a non-reimbursable grant<sup>302</sup> to the beneficiary State that is fully responsible for its implementation<sup>303</sup>. Since its establishment, the EUSF has been used in seventy occasions covering a range of different catastrophic events including floods, forest fires, earthquakes, storms and drought thus reaching the total value of more than EUR 3.7 billion<sup>304</sup>. Among all the cases of activation, it deserves to be recalled the major support granted in 2012, on the occasion of the earthquake in Italy and, precisely in Emilia Romagna, Lombardy and Veneto, for which the Commission allocated a record of EUR 670 million<sup>305</sup>.

Despite its significant added value in addressing overwhelming emergencies within the EU – by alleviating the financial burden on Member States and fostering the visibility of the action of the EU among its citizens – the functioning of the fund has more than once raised some critiques and suggestions of revision.

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<sup>301</sup> See, Council Regulation No 2012/2002, Article 3.

<sup>302</sup> Except when a third party subsequently meets the cost of repairing the damage. See, Council Regulation No 2012/2002, Article 8.

<sup>303</sup> See, Council Regulation No 2012/2002, Article 6.

<sup>304</sup> To have a completed picture of the financial contributions granted between 2002 and 2016, see *Overview of all Treated EU Solidarity Fund Cases since 2002* ([http://ec.europa.eu/regional\\_policy/it/funding/solidarity-fund/#3](http://ec.europa.eu/regional_policy/it/funding/solidarity-fund/#3)).

<sup>305</sup> See, European Commission, *EU Solidarity Fund: a record €670 million for Emilia Romagna* ([http://europa.eu/rapid/press-release\\_IP-12-959\\_it.htm](http://europa.eu/rapid/press-release_IP-12-959_it.htm)). For further evaluations, see F. Di Camillo et al., *The Italian Civil Security System*, Edizioni Nuova Cultura, 2014, pp. 83-88.

In particular, the Commission perceived the necessity to strengthen the solidarity aspect of EU crisis management by extending the scope and improving the operation mechanisms of the EUSF. Indeed, the existing Union programmes and funds were inadequate in not dealing with also man-made disasters and major emergencies that might threaten public health, such as possible outbreaks of SARS or nuclear accidents. As a consequence, in 2005 the Commission proposed a new regulation for the EUSF containing a lot of improvements, such as the lowering of the thresholds for being granted assistance, more flexible criteria to be respected and the opportunity of advanced payments to be granted immediately after a disaster<sup>306</sup>.

The proposal from the Commission was addressed to the Council and the 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 the thresholds for applications, at the same time it did not want to let the Commission alone decide whether a disaster could fall within the scope of the Regulation<sup>307</sup>. Such a motivation was used also by the Council, where several Member States were reluctant to revise the EUSF because it could lead to other not desirable changes and to a strengthening of the EU in this area<sup>308</sup>. Hence, the Commission proposal was definitely blocked because of the persistent reluctance of States to favour an ‘Europeanization’ of financial solidarity animated by the fear of improper use from other Member States. As a consequence, the demand for solidarity in this field collided with that for protection of the EU fortune and, indirectly, of the national ones.

In this situation of *impasse*, in 2008 the European Court of Auditors made a first evaluation of the EU Solidarity Fund, by focusing on the ability to provide

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<sup>306</sup> See, 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.

<sup>307</sup> See, 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.

<sup>308</sup> See, 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.

assistance in a rapid, efficient and flexible manner<sup>309</sup>. 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, because of administrative rules, Commissions' working procedures as well as the promptness and quality of the applicants' information and requests<sup>310</sup>.

The same shortcomings were issued by the Commission in 2011 in its Communication on the *Future of the European Union Solidarity Fund*<sup>311</sup>, 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 for making financial aid to Member States more rapidly available by stressing, *inter alia*, its incapacity to apply equal level of solidarity vis-à-vis an EU Member State as compared to a third country to which an immediate financial assistance can be granted<sup>312</sup>. As a result, despite the deadlock of 2005, after the entry into force of the Lisbon Treaty, the Commission decided to submit another amending proposal to Regulation 2012/2002 which was then negotiated under the ordinary legislative procedure *ex* Article 294 TFEU.

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<sup>309</sup> See, European Court of Auditors, Special report No 3/2008, pp. 9–11, and, 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.

<sup>310</sup> See, European Court of Auditors, Special report No 3/2008, pp. 5-6.

<sup>311</sup> See, 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.

<sup>312</sup> *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. 2.1 of the present Chapter.

*1.1.1 Regulation (EU) 661/2014: a step forward in granting financial assistance under the EUSF*

On 15 May 2014 the amending Regulation (EU) 661/2014 entered into force<sup>313</sup>. In a larger effort to make the Union more efficient and comprehensive in dealing with major emergency situations, the Commission made noteworthy and substantive changes on the procedure of granting that now deserve to be assessed for the purposes of the present work.

First of all, it must be underlined that, according to the current regulation, the EU Solidarity Fund can be activated in the event of a “major disaster”, namely whether it has resulted in damage estimated either at or over EUR 3 billion, or more than 0,6% of its gross national income of the affected Member State<sup>314</sup>. Under exceptional circumstances, the Fund may also be used for “regional natural disasters” involving the major part of its population and resulting in direct damage in excess of 1,5 % of that region’s gross domestic product<sup>315</sup>. As a consequence, the request of funding through the EUSF does not imply the existence of a link with specific circumstances as previously listed, but just with the serious character of the event, regardless its origin – that, however, shall remain natural –, and with a minimum threshold of damage.

Insofar as such preliminary requirements are met, according to the new procedure, the national authorities of the affected Member State within twelve weeks – and no longer ten – after the occurrence of the damage may submit their request of activation of the EUSF to the Commission by including all the “available information” concerning: 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

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<sup>313</sup> See, 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.

<sup>314</sup> See, Regulation (EU) 661/2014. Article 2(2).

<sup>315</sup> See, Regulation (EU) 661/2014, 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.

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<sup>316</sup>. Moreover, Article 2 of Regulation 661/2014 confirms that also a neighbouring Member State or country involved in accession negotiations with the European Union, which is affected by the same disaster, can benefit from assistance from the Fund<sup>317</sup>.

On the basis of the information received by the national authorities, the Commission has a maximum of six weeks for assessing whether the conditions for mobilizing the EUSF are met and, if so, for determining the amount of the grant to be proposed both to the European Parliament and the Council<sup>318</sup>. 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<sup>319</sup>.

Among the main and tangible improvements brought by the amending Regulation, it 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<sup>320</sup>. The only condition is that the sum does not exceed 10% of the anticipated total amount of the financial contribution from the EUSF, capped at EUR 30 million. Such enhancement can be explained by the interest of combining the practical need of further accelerating the process

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<sup>316</sup> See, Regulation (EU) 661/2014, Article 4(1).

<sup>317</sup> This is the reason why the amending regulation includes two legal basis: Article 175 third subparagraph and Article 212 second paragraph TFEU. Recourse to Article 212 is necessary to include non-Member States that are in the process of negotiating their accession to the EU.

<sup>318</sup> See, Regulation (EU) 661/2014, Article 4(2).

<sup>319</sup> See, Regulation (EU) 661/2014, Article 8(1).

<sup>320</sup> See, Regulation (EU) 661/2014, Article 4a.

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 stages after a disaster<sup>321</sup>. The meaningful and increasing idea is, indeed, that solidarity implies not only 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 particular in the post-emergency phase. At present, however, the Fund does have still some limits that should be taken into account by the EU institutions.

In the first place, it is questionable the fact that – notwithstanding the calls of the European Parliament and the 2005 Commission proposal – the regulation currently in force does not cover man-made disasters or other complex emergencies not having a proper natural character. Besides, albeit extremely objective, the definition of the events that may trigger the activation of the EUSF appears definitely limited, as including only the direct damage suffered, but not the loss of profit, which is certainly more difficult to assess. Alongside this, there is to say that the granting of the financial support is based on the calculation of the damages arising from a single event, while it should be more appropriate to consider a cumulative calculation of the damages caused by disastrous events in a full calendar year.

In the second place, the EUSF cannot cover more or less severe damage to the economic and productive activities of the territory (especially SMEs, farms and tourist activities) in addition to the serious consequences for the social system and housing arising from these events. Thus, it emerges the need to resort, if necessary, to other instruments that have national origin such as State aids. As

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<sup>321</sup> The devastating consequences of the recent 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. This new proposal, that is currently under consideration in the European Parliament and the Council, would supplement EU Solidarity Fund support and spare national resources by operating directly after a disaster has occurred. See, European Commission, Proposal for a Regulation of the European Parliament and the Council, amending Regulation (EU) No 1303/2013 as regards specific measures to provide additional assistance to Member States affected by natural disasters, COM(2016) 778 final, 30 November 2016.

well known, the granting of State measures to businesses are strongly 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 way – the whole picture on the financial mechanisms of response to disasters. Moreover, although the regulatory framework on State aids seems unrelated to the issue concerning to the post-emergency situations, it is gradually gaining importance in the debates on reconstruction and on the respect of solidarity requirements in the event of a disaster.

### *1.2 The EU' State aid regime and the EU fiscal rules 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 adopted to the general legal frameworks concerning State aids and fiscal policies.

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. For more long-term recovery and reconstruction, depending on the extent of the catastrophe, national authorities could 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 enterprises in difficulty is, thus, one of the instruments that national authorities have always used to support them in the phases of recovery and reconstruction thereby showing national solidarity<sup>322</sup>. 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

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<sup>322</sup> 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, *Tax Implications of Environmental Disasters and Pollution*, Kluwer, 2015, pp. 1-6.

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 market territorially limited and circumscribed shall enable any business to welcome and attract both domestic and foreign companies without any advantage being granted through State resources<sup>323</sup>. 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 such a rigidity, 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 for a list of aids automatically compatible<sup>324</sup> and a list of those that can be considered compatible by the Commission under its own discretion<sup>325</sup>.

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<sup>323</sup> See, W. Schon, "Taxation and State aid law in the European Union", in *Common Market Law Review*, Vol. 36, 1999, pp. 911-936; K. Bacon (ed.), *European Union Law of State Aid*, 2nd edition, Oxford University Press, 2013; A. Biondi, P. Eeckhout, J. Flynn, *The law of State aid in the European Union*, Oxford University Press, 2004; P. Nicolaidis, M. Kekelekis, M. Kleis, *State Aid Policy in the European Community: Principles and Practice*, 2nd Edition, Wolters Kluwer, 2008.

<sup>324</sup> See, Article 107, para. 2, TFEU: "The following shall be compatible with the internal market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point."

<sup>325</sup> See, Article 107, para.3, TFEU: "The following may be considered to be compatible with the internal market:(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation; (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest; (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission."

The list of aids *ex lege* compatible includes also those directly intended to make good “the damage caused by natural disasters or other exceptional occurrences”, thus limiting the discretionary power of the European Commission to authorize 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 for making 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<sup>326</sup> 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 exempted from an *ex-post* control by the Commission over the respect of specific conditions. In 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 of the damage effectively suffered as a consequence of the natural disaster.

In this way, it has been acknowledged the need to streamline the monitoring procedure, thus ensuring full support and offering further solidarity to Member States by giving them the opportunity to react more quickly to make good the damage suffered, without jeopardising the monitoring role of the Commission<sup>327</sup>. Accordingly, over In this way, it has been acknowledged the need to streamline

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<sup>326</sup> See, 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.

<sup>327</sup> See, C. Micheau, *Droit des aides d’État et des subventions en fiscalité*, Larcier, 2013.

the monitoring procedure, thus ensuring full support and offering further solidarity to Member States by giving them the opportunity to react more quickly to make good the damage suffered, without jeopardising the monitoring role of the Commission<sup>328</sup>. the last years the Commission has made some steps forward to support States in the reconstruction process, by acting in line with the demands of solidarity enshrined in the Treaties and by giving substance to that vertical solidarity between the EU institutions and Member States which characterises the EU legal order<sup>329</sup>.

### *1.2.1 Negative elements affecting solidarity in the field of State aids regime*

Despite this recent positive improvement and the fact that the Commission has rarely declared an aid granted by national authorities after a disaster incompatible, from a strictly legal point of view, current legislation is still characterized by some challenges that deserve 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 appropriate 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 both to the Commission and the CJEU, should be interpreted restrictively<sup>330</sup>. As for the notion of “natural disaster”, the Commission has preferred to demarcate the scope of application of Article 107, para. 2, point b, TFEU by specifically indicating an exhaustive list of events that can fall within the concept, rather than providing a more generic and objective definition.

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<sup>328</sup> See, C. Micheau, *Droit des aides d'État et des subventions en fiscalité*, Larcier, 2013.

<sup>329</sup> See, 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.

<sup>330</sup> See, 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; 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.

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 river banks or lake shores, avalanches, tornadoes, hurricanes, volcanic eruptions and wildfires of natural origin”<sup>331</sup>. Despite the situations covered are wide-ranging, the letter of the recital does leave no room for new types of assessments or for the introduction of new categories of disasters. 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 as natural disasters within the meaning of Article 107, para.2, point b, TFEU. This exclusion seems quite curious since in *Guidelines for State aid in the agricultural and forestry sectors and in rural areas 2014 - 2020*, the Commission explicitly keeps open the option of considering compatible with EU law those aids granted in occasion of adverse weather situations comparable to disasters which destroy more than 30% of average annual production<sup>332</sup>. Moreover, the intensification of events related to climate change might require a more frequent State intervention in favour of businesses that have suffered from 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 number of incompatibility cases, and, consequently, of 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

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<sup>331</sup> See, Regulation (EU) 651/2014, Recital 69.

<sup>332</sup> See, European Union Guidelines for State aid in the agricultural and forestry sectors and in rural areas 2014 to 2020, cit., para. 330.

has demonstrated a certain openness in this regard<sup>333</sup>, by determining the compatibility of State aids granted, for example, in occasion of the Erika oil tanker accident, the Chernobyl nuclear disaster, the crisis sparked by the dioxin contamination in animal feed as well as that of the bovine spongiform encephalopathy (commonly known as the disease of “mad cow disease”)<sup>334</sup>. However, Regulation 651/2014 has excluded the so-called “exceptional events” from those situations that may be exempted from prior notification.

*Prima facie*, this choice is understandable since the inclusion of such a wide category would create not only some confusion about the events subjected to the new regulation, but also an *ex post* excessive monitoring work for the Commission. In addition, the automatic compatibility of the above-mentioned events could encourage the entrepreneurs not to take precautionary measures against foreseeable occurrences to limit the damages. Despite this, it seems less evident why there has been no mention of specific events whose origin is not natural, but that in certain circumstances may be regarded as natural disasters in terms of impact and need for intervention. Indeed, also disasters of anthropic character like far-reaching industrial or nuclear accidents as well as health or environmental emergencies, could have negative consequences on the functioning of the society so as to require early interventions by the national authorities through measures falling in 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 accentuate some uncertainties 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

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<sup>333</sup> See, M. Tjepkema, “Damages Granted by the State and their Relation to State Aid Law”, in *European State Aid Law Quarterly*, Vol. 3, 2013, pp. 478-492.

<sup>334</sup> See, 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”.

avoid overcompensation<sup>335</sup> and, consequently, incompatibility<sup>336</sup>. Definitely, it is reasonable that whether a company has been the beneficiary of an inappropriate advantage, the value corresponding to the facilitation obtained should be paid back. This notwithstanding, it is necessary to make a further consideration.

In disaster settings it is not always straightforward to identify a clear 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 an economic damage that may not be evident at first sight. The context in which businesses operate after a disaster is certainly not equal to that of 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 the 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 penalize the already highly injured businesses and, once again, limit the full effectiveness of solidarity in the event of disaster and, consequently, the citizens' trust in the Union.

### *1.2.2 Solidarity and national budget balance: some brief reflections*

The occurrence of a disaster and the consequent fiscal measures that national governments adopt may affect also the whole system of EU public finance and the

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<sup>335</sup> In this regard, see, CJEU Third Chamber, Joined Cases C-346/03 and C-529/03, *Atzeni and Others v. Regione autonoma della Sardegna*, 23 February 2006, ECLI:EU:C:2006:130, para. 79.

<sup>336</sup> See, 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.

new rules deriving from the recent Fiscal Compact<sup>337</sup>. In fact, any measure aimed at facilitating the rebuilding of public and private facilities should be included in the national Budget Stability Act within the expenditures, thus contributing to worsen the annual budget balance. Furthermore, according to the Stability and Growth Pact, each country should avoid significant deviation in their annual budgets from their medium term budgetary objective.

Such an imposition is fuelling 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 Stability and Growth Pact. In this regard, the document containing *Specifications on the implementation of the Stability and Growth Pact and Guidelines on the format and content of Stability and Convergence Programmes* 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”<sup>338</sup>. 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”<sup>339</sup>. It is, thus, possible to “derogate” to the general rules on the balanced budget for interventions of immediate relief and assistance. The major problem stems from the fact that the constraints imposed by the Fiscal Compact, while contemplating the option to deviate from the medium-term one-off in case of exceptional events, do not provide the possibility to exclude the costs of prevention and securing of the public infrastructure and buildings nor those for the reconstruction of private buildings and production activities from the calculation of the deficit.

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<sup>337</sup> 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 introduced as a new stricter version of the previous Stability and Growth Pact, signed on 2 March 2012 by all Member States of the European Union, except the Czech Republic, the United Kingdom and Croatia. For further information: <https://ec.europa.eu/info/node/4287/>.

<sup>338</sup> See, 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.

<sup>339</sup> *Ibid.*, p. 4, note 4.

Against this background, the European Parliament<sup>340</sup> has recently invited the Commission to introduce major flexibility in the procedure of evaluation of the national deficit. In particular, it has suggested to consider the chance that, in serious cases wherein it is clear the intense financial pressure supported by the public authorities at national, regional and local level, 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 a major compliance with the requirements of solidarity between Member States and Union. Indeed, albeit 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 sincere cooperation, it would be appropriate that the Union's obligation to provide assistance according to the principle of solidarity was not limited to the stage of first intervention, but that operated in a long-term perspective, by embracing also the reconstruction phase and the prevention one in order to offer to citizens the security and stability needed to continue living in their territories.

### *1.3 Solidarity and conditionality: two concealable principles?*

The analysis so far reported makes evident that, with regard to the EU Solidarity Fund and the State aid regime, 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. This leads to the question of how conditionality may acquire some relevance also in the field of disaster response when dealing with financial assistance. Although it is not possible to deepen the numerous problems raised by the application of this requirement, for the purposes of the present work it is notable, even only shortly, to reflect on the relationship between the latter and the principle of solidarity.

Actually, the issue of conditionality is well-known with reference to the field of the EU economic governance and, mainly, to the financial assistance packages

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<sup>340</sup>See, European Parliament resolution on the situation in Italy after the earthquakes, 2016/2988(RSP), 23 November 2016, para.7.

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<sup>341</sup>. In order to receive the financial help, recipient States are required to adopt a set of fiscal consolidation measures aimed at halting the deterioration in 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 then been endorsed and confirmed by the very CJEU in the already mentioned *Pringle case* wherein the Court, rather than to call on the principle of solidarity<sup>342</sup>, 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 European Union law”<sup>343</sup> and that, in any case, assistance could be granted only in case of danger to the euro area as a whole. Such a conclusion has already suggested a first debate on the conciliation between a reasoning based on the potential danger to the whole euro area (and not to a single EU Member) and the principle of solidarity. In this regard, there is to say that – on account of the very CJEU jurisprudence – solidarity has been always considered expression of the desire to act in the 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 in disadvantage and worsen the hardship suffered by Member States in the absence

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<sup>341</sup> For a deeper analysis on the principle 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*, Vol. 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*, Vol. 4, 2015, pp. 268-288; K. Featherstone, “Conditionality, Democracy and Institutional Weakness: the Euro-crisis Trilemma”, in *Journal of Common Market Studies*, Vol. 54, 2016, pp. 48-64.

<sup>342</sup> See, *supra*, Chapter II, para. 1.2.

<sup>343</sup> See, CJEU, *Pringle case*, *cit.*, point 72.

of assistance<sup>344</sup>. The economic and financial crisis has thus exposed the principle of solidarity to new challenges that the Court should have clarified and addressed in a more detailed way.

Returning to the topic 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 in the scope of application of such instruments.

With regard to the first instrument of financial solidarity, it is meaningful the fact that, 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]*<sup>345</sup>.

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, 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 rebuilding of infrastructure<sup>346</sup>.

In principle, such a *caveat* is acceptable because stimulates the EU Members 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.

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<sup>344</sup> See, A. McDonnell, “Solidarity, Flexibility, and the Euro-Crisis: Where do principles fit in?”, cit., pp. 79-82.

<sup>345</sup> See, Regulation (EU) No 661/2014, Article 4, para.2.

<sup>346</sup> See, European Commission, DG Regional Policy, *The European Union Solidarity Fund and European Commission*, (2008) 130 final.

Moreover, it confirms the Union's intention to conceive disaster management in its whole dimension by covering not only 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 the principle of solidarity which should guide the Union action for the final purpose of providing help to the affected population as stressed in the Preamble of the very Regulation 2012/2002.

Similarly, the evident conditions set by the Commission with regard to the compatibility of the measures adopted by the Member State in favour to the local companies following a disaster seem to rise some unbalances with the principle of solidarity. After all, by reformulating the Court statement with regard to State aid, "the derogations from free competition in favour of [aid to make good the damage caused by natural disasters or exceptional occurrences] are based on the aim of Community solidarity"<sup>347</sup>. And, according to the CJEU, "in exercising its discretion, the Commission should to ensure that the aims of free competition and Community solidarity are reconciled, whilst complying with the principle of proportionality"<sup>348</sup>. 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 again to jeopardise the effective granting of the aid to those who have been deeply affected by the event occurred.

Behind the choice to include such 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 limit their attempts of moral hazard. Borrowing from the arguments dealing with financial and economic issues, also with regard to calamitous events national authorities should demonstrate to be

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<sup>347</sup> See, 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".

<sup>348</sup> *Ibid.*

aware of their commitments and responsibilities before not only their own population, but also the other EU Members and the very Union. Hence, responsibility would be the feeder between solidarity and conditionality, and, the latter would be a sort of insurance for the right balance between external solidarity and national responsibility.

Notwithstanding the principle of conditionality has been rightly conceived for preventing 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 a EU citizens-centred approach). Therefore, it can be doubted that conditionality can be considered an expression of the principle of solidarity in its essence of principle guiding the action of the Union and the Member States<sup>349</sup>. Moreover, conditionality may affect solidarity also in its social dimension as the imposition of specific requirements for the granting of assistance can impinge on the respect of the fundamental economic as well social rights, now part of primary law for all intents and purposes, of the affected population.

## **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 for supporting 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 macro-financial level. On the contrary, immediate financial support has always been directed to third countries by resorting to the humanitarian aid instrument, that has been the first ever tool to be created in order to cope with major disasters. Therefore, one can argue that financial solidarity as constitutional paradigm within EU law was initially more a manifestation of the Union’s external projection rather than a vehicle of internal cooperation. The introduction of an emergency support

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<sup>349</sup> With reference to the application of the principle of solidarity during the economic crisis in Europe, see J.-V. Louis, “Solidarité budgétaire et financière dans l’Union européenne”, cit..

instrument may represent 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.

### *2.1 Filling the gap with the international solidarity provided by the humanitarian aid instrument*

In order to understand whether and to what extent the establishment of the emergency support instrument may impact on 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 that has been the first useful tool in the hands of the EU for responding to crisis occurring in third countries.

The origins of this instrument shall be traced back to the first connections with the 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 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<sup>350</sup>. 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<sup>351</sup>.

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<sup>350</sup> For deeper insights on international humanitarian assistance in disaster settings, see, P. Mac Alister-Smith, *International humanitarian assistance: Disaster Relief Actions in International Law and Organizations*, Martinus Nijhoff Publishers, 1985.

<sup>351</sup> 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*, Basingstoke, Palgrave, 2012, pp. 109–110; T. Mowjee, "The European Community Humanitarian Office (ECHO): 1992–1999 and Beyond", in *Disasters*, Vol. 22, No. 3, 1998, pp. 250–267.

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<sup>352</sup>. 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<sup>353</sup>, was adopted *ex Article 130W TEC 8* (now Article 209 TFEU) on development cooperation<sup>354</sup>. But, humanitarian aid and development cooperation have been gradually conceived as fundamentally different, both in terms of application and in terms of guiding principles<sup>355</sup>. In fact, while development

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<sup>352</sup> See, 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.

<sup>353</sup> See, Council Regulation No 1257/96 of 20 June 1996 concerning humanitarian aid, *OJ L* 163, 2 July 1996.

<sup>354</sup> Both the EU institutions and the CJEU applied this extensive interpretation concerning the notion of “development cooperation” also in other cases. For example, in the *Portugal v. Council* case (that concerned the validity of a Decision referring to the conclusion of the Cooperation Agreement between the European Community and India on partnership and development on matters falling within the scope of other EC policies, e.g., energy, tourism, and culture) the Court affirmed the validity of the Decision and hold that “the objectives of the development cooperation policy are broad in the sense that it must be possible for the measures required for their pursuit to concern a variety of specific matters. That is so in particular in the case of an agreement establishing the framework of such cooperation”, see, CJEU, Case C-268/94, *Portuguese Republic v. Council of the European Union*, 3 December 1996, ECLI:EU:C:1996:461, para. 37. In the ECOWAS case, the Court confirmed this line of reasoning by stating that: “cooperation with developing countries refers not only to the sustainable economic and social development of those countries, their smooth and gradual integration into the world economy and the campaign against poverty, but also to the development and consolidation of democracy and the rule of law, as well as to respect for human rights and fundamental freedoms”, see, CJEU, Case C-91/05, *European Parliament v Commission of the European Communities*, 20 May 2008, ECLI:EU:C:2008:288, para 65.

<sup>355</sup> See, M. Broberg, “Legal Basis of EU Council Regulation 1257/96 Concerning Humanitarian Aid – Time for Revision?”, in H. J. Heintze and 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

policies are based on a long-term perspective aimed at, *inter alia*, 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<sup>356</sup>. Furthermore, the provision of humanitarian assistance is based on the principles of humanity, neutrality, impartiality and independence<sup>357</sup>, while 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 work of drafting of the European Convention, the necessity to acknowledge the speciality of humanitarian aid in comparison to development cooperation raised<sup>358</sup> 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. The failure of the procedure of ratification of the Constitutional Treaty in 2004 did not represent a step back in the recognition of the specificity of humanitarian aid as instrument of EU external policy. Indeed, as with so many issues, the Lisbon Treaty re-proposed such intention by including an explicit and separate legal basis for the EU's action in the field of humanitarian aid in Article 214 TFEU<sup>359</sup>. Besides, in December 2007, the European Commission, the European

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A. De Guttry, M. Gestri and G Venturini (eds.), *International Disaster Response Law*, cit., pp.129–154.

<sup>356</sup> In this respect, it is worth underlining that the scope of application *ratione loci* covers not only countries affected by natural or man-made disasters, interpreted according to a *stricto sensu* logic, but more in general to war contexts.

<sup>357</sup> It is worth to note 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.

<sup>358</sup> See, *Note from Mr Poul Nielson, member of the European Commission, on Humanitarian Assistance, doc. Working Group VII*, Working Document 48, 21 November 2002.

<sup>359</sup> See, Article 214 TFEU: “1. The Union’s operations in the field of humanitarian aid shall be conducted within the framework of the principles and objectives of the external action of the Union. Such operations shall be intended to provide *ad hoc* assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these different situations. The Union’s measures and those of the Member States shall complement and reinforce each other. 2. Humanitarian aid operations

Parliament, the Council and the Member States jointly adopted the *European Consensus on Humanitarian Aid*<sup>360</sup>, thus adding a solid political character to the legal framework upon which such an instrument is based<sup>361</sup>.

As anticipated, even after the adoption of the Lisbon Treaty, the instrument of secondary law governing the provision of humanitarian assistance is Council Regulation 1257/96 under which the EU finances in the form of grants for about €1 billion annually and coordinates projects implemented by NGOs and international organisations, as well as “if necessary” by the Commission itself or specialized agencies of Member States, for assisting over 120 million people every year<sup>362</sup>. For this purpose, Regulation 1257/96 describes a number of

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shall be conducted in compliance with the principles of international law and with the principles of impartiality, neutrality and non-discrimination. 3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures defining the framework within which the Union’s humanitarian aid operations shall be implemented. 4. The Union may conclude with third countries and competent international organisations any agreement helping to achieve the objectives referred to in paragraph 1 and in Article 21 of the Treaty on European Union. The first subparagraph shall be without prejudice to Member States’ competence to negotiate in international bodies and to conclude agreements. 5. In order to establish a framework for joint contributions from young Europeans to the humanitarian aid operations of the Union, a European Voluntary Humanitarian Aid Corps shall be set up. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall determine the rules and procedures for the operation of the Corps. 6. The Commission may 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. 7. The Union shall ensure that its humanitarian aid operations are coordinated and consistent with those of international organisations and bodies, in particular those forming part of the United Nations system.”

<sup>360</sup> 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 European Commission, *The European Consensus on Humanitarian Aid*, *OJ C* 25, 30 January 2008.

<sup>361</sup> 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. Since the adoption of the 2030 Agenda for Sustainable Development by the international community at the UN Summit in September 2015, the EU is now working towards a new European Consensus on Development as a new common vision for development policy for the EU and its Member States.

<sup>362</sup> The EU’s multi-annual Financial Framework (MFF) 2014-2020 has programmed an initial amount to approximately €1 billion per year, but the precise figure is decided each year following the annual budget procedure and since 2012 the European Commission adopts yearly a “Worldwide Decision” which covers all humanitarian aid actions the Commission anticipates

eligibility criteria for NGOs' grantees, including 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*<sup>363</sup>.

Besides underlining the importance of the respect of some key principles as precondition for the implementation of the EU's humanitarian activities, the Lisbon Treaty codifies also 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.

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during a given period. In addition, an EU Emergency Aid Reserve can be called upon to respond to unforeseen events and major crises and to transfer unused amounts from other EU funding programmes to humanitarian aid during the course of the year.

<sup>363</sup> In particular, the European Consensus provides a definition of the principles of "humanity", "neutrality" and "impartiality" as common denominator of international legal instruments related to humanitarian aid in disaster situations and adds also that of "independence". According to the 2007 document, humanity implies that "human suffering must be addressed, wherever it is found, with particular attention to the most vulnerable in the population", neutrality means that humanitarian aid "must not favour any side in an armed conflict or other dispute", impartiality requires that "humanitarian aid must be provided solely on the basis of need, without discrimination between or within affected populations" and respect for independence entails "the autonomy of humanitarian objectives from political, economic, military or other objectives". Hence, the sole purpose of humanitarian aid is "to relieve and prevent the suffering of victims of humanitarian crises"<sup>363</sup>. It is, however, noteworthy that Article 214(2) TFEU refers to "impartiality, neutrality and non-discrimination" as fundamental principles guiding the EU's humanitarian aid, thus leaving apart those of "humanity" and "independence" and suggesting a striking difference between the humanitarian principles included in the European Consensus and those in the Treaty. This discrepancy can only be understood in light of the history behind the Lisbon Treaty. Indeed, following the political dispute during the negotiations over the notion of "humanity" and especially that of "independence" because of their potentially contrasts with the ambition to develop a more "comprehensive approach" in response to crisis situations, it was decided to decline out the opportunity to include all four of the humanitarian principles in the European Consensus in the new Lisbon Treaty provision. 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, *International Law of Disaster Relief*, Cambridge University Press, 2014, 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.

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, that is special since Member States are not prevented from exercising their competence in this sector<sup>364</sup>. 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<sup>365</sup>. But, 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 principle of loyal cooperation, Member States have the obligation to take each other’s activities into account and not to create obstacles to the implementation of EU law<sup>366</sup>. Besides, 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 element 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<sup>367</sup>.

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 facilitator and coordinator of the

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<sup>364</sup> See, P. Van Elsuwege, J. Orbie, “The EU’s Humanitarian Aid Policy after Lisbon: Implications of a New Treaty Basis”, in I. Govaere and S. Poli (eds.), *Management of Global Emergencies, Threats and Crises by the European Union*, Brill/Nijhoff, Leiden, 2014, pp. 28-30.

<sup>365</sup> See, Article 214, para.4, TFEU.

<sup>366</sup> 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*, Vol. 47, 2010, pp. 329–359; C. Hillion, “Coherence et action extérieure de l’Union européenne”, in E. Neframi (ed.), *Objectifs et compétences de l’Union européenne*, Paris, Bruylant, 2012, pp. 229–241.

<sup>367</sup> See, Article 220, para.2, TFEU.

provision of aid and relief in emergency situations<sup>368</sup>. In this respect, it is then of utmost importance the inclusion in Article 214 TFEU of the idea to establish a European Voluntary Humanitarian Aid Corps (hereinafter, EVHC) as expression of the European value of solidarity with people affected by disasters in third countries<sup>369</sup>.

For a long time, Member States have been excluded from the opportunity to benefit from such immediate forms of financial assistance, thereby creating a gap between solidarity granted for external and internal emergencies. This discrepancy was explicitly acknowledged on occasion of the European Council of 19 February 2016 that called for concrete proposals from the Commission “to the put in place the capacity for humanitarian aid internally”<sup>370</sup>.

## *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 authorizes the implementation of financial assistance measures to support Member States dealing with severe humanitarian difficulties caused by natural or man-made disasters<sup>371</sup>. In particular, the Regulation has been adopted as an emergency measure for the management of the ongoing refugee crisis which has

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<sup>368</sup> See, 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*, Vol. 22, 2014, pp. 170-171.

<sup>369</sup> See, 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, thus, launched in 2014 with the adoption of Regulation (EU) 375/2014 that reflects the multiple objectives behind the EVHC. On the one hand, the initiative “should contribute to efforts to strengthen the Union’s capacity to provide needs-based humanitarian assistance”. See, Regulation (EU) No 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.

<sup>370</sup> See, European Council Conclusions, 18-19 February 2016, EUCO 1/16.

<sup>371</sup> See, Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union, *OJ L 70*, 16 March 2016. Hereinafter, Council Regulation (EU) 2016/369.

put under unprecedented strain the resources of Member States at the southern borders of the Union and generated a serious humanitarian crisis<sup>372</sup>.

Despite it has been adopted to provide for assistance to those Member States that are coping with the arrival of a large number of migrants and asylum-seekers, such an instrument has 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 made in favour of those affected by man-made or natural disasters in third countries (recital 7). In this regard, it is appropriate to say that the act under examination actually does not provide a definition of the term “disaster”, thereby implicitly referring to the definition contained in other EU legal texts and to the practice<sup>373</sup>. As reported in the introduction of the present work and as it will be clearer in the next chapter, the EU instruments propose a quite broad meaning of the term “disaster”, so differentiating from other international instruments. The terms “disaster” or “catastrophes” on the one hand, and “emergencies” and “crises” on the other one can be considered as comparable because the

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<sup>372</sup> Between January 2015 and February 2016, over 1.1 million people – refugees, asylum seekers and migrants – made their way to the European Union, either escaping conflict in their countries of origin or in search of a better and safer life. The majority of these people used the Western Balkan migratory route, reaching the Greek islands by boat from Turkey, then continued to the mainland and the northern border of Greece and crossing into the former Yugoslav Republic of Macedonia and then onwards until eventually reaching central and northern Europe. Despite harsh winter conditions, the number of people reaching EU shores in 2016 has been ten times greater than the figure registered during the same period in 2015. Since 9 March 2016, the former Yugoslav Republic of Macedonia has completely closed its borders to any undocumented person, thus leaving more than 57.000 people under difficult conditions at the border in northern Greece, often without adequate access to shelter, food and water. Against this background and seen the scale of the emergency, the European Union has taken a comprehensive approach to tackle the refugee crisis by shaping a European Agenda for Migration, proposing measures to be implemented immediately in order to improve the management of migration as a whole. 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: a 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, n.1, pp. 101-113.

<sup>373</sup> 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. See, 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.

qualification of an event as a disaster shall not be estimated (just) on the basis of its origin but (mainly) with reference to its severe impact on people, environment, property and cultural heritage. Otherwise, it could be very hard to justify the inclusion of migrants' inflow within the category of natural or man-made disasters.

Regulation 2016/369 is, thus, potentially applicable to any situation of crisis giving rise to "severe wide-ranging humanitarian consequences"<sup>374</sup> and this is the reason why, before embarking in the analysis of the act of secondary law, it is noteworthy to dwell on the legal basis upon which Regulation 2016/369 has been adopted, that is Article 122, para.1, TFEU<sup>375</sup>.

Such a Treaty provision, that mirrors the text of Article 100 TCE, grants the Council, on a proposal from the Commission, "in a spirit of solidarity between Member States", the power to adopt measures aimed at coping with emergency situations that the States are not capable to face individually, in particular in case of difficulties arising in connection to the supply of products in the area of energy<sup>376</sup>.

The Council has justified the choice to rely on Article 122, para.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

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<sup>374</sup> See, Council Regulation (EU) 2016/369, Article 1: "1. This Regulation lays down the framework within which Union emergency support may be awarded through specific measures appropriate to the economic situation in the event of an ongoing or potential natural or man-made disaster. Such emergency support can only be provided where the exceptional scale and impact of the disaster is such that it gives rise 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 to the Union is sufficient. 2. Emergency support provided under this Regulation shall be in support of, and complementary to, the actions of the affected Member State. To this end, close cooperation and consultation with the affected Member State shall be ensured".

<sup>375</sup> See, Treaty of Lisbon, 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."

<sup>376</sup> 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*, 27 September 2016, <http://europeanpapers.eu/it>.

the EU Solidarity Fund. Hence, according to some commentators<sup>377</sup>, the main objective of the Council was not to grant simply financial assistance to Member States. Rather, the intention was to activate a broader 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<sup>378</sup>. And in effect, as will be seen, the support granted under the mechanism established by Regulation 2016/369 is not confined just to financial contributions to Member States' budgets. As a matter of fact, even though the CJEU has stated that this provision cannot encompass instruments other than having financial character<sup>379</sup>, the Treaty provision does not specify what kind of measures could be adopted thus leaving some uncertainties as well as leading to different interpretations.

This reasoning appears, however, scarcely justifiable and quite questionable<sup>380</sup>.

In the first place, the idea proposed by the Council on the potential overlapping of the emergency support instrument and the EU Solidarity Fund or other existing tools having financial character appears quite weird given their different nature. Indeed, the aim of the emergency support is not to provide assistance to the State following a calculation of the damages occurred upon request of the national authorities, but it is to guarantee protection and relief to the victims through partner organisations in the immediate aftermath of a disaster.

An attentive reading of the act at stake makes evident that it moves from the premise of the existence of a fundamental analogy of the *de quo* mechanism with the humanitarian aid instrument and, therefore, incorporates its constituent elements. Indeed, the new act explicitly sets that the emergency support instrument may include “any of the humanitarian aid actions which would be eligible for Union financing pursuant to Regulation (EC) No 1257/96”<sup>381</sup>. As a

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<sup>377</sup> See, CJEU, *Pringle*, cit., point 118.

<sup>378</sup> See, Council Regulation (EU) 2016/369, Recital 5.

<sup>379</sup> See, A. Miglio, “The Regulation on the Provision of Emergency Support within the Union Humanitarian Assistance and Financial Solidarity in the Refugee Crisis”, cit.

<sup>380</sup> 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*, Cacucci Editore, 2017, pp. 519-531.

<sup>381</sup> See, Council Regulation (EU) 2016/369, Article 3, para.2.

consequence, as for the humanitarian aid 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<sup>382</sup>, such as NGOs, specialised services of the Member States or international agencies and organisations having the requisite expertise. In addition, provided that such an instrument has been inspired by the principle of solidarity, Regulation 2016/369 sets that it shall be granted and implemented in compliance with the fundamental humanitarian principles of humanity, neutrality, impartiality and independence. The *ratio* is, therefore, that the Union – as for humanitarian aid in third countries – shall be ready to promptly cope with any exceptional event that causes and may cause serious humanitarian problems that cannot be controlled by the national authorities.

In the light of the potential broad scope of such an act, Article 122, para. 2, TFEU<sup>383</sup> would have been a much more suitable legal basis. Labelled as one of the innovations introduced by the Lisbon Treaty with regard to Article 122 TFEU, it authorizes 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”. Whether the intention was to establish a new instrument which was parallel to the humanitarian aid instrument and that could be activated in many potential circumstances other than the current migration crisis, this provision would have been more appropriate. Among the other things, also the migration crisis – which has been the trigger for the adoption of this act – may be compared in extensive and absolute terms more to a ‘disaster’ intended as ‘humanitarian emergency’ rather than to a situation of difficulty in the supply of products in the field of energy. Besides, the very

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<sup>382</sup> 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.

<sup>383</sup> See, Treaty of Lisbon, 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, 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.”

Regulation opens by labelling the large inflows of migrants and asylum-seekers as “a notable example” of disaster directly affecting Member States<sup>384</sup>.

The result of the choice made by the Council is thus two-fold. On the one hand, it seems to have broadened the scope of application of Article 122, para.1, TFEU thereby making the reference to difficulties in the supply of products only as an example and leading to a potential re-interpretation of this provision from the CJEU. On the other hand, by excluding Article 122, para. 2, TFEU, it has arguably 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”<sup>385</sup>.

Besides these considerations, it is appropriate to make a brief analysis of the specific features of the new instrument starting from its scope of application in order to evaluate its potential contribution in the assessment of the existing cooperation mechanisms that may be activated in case of disaster as expression of the principle of solidarity in the EU.

As already underlined, the scope of application *ratione materiae* of this new instrument is quite broad as, according to the letter of Regulation 2016/369, it is potentially intended to face any serious disaster or exceptional situation which go further the Member State’s capacity. In this regard, it is quite interesting the decision taken on the scope of application *ratione temporis*: the Council decided to justify the activation of the emergency support in case of “ongoing or potential” disaster, so that it could be assumed that the mechanism could be activated also 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 be provided only when the consequences of a disaster reach a certain scale of humanitarian impact. It is, therefore, highly unlikely that the measures may be authorized on the basis of an *ex ante* assessment on the likelihood of a severe impact.

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<sup>384</sup> See, Council Regulation (EU) 2016/369, Recital 2.

<sup>385</sup> 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.

By remaining in the scope of application of the emergency support instrument, it is essential to critically assess the content of Regulation 2016/369 as for the purpose of this mechanism. Indeed, despite the implementation of such an instrument is left to partners working in the field of humanitarian assistance and, hence, having as main objective the mitigation of human sufferings, the wording of the Regulation suggests that there is a second goal to be pursued. It is “to implement operations of a potentially life-saving nature in an *economic*, efficient and effective manner, thereby allowing a more effective action by reason of its scale and complementarity”.<sup>386</sup> As a matter of the 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”. More specifically, in the Preamble of the Regulation, it is reported the real reason for the adoption of the emergency support instrument: “the migration and refugee situation currently affecting the Union is a notable example of a 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”. It is no coincidence that, furthermore, the Regulation requires that the measures adopted are “appropriate to the economic situation”, a condition that echoes a proportionality assessment, but also that specifically focuses on the economic consequences of the event justifying the granting of emergency support.

Ultimately, besides the doubts concerning the reasoning behind the choice of Article 122, para.1, TFEU as legal basis for the creation of the emergency support instrument, such considerations, combined with the fact that the European Parliament has not been consulted for the adoption of the instrument under investigation, may wonder about its effective relevance in relation to other emergencies<sup>387</sup>. Indeed, it seems that the emergency support instrument could be activated not only in case of a disaster having exceptional or wide-ranging severe consequences from a humanitarian point of view but also from an economic perspective, potentially affecting other Member States. In this regard, it has to be

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<sup>386</sup> See, Council Regulation (EU) 2016/369, Recital 12 [emphasis added].

<sup>387</sup> See, L. Den Hertog, “EU Budgetary Responses to the «Refugee Crisis». Reconfiguring the Funding Landscape”, *CEPS Paper in Liberty and Security in Europe*, May 2016.

said that such a consideration makes the application of the emergency support instrument as illustrated by Regulation 2016/369 extremely limited to the current “refugee crisis” rather than applicable to other future emergencies. In this way, it would be confirmed its temporary character confined to the present and contingent situation that some Member States are coping with. To be fair, there is to say that in any case the permanent nature of the mechanism created appears quite partial since the Commission, after the periodic monitoring, could propose to the Council the suspension of the assistance whether the conditions no longer exist<sup>388</sup>. In addition, Article 8 of the Regulation establishes that, by 17 March 2019, the Commission shall submit an evaluation of the operation of such an instrument to the Council, together with suggestions for the future of this Regulation and, where appropriate, proposals to amend or terminate it: the emergency support instrument has not therefore been conceived as a permanent but rather as a temporary mechanism.

With reference to the activation of the emergency support, the Regulation refers to the procedures laid down by Regulation 966/2012 on the financial rules applicable to the general budget of the Union<sup>389</sup>. Once received the Commission proposal, 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”<sup>390</sup> in order to mobilise the necessary resources coming from the EU general budget but also from contributions made by public or private donors.

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<sup>388</sup> See, Council Regulation (EU) 2016/369, Article 8.

<sup>389</sup> See, 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. In this regard, it is relevant to stress that *ex* Article 314 TFEU in the phase of revision of the Union budget also the European Parliament is involved. For the migrants’ 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.

<sup>390</sup> See, Council Regulation (EU) 2016/369, Article 2: “1. The decision about the activation of the emergency support under this Regulation in case of an ongoing or potential disaster shall be taken by the Council on the basis of a proposal by the Commission, specifying where appropriate the duration of the activation. 2. The Council shall immediately examine the proposal of the Commission referred to in paragraph 1 and shall decide, in accordance with the urgency of the situation, on the activation of the emergency support”.

Since the entire scheme is based upon 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 prominent display of the EU 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<sup>391</sup>. 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.

Against this background, a brief evaluation on the role played by the affected State is also interesting. From the letter of the Regulation, since no reference concerning the request of activation from the affected States is made, it seems that the emergency support instrument may be activated in any case where the requirements are respected. Such a perspective could be confirmed by the fact that Regulation 2016/369 clearly states only that the activation of the emergency support instrument shall imply “a close cooperation and consultation with the affected Member State”, thereby keeping it in the background rather than in the central place. Despite this, it should not be forgotten that the whole EU framework is built on a consensual *caveat* between the Union and Member States

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<sup>391</sup> Further explanation of visibility requirements can be consulted on the dedicated visibility site <http://www.echo-visibility.eu/>.

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 comprise also to protect those who are under its jurisdiction as 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<sup>392</sup>. 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. Rather, it is an instrument that operates as a complement to the action of national authorities and of the Union, by fully respecting the principle of subsidiarity. *Mutatis mutandis*, the subsidiary role of the emergency support instrument works also in relation to the other mechanisms that can be activated in the event of a disaster. In fact, 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 rise 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 to the Union is sufficient”. It seems to be, hence, a last resort mechanism whose activation shall take into account other forms of (financial and in-kind) assistance already deployed.

Ultimately, albeit the adoption of the emergency support instrument has apparently filled a significant gap on the provision of financial assistance in emergency scenarios, the multiple question marks that arise from such an analysis – with particular reference to the legal basis chosen for the adoption of the instrument at stake – make the real and future use full of relevant obstacles. In particular, for the purposes of the present work, the main risk is that the unclear temporal nature (that is its permanent or non-permanent character) may lead again

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<sup>392</sup> See, 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.

to a legal vacuum concerning the provision of financial assistance to EU Members in situations of emergency thereby undermining the implementation of solidarity measures in the internal context.

### **3. 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.

In the first place, this investigation has reported the attention of the Union to the necessity to fill the gap between EU Members and third countries in terms of immediate financial assistance to be granted. But, the positive premises of the new emergency support instrument as parallel mechanism of humanitarian aid in response to internal emergencies seems not to meet reality, even though it surely represents an attempt to show major solidarity within the Union, by being disengaged from the issue of damages calculation.

In the second place, this chapter has revealed a strong separation in the effectiveness of the solidarity principle between the response tools that draw power directly from the action of the Union – such as the emergency support mechanism and the EUSF – and those that operate on a national level without any direct involvement of EU institutions if not in terms of control. In fact, in relation to the former, although further improvements are still desirable, the Commission ensures a ‘horizontal’ support to States becoming complementary to them, while respecting the principle of subsidiarity. On the contrary, the overall regulatory framework concerning State aids and fiscal policy is still characterised by a top-down reconstruction of the relationship between the Union and the Member States with the risk that a strict control over national financial choices could represent a limit to the application of the principle of solidarity. Albeit the instruments illustrated give a relevant contribution in 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.

At this point, it is therefore appropriate to make a step forward by investigating the existence of other significant instruments having an operative character and envisaging a more cooperative attitude among States, but also between States and EU. Indeed, from a theoretical point of view, more and better coordination can serve to diagnose, prevent and redress divergences within a group, thus reducing the need for solidarity-based-on-difference while producing a 'widespread solidarity'.

## CHAPTER IV

### THE EU CIVIL PROTECTION MECHANISM: IN-KIND ASSISTANCE TO COPE WITH DISASTERS

#### 1. The Union as catalyst of solidary integration: an introduction

In recent years, it has become increasingly clear that traditional ways of managing crises no longer suffice in this diffuse threat environment. A centralized, 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, transboundary threats demand transboundary crisis management capacities. Therefore, a growing distress among the EU Members about the trans-national effects of major emergencies – such as the health ones – has convinced them that more cooperative operational arrangements within the field of disaster are a necessary prerequisite and an added value for efficient crisis management at national level. Moreover, responding to (multiple) disasters and taking care of the victims could not see anymore the sole responsibility of the individual Member States and financial assistance could not be the only way to show solidarity. Hence, the EU<sup>392</sup> has become a political and legal forum of discussion and sharing of common strategies, in some cases open also to third countries. Among these the Civil Protection Mechanism established in 2007 represents, from an operational point of view, one of the key instruments of response to disasters.

The EU countries have a long tradition of concern for disaster relief, but the management of civil protection operations at supranational level is a relatively new issue. Before the Lisbon Treaty, it 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 case of calamity is

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<sup>392</sup> For sake of clarity, it is necessary to stress that, for linguistic convention, in the present chapter the term “European Union” will be sometimes used in its broadest sense as alternative to the term “European Community”, thus embracing all the moments of the EU integration process.

traditionally conceived as one of the main responsibilities relating to State sovereignty and, therefore, detached financial assistance is more welcomed and successful. However, experience shows 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 the 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 in the course of time. The following paragraphs will present an *excursus* of the main rules adopted from '80s to the changes brought by the Lisbon Treaty in the area of civil protection in order to evaluate how and to what extent solidarity materialises in this sector.

## **2. The long way towards the creation of the EU Civil Protection Mechanism**

### *2.1 The normative framework of civil protection: first steps within the EEC*

Cooperation in the area of civil protection at EU level could be traced to the end of 1970s. At the beginning, such a cooperation developed at bilateral level with the establishment of two parallel initiatives in France and Italy dealing with disaster mitigation. Both countries, for responding to social concern over the devastating potential of catastrophic events, initiated a highly beneficial period of cooperation. As early as 1980, France established the *Plan d'Exposition aux Risques*<sup>393</sup>, a national programme to assess the geophysical environment and 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. Disaster

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<sup>393</sup> The Risk Exposure Plan (PER) has been 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>.

hazards were 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 such catastrophes on their own, but often emergency assistance was required from other nations. It was in this context that the EU concept of cooperation in civil protection issues 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 there were benefits and efficiencies to be gained through cooperation.

The clear necessity to tackle this issue in a supranational coordinated manner emerged just in the early 1980s, after the Seveso disaster<sup>394</sup> and the Chernobyl accident<sup>395</sup>. Indeed, the underestimation of the risks originating from the presence of production facilities on one hand and the subsequent growing attention to the protection and preservation of the environment and of individuals on the other, put the issue of industrial risk at the centre of the public debate.

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<sup>394</sup> The accident took place on July 10, 1976, in a chemical plant located near the town of Seveso, 25 km north of Milan. A chemical cloud containing several kilograms of dioxin TCDD was released into the environment and contaminated a vast and densely populated area causing death and suffering of tens of thousands of human beings and animals. Moreover, it has been recorded elevated cardiovascular mortality in the first years after the event and increases in diabetes and other chronic lung diseases. The response to Seveso disaster was widely criticized as too slow and ineffective. Against this background, a new regulatory framework to be shared by all the Member States was perceived as urgent and in 1982 the European Economic Community (hereinafter EECC) adopted the Directive 82/501/EEC, renamed as Seveso I Directive (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”, in S. Olsson (ed.), *Crisis Management in the European Union: Cooperation in the Face of Emergencies*, p. 85; M. Kotzur, “European Union Law on Disaster Preparedness and Response”, in *German Yearbook of International Law*, Vol. 55, 2012, pp. 267-268.

<sup>395</sup> In the early morning hours of April 26, 1986, residents of the Ukrainian village of Pripjat saw a spectacular and terrifying sight: a glowing fountain of molten nuclear fuel and burning graphite was spewing into the dark sky through a gaping hole in the roof of the Chernobyl Nuclear Power Plant only a few kilometres away. 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.

In April 1985, the European Commission – DG Environment hosted the first meeting on civil protection and, under the Italian Presidency impulse, the Italian Minister of Civil Protection Giuseppe Zamberletti invited the other European Ministers for an informal summit in Rome. Indeed, Italy had been already hit by a number of natural catastrophes, i.e. the earthquake in Garfagnana which had caused thousands of displaced and homeless people, and the Italian Minister had urged his European colleagues to tackle this issue all 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<sup>396</sup>.

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"<sup>397</sup>. While the general interest was more oriented to the effects of natural disasters, the 1986 explosion of the Chernobyl nuclear facilities 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, seen the difficulties faced by the then European Community in tackling the different approaches of Member States, it arrived the moment to provide a even more combined response to whatever kind of calamity at EU level.

Between 1985 and 1994, studies and research programmes, 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

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<sup>396</sup> See, C. Wendling, *The European Union Response to Emergencies. A Sociological Neo-Institutionalist Approach*, European University Institute, 2009, p. 98.

<sup>397</sup> See, M. Ekengren, N. Matzen, M., Rhinard, M. Svantesson, "Solidarity or Sovereignty? EU Cooperation in Civil Protection", in *European Integration*, Vol. 28, 2006, p. 460.

*ad hoc* resolutions by the Council and Member States without a legal basis<sup>398</sup>. Therefore, at these first stages of the process of development of a EU configuration for civil protection, it appears quite clear that it was essentially a intergovernmental system based on national capacities and determination. Despite this and the fact that the instruments adopted were and non-binding, step by step they became more relevant up to the creation of a comprehensive system capable to face different kinds of calamities and helped to shape the basis of the existing Civil Protection Mechanism legislation by making the occurrence of serious disasters an issue of common concern<sup>399</sup>.

## *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 communitarian competence in civil protection there was with the entry into force of the Treaty of Maastricht, adopted in 1992, which extended the objectives of the Community and dropped the

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<sup>398</sup> 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, meeting within the Council of 25 June 1987 on the introduction of Community Cooperation on Civil Protection (87/C 176/01). In particular, such a resolution has introduced a Guide for the inclusion of a list of liaison officers from the Member States and the Commission in the civil protection. Besides, the Resolution encouraged regular meetings and training programmes of persons responsible for civil protection as well as the better use of data banks and the exchange of information available to deal with disasters. Subsequently, it has been adopted the Council Resolution 89/C 44/03 on the new developments in Community cooperation on civil protection which has stressed the intention of assessing in cooperation with national experts and 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 a view to developing actions for the improvement of intra-Community cooperation in order to establish basic conditions for preventing and combating calamities. Finally, just one year later, the Council adopted Resolution 91/C 198/01 on improving mutual aid between Member States in the event of natural or technological disaster represents the most important resolution adopted before the Maastricht Treaty by stipulating that the Member States provided assistance in the event of natural or technological disasters through the dispatch of aid teams and equipment to the affected State for the rescue and protection of persons, property and the environment.

<sup>399</sup> See, G. Vincent, “The EC Programme in Civil Protection”, in A. Colombo and 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).

‘economic’ label to form the European Union<sup>400</sup>. As well known, such a Treaty introduced a new institutional structure composed of three ‘pillars’ and a broader umbrella, new policies and forms of cooperation were created<sup>401</sup>.

Article 3 of the Maastricht Treaty listed the activities that the Community was empowered to carry out for the purposes set out in Article 2 of the Treaty on the European Community<sup>402</sup>. In particular, the European Community could take “a policy in the sphere of the environment” and “measures in the sphere of energy, civil protection and tourism”; albeit it recognized the competences of the Community in this field, it was not accompanied by any other provision in the Treaty articulating the objectives of the measures to be adopted in the areas in question<sup>403</sup>. 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 ‘hanging in the air’<sup>404</sup>.

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

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<sup>400</sup> See, Treaty establishing the European Economic Community (Maastricht Treaty), 7 February 1992.

<sup>401</sup> The first pillar corresponded to the three Communities: the European Community, the European Atomic Energy Community (Euratom) and the former European Coal and Steel Community (ECSC). The second pillar was devoted to the common foreign and security policy, which came under Title V of the Treaty on European Union. The third pillar was devoted to police and judicial cooperation in criminal matters, which came under Title VI of the Treaty on European Union.

<sup>402</sup> See, Treaty of Maastricht, Article 2: “The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community 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”.

<sup>403</sup> See, Treaty of Maastricht, Art. 3 (k)(t).

<sup>404</sup> See, M. Gestri, “EU Disaster Response Law: Principles and Instruments”, in A. De Guttry, M. Gestri, G. Venturini, *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.

objectives of the environmental policy, Article 174 TEC included “promoting measures at international level to deal with regional or worldwide environmental problems”<sup>405</sup>. 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<sup>406</sup>. 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”<sup>407</sup> which explicitly referred to civil protection. It was expected that the Community’s activities stepped up in the fields of civil protection and environmental emergencies as mirror of political and economic developments within and outside the Community. In particular, it was underscored the need to press ahead with further improvement and refinement of the mutual assistance procedures and arrangements in respect of both natural and technological 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 the improvement of information and communication systems for more rapid and efficient transmission of information, instructions and

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<sup>405</sup> 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 as regards 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.

<sup>406</sup> See, Article 3B of the Maastricht Treaty: “The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty”.

<sup>407</sup> See, 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.

decisions between the key players in emergency situations. Even more important, it advocated the establishment of task forces to respond to different types of emergency, shaping an embryonic Community structure for civil protection<sup>408</sup>. Besides, in accordance with the procedure laid down in Article N (2) of the Treaty on European Union<sup>409</sup>, the Commission was supposed to prepare a report on the opportunity to introduce a separate Title for civil protection into the Treaty<sup>410</sup>. The 1995 Reflection Group's Report outlined its position concerning the possibility of including the spheres of energy, tourism and civil protection in common policies and, by considering the divergent opinions expressed by the

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<sup>408</sup> *Ibid.*, para. 6.3.

<sup>409</sup> See, Article N of the Maastricht Treaty: "1. The government Council proposals founded of any for the Article N Member State or the Commission may submit to the amendment of the Treaties on which the Union is If the Council, after consulting the European Parliament and, where appropriate, the Commission, delivers an opinion in favour of calling a conference of representatives of the governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to those Treaties. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements. 2. A conference of representatives of the governments of the Member States shall be convened in 1996 to examine those provisions of this Treaty for which revision is provided, in accordance with the objectives set out in Articles A and B".

<sup>410</sup> The first Declaration attached to the Maastricht Treaty states as follows: "The Conference declares that the question of introducing into the Treaty establishing the European Community Titles relating to the spheres referred to in Article 3(t) of that Treaty will be examined, in accordance with the procedure laid down in Article N(2) of the Treaty on European Union, on the basis of a report which the Commission will submit to the Council by 1996 at the latest. The Commission declares that Community action in those spheres will be pursued on the basis of the present provisions of the Treaties establishing the European Communities". This opportunity has 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. 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 (see, 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). 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 (see, 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](http://www.europarl.europa.eu/igc1996/fiches/fiche34_en.html)).

States' representatives<sup>411</sup>, the final decision was to support an increasing cooperation on civil protection, rather than extending the Community competence to this area<sup>412</sup>. Given these premises, there was not any possibility to extend the scope of Article 3(t) and to create a Community civil protection force. However, starting from the end of 1997, the Council improved the foundations for co-operation still 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 sub-national levels through different projects for the protection of persons, property and environment in the event of natural and technological disasters.

The Council considered that Community cooperation in the field of civil protection helped to achieve the objectives of the Treaty by promoting solidarity among Member States, raising the quality of life and contributing to preserving

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<sup>411</sup> As for the positions of Member States, they mirrored the disagreement of the Reflection Group. The first group composed by Germany, Finland and Belgium considered civil protection as an example of an area where the compatibility between existing Community competence and the 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 a tangible means of coming closer to European citizens. Instead, United Kingdom confirmed its opposition to extending Community competence to further areas and consequently to the inclusion in the Treaty of new titles on energy, civil protection and tourism. See, 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.

<sup>412</sup> See, 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](http://www.europarl.europa.eu/enlargement/cu/agreements/reflex5_en.htm).

and protecting the environment. Despite the Decision had stated that the programme should not last for more than two years, after the first two-year Action Programme (1998- 1999)<sup>413</sup> it was established a new five-year Action Programme for the period 2000-2004<sup>414</sup>. In 2005, the Council adopted the Decision 2005/12/EC to cover the period until 31 December 2006<sup>415</sup>. 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<sup>416</sup>.

The adoption of the first programme has thus represented the foremost moment the European Community has been 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 European Parliament, Economic and Social Committee and Committee of the Regions. Besides such a matured recognition, the serious consequences of earthquakes in Turkey and Greece in 1999<sup>417</sup> and of the terrorist attacks in the United States on 11 September 2001 have contributed to trigger the establishment of the so-called Community Mechanism for Civil Protection in 2001.

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<sup>413</sup> See, Council Decision of 19 December 1997 establishing a Community action programme in the field of civil protection, *OJ L* 8, 14 January 1998.

<sup>414</sup> See, Council Decision of 9 December 1999 establishing a Community action programme in the field of civil protection, *OJ L* 327, 21 December 1999.

<sup>415</sup> See, 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.

<sup>416</sup> See, 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.

<sup>417</sup> 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*, 2005, pp. 93-130.

### 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<sup>418</sup>. To justify this necessity, the Commission referred first of all 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<sup>419</sup>. In addition, the mechanism would have 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 States' national contact points.

After the positive opinion of the European Parliament and those 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<sup>420</sup>. The Civil Protection Mechanism (CPM) that entered into force in 2002 consisted in a number of tools that have been established by the later

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<sup>418</sup> See, 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.

<sup>419</sup> 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.

<sup>420</sup> See, 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.

implementing Decision 2004/277/EC<sup>421</sup>: pre-identification of intervention resources<sup>422</sup>, a training programme to improve response capability<sup>423</sup>, a system of assessment and coordination teams<sup>424</sup>, a monitoring and information centre and of a common emergency communication system<sup>425</sup>. 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 for representing the operational core of the Mechanism. In particular, the MIC served as a communication hub by providing access to and the 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 co-ordination 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 information on the availability of civil protection assistance<sup>426</sup>. 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). All of these structures served to create a dense environment of institutional bodies and

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<sup>421</sup> See, 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. Hereinafter, Commission Decision 2004/277/EC.

<sup>422</sup> See, Commission Decision 2004/277/EC, Article 3.

<sup>423</sup> See, Commission Decision 2004/277/EC, Article 4(d).

<sup>424</sup> The Commission was asked to establish the capability mobilise a small assessment and coordination team and dispatch it immediately to the scene. This would have improved on-the-scene efficiency and coordination and enable rapid identification of the most appropriate resources for dealing with the emergency. Besides, the teams would have also liaised with the competent authorities of the country requesting assistance.

<sup>425</sup> See, Commission Decision 2004/277/EC, Article 4(a) and (b).

<sup>426</sup> See, T. Åhman, C. Nilsson, "The Community Mechanism for Civil Protection and the European Union Solidarity Fund", cit., p. 87.

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<sup>427</sup>.

During the following years, the European Community continued to work for the improvement of cooperation in the field of civil protection through the adoption, by the Council, of a number of resolutions requiring for an improvement of the very Mechanism<sup>428</sup>. From its establishment, the mechanism has been employed several times both inside and outside the European Community. Regarding calamities occurred beyond EU boundaries, it is appropriate to recall for instance the earthquakes in Algeria and in Iran in 2003 as well as that in Pakistan in 2005, the tsunami in Southeast Asia in 2004<sup>429</sup>, the 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<sup>430</sup>. Crises inside the EU

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<sup>427</sup> See, M. Ekengren et al., “Solidarity or Sovereignty? EU Cooperation in Civil Protection”, cit., p. 461.

<sup>428</sup> 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.

<sup>429</sup> The most devastating event was the tsunami of unprecedented scale which struck several nations in Southeast Asia in December 2004. A massive undersea earthquake, the most powerful in forty years, triggered a series of deadly waves that fanned out across the Indian Ocean. 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 co-ordinates EU civil protection support to catastrophe areas in South Asia, IP/04/1544, Brussels, 31 December 2004.

<sup>430</sup> About this last event, it is worth noting that the Presidency of the European Union, that was French at the time, actually 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<sup>431</sup>, the floods in Central and Eastern Europe in 2002<sup>432</sup>, 2005 and 2006, the forest fires in Portugal in 2003/2004/2005, the storm in northern Europe in 2005 and the forest fires in Greece in 2007<sup>433</sup>. Notwithstanding the Mechanism has been applied, these cases-study have also demonstrated the existence of several weaknesses in its efficiency and an overall lack of coordination because of 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. On March 2004 the Commission adopted a

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<sup>431</sup> 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 other oil into the Atlantic. This caused major damage to the environment, polluting the Spanish and the French coastline and affecting fishing and shellfish farming. 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, Bruxelles, 21 November 2002.

<sup>432</sup> The floods in the summer of 2002 caused by the overflowing of the Oder and Neiss, Elbe, Mulde and Danube rivers. Austria, Czech Republic, Germany and Slovakia suffered severe property damages and hundreds of human deaths. On this occasion, the Commission launched the idea to create a new Disaster Relief Fund to assist affected regions in 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*, 2002, Vol. 418, p. 905. 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.

<sup>433</sup> In summer 2007, hot and dry weather conditions caused extreme forest fires in Southern Europe and in particular in Greece which requested help through the Mechanism four times between June and August. Following the first request, France, Italy, Portugal and Spain made available a total of seven fire-fighting aircraft, while in relation to the second request, on 5 July, Italy made available two fire-fighting aircraft. Moreover, following the third request, on 18 July, France, Italy, Portugal and Spain made available a total of 11 fire-fighting aircraft. By the time of the fourth request for assistance, on 24 August, the forest fires had caused severe damage and the loss of several lives. This became the largest operation for the Mechanism. 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; See, European Commission, *Natural disasters: update on EU civil protection activities*, IP/07/1166, Bruxelles, 24 July 2007.

Communication entitled “Improving the Community Civil Protection Mechanism”<sup>434</sup> which underscored three areas for the possible improvement of the whole system: preparedness of the resources to be deployed, communication with the MIC, 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 co-operation 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 protection<sup>435</sup>. Furthermore, Article I-42 of the Draft Treaty calling for solidarity between Member States in case of terrorist attacks and natural disasters provided for access to the complete array of civil protection instruments in order to protect citizens and democratic institutions<sup>436</sup>.

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

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<sup>434</sup> See, European Commission, Communication on Reinforcing the Civil Protection Capacity of the European Union, COM (2004) 200 final, 25 March 2004.

<sup>435</sup> See, Treaty Establishing a Constitution for Europe, 2004. The Article III – 184: “1. The Union shall encourage cooperation between Member States in order to improve the effectiveness of systems for preventing and protecting against natural and man madder disasters within the Union. 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; (b) promote swift, effective operational cooperation between national civil-protection services; (c) promote consistency in international civil –protection work. 2. The measures necessary to help achieve the objectives referred to in paragraph 1 shall be enacted in European laws or framework laws, excluding any harmonisation of the laws and regulations of the Member States”.

<sup>436</sup> See, Treaty Establishing a Constitution for Europe, 2004, Article I-42: “1. The Union and its Member States shall act jointly in the spirit of solidarity if a Member State is a victim of a terrorist attack or natural or man-made disaster. The Union shall mobilise all 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 disaster; 2. The detailed arrangements for implementing this provision are at Article III-231.”

Protection Mechanism and a deeper assessment of the options to reinforce the EU response to disasters started from the *Barnier Report* adopted in 2006<sup>437</sup>.

### 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 Commission and European Council, José Manuel Barroso and Wolfgang Schäuble 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*<sup>438</sup>.

The report centred around the reaction to major emergencies occurring outside the Union, sure that if the Member States and the EU institutions had taken up the proposals outlined in his report to improve the civil protection response, that would have applied also to disasters within the territory of the EU<sup>439</sup>. Indeed, the 2004 Asian tsunami had demonstrated that the price of non-Europe in crisis management 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 EU level for responding to any of seven major risks with the result that existing resources were not always offered when needed. Furthermore, despite Member States had a capacity to organise relief and prepare for disasters, the Mechanism, lacking a European pool of existing national assets, had reduced impact and visibility on the ground. According to Barnier, the EU response was, therefore, limited to guarantee more cost-effectiveness by properly organising the Member States' civil protection

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<sup>437</sup> See, M. Barnier, For a European civil protection force: Europe aid, 9 May 2006.

<sup>438</sup> See, A. Boin, M. Ekengren, M. Rhinard, *The European Union as Crisis Manager: Patterns and Prospects*, Cambridge University Press, 2013, p. 27.

<sup>439</sup> See, M. Barnier, For a European civil protection force: Europe aid, p.8.

capabilities and consular assistance on the basis of common scenarios, 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”<sup>440</sup>. 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 the EU according to some compromise elements.

First of all, the resources of people and equipment put at disposal had to be managed and maintained by the Member States and not centralised in Bruxelles. 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. Member 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 together to establish a group of countries skilled at managing a particular threat<sup>441</sup>.

The new force imagined by the former EU Commissioner would have not determined a real centralization 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 in order to perform horizontal tasks (assessment, logistic, coordination) or to fill gaps in the

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<sup>440</sup> *Ibid.*

<sup>441</sup> 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 (ECGFF) 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. More recently, the necessity to face migrants’ flows in a coordinated way triggered the Commission to announce a number of immediate operational, budgetary and legal measures under the European Agenda on Migration, which include an ambitious proposal towards establishing a European Border and Coast Guard (December 2015). See, [http://ec.europa.eu/information\\_society/newsroom/cf/mare/itemlongdetail.cfm?item\\_id=25804&subweb=342&lang=en](http://ec.europa.eu/information_society/newsroom/cf/mare/itemlongdetail.cfm?item_id=25804&subweb=342&lang=en).

civil protection capacities of Member States. Moreover, he proposed the use of complementary military resources, in order to achieve maximum integration and to limit the cost of emergency deployments. The Barnier's recipe focused on the opportunity to overcome State sovereignty and the inter-governmental logic in order to create a unique EU force able to respond to specific scenarios in a planned, organised and tested way to prove the EU's value added. This argument was reinforced by the negative results of the referendums for the European Constitution in France and Netherlands that, according to Barnier, urged European countries to show more solidarity. The EU was called on to act and the Member States asked to help<sup>442</sup>.

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<sup>443</sup> 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”<sup>444</sup>.

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<sup>442</sup> See, M. Gestri, “EU Disaster Response Law: Principles and Instruments”, cit., p.121.

<sup>443</sup> See, 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 on 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).

<sup>444</sup> *Ibid.*, Article 1.1.

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, 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 intended also to finance up to 50% of the total transportation costs for civil protection operations, with exceptions for materiel.

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. But, at the same time, without a convincing revision of the existing Mechanism, it remained only 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 the framework of the Community Civil Protection Mechanism by adopting the Decision 2007/779/EC<sup>445</sup>.

One of the major changes brought by the new Decision was the recognition that the term “disaster” should cover not only natural disasters but also complex emergencies, such as terrorist attacks and man-made disasters as events triggering the activation of the Mechanism<sup>446</sup>. 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 security threats for European citizens travelling to third countries or residing there<sup>447</sup>. As a consequence, the Civil Protection Mechanism

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<sup>445</sup> See, Council Decision of 8 November 2007 establishing a Community Civil Protection Mechanism (recast), 2007/779/EC, Euratom, *OJ L* 314, 1 December 2007. Hereinafter, Council Decision 2007/779/EC. On 2006 the European Commission had adopted the Proposal for a Council Decision Establishing a Community civil protection mechanism (recast), COM/2006/0029 final.

<sup>446</sup> See, Council Decision 2007/779/EC, Article 1.

<sup>447</sup> 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 available additional ships and aircrafts 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).

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<sup>448</sup>.

The second main innovation was the development of the modular approach consisting of resources of one or more Member States which aimed to avoid duplications of actions and to be fully interoperable depending on the type of major emergency and on particular needs in that emergency<sup>449</sup>. This procedural change recalled the 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 for providing assistance. However, modules still were made up on a voluntary basis<sup>450</sup>. Moreover, it is worth to note that, as proposed by Barnier, the 2007 Decision introduced the opportunity for Member States to provide preventive information about 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 transport and logistical or medical support<sup>451</sup>.

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 like establishing and managing the MIC and CECIS, contributing to

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<sup>448</sup> The right of EU citizens to diplomatic and consular protection by any other Member States in a third country where the national State has not representation is conferred by Article 23 TFEU as well as by Article 46 of the Charter of Fundamental Rights of the EU.

<sup>449</sup> See, Council Decision 2007/779/EC, Article 4.1.

<sup>450</sup> The technical requirements for the establishment of EU civil protection modules — in terms of tasks, capacities, main components, self-sufficiency, and deployment times — have been articulated in the rules for the implementation of Decision 2007/779 adopted by the Commission in 2010. It has indicated thirteen modules characterised by different components and tasks. In particular, the modules covered the following capacities: high capacity pumping, water purification, urban search and rescue, aerial forest fire fighting, medical support, medical aerial evacuation of disaster victims, emergency temporary shelter, chemical, biological, radiological and nuclear detection and sampling (CBRN) and search and rescue in CBRN conditions. See, European Commission, Decision of 29 July 2010 amending Decision 2004/277/EC, Euratom as regards rules for the implementation of Council Decision 2007/779/EC, Euratom establishing a Community civil protection mechanism, 2008/73/EC, Euratom, *OJ L* 20, 24 January 2008.

<sup>451</sup> See, Council Decision 2007/779/EC, Article 4.5.

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 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 Presidency of the Council and Commission in order to ensure “the effectiveness, coherence and complementarity of the overall Community response”<sup>452</sup>.

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 was dependent 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 planning for deploying assistance could not be done 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 deny protection to people in need.

A past example of this ineffectiveness was the major forest fires in Bulgaria in the summer of 2007, where the request for assistance was left unanswered by other States Party because their fire fighting aircrafts were either in use in other State or on high alert to react domestically. In addition, there was often unavailability of critical response assets to be quickly mobilised and thus needs of disasters’ victims could not be met. In particular, capacity gaps occurred with regard to assets dealing with low probability and low impact risks that refrained States from justifying investments, even though the impact could be huge. Moreover, while such inadequacy has been repeatedly reported, the previous legal basis did not allow the Union support to filling such gaps. It was thus clear that relying on capacities of States and on their willingness, occasionally, could mean to fail.

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<sup>452</sup> See, Council Decision 2007/779/EC, Article 8.

In the second place, optimal responses were hindered by limited transport solutions and heavy procedures for States that have to face unexpected high cost for transports<sup>453</sup>. Actually, the 2007 Decision established that States could rely on support in the form of a EU co-financing for transport or on the activation by the Commission of a transport contractor to lease transport assets. But, 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.

In the fourth place, 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 Party 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 trainings and meetings at national level rather than at transnational level. As a consequence, without an orientation and a concrete assistance from the EU, first responders could not be able to substantially raise their preparedness levels for responding to overwhelming and cross-border events.

The last shortcoming was the lack of integration of prevention policies, despite the high number of Communications delivered by the Commission and the legislation on the necessity to improve cooperation in the area of risk assessment<sup>454</sup>. 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

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<sup>453</sup> This could be particularly problematic for responding to emergencies occurring in third countries. For example, 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 lack of transport from Europe to Peru and within the area affected. Moreover, during the Japan earthquake 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.

<sup>454</sup> See, 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, environment, land use policy, health, nuclear safety, consular protection.

2007/1627EC did not clearly cover the phase of prevention and the development of common disaster risk management plans, no activity in this field both at national or supranational level could be co-financed 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 a logic of 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 in a 'commanding' role in the area of civil protection<sup>455</sup>. On the other hand, Member States of northern Europe stressed the importance of the EU just as a driver to encourage an improved national capability as regards 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 reflected also different opinions about 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 not a 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 on the communitarian one and Member States maintained a significant degree of power which were not intentioned to leave. Moreover, it was apparent that also in case of serious emergencies both inside and outside the territories of Member States national interests were stronger than the collective ones. The tension between national and supranational dimension and the lack of a shared attitude among the Member

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<sup>455</sup> See, T. Åhman. C. Nilsson, "The Community Mechanism for Civil Protection and the European Union Solidarity Fund", cit., p. 103.

States of what the cooperation within the EU should focus on seemed to render the further development of the Mechanism uncertain.

### **3. The Lisbon Treaty and the Union Civil Protection Mechanism**

#### *3.1 The new competence in the area of civil protection*

The entry into force of the Treaty of Lisbon in 2009, even though driven by a political compromise among conflicting ideas on the nature and the future of the European Union, has opened the way for some common ground in the area of civil protection which, according to Article 6 TFEU, now falls within the so-called supporting competences<sup>456</sup>. The detailed definition of the objectives and the scope of the new EU competence regarding civil protection is spelled out in Title XXIII, Article 196 of the 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 orientation of the legal doctrine and with the practice consolidated over time, it has been thus clearly recognised the complex nature of emergencies, that may have both natural and anthropogenic origins.

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<sup>456</sup> See, 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.

Even though the EU interventions for coping with disasters occurring outside the Union's territory are not covered by the present work, it is anyway important 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 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, as for the external sphere it is just 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 require only that there are not contradictions between the internal and the external dimension of the EU policies, but also that the actions carried out in the international arena are coherent and compatible with each other<sup>457</sup>. It is thus clear that, in order to understand how the EU can foster consistency of measures of civil protection adopted to respond to emergencies occurring outside the Union, Article 196 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 covers not only the phases of preparedness and response, but also that of prevention which,

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<sup>457</sup> The concept of 'consistency' was introduced by the Single European Act (SEA), whose Preamble refers to the "responsibility incumbent upon Europe to aim at speaking ever increasingly with one voice and to act with consistency and solidarity in order more effectively to defend its common interests and independence". Starting from the Lisbon Treaty the issue has become object of a number of contributions, in particular as regards to the distinction between coherence and consistency. 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*, Vol. 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*, Vol. 18, 2013, pp. 373-388; M. Gatti, *European External Action Service - Promoting Coherence through Autonomy and Coordination*, Brill, 2016.

as then proposed by the Commission in its 2009 Communication<sup>458</sup>, should be reinforced in the light of a more comprehensive approach to disaster management<sup>459</sup>. This gives the opportunity to the Union to have a certain room for manoeuvre to increase Member States awareness on *ex-ante* disaster management. Indeed, before the Lisbon Treaty, there was not a coherent and comprehensive system of measures for prevention in the field of civil protection. Decision 2007/779 had sidestepped to focus on prevention and early warning systems by repeating the ambivalent statement of the 2001 Decision which had recognised just its importance and the necessity of further considerations<sup>460</sup>. On the contrary, following the Lisbon revision, secondary legislation in the area of civil protection has adopted an entirely different approach by making prevention the new core of the Mechanism.

As for the recipients of the 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 refers to the objective of supporting and complementing Member States' action 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 intending to replace nor radically transform national systems in this area.

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<sup>458</sup> See, 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.

<sup>459</sup> 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.

<sup>460</sup> See, Council Decision 2007/779/EC, Recital 7: "Prevention is of significant importance for protection against natural, technological and environmental disasters and would require further action to be considered. By contributing to the further development of detection and early warning systems, the Community should assist Member States in minimising the lead time to respond to disasters and in alerting EU citizens. These systems should take into account and build upon existing information sources". Moreover, the word "prevention" was mentioned just twice in the entire text.

As already anticipated, 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, envisaged by Article 294 TFEU. As a consequence, legislative acts are to be adopted upon a proposal from the Commission, in co-decision by the European Parliament and the Council that votes by qualified majority. Against this background, it is surprising 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. The new decision-making process is, therefore, a crucial step forward in comparison to the pre-existing legal framework where the legislative acts were adopted according to the flexibility clause requiring the unanimous voting within the Council. The procedure provided for in the Treaty involves a strengthened legislative role for the European Parliament and undoubtedly facilitates further advances in the EU Civil Protection Mechanism<sup>461</sup>.

The EU has, therefore, more competence in this area than it might be thought, but it appears clear the 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 easier 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 mention of the legislative procedure to be used indicates that the institutions shall select any type of legislative act. Since the Treaty does not provide any specific link between the types of acts adoptable and the nature of the competence to be exercised, the Union may adopt the whole range of legal binding instruments at disposal in accordance with Article 288 TFEU<sup>462</sup>.

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<sup>461</sup> See, M. Gestri, "EU Disaster Response Law: Principles and Instruments", cit., pp. 116-117.

<sup>462</sup> See, Article 288: "To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

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 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<sup>463</sup>. The borderline between the adoption of *legitimate* binding acts and *illegitimate* harmonisation of national law is very narrow. The consequence for Member States is that, despite their remits are not *per se* superseded, they will be constrained to the extent stipulated by the legally binding act chosen among regulations, directives and decisions. It remains to be seen whether the act adopted according to Article 196 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 by some events, like the devastating earthquake in Haiti in early January 2010 and the floods in Pakistan in June of that year, have triggered the Commission to adopt new initiatives on civil protection from an operational and legal point of view.

First of all, 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

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Recommendations and opinions shall have no binding force". For legal doctrine, see R. Adam, A. Tizzano, *Manuale di Diritto dell'Unione Europea*, Giappichelli Ed., 2014, p. 159.

<sup>463</sup> See, P. Craig, *The Lisbon Treaty. Law, Politics and Treaty Reform*, Oxford University Press, 2013, pp. 173-178.

mentioned Humanitarian Aid Consensus. Moreover, as acknowledged by the European Parliament, this should improve consistency of the overall disaster response outside the Union according to para. 1 c) of Article 196<sup>464</sup>. Furthermore, on the basis of the 2010 Communication *Towards a stronger European disaster response: the role of civil protection and humanitarian assistance*<sup>465</sup>, the Commission urged to reinforce the effectiveness, efficiency, coherence and visibility of EU's response to disasters. The Commission was aware that, while the Mechanism was performing well for what it was designed for in 2001, it was limited by a number of shortcomings related mainly 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, according to the provisions of the Lisbon Treaty, 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.

On 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<sup>466</sup>. 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 like 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 a more effective and integrated EU support for disaster management

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<sup>464</sup> See, European Parliament, Recommendation to the Council of 14 December 2010 on setting up EU rapid response capability, INI/2010/2096, 14 December 2010.

<sup>465</sup> See, 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.

<sup>466</sup> See, European Commission, Staff Working Paper, Impact Assessment – 2011 review of the Civil Protection regulatory framework, SEC/2011/1632/FINAL, 20 December 2011.

including risk management planning could have a positive impact on society and 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<sup>467</sup>, both having the possibility to amend what delivered by the Commission. Moreover, since the field of civil protection concerns also 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<sup>468</sup> in order to ensure that the position and needs of regional and local authorities 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 because 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 EU level able to threat national bodies<sup>469</sup>.

On the same page but with much more 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 for strengthening planning and disaster prevention, as well as for 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 on 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

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<sup>467</sup> See, 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.

<sup>468</sup> See, 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.

<sup>469</sup> *Ibid.*, II. Recommendation for Amendments, Amendments 3-4.

modification by the Council<sup>470</sup> which, however, recognised the necessity to improve the effectiveness and cost-efficiency of systems preventing, preparing for and responding to natural and man-made disasters of all kinds. Even though both Germany and Austria voted against the Decision and United Kingdom abstained<sup>471</sup>, there were the necessary conditions for a first-reading agreement with the European Parliament. The text was thereby soon approved and on 17 December 2013 Decision 1313/2013 on a Union Civil Protection Mechanism<sup>472</sup> was signed thereby marking the latest step of the institutionalization of EU civil protection mechanism as expression of in-kind solidarity among Member States.

### *3.3 The 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 Union level, but in some respects also a sort of compromise between the Commission and the Council. It is, therefore, worth to explore the content of the Decision by underlying both aspects.

On the path of 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

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<sup>470</sup> See, Council of the European Union, Press Release of the 3195th Council meeting - Justice and Home Affairs, Doc. 15389/12, 25 and 26 October 2012.

<sup>471</sup> It is worth to recall that, according to the previous rule on qualified majority, the weighting of votes reflected the size of population of each Member State. As a consequence, both Germany and United Kingdom had 29 votes each, while Austria 10 votes: the Decision was approved with 284 votes in favour, 39 votes against and one abstention. Finally, it must be underlined that from a technical point of view, under qualified majority voting, an abstention counted as a vote against. See, Council of the European Union, Voting results on Decision of the European Parliament and the Council on a Union Civil Protection Mechanism, 3285<sup>th</sup> meeting – Agriculture and Fishing, 2011/0461(COD), Doc. 18087/13, 16 December 2013.

<sup>472</sup> See, 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. Hereinafter, Decision 1313/2013/EU. 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. Hereinafter, Implementing Decision 2014/762/EU.

on people, the environment, or property, including cultural heritage”<sup>473</sup>. It is thus reiterated the actual or potential severity of an emergency triggering the response, which is not clearly determined by its transnational nature, but rather by the incapacity of the State to react its own. Secondly, the serious consequences of a disaster may refer also to those events which affect the environment or the cultural heritage without necessarily jeopardising people’s lives.

So far, anything 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 contain just an illustrative list of situations where the Mechanism can be activated and this leaves the door open to an even wider interpretation<sup>474</sup>.

Once reported the scope of application of the Mechanism, it is interesting to analyse the *temporal* element of its activation. In line with the spirit of the Lisbon Treaty, the second main change lies in the fact that Decision 1313/2013 reflects the classical disaster management circle, by including prevention, preparedness and response. As a consequence, compared with the legislation previously in force, the new instrument has been intended to give a much greater emphasis to disaster prevention and risk management thus translating from a culture of reaction to a culture of prevention as expression of long-term solidarity<sup>475</sup>.

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

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<sup>473</sup> *Ibid.*, Article 4, para. 1.

<sup>474</sup> By extending the analysis to situations occurring outside the EU territory, conflict areas could now be covered by the Union action. And, in effect, current practice is confirming such an orientation. For instance, the Union Civil Protection Mechanism has been activated for helping Ukrainian citizens during the Crimea crisis which cannot be labelled as a disaster, but rather as an international conflict.

<sup>475</sup> See, Decision 1313/2013/EU, Preamble, point 8.

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 communication platform and to ensure 24/7 operational capacity (Article 7). The breakthrough of this idea is twofold. On one hand, it represents the opportunity to streamline existing structures and to grant to the ERCC a more active role consisting in guaranteeing operational and logistical support. On the other hand, it has become clear the Commission interest to ensure 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<sup>476</sup>.

Furthermore, the Commission expressed its intention to create a unique *European Civil Protection Force* by establishing an “European Emergency Response Capacity” (EERC)<sup>477</sup>. Despite the more prudent terminology used, the idea is

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<sup>476</sup> The external projection of the Civil Protection Mechanism is reflected in the reference to the role of the European External Action Service (EEAS) created by the Treaty of Lisbon and established by Council Decision 2010/427/EU in 2010. 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 because the Service should manage the overall Union relations with the affected country where civil protection operations has been carried out. This represents a crucial innovation for two reasons. First of all, the overall coordination among different capacities shall be exercised by the EEAS rather than by the Presidency of the Council as set out in the 2007 Decision. In addition, it has reinforced the Commission in promoting a more efficient operational coordination for the activation of the Mechanism. Secondly, it ensures smooth linkages between relief assistance and the EU military staff, the source of military expertise within the EEAS which made possible, for instance, military airlift support to humanitarian operations on 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 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 of logistical and medical support when acting outside the Union. Therefore, the Decision 1313 accepts that the military forces can play a useful role in emergency relief contexts, but just as matter of last resort and always under civilian management (Decision 1313/2013/EU, Article 9, para. 5). The reason of this limit is twofold. On one hand, it safeguarded the efforts already made to organise the provision of civilian assets and, on the other one, it avoided possible abuses of military means especially outside the EU territory. In this way, it appears strengthened the image of the Union not only as a *unique* 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 to the military one.

<sup>477</sup> See, 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. See,

similar to that proposed by Barnier in 2006: 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.

In this regard, the Commission proposal was particularly daring. 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 the capacities<sup>478</sup>. 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 standby for EU disaster response operations<sup>479</sup>. In this context, the European Commission and Member States should have been responsible for defining quality requirements for the capacities to be committed and for ensuring their quality, respectively<sup>480</sup>.

Albeit the attempt of compromise between general interest and national interest – underscored by the nature essentially voluntary of the registration of the capacities from Member States – a lively debate on the Commission proposal has been sparked within the Council. Indeed, some Member States were determined to leave open the possibility of opting-out in specific disasters thereby jeopardising the common effort in facing disasters. Accordingly, the Presidency’s compromise stressed the necessity that the response capacities made available for the EERC should remain accessible for national purposes in case of compelling reasons and that the ultimate decision on their deployment should be taken by the Member

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<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.

<sup>478</sup> See, European Commission, Proposal for a Decision of the European Parliament and of the Council on a Union Civil Protection Mechanism, Article 10.

<sup>479</sup> See, 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)).

<sup>480</sup> See, European Commission, Proposal for a Decision of the European Parliament and of the Council on a Union Civil Protection Mechanism, Article 11 (3).

States which registered the response capacity concerned<sup>481</sup>. As it will be explained in detail in the following paragraph, the final version of the Decision 1313/2013 includes such amendments which further underline the voluntary nature of these commitments. It is thus clear that, even though the system is more certain and efficient given the accelerated process of response, States still keep a high degree of discretion in this phase.

The pressures received from States are then evident also while reading Article 12 of the Decision. The initial idea, already envisaged in the 2010 Communication and endorsed by the European Parliament<sup>482</sup>, was to develop specific EU-funded assets for civil protection. This would have guaranteed burden-sharing and common use of cost-efficient resources, but Member States presented multiple reservations related to the potential political cost of such a step. Indeed, it could represent an incentive for each Member States not only to reduce its civil protection capacities to protect its citizens, but also to start relying systematically on these EU-funded assets. But, 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 primary responsibility of States Party for the protection of their populations, it was inappropriate for the EU to develop its “own” assets and to pose a risk of “crowding out” national capacities<sup>483</sup>.

It was thus decided to adopt another formula which, however, is completely different from that elaborated by the Commission in its proposal. Indeed, Article 12 of the Decision provides that the Commission should determine, in cooperation with Member States, the existence of gaps in the emergency response capacities and examine whether the necessary capacities are available to the Member States outside the EERC. More precisely, Article 21 (j) establishes that

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<sup>481</sup> See, 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.

<sup>482</sup> See, 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.

<sup>483</sup> See, Council of the European Union, 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.

the development of new response assets could be eligible for financial assistance up to a maximum of 20 % of the eligible costs. It is important to highlight that the delivery of co-financing is linked to the subsequent commitment of those resources to the voluntary pool for a minimum period of two years and that, where appropriate, preference shall be given to consortia of Member States cooperating on a common risk. Despite this clause, it has been completely deleted the opportunity to develop response capacities at the Union level that, being part of the European Emergency Response Capacity, could serve as a common buffer against shared risks<sup>484</sup>. This demonstrates that in managing interventions of civil protection States are still linked to the idea that the Mechanism should coordinate multiple forms of assistance, but without guaranteeing a real and unique EU assistance capable of showing the factual side of solidarity as enshrined in the Treaties<sup>485</sup>.

#### *3.4 The Union Civil Protection Mechanism: right or obligation to solidarity?*

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 which 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,

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<sup>484</sup> See, 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).

<sup>485</sup> See, 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. Actually, in this regard, it is necessary to stress that the European Commission has recently issued a proposal for amending Decision 1313/2013 which would establish a dedicated reserve of operational capacities at Union level (rescEU), see 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/2017/0772 final, 23 November 2017.

indicating the scope, terms and, where applicable, costs of the assistance it could render”<sup>486</sup>.

This means that once Member States have received a call for action from the ERCC, they can decide whether and how to provide for assistance, thereby returning to a discourse which excludes the existence of solidarity obligations in the field of disaster response. However, it is appropriate to recall that the new EU Civil Protection Mechanism has been thought to progressively avoid *ad hoc* interventions by creating pre-planned structures and modules of intervention, that form the so-called “voluntary pool” or EERC<sup>487</sup>.

Actually, the voluntary pool is not only a strategic way 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 States of the European Union should act and that underpins the process of integration. Indeed, pooling national resources for the benefit of each EU Member means to go beyond national borders and react as the affected territory was its own, by putting solidarity before sovereignty. But, it remains a voluntary force whose ‘voluntariness’ – both in the phase of establishment and in that of deployment – has to be assessed in order to challenge State consent and discretion in responding to crisis occurring within the Union.

As for the establishment of the voluntary pool, Member States have the power to decide whether or not pre-commit a number of resources. It is a key issue that has been discussed at length during the debates on the adoption of the Decision 1313/3013 when, under pressure of some States, it was decided to cut the level of commitment required to the Member States in relation to the inclusion of national resources to the EERC. As proof of that, the Decision repeats more than once that

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<sup>486</sup> It is to be noted that the time limit within which the Member State shall in principle 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.

<sup>487</sup> This aspect has 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. Moreover, on February 2017 the European Commission issued to the European Parliament and the Council a report on the developments of the EERC, see European Commission Report on progress made and gaps remaining in the European Emergency Response Capacity, COM (2017) 78 final, 17 February 2017.

the identification of the means to be committed must be carried out on a voluntary basis, without creating a specific obligation. As a result, it seems that State willingness has not been jeopardised by the new Mechanism that, despite its evolution, could not undermine the State-centred system in favour of a solidarity one. But, the significant benefits that States can receive from the financial contribution eligible according to Article 21 of Decision 1313/2013 and Article 17 of the implementing Decision 762/2014, may frame the issue in a different light. As already reported, the resources at disposal must follow the quality requirements defined by the Commission in Article 35, para. 7, of the implementing Decision<sup>488</sup> and, to this end, Member States may request a grant for the financing of adaptation costs covering individually up to 100% of the eligible costs for the supply of modules, technical assistance, support teams or other response capacities.

Moreover, Article 21, para. 2, point (d), of Decision 1313/2013 opens to the possibility for financial assistance to make available capacities additional to participating States' existing capacities which would contribute to addressing temporary shortcomings of response capacities in extraordinary disaster situations. The EU grant may cover 100% of total eligible costs of designing, preparing, negotiating, concluding and managing the contracts or arrangements, as well as the costs of developing standard operating procedures and exercises to ensure the effective use of buffer capacities. These buffer capacities would be registered in the voluntary pool and would be available for Union Mechanism deployments under the same general terms as other capacities registered in the voluntary pool<sup>489</sup>. By considering the high technical quality of the final assets and the extensive funding received, it is conceivable that an increasing number of Member States decides to benefit from the financial support of the Union and

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<sup>488</sup> In particular, the Decision refers to (a) availability; (b) suitability; (c) location/proximity; (d) estimated transport times and costs; (e) prior experience; (f) prior use of the asset; (g) other relevant criteria, such as language capabilities, cultural proximity. See, Table I at the end of the present work.

<sup>489</sup> For further details on the procedure of financial granting, see European Commission, Call for proposals – Buffer capacities for addressing temporary shortcomings in extraordinary disasters. Grant application guide, 2016 edition, available at [http://ec.europa.eu/echo/sites/echo-site/files/guide\\_for\\_applicants.pdf](http://ec.europa.eu/echo/sites/echo-site/files/guide_for_applicants.pdf).

therefore to join the EERC. Moreover, in nowadays 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 measure that are not needed very often, but that one may need to have.

As a consequence, in the establishment phase of the voluntary pool, it seems that the number of advantages coming from both the financing of adaptation costs and the permanent opportunity to use the resources when necessary contribute to mitigate, although partially, the initial discretion of the States in participating to this system of pre-commitment. Furthermore, in a wider perspective, it is appropriate to recall that also applicants established in third countries that concluded an Agreement for participation in the Mechanism with the Union – that means Iceland, Montenegro, Norway, Serbia, former Yugoslav Republic of Macedonia – may be eligible for grants. In this way, State consent in joining the EERC, as manifestation of the voluntary dimension of sovereignty, is nuanced not only for EU Member States, but also for enlargement countries that are encouraged to give they own contribution to faster response to exceptional disasters.

In respect of the phase of deployment of the resources, despite they are pre-committed and directly at disposal, in Decision 1313/2013 there is no shortage of details which question such an automaticity. Indeed, 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]. In order to further specify this point, Article 11, para.7, adds that “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”. Therefore, Member States keep the right to deny assistance especially in case of domestic emergencies, force majeure or, in exceptional cases, serious reasons. In addition, Decision 1313/2013 is careful to underscore 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"<sup>490</sup>.

In line of 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. Voluntariness seems, therefore, particularly strong in this phase, but from a legal point of view it cannot be ignored the wording of the first sentence of Article 11 of Decision 1313/2013, setting out that "response capacities that Member States make available for the EERC 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, a commitment which should be respected because once the EERC is established it must work out.

In this perspective, it not a coincidence that, as for the buffer capacities registered in the voluntary pool, their domestic use in the Member State that co-financed the availability of the capacities is subjected to some limits<sup>491</sup>. 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 arise. These two options, on the one hand, counter that vision which places singular national interests over the global ones and, on the other one, confirm the orientation 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 – domestic

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<sup>490</sup> See, Decision 1313/2013/EU, Article 15, para. 7.

<sup>491</sup> See, Implementing Decision 2014/762/EU, Article 25, para. 9.

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 is suffice to recall that, if we look at the provisions of international law and in particular to the 2001 Articles on Responsibility of States for Internationally Wrongful Acts<sup>492</sup>, the mentioned exceptions represent genuine and formal derogations to an international obligation.

According to Article 23 of the Articles on Responsibility of States, *force majeure* is recognised as one of the circumstances precluding wrongfulness of those conducts that would otherwise not be in conformity with the international obligations. In particular, it defines ‘force majeure’ as the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation. The provision, then, points out two circumstances where the justification of the *force majeure* cannot operate, that are 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 and, although Member States had more than once invoked such an excuse to justify their failure to fulfil EU obligations, the CJEU has regularly rejected pleas of force majeure 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”<sup>493</sup>. The CJEU did, however, agree that force majeure could be invoked in “circumstances beyond the control of the person claiming

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<sup>492</sup> 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.

<sup>493</sup> See, CJEU, Case C-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.

*force majeure*, which are abnormal and unforeseeable and of which the consequences could not have been avoided despite the exercise of all due care”<sup>494</sup>. As for the other two exceptions, that are 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 Articles of the ILC whose 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”. For what concerns EU law, the concept of necessity does not hold an independent character, but has been often conceived in relation to that of public and social security of the State, that is, by definition, linked to the national dimension of sovereignty. Accordingly, this means also that the burden of proof is up to the national authorities which – in the case at stake – shall demonstrate the existence of imperative circumstances preventing the deployment of resources pre-committed in the voluntary pool.

In the light of these arguments, it is fair to affirm that the participation in the EERC, alongside envisaging a voluntary pre-commitment of resources, expects a high level of commitment on the States so that it can operate in an effective manner. And, exactly in this phase, it cannot be underestimated the role played by the principle of loyal cooperation which 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 facilitated 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, when the EU objective is, according to Article 3 TEU, to promote solidarity among Member States and, more specifically, to promote swift, effective operational cooperation for protecting against natural or man-made disasters (Article 196 TFEU), Member States have to act in order to comply with their loyalty duties thus fully

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<sup>494</sup> See, *inter alia*, CJEU, Case C-109/86 *Ioannis Theodorakis Biomichania Elaiou AE v. The Greek State*, 27 October 1987, ECLI:EU:C:1987:460.

cooperating with the EU institutions for ensuring the effectiveness, in this case, of the Civil Protection Mechanism. As a result, when the Union is requested to intervene through the deployment of the Mechanism, since it is not provided with its own resources, it has to rely on those put at disposal by Member States that, in a spirit of loyal cooperation, have to cooperate in good faith with the EU institutions in order to give substance to the tasks which flow from the Treaties<sup>495</sup>. On the other hand, also the Commission has to play its part by guaranteeing the whole coordination of the assets deployed and sharing the financial and operative burdens thus giving practical substance to its loyalty duties in its interaction with EU Members.

Against this background, as anticipated in Chapter II of the present work, the suggested elements confirm the fact that the principle of loyal cooperation in times of crisis is capable of establishing conducts that ultimately have also a solidary nature. In fact, loyalty expresses the practical attitude that EU actors shall have in implementing the very process in the view of the common interest thereby complement the principle of solidarity which reflects the more general political inspiration to complete the integration process<sup>496</sup>. This notwithstanding, there is to say that State willingness is at the basis of the Union Civil Protection Mechanism both in the phase of pre-commitment and in that of deployment of the civil protection assets with the result that also this instrument responds to the traditional logic according to which the State has the right, rather than the duty, to provide for 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<sup>497</sup>. Indeed, the fact that States are

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<sup>495</sup> In this regard, both primary and secondary law make reference to the notion of cooperation between the Union and Member States, as well as at interstate level, in order to guarantee the effectiveness of the Mechanism. Moreover, within the text of Decision 1313/2013 the term “cooperation” – which is repeated several times and within the body of the text – acquires a more relevant role thereby becoming primary objective of the very establishment of the Civil Protection Mechanism.

<sup>496</sup> See, A. Berramdane, “Solidarité, loyauté dans le droit de l’Union européenne”, cit., pp. 53-79.

<sup>497</sup> 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

more prompted to intervene or that hardly may shy away from their duties of loyal cooperation because of a number of different reasons does not imply that such a behaviour is determined by the pre-existence of an obligation of solidarity. Pending the potential changes of the near future<sup>498</sup>, the next chapter will verify, *inter alia*, whether the so-called ‘solidarity clause’ enshrined in the Lisbon Treaty may represent the adequate provision for making the provision of assistance via the Civil Protection Mechanism an obligation of solidarity.

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on the Civil Protection Mechanism, modules and response capacities still have to be created or at least improved. See, Report of 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, COM (2017) 460 final, 30 August 2017.

<sup>498</sup> The scarce efficiency of the Mechanism due to the voluntary nature which characterises the deployment of the national resources is one of the reasons why the Commission has recently issued a proposal for amending Decision 1313/2013 that could be more favourable to the establishment of stronger commitments both on Member States and the Union. See, European Commission, Proposal for a Decision of the European Parliament and the Council amending Decision No 1313/2013/EU on a Union Civil Protection Mechanism, COM/2017/0772 final, 23 November 2017.

## 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 disasters. And, 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, in order to avoid that such an analysis remains just a desk study, it is now necessary to make a step forward.

The present chapter will be thus aimed at evaluating 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. To this end it will be pursued a two-fold investigation. First of all, it will be explored in detail the ‘solidarity clause’ which explicitly asks the Union and Member States to act in a spirit of solidarity in order to provide assistance to another Member States. Secondly, it will be evaluated the coherence of the instruments analysed, how they interplay with the solidarity clause and whether the existence of an EU system of solidarity<sup>499</sup> in situations of disaster can be established. Finally, it will be evaluated what is the actual legal value of this provision of primary law<sup>500</sup>.

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<sup>499</sup> On the existence of a system of solidarity at EU level, see T. Russo, “La solidarietà come valore fondamentale dell’Unione europea: prospettive e problematiche”, in *Dialoghi con Ugo Villani*, 2017, Cacucci Editore, pp. 667-672.

<sup>500</sup> 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. Ali, “Art. 222”, in F. Pocar, M. Baruffi (eds.), *Commentario breve ai Trattati dell’Unione europea*, CEDAM, 2014, pp. 1214-1217.

## 1. The ‘solidarity clause’: content and implementation

As already made clear in the second chapter of the present work, the increasing relevance of the notion of solidarity among Member States in the field of response to serious emergencies was enlivened starting from 2002, in the framework of the Convention proposing a draft Treaty establishing a Constitution for Europe. Actually, in the wake of the attacks of 11<sup>th</sup> September 2001, the issue was originally matter for discussion within the Working Group on Defence, chaired by Mr. Michel Barnier, that took up the issue of security and defence from terrorist attacks and witnessed most of the deliberations on whether, and how, the European Union should develop its instruments for collective security, thereby balancing subsidiarity with solidarity<sup>501</sup>.

Members of the Working Group on Defence were, however, divided with regard to the value to be given for the notion of ‘solidarity’ and the situations wherein it could be invoked thereby establishing specific duties of intervention. Indeed, on the one hand there were those who considered the already issued solidarity clause as complement to the mutual defence clause enshrined in Article I-41(7)<sup>502</sup> and thus applicable in case 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 confronting the EU. Indeed, a new kind of clause was needed to supplement, but not to overlap with the mutual defence clause.

The Lisbon revision has changed the latter orientation by including an autonomous provision concerning solidarity in the event of emergency situations other than armed attacks. For the purpose of the present chapter and of the

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<sup>501</sup> See, *The European Convention, Final report of Working Group VIII ‘Defence’*, Doc. CONV 461/02, 16 December 2002, p. 21.

<sup>502</sup> See, Treaty establishing a Constitution for Europe, Article I-41(7): “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. Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation”.

research work as a whole it is of utmost importance to deeply explore the content of the provision enshrined in Article 222, paras. 1 and 2, TFEU.

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 use of the modal verb “shall” leaves no doubt that it is a mandatory formulation, able to give practical effect to solidarity as principle. Indeed, the wording of Article 222 TFEU and the use of the reinforcing adverb “jointly” 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 as an inspiring principle governing EU law. According to Article 222 TFEU, solidarity does not represent a moral rule, but has been extended to categorical obligation that, being part of “hard law”, must be practiced by the Union – by deploying EU’s own institutional tools, mechanisms, and resources that that may operate in a coherent, coordinated and effective way – and by all and not some Member States. Thus, the solidarity clause is by far not coextensive with the institutional principles aimed at regulating the relationship between the actors of 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<sup>503</sup>, as it will be seen in the next paragraph, the Union is entrusted with specific obligations of solidarity.

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<sup>503</sup> See, F. Casolari, ““EU Loyalty After Lisbon: An Expectation Gap to Be Filled?””, cit., pp. 106-111.

Notwithstanding the obligation on the Union to use all its instruments at disposal, including military resources made available by States<sup>504</sup>, in order to avoid conferring on the Union too much autonomy in application of the solidarity clause, Article 222, para. 3, TFEU establishes 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 elaboration 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.<sup>505</sup> 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 exposing the full procedure to a democratic deficit<sup>506</sup>.

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<sup>504</sup> 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 equipments for large-scale disaster clean-up.

<sup>505</sup> Actually, the actual function of COSI and of PSC needs further clarification: indeed, there is not a 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. Ahman, *The Treaty of Lisbon and Civil Protection in the European Union*, 2009, Swedish Defence Research Agency, pp. 52-62.

<sup>506</sup> 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

Despite the (almost) inter-governmental character of the decision-making procedure enshrined in Article 222 TFEU and the reference to a cooperation between Commission, Council and High Representative as well as the Political and Security Committee that *de facto* excludes the European Parliament, it appears, however, curious that a provision concerning just events occurring within the territory of EU Member States is set in the Fifth Part, TFEU, related exclusively to the EU's external action. Similarly, despite its potential relevance in the field of the CSDP, it would have hardly been appropriate to include it in Title V, Section II TEU<sup>507</sup>, since Article 222 TFEU stretches beyond the CSDP by also engaging with non-military instruments<sup>508</sup>. Instead, by referring both to terrorist attacks and natural or man-made disaster – and 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<sup>509</sup> 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<sup>510</sup>.

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force of the Lisbon Treaty, the European Parliament has demonstrated to be really interested in a full implementation of the Solidarity Clause. On 31<sup>st</sup> October 2012, the European Parliament adopted the Resolution entitled “The EU's mutual defence and solidarity clauses: political and operational dimensions”, 2012/2223(INI).

<sup>507</sup> An opposite opinion is presented by Koutrakos, in P. Koutrakos, *The EU Common Security and Defence Policy*, Oxford University Press, 2013, Chapter 3.

<sup>508</sup> The link between the solidarity clause and the CSDP deserves a more detailed analysis which is not possible to render 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.

<sup>509</sup> See, The Lisbon Treaty, Article 71 TFEU: “A standing committee shall be set up within the Council in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union. Without prejudice to Article 240, it shall facilitate coordination of the action of Member States' competent authorities. Representatives of the bodies, offices and agencies of the Union concerned may be involved in the proceedings of this committee. The European Parliament and national Parliaments shall be kept informed of the proceedings”.

<sup>510</sup> See, The Lisbon Treaty, Article 75 TFEU: “Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European

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<sup>511</sup>. Definitely, whatever the reasons of such a choice are, it appears that there is a gap between the inclusion of the provision in the Fifth Part TFEU, where the rules on common foreign and security policy are based on a decision-making procedure that continues to be more inter-governmental and less supranational in comparison to other areas of Union competence<sup>512</sup>, and the role that is granted to the Union as a whole in mobilising all the instruments at its disposal. In addition, it seems that it has been given major emphasis to the mutual reaction to terrorist attacks occurring within the Union – for which the clause operates also in the phase of prevention – than to disasters which may have a different origin. The next paragraphs will address the way it has been decided to implement the solidarity clause in order to better evaluate its implications in situations of disaster.

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Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities. The Council, on a proposal from the Commission, shall adopt measures to implement the framework referred to in the first paragraph. The acts referred to in this Article shall include necessary provisions on legal safeguards”.

<sup>511</sup> See, S. Blockmans, “L’union fait la Force: Making the Most of the Solidarity Clause (Article 222 TFEU)”, cit., p. 120.

<sup>512</sup> See, 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 edition, 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.

### *1.1 The implementation of the solidarity clause by the Union: Council Decision 2014/415/EU*

The Council Decision on the implementation to the clause from the Union is the result of negotiations that took place starting from 2011 and that lasted a very long time because of the classical reluctance of States to activate binding procedures limiting their sovereignty and discretion.

In order to facilitate the drafting works, the Presidency of the Council addressed to the Member States a document encouraging national authorities to take appropriate steps forward to give proper implementation to the clause<sup>513</sup>. Member States thus 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<sup>st</sup> 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 by the Union of the solidarity clause<sup>514</sup> that provided some more clarity about the definitional scope of Article 222 TFEU as well as its activation. On the basis of such a proposal, even though with some substantial differences, on 24<sup>th</sup> June 2014 the Council has adopted the final text of Decision 2014/415/EU<sup>515</sup>. In order to evaluate the effective added value of the solidarity clause in its complexity, it is therefore appropriate to explore critically the arrangements for implementing the provision by the Union as prescribed by Decision 2014/415 by addressing: i) the scope of application *ratione materiae* and *ratione temporis* of

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<sup>513</sup> See, 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.

<sup>514</sup> See, 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.

<sup>515</sup> See, 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.

the clause; ii) the scope of application *ratione loci* of the clause and, iii) the response arrangements that can be activated following the invocation of the clause.

*i) scope of application ratione materiae and ratione temporis of the solidarity clause*

As general rule, according to Article 222 TFEU, the solidarity clause applies in case of terrorist attacks or disasters, but such a general provision has prompted the necessity to explore what circumstances are exactly 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 international level<sup>516</sup>.

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 firstly appropriate to underscore that the definition reproduces that contained in Article 4 of Decision 1313/2013 concerning the establishment of the new Civil Protection Mechanism. As a consequence, the solidarity clause may be activated not only in response to the actual occurrence of a severe event, but also in case of a potential disaster; and as with the Mechanism, such a opportunity opens a range of issues, concerning

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<sup>516</sup> See, A. Cassese, “The Multifaceted Criminal Notion of Terrorism in International Law”, in *Journal of International Criminal Justice*, 2006, Vol. 4(5), pp. 933-958; S. D. Murphy, “Terrorism and the Concept of Armed Attack in art. 51 of the Charter”, in *Harvard International Law Journal*, Vol. 43, 2002, pp. 41-52.

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 adjective “adverse” offered in the Joint proposal<sup>517</sup>, appear less vague and more precise in terms of seriousness of the event.

In the framework of elaboration of the implementing Decision, the threshold of application was yet one of the most debated issues between Member States. Back in 2011, in a time when the European Union was struggling to overcome the financial and economic crisis, at the meeting of the Article 36 Committee<sup>518</sup>, 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”<sup>519</sup>. Indeed, it was floating around the belief that well-equipped Member States would make little use of the solidarity clause, while disaster-prone States could rely much more on it to limit the mobilisation of national resources.<sup>520</sup> 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 on the application of the clause should not be entrusted just to the affected State, but also to the Council.<sup>521</sup> For these purposes, certain State representatives forwarded the

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<sup>517</sup> See, Joint proposal for a Council Decision on the arrangements for the implementation by the Union of the Solidarity Clause, cit., Article 3.

<sup>518</sup> 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.

<sup>519</sup> See, 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*, Vol. 19, No. 2, 2013, pp. 267–282.

<sup>520</sup> See, 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.

<sup>521</sup> 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. 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 just

idea to confine the use of the clause to disasters affecting multiple EU Members in order to reduce the risk that the system was monopolised by those who are less-prepared in terms of response.<sup>522</sup>

The compromise reached is suggested by the wording of the Decision itself that seems to introduce the most reasonable solution to this dilemma, by prescribing 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<sup>523</sup>. Thus, the first and foremost subject called upon to assess the level of impact of a disaster is again 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<sup>524</sup>. Such a Framework Decision represents the most advanced legislative act from the defining point of view as, within an international context where States keep their own definition of terrorism, it addresses a common definition at EU level by indicating, *inter alia*, a clear list of offences that may constitute acts of terrorism against a country or an international organisation.

In particular, Article 1 of the Framework Decision 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

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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. See, N. Von Ondarza, R. Parkes, *The EU in the face of disaster, implementing the Lisbon Treaty’s solidarity clause*, cit., p. 4.

<sup>522</sup> See, 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, 2010, Swedish Institute of International Affairs, p. 17.

<sup>523</sup> 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”.

<sup>524</sup> See, Council of the European Union, Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *OJ L 164*, 22 June 2002. Hereinafter, Implementing Decision 2014/415/EU.

seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation<sup>525</sup>. Therefore, in accordance with the Council Framework Decision 2002/475/JHA, 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 cover just acts of terrorism occurring abroad, but also those organised by EU citizens against Member States.

Finally, Council Decision 415/2014 introduces the notion of ‘crisis’, as residual category for the application of the clause. However, it inexplicably restricts the term by including only disasters and terrorist attacks “of such” wide-ranging impact or political significance to urge a 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”.<sup>526</sup> The definition contained in

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<sup>525</sup> *Ibid.*, Article 1. Terrorist offences and fundamental rights and principles: “1. Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of: - seriously intimidating a population, or - unduly compelling a Government or international organisation to perform or abstain from performing any act, or - seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation, shall be deemed to be terrorist offences: (a) attacks upon a person's life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage taking; (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss; (e) seizure of aircraft, ships or other means of public or goods transport; (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons; (g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life; (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life; (i) threatening to commit any of the acts listed in (a) to (h). 2. This Framework Decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.”

<sup>526</sup> See, 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.

the Joint proposal was, therefore, 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 it is less intuitive which other categories of events could be covered.

Apart from the said doubts concerning the definition of the circumstances that may trigger the activation of the clause, there is to underscore 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 also multiple and continuing situations of crisis, thus needing a long-term approach of resolution. 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 415/2014 no reference is made concerning the opportunity to invoke the solidarity clause to prevent serious events, despite Article 222 TFEU introduced this element with reference to terrorist attacks. It thus remains unsolved the scope of application *ratione temporis* of the solidarity clause.

Finally, there is to say that, according to Article 4 of Decision 415/2014 the solidarity clause can be invoked by the affected State just after having exploited all the possibilities offered by existing means and tools at national and Union level. The result is that, from 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.

*ii) 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, which has been partially – but significantly – reformulated in

comparison to the original text of the Joint Proposal, is one of the most controversial issues that deserve 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 such an article, it seems to be emerging a predominantly internal dimension of solidarity<sup>527</sup>. Actually, such a orientation is not in line with what proposed by the Commission and the High Representative. Indeed, the Joint Proposal’s version of Article 2 affirmed in its paragraph (b) that the decision of the Council should apply irrespective of whether the crisis originated inside or outside the EU and, therefore, also when affecting ships (when in international waters) or airplanes (when in international airspace) or critical infrastructure (such as off-shore oil and gas installations).<sup>528</sup> In fact, as well know, from an international law perspective, ships, airplanes and critical infrastructures located in high sea cannot be properly considered as territory of States, 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<sup>529</sup>.

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<sup>527</sup> See, E. Neframi, “La solidarité dans l’action extérieure de l’Union européenne”, cit., p. 149.

<sup>528</sup> See, Joint proposal for a Council Decision on the arrangements for the implementation by the Union of the Solidarity Clause, cit., Article 2(b).

<sup>529</sup> See, UN Convention on the Law of Sea, Montego Bay, 1982, Article 92: “1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry. 2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality”; Convention on International Civil Aviation, Chicago, 1944, Article 17: “Aircraft have the nationality of the State in which they are registered.” 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 as regard to a definitive intervention could be much more complex.

Albeit the Joint Proposal complied with international law, it was questioned by some Member States that stressed on the literary content of Article 222 TFEU. Indeed, in the first paragraph, the primary law provision introduces a limitation to its geographical scope of application by making explicit reference to the “territory” of the Member States as regards 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. As a result, the majority of the EU Members 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 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.

As matter of fact, such a conclusion appears rather dubious for a number of reasons. First of all, it is clear a 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 is applied irrespective of whether it originates inside or outside the territory of the Member States. But, 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<sup>530</sup>. Against this background, the wording of Article 2 of Decision 2014/415 would 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.

It remains yet to be seen how to concretely combine the opportunity to intervene in response to crisis originating outside the territory of EU Member States and the strict territorial scope of application of the clause<sup>531</sup>. In addition, in comparison to

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<sup>530</sup> See, T. Ahman, *The Treaty of Lisbon and Civil Protection in the European Union*, cit., p. 24.

<sup>531</sup> See, M. A. Martino, “The “Solidarity Clause” of the European Union – dead letter or enabling act?”, in *SIAC-Journal – Zeitschrift für Polizeiwissenschaft und polizeiliche Praxis*, Vol. 2, 2015, p. 44.

the Joint Proposal, events occurring in international spaces on ships, aircrafts and installations over the State may exercise jurisdiction have been *de iure* excluded thereby limiting significantly the cases of application of the clause.<sup>532</sup> Furthermore, it could be useful to understand why the Council decided to mention, as examples of infrastructures to be protected, just off-shore oil and gas installations by leaving aside other kinds of infrastructures having a ‘civilian’ rather than ‘economic’ character, such as embassies, that, though 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 refusing 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 through the evacuation of EU nationals in third countries following a terrorist attack<sup>533</sup>. In any case, it is safe that the circumstances of activation of the solidarity clause have been strongly narrowed by the Council Decision thus keeping to a minimum the extraterritorial application of this provision.

*iii) instruments of application of the solidarity clause*

As already anticipated, according to Article 4 of the Implementing Decision it is up to the national authorities – on a high political level<sup>534</sup> – of the affected Member State to address their invocation of the solidarity clause to the Presidency of the Council whenever they consider that the crisis clearly overwhelms the

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<sup>532</sup> See, M. Gestri, “La risposta alle catastrofi nell’Unione europea: protezione civile e clausola di solidarietà”, cit., p. 55.

<sup>533</sup> One of the most known intervention is that performed in India following the terrorist attack in Mumbai in November 26, 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, available at <http://nicholasnicoletti.com/EU%20Conference/Paper%20Submissions/Winger,%20Gregory%20-%20In%20the%20Midst%20of%20Chaos.pdf>. Moreover, see, M. Lindström, “EU Consular Cooperation in Crisis Situations”, cit..

<sup>534</sup> 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.

response capabilities available<sup>535</sup>. In addition, it is prescribed that the invocation shall also be addressed to the President of the European Commission.

In this regard, the text of the Joint Proposal set that the affected State should address the request of activation of the clause firstly to the President of the European Commission and then to the President of the Council. As a consequence, the original idea was to attribute the steering role to the Commission and the High Representative thereby leaving to the Council just a marginal role following the decision of the Presidency of the Council to activate all the necessary arrangements to respond to the crisis<sup>536</sup>. 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”, albeit it has to respect the Commission’s and the High Representative’s competences<sup>537</sup>.

Before illustrating the instruments that could be activated in the wake of the solidarity clause, it deserves to be recalled that, as stressed in the preamble of the Implementing Decision, the latter concerns just the implementation by the Union of Article 222 and not that by Member States.<sup>538</sup> As a consequence, it aims at regulating the vertical perspective of solidarity thereby indicating those initiatives that should be carried out by the Union and those instruments that should be mobilised to face a disaster or a terrorist attack.<sup>539</sup>

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<sup>535</sup> In this regard, it is appropriate to report that the Joint Proposal refers to the possibility of 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 included in the scope of application of the solidarity clause also prevention activities against terrorism.

<sup>536</sup> See, Joint Proposal for a Council Decision on the arrangements for the implementation by the Union of the Solidarity Clause, Article 6.

<sup>537</sup> See, Implementing Decision 2014/415/EU, Article 5.

<sup>538</sup> See, Implementing Decision 2014/415/EU, Recital 1.

<sup>539</sup> 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.

Relevant instruments include the European Union Internal Security Strategy, the Union Civil Protection Mechanism and the structures developed in the framework of the response to serious cross-border threats to health and of the CSDP. For that purpose, the Council shall rely on the IPCR, that means the EU Integrated Political Crisis Response (IPCR) arrangements approved by the Council on 25 June 2013<sup>540</sup>.

The IPCR arrangements have been designated to replace the Crisis Coordination Arrangements, criticised for being too complex and too difficult to use in exceptional events, thereby facilitating a coordinated EU response to a major crisis at the highest political level<sup>541</sup>. Indeed, such a Mechanism is driven by the Presidency, which ensures coherence of handling in the Council and of the overall response at 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 to a political coordination and the adoption of proper decisions.<sup>542</sup>

Therefore, there is no an automatic coincidence between the activation of the solidarity clause and the IPCR, because whereas the former has an inner focus and can be invoked in case a Member State is severely affected and its response capacity is not sufficient, the Council's crisis mechanism rather provides the platform for tailored and rapid response by the EU political level on a crisis happening inside or outside the EU. However, the IPCR mechanism clearly helps to structure the response when the solidarity clause is invoked. Indeed, the procedure provides for that, once addressed the invocation of the solidarity clause,

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<sup>540</sup> See, Council of the European Union, 3251st Council meeting – General Affairs, 25 June 2013, doc. 11442/13, p. 17.

<sup>541</sup> See, P. Minard, *The IPCR arrangements: a joined-up approach in crisis response?*, European Union Institute for Security Studies, Brief Issue, n. 38, December 2015.

<sup>542</sup> *Ibid.*, p. 2. In addition, 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*, Vol. 9(3), 2015, pp. 234-238.

the Council may activate the IPCR by informing all stakeholders in Brussels and in the Member States<sup>543</sup>.

As for the Commission and the High Representative, according to Article 5, para. 2 of the Implementing Decision, they shall identify all the relevant measures under their competences, including, among other things, identify military capabilities that can best contribute to the response to the crisis with the support of the EU Military Staff.<sup>544</sup> It is therefore 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 instruments of response existing at the Union level are, directly or indirectly, under the responsibility of the Commission, and on the other one the High Representative keeps a decisive task in reference to crisis 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

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<sup>543</sup> Information exchanges are managed through a specific crisis web platform – the IPCR web platform – by the managing authorities of the Commission, the EEAS, the Member States or by the Council, that is the General Secretariat of the Council or the Presidency. The continuous flow of information shared by the EU Members on the web platform serves as the basis for the relevant Commission or EEAS services to prepare the Integrated Situational Awareness and Analysis (ISAA) reports (see, Implementing Decision 2014/415/EU, Article 6). Once the ISAA reports are addressed to the Coreper or the Council, the Presidency is responsible preparing proposals for action by working level and high-level roundtables to find solutions to the specific crisis that are submitted for discussion either to the Coreper or – in the event of a major crisis that requires top-level political guidance like the refugee crisis – directly to the Council or to the European Council. Moreover, depending on the crisis, structures and Union agencies in the field of CFSP/CSDP provide their own contribution.

<sup>544</sup> See, Implementing Decision 2014/415/EU, Article 5, para. 2: “At the same time, and in accordance with Article 1(3), the Commission and the HR shall: (a) identify all relevant Union instruments that can best contribute to the response to the crisis, including sector-specific, operational, policy or financial instruments and structures and take all necessary measures provided under those instruments; (b) identify military capabilities that can best contribute to the response to the crisis with the support of the EU Military Staff; (c) identify and propose the use of instruments and resources falling within the remit of Union agencies that can best contribute to the response to the crisis; (d) advise the Council on whether existing instruments are sufficient means to assist the affected Member State following the invocation of the solidarity clause; (e) produce regular integrated situational awareness and analysis reports to inform and support the coordination and decision-making at political level in the Council, in accordance with Article 6 of this Decision.”

capabilities going beyond the existing arrangements on civil protection; or measures in support of a swift response by Member States.<sup>545</sup>

Finally, in the process of activation of the solidarity clause, a key element is the ERCC that shall act as the central 24/7 contact point at Union level with 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<sup>546</sup>.

Ultimately, 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 operational level<sup>547</sup>. However, against this background, the division of competences between the Union and Member States according to the subsidiary principle appears less clear.

On the one hand, Article 222 TFEU states that Member States "shall coordinate between themselves in the Council", and on the other hand, they are free to coordinate the assistance both on the basis of international law as within the CFSP. It is not thus clear how these two sets of competences would interact and how it would be possible to avoid any overlap and interference between the

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<sup>545</sup> See, Implementing Decision 2014/415/EU, Article 5, para. 3.

<sup>546</sup> See, Implementing Decision 2014/415/EU, Article 5, para. 6: "Upon invocation of the solidarity clause, the ERCC shall act as the central 24/7 contact point at Union level with Member States' competent authorities and other stakeholders, without prejudice to existing responsibilities within the Commission and the HR and to existing information networks. The ERCC will facilitate the production of Integrated Situational Awareness and Analysis (ISAA) reports, in collaboration with the EU Situation Room and other Union crisis centres, in accordance with Article 6 of this Decision".

<sup>547</sup> See, 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. Available at <https://europe-liberte-securite-justice.org/2015/07/27/the-solidarity-clause-one-of-the-most-unacknowledged-innovations-of-the-lisbon-treaty-the-european-parliament-debates-its-implementation-but-also-its-ambiguities/>.

decisions adopted by the Council, that gathers the representatives of States, and those taken independently by them. Maybe, contrary to what one can conclude at first reading of Article 222 TFEU, it does not require a separation of interventions, rather a positive synergy between the EU institutions and Member States which have a shared duty to react when the affected State demonstrates to not be able to control an event of extraordinary weight and dimension. 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”<sup>548</sup>.

The vertical dimension – that is immediately introduced in the first paragraph by referring to the mobilisation of Union instruments – meets thus the horizontal one – that is enclosed in the second paragraph of Article 222 TFEU and that requires Member States to react. As a consequence, after having illustrated in detail the content of the Council Decision establishing implementing arrangements for the Union, it is essential, for the purposes of the present work, to move into and to deeper evaluate 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.

### *1.2 The solidarity clause: what implications for Member States?*

Article 222 TFEU does not address exhaustively the duties of EU Members when another is object of a terrorist attack or of a disaster. However, 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 also for the implementation of the provision at stake by the Member States, thereby making it possible to derive some States’ obligations.

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<sup>548</sup> See, 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. 10.

*i) Member States shall jointly act with the Union*

Article 222, para.1, TFEU requires Member States to act jointly with the Union thus merging all the instruments that are at disposal at national and supranational level when another EU Member is seriously in trouble. This implies that, despite – as it will be suggested later – Member States may act also independently from the Union, once it has mobilised instruments that expect States’ contribution, they are forced to act, mainly when an effective mobilisation of the Union depends on the resources made available by the very Member States.

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<sup>549</sup>. Therefore, the Union obligation to intervene becomes necessarily intertwined with the States’ duties according to the principle of sincere cooperation<sup>550</sup>.

Such a perspective is further strengthened by the intrinsic nature of the event that – according to the letter of the implementing Decision – shall be faced 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 level is needed.

As a consequence, 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. The negative obligation requires States to avoid limiting the mobilisation of the Union instruments in response to

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<sup>549</sup> See, M. Klamert, *The Principle of loyalty in EU law*, cit., p. 35.

<sup>550</sup> See, 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.

exceptional circumstances while, as other side of the coin, the positive duty is to actively participate in the deployment of EU and national resources.

*ii) Member States shall assist the affected State*

Besides requiring to act jointly with the EU institutions, Article 222, para. 2, TFEU reinforces the role of the Member States by prescribing that they shall make assistance available to another State in case its political authorities request the activation of the clause. In general terms, there is to say that, whether according to Council Decision 2014/415 the invocation of the solidarity clause for activating Union's instruments may occur just in *extrema ratio*, by taking into considerations the evaluations made by the Member States in its elaboration, it is possible to state – by analogy – that also the alleged interventions of the other EU Members have to be conceived as acting in last resort.

In any case, providing for assistance constitutes a formal obligation on all EU Member States and not just a concept operating in the political dimension. And, in this regard, EU primary law represents the unique legal framework at 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 appears 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.<sup>551</sup>

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<sup>551</sup> Indeed, the control by the Court is limited just with reference to the Common Foreign and Security Policy, see, Article 275 TFEU: “The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions. However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.” It is not, however, excluded that the solidarity clause could be activated within CSFP matters thereby limiting the CJEU jurisdiction.

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.”<sup>552</sup>

It, therefore, prescribes that States keep their procedural autonomy in establishing which resources to put at disposal in order to provide for assistance to the affected State. Having regard to the potential implications that the content of such a Declaration could have in respect of 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<sup>553</sup> the mere fact that the Declaration is annexed to the Lisbon Treaty does not imply that it is 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<sup>554</sup>.

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<sup>552</sup> See, Treaty of Lisbon, Declaration n. 37 on Article 222 of the Treaty on the Functioning of the European Union.

<sup>553</sup> See, 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.

<sup>554</sup> See, Vienna Convention on the law of Treaties, 23 May 1969, Article 31. General Rule of Interpretation: “1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding

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 Treaty of Lisbon<sup>555</sup>. 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 case 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 last resort – to provide for assistance, but keeps the right to choose those measures deemed appropriate. In exercising this choice, the State in question is, however, obliged to act in good faith and in a spirit of sincere cooperation as prescribed in Article 4, para. 3, TEU<sup>556</sup>. 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

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the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.”

<sup>555</sup> See, 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.

<sup>556</sup> See, Treaty of Lisbon, Article 4(3): “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. Konstantinides, *Civil Protection in Europe and the Lisbon ‘solidarity clause’: A genuine legal concept or a paper exercise*, cit.

appropriate and favourable instruments of response. 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<sup>557</sup>.

*iii) 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 sincere cooperation or to a formal duty to cooperate with one another<sup>558</sup>, but about a clear and substantial obligation to be coordinated. In addition, it is complement to the obligation to render assistance as prescribed by Article 222 TFEU itself, thus contributing to the elaboration 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 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<sup>559</sup> assumes that Member States are bound by an obligation to cooperate

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<sup>557</sup> See, P. Hilpold, "Filling a Buzzword with Life: The Implementation of the Solidarity Clause in Article 222 TFEU", in *Legal Issues of Economic Integration*, Vol. 42, no. 3, 2015, p. 219.

<sup>558</sup> See, 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: "States have the duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international cooperation free from discrimination based on such differences."

<sup>559</sup> 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.

among themselves. What's more, the requirement to be coordinated within an established institution strengthens the validity and the seriousness of such an obligation that does not remain just a well-intentioned initiative with a vague content. Hence, the clause heightens the profile of cooperation on crisis and disaster issues within the Union and according to EU law for national governments have to take a more principled (and thus 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<sup>560</sup> and, on the other one, 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: interplays 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 dispense from exploring how the instruments illustrated in the previous chapters could interplay with the content of the mentioned Decision.

As matter of the fact, Article 222 TFEU, by establishing that the Union shall mobilise all the instruments at its disposal, is quite vague with regard to what kind of mechanisms may exactly activate in order to assist a EU Member affected by a disaster or a terrorist attack. The implementing Decision has partially contributed to clarify such a point by specifying that the Union should rely on the existing instruments to the extent possible for avoiding the adoption of additional

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<sup>560</sup> 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.

resources<sup>561</sup> and by referring explicitly to some relevant instruments that could be used.

According to recital 5 of the implementing Decision, “[r]elevant instruments 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 Union Civil Protection Mechanism is explicitly mentioned in the implementing Decision, it is first of all necessary to understand how it can interact with the solidarity clause by representing a useful instrument to be deployed. Besides, albeit it is not mentioned because of its recentness and its future is uncertain, even the EU emergency support instrument could be concerned by such a provision. Finally, whether the expression “all the instruments at disposal” used in Article 222 TFEU was interpreted as including also those mechanisms that may intervene in the phase of recovery, few words to 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 instruments to be most likely utilised in relation to the solidarity clause<sup>562</sup>. Indeed, there is no doubt that a connection between these two instruments is established because of the ERCC, that has been

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<sup>561</sup> See, Council implementing Decision 2014/415, recital 4: “The implementation of the solidarity clause by the Union should rely on existing instruments to the extent possible, should increase effectiveness by enhancing coordination and avoiding duplication, should function on the basis of no additional resources, should provide a simple and clear interface at Union level to Member States, and should respect the competences conferred upon each Union institution and service”.

<sup>562</sup> See, P. Konstadinides, “Civil Protection in Europe and the Lisbon ‘solidarity clause’: A genuine legal concept or a paper exercise”, cit., p. 20.

gradually developing into crisis platform and central hub of the EU where all the information come together in case of a crisis. As already 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 request to the President of the Commission and as collector of information able to develop a common picture of the emergency. As a result, despite the activation of the solidarity clause has, at the first stage, a political and inter-governmental dimension that overshadows the Union one, at operational level the ERCC plays a relevant role in the phase of implementation and coordination thereby rebalancing the general framework of action.

Actually, the fact the Decision 2014/415 concerns just the application of the solidarity clause from the Union presages that the intervention of the Union cannot be particularly incisive but limited to make available the coordination 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 the 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<sup>563</sup>. But, 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 Civil Protection Mechanism – 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 of all, according to a long-term perspective, the solidarity clause could reframe the issue concerning the costs of assistance. Indeed, albeit Article 39 of Decision 2014/762 on the implementation of the Union Civil Protection

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<sup>563</sup> See, 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.

Mechanism states that any Member State providing assistance may offer its assistance entirely or partially free of charge and that may waive all or part of the reimbursement of its costs at any time, they are in general bore 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 elaborate new financing arrangements when a massive intervention is necessary – at least in relation to events occurring within the EU – by imposing to Member States to refrain from requesting the reimbursement of the costs of deployment.

Secondly, on occasion of the debates concerning the scope of the clause, Member States have intended to stress that Article 222 TFEU can be invoked just after having exploited all the possibilities offered by existing means and tools at national and Union level. These means include also the EU Civil Protection Mechanism, which, at the same time, could be one of the instruments to be mobilised following the activation of the clause.

At first sight, one could ask how to merge these two moments and which additional measures to trigger within the UCPM that have not been already deployed. Actually, 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 to the request of assistance from the affected State or that did not put at disposal sufficient resources in its favour would be obliged to intervene within the framework of activation of the solidarity clause.

## *2.2 The solidarity clause and the EU emergency support instrument*

Notwithstanding the permanent nature of the emergency support instrument is uncertain and it is not possible to establish whether it will be activated or at least replicated in the event of future serious emergencies occurring in the Union's

territory, at the moment it could represent one of the instruments – the only having financial nature – to be activated for helping a EU Member.

Actually, on the one hand, recital 4 of the implementing Decision on the solidarity clause does set that, rather than creating new additional resources, the Union should increase effectiveness by enhancing coordination and avoiding duplication of the existing instruments, and, on the other one, Regulation 2016/369 quite unexpectedly does not cite the solidarity clause. This notwithstanding, the emergency support instrument 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 rely on the Commission's discretion, the provision of financial assistance to EU Members would become compulsory.

In this regard, however, there is to recall that both the instruments have been conceived as *last resort mechanisms*. Indeed, while on the one hand the solidarity clause may be activated just when the affected State has already exploited all the resources at disposal, on the other the instrument providing for 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<sup>564</sup>.

As matter of the 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, para. 1, TFEU strictly speaking must give precedence to others solidarity mechanisms foreseen by primary law, including, of course, those incorporated in the solidarity clause. However, seen the exceptional nature of the solidarity clause as conceived in the implementing

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<sup>564</sup> 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.

Decision, it is not to be excluded that the emergency support instrument 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 has not been preceded from any request by the national authorities to activate the solidarity clause. In this case, however, there is the risk that – since the affected State are always provided with new instruments of assistance – the clause in question is never activated.

### *2.3 The solidarity clause and the EU Solidarity Fund: an obligation in perspective?*

Albeit no reference to the EU Solidarity Fund is made in implementing Decision 2014/415, its potential relevance cannot be disregarded. 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<sup>565</sup>. But, clearly, such an option has been eliminated in phase of approval by the Council. On the other hand, the very Commission, in its amendment proposal for the EUSF, made 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 of crisis situations whereas the criteria for the activation of the EUSF are defined in a way leading to the use of the Fund several times each year. Secondly, under the legislative procedure foreseen by Article 222 TFEU, the European Parliament is informed but not actively involved, and this could 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 includes certain non-Member States not covered by Article 222 TFEU.

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<sup>565</sup> See, 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.

Notwithstanding these objections, it cannot be ignored the theoretical interest of the Commission to link the very objective of the EUSF with the content of Article 222 TFEU. Therefore, the opportunity that these two instruments may somehow interplay 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 for responding to exceptional emergencies, could indeed operate in an extensive way thereby covering all the phase of response and post-disaster. In this case, the obligation imposed on the Union could be extended also with reference to the deployment of instruments intervening in the recovery phase, included 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, as well for the Civil Protection Mechanism, the solidarity clause could really represent the instrument capable of establishing duties to provide for assistance both on the Union and on Member States by means of the very instruments already existing.

### **3. Evaluating the real legal value of the solidarity clause: to what extent is solidarity really binding?**

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 link and trigger of the very mechanisms for disaster response and assistance. National governments should thus consider their solidarity obligations more carefully and respect them by virtue of the principle of *bona fide* that is central in treaty law<sup>566</sup>. That represents a breakthrough in comparison to the current and still uncertain legal framework

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<sup>566</sup> See, 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 *res inter alios acta tertio neque nocet neque prodest*, since that clearly does not apply when a disaster occurs outside the Union.

governing disaster relief at international level. Moreover, one of its added values is the institutional and the procedural transparency able to ensure an effective coordination in times of response to crises. From a systemic point of view, it makes clear that some of the most basic security challenges for the Union can only be tackled through a solidary approach.

Notwithstanding the overall theoretical positive 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 detail on the procedure thus leaving it open to different interpretations as regards 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<sup>567</sup>. Besides, the analysis of the content of the implementing Decision makes evident that there has been an important rereading and downsizing of the provision contained in primary law, mainly in terms of scope of application, thereby limiting the objective circumstances of invocation of the very clause. Finally, so far, the solidarity clause has never been clearly activated, despite the occurrence of a number of favourable opportunities, including the multiple terrorist attacks to which the French government decided instead to respond by activating for the first time the clause of mutual defence according to Article 42, para. 7, TEU<sup>568</sup>.

Despite terrorist attacks and armed conflicts have been explicitly left out from the scope of the present research work<sup>569</sup>, in order to provide for a better

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<sup>567</sup> See, 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.

<sup>568</sup> See, 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 *Quaderni di SIDIBlog*, 21 December 2015, available at [www.sidiblog.org/2015/12/21/lattivazione-della-clausola-ue-di-mutuaassistenza-a-seguito-degli-attacchi-terroristici-del-13-novembre-2015-in-francia](http://www.sidiblog.org/2015/12/21/lattivazione-della-clausola-ue-di-mutuaassistenza-a-seguito-degli-attacchi-terroristici-del-13-novembre-2015-in-francia); C. Moser, “Awakening dormant law – or the invocation of the European mutual assistance clause after the Paris attacks”, in *VerfBlog*, 18 November 2015, available at [verfassungsblog.de/?p=11929](http://verfassungsblog.de/?p=11929).

<sup>569</sup> For comments on the relevance of the solidarity clause in situations of terrorism, see M. Gestri, “La clausola di solidarietà in caso di attacchi terroristici di calamità (art. 222 TFEU)”, cit.

understanding of the practical obstacles that the application of the solidarity clause finds, it is necessary – even if briefly – to report the main legal elements which differentiate the content of Article 222 TFEU from the provision *ex* Article 42, para. 7, TEU<sup>570</sup>. In fact, albeit 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, it must be underlined the positive decision to differentiate the scope of application of the two clauses, by distinguishing between international and regional, civil and military forces. As well known, Article 222 TFEU applies in case of terrorist attacks or natural/man-made disasters, while Article 42, para.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<sup>571</sup> and a form of closer cooperation in comparison to that provided by NATO<sup>572</sup>.

The choice to separate the two clauses and, in particular, to include terrorist attacks within the solidarity clause and not in Article 42, para.7, TEU can be

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<sup>570</sup> See, 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.”

<sup>571</sup> See, UN Charter, Article 51: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

<sup>572</sup> See, North Atlantic Treaty, signed in Washington on 4 April 1949, Article 5: “The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security”.

founded on specific legal considerations concerning the still debated nature of terrorist aggressions. Indeed, following the attacks of September 11<sup>th</sup>, discussions on the question 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<sup>573</sup>. As a result, the separation made is perfectly in line with the concerns addressed at international level.

In the second place, Article 42, para. 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 power to mobilize all instruments at its disposal in order to protect and assist them in the event of a terrorist attack, or natural or man-made disaster.

Thirdly, it is possible to argue that, while Article 42, para. 7, TEU represents a ‘mere’ obligation to assist the victim 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 reference point for a definition of this concept, but rather deals with a segment of solidarity, that must find concrete application by interacting with a broader range of norms that pursue similar aims. Said that, the 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, para. 7, TEU was chosen over the solidarity clause for a number of reasons.

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<sup>573</sup> 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*, Vol. 14, 2003, pp. 227–240.

First of all, it was intended 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 to the EU as a whole. Secondly, the type of expected solidarity related to external operations rather than to an internal response to the consequences of the attacks, thus pushing more reluctant Member States towards an enhancement of the coalition against the ISIL by supporting for its military campaigns in Iraq and Syria, as well as in Mali and the Central African Republic<sup>574</sup>. 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, para. 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, has represented a missed opportunity to empower the solidarity clause. As matter of fact, regardless the ultimate French interests and the fact that Decision 2014/415 specifies that shall not have defence implications, what happened in Paris could be traceable, 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, it could not be excluded the simultaneous use of the two clauses 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<sup>575</sup>.

The lack of a concrete application and the still existing reluctance of States to invoke the solidarity clause risk turning the content of Article 222 TFEU solely a political stance, having therefore a scarce legal value in terms of obligations mainly for Member States. And, in effect, albeit the solidarity clause operates with reference both to the Union and to Member States as well as it is unquestionable the relevance of the obligation to cooperate within the Council, the decision to trigger or not the solidarity clause and to activate the adequate arrangements are politically heavily loaded. Moreover, the content of Declaration

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<sup>574</sup> See, T. Tardy, “Mutual defence – one month on”, *European Union Institute on Security Studies*, n. 55, December 2015.

<sup>575</sup> See, C. Hillion, S. Blockmans, “Europe’s self-defence: Tous pour un et un pour tous?”, *Centre for European Policy Studies Commentaries*, 20 November 2015.

n. 37 raises doubts that remain objectively unresolved about to what extent 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. In addition, it has not been established to what extent Member States are free to decide what instruments to put at disposal once the arrangements are activated by the Council. Accordingly, it will be interesting to see whether the EU institutions or Member States will refer the matter to the CJEU and, if the occasion will arise, whether the Court will be less reluctant to deal with politically sensitive issues by scrutinising Member States' compliance with the solidarity clause<sup>576</sup>. In conclusion, the actual legal relevance of the solidarity clause will be able to be assessed just in a long-term perspective, because at the moment it risks remaining a dead letter rather than representing an enabling act capable of imposing both on the EU institutions and on the Member States a clear duty of solidarity in the event of a disaster.

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<sup>576</sup> See, T. Ahman, *The Treaty of Lisbon and Civil Protection in the European Union*, cit., pp. 28-29.

## CONCLUSIONS

### *1. Finding the legal implications of solidarity in international disaster response law: an uphill climb*

In recent times, the protection of persons in the event of overwhelming natural and man-made disasters has become an issue of great importance for international legal doctrine and the international community as a whole. This notwithstanding, Chapter I of the present work intended to stress that the high level of fragmentation of the so-called International Disaster Response Law (IDRL) affects not only the provision of effective assistance to the victims of serious disasters, but also the elaboration of specific duties of solidarity on States.

As emerged in Chapter I, para. 2, despite disaster contexts are the best occasion for prioritising humanitarianism and demonstrating international solidarity towards the affected population by means of external humanitarian assistance, State sovereignty and the rights deriving from it are still perceived as the cornerstone of IDRL. Indeed, on the one hand, it is unquestionable that disaster response falls within the jurisdiction of the State in whose territory the catastrophic event has occurred and that the national authorities remain the first and foremost subjects responsible for controlling the provision of humanitarian relief within their territory thereby potentially refusing or limiting external assistance. On the other hand, albeit still controversial, it seems that the potential assisting actors (i.e. States, the United Nations, international and regional organisations as well as NGOs) have the right, rather than the duty, to offer and provide assistance to the affected State. And, the absence of a well-established duty to offer and to provide for assistance is indicative of the sovereignty-centred, rather than solidarity-centred, perspective adopted at international level.

Since the lack of a clear set of duties on States risks, ultimately, jeopardising the fundamental rights to life and human dignity of the affected people, as reported in Chapter I, para. 2.3, 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, *inter alia*, to human rights instruments and by invoking the alleged right to humanitarian assistance. Notwithstanding the increasing human rights-based approach has somehow remodelled the principle of State sovereignty, the latter has not been substantially bruised so as to determining the shifting from a right to a duty of solidarity at level of international customary law.

The work carried out by the International Law Commission as illustrated in Chapter I, para. 3, has attempted to overcome such an orientation by confirming the centrality of human rights in international legal discourses and by introducing some specific and relevant legal novelties in the field at stake, such as the duty to cooperate, the duty to seek for assistance in case the affected State is unable to cope with the consequences of overwhelming disasters, as well as the necessity that the potential assisting actors take in due consideration the requests of assistance coming from the affected States. But, as demonstrated in the critical analysis proposed in Chapter I, para. 3.2, the Draft Articles on the protection of persons in the event of a disaster contain a number of legal and substantive shortcomings – with particular reference to judicial remedies and accountability – to be filled. Moreover, according to the Draft Articles, the contribution of the international community relies just on a right, or at least on a moral duty, based on the discretion of the assisting actors. Besides, it has to be signalled the lack of any reference to the existence of a right to humanitarian assistance in case of disaster.

In any case, by considering the reluctance already made evident by States, the actual chance that the UNGA adopts a universal regulatory framework by fully reflecting the set of duties enshrined in the draft articles appears quite remote.

Therefore, at the moment, ‘rights of solidarity’ prevail over ‘duties of solidarity’ thus potentially impinging on the alleged right to humanitarian assistance of the affected population. As a result, one can conclude that, in situations of disaster, the principle of solidarity has not yet given rise to a comprehensive set of rules, but rather to disarticulated rights on States.

It is hence clear that, also in the face of the increasing role played by regional organisations, the full implementation of the positive dimension of solidarity, which would require the establishment of obligations on States, has not been definitely reached at international level. And the absence of specific duties of

solidarity in the event of a disaster confirms that within customary international law the notion of solidarity is more an interpretative canon rather than a legally binding norm capable of imposing duties on States.

Chapter II has intended to make a detailed reconstruction of the notion of solidarity as conceived at EU level. Besides being at the basis of the EU integration process, it represents the paradigm of reference of the structural and normative configuration of the European Union. Moreover, it has been noted that within the EU legal order solidarity acquires different expressions which make it an amorphous concept whose contours change depending on the actors and the legal areas involved. The Lisbon Treaty has contributed to give impetus to the legal concept of solidarity by assuring it a special position as manifold (but rather complex) notion serving as *core value*, as *objective* and as *principle* to be respected and pursued by the EU institutions and the Member States.

It is exactly this three-fold functionality of solidarity as integrated concept at EU level which, in theory, should play a fundamental and decisive role in emergency scenarios. More to the point, the analysis carried out in the present study has attempted to verify to what extent solidarity animates EU disaster response law and, mainly, whether specific solidarity duties insisting both on the EU institutions and on Member States can be invoked in disaster situations thereby going beyond what is normally required under the principle of loyal cooperation.

## *2. The functional dimension of solidarity within EU disaster response law*

As anticipated in Chapter II, para. 2, EU disaster response law has been progressively shaped according to a significant and ambitious position by establishing new legal instruments and improving the existing ones for responding more adequately to severe emergencies. In this regard, there is to say that initially both the lack of specific legal basis and of clear references to solidarity have affected the opportunity to adopt specific instruments of solidarity capable of covering all the needs of the affected population in a comprehensive way. But, the Lisbon revision has fuelled an important improvement as for the instruments to be deployed within the Union's territory for providing for financial and in-kind

assistance thereby giving rise of a multilayered and complex EU disaster management system that is based on solidarity. Indeed, 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 at stake, but there is to say that no single and comprehensive EU policy concerning disaster response exists. Rather, such a field of intervention has a transversal and, therefore, quite fragmented nature that derives, *inter alia*, from the absence of a specific EU competence concerning disasters management. On the contrary, the latter is based on a mix of shared and supporting competences and thus on different degrees of intensity as for the interventions at the Union level. Yet, it is evident that, as underscored by the wording of the preambles of all the instruments of secondary law, the principle of solidarity has guided the EU institutions and Member States in enhancing their collaboration in the field at stake.

Chapter III has intended to catch such improvements with regard to the instruments of financial assistance. However, in these final comments it is difficult to make a univocal assessment, because if, on the one hand, they have been positively modified, on the other one, they still contain serious defects.

More in detail, both the enhancements of the EU Solidarity Fund as well as of the policy concerning the granting of State aids in the event of serious calamities reported in Chapter III, para. 1, shall be considered remarkable. As for the EU Solidarity Fund, Regulation 661/2014 has, for instance, introduced the possibility of granting an advance payment shortly after the application for a financial contribution from the Fund has been submitted to the Commission by the affected State. In addition, with regard to the rules on State aid, the increased flexibility granted by the Commission in terms of notification may facilitate Member States in the reconstruction process thereby giving substance to the principle of multilevel solidarity between Union and Member States. In both cases, the Commission has thus proposed a reformulation in terms of time limits and flexibility that seems to go hand in hand with the requirement of solidarity and, as for State aid regime, to rebalance the trade-off between solidarity and competition

as well as to allow national authorities to implement the national solidarity<sup>577</sup>. Notwithstanding these advances, it cannot be neglected that such instruments are still characterised by a number of relevant shortcomings deriving from the necessity to secure the national and EU budgets as well as the normal market equilibrium in the European Union thereby affording to undermine the application of solidarity. More specifically, Chapter III, para. 1.3, has sought to focus on the existence of some requirements which reshape solidarity on the basis of the principle of conditionality that, mainly in the course of the economic crisis, has been attributed with a central and constitutional dimension<sup>578</sup>.

Albeit the different nature of the conditions indicated by each instrument, they seem to be intended to establish a framework of co-responsibility between the affected State and the EU institutions thus making conditionality link between solidarity and responsibility, and instrument for boosting State accountability. While the principle of conditionality can be rightly conceived for preventing measures of financial assistance from becoming abused by Member States, it may appear problematic and hardly reconcilable with the final aim of these tools, that is to provide for direct or indirect assistance in case of a serious disaster. In fact, it cannot be neglected the fact that the activation of the illustrated financial mechanisms, as well as of the Civil Protection Mechanism, should be aimed at supporting the people in need according to a people-centred approach (and in this case a EU citizens-centred approach) thereby putting State's failings into the background. In 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 *ex ante* applied, the principle of conditionality risks to become justification to limit the scope of application of solidarity and to make the latter a 'conditioned solidarity'<sup>579</sup>. And, besides having practical repercussions on the functional role of solidarity in the field of disaster response,

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<sup>577</sup> See, C. Boutayeb, "La solidarité, un principe immanent au droit de l'Union européenne", cit., pp. 35-37.

<sup>578</sup> See, P.A. Van Malleghen, "Pringle: A Paradigm Shift in the European Union's Monetary Constitution", in *German Law Journal*, Vol. 14, 2013, p. 162.

<sup>579</sup> Such an expression has been already used with reference to the EU economic governance. See, J. V. Louis, "Les réponses à la crise", in *Cahiers de droit européen*, 2011, p. 356.

the fact that it can be relativised instead of being acknowledged in absolute terms casts doubts on the legal value to be attributed to the principle of solidarity. Indeed, this demonstrates that solidarity can be clearly revisited and shaped on a case-by-case basis thus ultimately affecting its capacity of being justiciable and, even before, of being included among the constitutional principles of EU law which, instead, are compulsory in their entire essence.

The emergency support instrument illustrated in Chapter III, para. 2, which might fill the legal gaps concerning the provision of immediate financial assistance to EU Members, could represent a proper way to overcome such a limit and to avoid that financial assistance remains just the manifestation of a ‘subsequent solidarity’. Despite this, it reveals some controversial characters which could limit its extensive application in the near future.

First of all, it is significant the seeming non-permanent nature of such an instrument which, if not extended to other situations of emergency, could remain just one of the multiple tools activated for responding to the contingent crisis. In the second place, even though it may be explained by the context wherein it now operates and by the fact that other instruments of financial assistance have been activated, it is actually worrying the scarce level of funds granted on its basis which, therefore, makes one wonder on the real impact of the mechanism. Accordingly, the real effect and the supposed added value of the emergency support instrument cannot be fully evaluated until it has not been activated (hopefully) also on future occasions.

The temporal and substantive reconstruction proposed in Chapter IV has made evident that one the most notable novelty provided by the Lisbon revision has been undoubtedly the inclusion of a specific provision on civil protection which has enabled to strengthen the Union Civil Protection Mechanism. As repeatedly stressed in the course of the analysis, it embodies the operational side of solidarity thus conferring to 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, new impulse to solidarity among Member States has been provided by means of the establishment of the EERC which reflects the timid intention to create a more predictable and permanent system of civil protection resources capable of better

and timely responding to disasters. Accordingly, since solidarity passes also 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. The findings reported in Chapter IV, para. 3.3, have hence suggested that the Civil Protection Mechanism inaugurated in 2014 could not be limited to the support and cooperation among national civil protection services, but aimed at progressively ‘federalising’ them under the helm of the European Union. And, such a potentiality is evident also from the very recent proposal issued by the Commission for strengthening the current Mechanism by establishing a new force named ‘rescEU’ and composed by EU response capacities to be activated and controlled directly by the Commission itself when those in the voluntary pool were insufficient to respond to a disaster. If approved by the Council and the Parliament, it could represent the prototype of the EU civil protection force envisaged by Michel Barnier<sup>580</sup>.

However, from a legal point of view, such a proposal goes into a very challenging terrain that could fuel a new debate on the nature of the competence granted to the Commission by the Treaties. In fact, it cannot be neglected that in the field of civil protection (which is a supporting competence according to the wording of the Treaties), there has already been a substantive rereading of primary law in favour of the Commission which has carved out a competence wider than that prescribed<sup>581</sup>. Indeed, by introducing specific requirements to be respected when registering national modules within the EERC, the Commission has done a leap towards a voluntary quasi-harmonisation of national legislations in this field. The creation of a force of civil protection entirely managed by the Commission could represent a further extension of its competences thereby opening a new breach in

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<sup>580</sup> See, European Commission, Proposal for a Decision of the European Parliament and the Council amending Decision No 1313/2013/EU on a Union Civil Protection Mechanism, COM/2017/0772 final, 23 November 2017.

<sup>581</sup> Such a perspective had already extremely worried the UK Government which at that time manifestly expressed its disapproval by stating that the functioning of the new Mechanism exceeded the competence conferred on the European Union under Article 196 TFEU. 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 2012-13, p. 42.

the labile equilibrium in terms of division of powers established with the Lisbon revision. If that happened, one could argue that solidarity – channelled by the necessity to guarantee effectiveness to the Union Civil Protection Mechanism – has also the potentiality to reshape the contours of the supporting nature of the power in civil protection issues.

The final evaluation concerning the functional role of solidarity cannot therefore be unidirectional. In fact, on the one hand, it is impossible not to acknowledge that the instruments established and improved in the course of time comply – at least in terms of intention – with the requirement to apply the spirit of solidarity expressed by the Treaties thereby fuelling the idea that the occurrence of serious disasters is an issue of common concern needing a common response. After all, as stressed more than once also by the Special Rapporteur Valencia-Ospina in his reports<sup>582</sup>, the effective and complementary legal instruments the EU disaster response law contains are a good example of how a regional organisation may be active and successful in providing assistance in the event of a disaster thus creating a *de facto* solidarity.

On the other hand, however, there is to say that – according to a more careful examination – the tools analysed are just partially satisfactory because of a number of inconsistencies having a structural and inherent nature, and legal gaps which still need to be addressed and filled in order to avoid slowing down the natural impulse of solidarity which should flow within the EU.

These include, *inter alia*, the lack of an overlay with regard to the material scope of application of these instruments. In fact, all the instruments analysed propose a different scope of application and a different meaning of the term “disaster” to be applied for their activation. As a matter of fact, it must be highlighted that the existing framework is really fragmented both at the normative and the operational level. Indeed, each instrument operates at different stages of intervention and, often, is managed by different operating structures: the EU Solidarity Fund intervenes just in the event of disasters having natural character and provoking a certain degree of damage; the emergency support instrument can be activated just

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<sup>582</sup> See, International Law Commission, *Fifth report of the Special Rapporteur, on the protection of persons in the event of disasters*, UN Doc. A/CN. 4/652, 2012, point 11.

in exceptional circumstances when the finances of the Member States are or risk to be seriously affected; while the Civil Protection Mechanism can be deployed disregarding the nature and the intensity of the emergency thus potentially responding to a wide range of situations. In addition, it cannot be justified the rigid distinction between natural disasters and other exceptional circumstances which characterises the EU regime on State's aid and that makes it inconsistent with the Union legislation governing disaster response interventions.

The lack of a clear convergence between the scope of these instruments of assistance may be an obstacle to fully respecting the solidarity needs demanded at every stage of disaster response. The risk of the current uncertainty could be a 'selective' solidarity that operates extensively only in certain circumstances – i.e. those for which there is a coincidence of definition between the existing instruments – but excluding other situations that might deserve particular attention. This contributes in turn to the fragmentation of the regulatory framework concerning disaster management and to the downsizing of the requirements of solidarity required at every stage of disaster response.

In the second place, it has to be stressed that all the mechanisms analysed respond to different time-frame 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 should intervene during the emergency and, as well humanitarian aid, provide for financial support to partner organisations in the field; finally, the Civil Protection Mechanism, which actually operates in the whole disaster cycle, may be activated in order to immediately respond to a critical event and to continue its work also in the phase of rebuilding.

In the light of these considerations, it would be more effective and in line with a teleological reading of the Treaties to operate according to a long-term and structural rethink thereby shaping a real and comprehensive system for disaster response that was permanent and based on solidarity as essence of the EU integration process. The major problem is, however, represented by the fact that, even though the instruments analysed reflect the intention to place solidarity at the

core of their activation, it is still anywhere near what solidarity could express in the field of disaster response from a legal point of view.

*3. The normative force of solidarity: what place for solidarity obligations in EU disaster response law?*

The EU legal order should differ from the international one, *inter alia*, because solidarity is asked to have a stronger normative force, capable of establishing specific duties of solidarity for tackling issues of common concern that go beyond national interests. But, the findings of the whole research suggest that the existence of clear solidary obligations in the field of disaster response is still a challenging issue and that EU disaster response law is still far from considerably diverging from international customary law in terms of solidarity duties.

Despite the fact that disaster settings may be the adequate example of situations in which the rationale of solidarity should be very pronounced, none of the explored legal instruments of secondary law, be they the EU solidarity fund, the emergency support instrument, or the Union Civil Protection Mechanism, reflects a compulsory character in its early activation or even duties of solidarity (in the form of a duty to provide for assistance) in favour of the affected State. Rather, the provision of financial and in-kind assistance remains in the sphere of the rights of the States and of the Union itself and, therefore, subjected to their final will.

After all, by referring again to the principle of conditionality, it cannot be neglected that setting of conditions for the delivery of financial assistance in favour of Member States questions the intention to impose duties of financial assistance on the Union and its Member States. Accordingly, within the explored mechanisms provided by EU law for responding to internal emergencies, the voluntary element and the creeping logic of State discretion are predominant over compulsory rules. The only obligations upon both the EU institutions and Member States are essentially based on the respect of the principle of loyal cooperation whose relationship with the principle of solidarity has been dealt with in Chapter II, para. 1.4. In this regard, it is significant the evident duty of procedural nature, that is to provide for timely responses concerning the approval and the

coordination of the deployment of financial and in-kind resources<sup>583</sup>. These duties are linked to the loyalty principle rather than to the principle of solidarity precisely because entail a loyal relationship between the actors involved.

Loyalty comes in also in reference to the Union Civil Protection Mechanism. As outlined in Chapter IV, para. 3, the Mechanism is clearly based on the voluntary – and not enforced – pooling of resources of the States which, moreover, make just a ‘promise’ of deployment in case of necessity. In this regard, there is to say that it is nonetheless true that the promise made by States seems to have a particularly strict character. In fact, according to Decision 1313/2013, once resources have been pre-committed in the EERC, they should then be deployed when it is needed except in the event that reasons of *force majeure* for not providing for assistance come in. And, this occurs exactly because of the principle of loyal cooperation which, in times of crisis, translates in conducts aimed at ensuring the proper functioning of EU tools and, indirectly, contributing to determine choices of solidarity for all the EU actors. In fact, the duty of sincere cooperation, as reported in Chapter II, does instrumentally operate both between Member States, and between Member States and the EU institutions thus supporting the European integration process from an institutional point of view<sup>584</sup>.

Against this background, one could thus argue that the principle of solidarity governing the interventions for coping with disaster scenarios is just the engine, which leads to the activation of these instruments or to the facilitation in the delivery of the assistance, without, however, having clear legal implications on the EU institutions and on EU Members. In more general terms, it seems that

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<sup>583</sup> This is valid first of all for the EU Solidarity Fund, where Article 4a of Regulation states that “Where those conditions are fulfilled and sufficient resources are available, the Commission may adopt a decision, by means of an implementing act, awarding the advance and pay it out *without delay* before the decision referred to in Article 4(4) has been taken” [emphasis added]. Secondly, Article 15 of the Council Decision 1313/2013 establishing the UCPM sets that: “Any Member State to which a request for assistance is addressed through the Union Mechanism *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. The ERCC shall keep the Member States informed” [emphasis added].

<sup>584</sup> See, CJEU, Case 235/87, *Annunziata Matteucci v. Communauté française of Belgium and Commissariat general aux relations internationales of the Communauté française of Belgium*, 27 September 1988, ECLI:EU:C:1988:460, par. 19.

solidarity remains more objective and guiding principle of the EU legal order thus simply reinforcing the cooperation required under the principle of loyalty from which more concrete rules derive. This implies that in these circumstances the interaction between the EU institutions and Member States, as well as that between Member States in implementing the mechanisms to be activated in emergency scenarios, is actually governed by the ordinary interplay between loyalty, on the one hand, and solidarity, on the other. After all, the EU legal order ultimately rests on the voluntary obedience of its Member States<sup>585</sup>.

The present work has, however, set out that the unfavourable findings within international law concerning the existence of a clear duty to provide for assistance alongside the duty to cooperate in the event of overwhelming disasters cannot be totally applied to the Union legal framework. More to the point, the solidarity clause contained in Article 222 TFEU and analysed in Chapter V represents a breakthrough of EU disaster response law in comparison to international law by establishing a *lex specialis* which imposes on Member States an explicit duty to assist another EU Member affected by a disaster: no matter the content of Declaration n. 37 which acknowledges the States' procedural autonomy in defining which resources to put at disposal. Indeed, while States remain free to decide how to show solidarity, there is no doubt that solidarity has to be shown thus providing for assistance. Moreover, Article 222 TFEU entails a kind of solidarity which operates in its multiple 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 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 link and trigger of the illustrated mechanisms of financial and in-kind assistance<sup>586</sup>. As a result, the activation of those instruments which usually rely just on a mere right of deployment becomes

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<sup>585</sup> See, A. Von Bogdandy, J. Bast (eds.), *Principles of European constitutional law*, cit., p. 42.

<sup>586</sup> In this regard, it is of particular significance the mention to the solidarity clause within the 2011 *Communication on The Future of the European Union Solidarity Fund* and the 2013 Proposal for amending Regulation 2012/2002, as though the content of Article 222 TFEU was pushing for a rethinking of the whole disaster law framework in favour of major solidarity towards Member States.

compulsory when operating according to Article 222 TFEU. In this way, the principle of solidarity experiences a step up over the principle of loyal cooperation and that of conditionality in emergency scenarios.

But, as reported in Chapter V, para. 3, a closer and comprehensive legal investigation suggests that the solidarity clause is characterised by a general and very vague scope which undermines its legal significance at the implementing level thus running the risk of keeping the clause a dead letter rather than an enabling act. First of all, 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, it remains unclear the maximum threshold to be reached before invoking 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. Thirdly, it is doubtful in what consists the alleged separation of duties of assistance between the Union and Member States and what kind of solidary tools the EU Members could activate to comply with their obligations. Finally, from a temporal perspective the solidarity clause cannot operate in an extensive way: according to Council Decision 2014/415, it can be activated *vis-à-vis* the Union just as last resort, i.e. when the affected Member State has exploited all the possibilities offered by existing means and tools at national and Union level. *Mutatis mutandis*, the same requirement should also apply for the other Member States which could intervene by means of other tools. Accordingly, the fact that it is a last resort mechanism makes also the duty to provide assistance by means of this provision just a residual duty of solidarity operating in *extrema ratio* and coming in when the affected Member State has fully accomplished its duty to protect its own populations.

Behind such shortcomings it is hiding, *inter alia*, the creeping willingness of States to confine solidarity to their voluntary action as well as not to undermine the responsibility of the affected State. The objective differences between Member States – in terms of risk, vulnerability and resources at disposal – open disagreement over individual responsibilities: southern States, which are more often affected by natural disasters, 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<sup>587</sup>. Such a structural imbalance, that makes some lastingly stronger than others, permanently in the role of ‘givers’ and others as ‘takers’, as well as the lack of a *de facto* reciprocity limits the full implementation of solidarity in interstate relationships within this field<sup>588</sup>. This is also because, according to what raises from the analysis carried out, all the illustrated instruments essentially confirm the first and foremost role of the victim State as responsible of its own population. Indeed, if one focuses on the existence of specific duties on the affected Member States towards their own population, also according to EU law they keep their prerogatives to take care of the population and the *right* to seek for assistance from the Union and other Member States. This is substantiated by the fact that none of the instruments illustrated contains a duty to request for external assistance, but they rely on the discretion of the affected State also when the extent of the disaster overwhelms national capacities.

The only substantial obligation on the affected State is expressed by Article 14 of Decision 1313/2013 with reference to notification in case of events which cause or are capable of causing trans-boundary effects. Therefore, besides tracing what prescribed by international law and identifying the duty to notify as expression of the broader duty to cooperate, the EU legal order does not introduce any further obligation on the affected State in order to provide better assistance to the affected people. Member States thus retain the power to decide when to ask for external aid. And, whether as for the inter-State relations this results from the classical requirement of State consent for getting access to its territory, at EU level it is justified and reinforced by the principle of subsidiarity and by Article 4, para. 2, TEU which stresses, *inter alia*, that the Union shall respect the essential State functions which arguably include the protection of those under its jurisdiction in the event of an emergency. In this regard, it cannot be neglected that, for instance,

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<sup>587</sup> See, T. Áhman, *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.

<sup>588</sup> See, *inter alia*, J. Vignon, *Solidarity and responsibility in the European Union*, Notre Europe Policy Brief, No. 26, June 2011.

the provisions concerning the activation of the Civil Protection Mechanism for internal emergencies do not mention other actors than the affected State as potential triggers of the Mechanism.

The intention not to affect States' prerogatives in choosing when and whether to ask for supranational help in case of internal emergencies is, moreover, revealed by the absence of any reference to the right to international humanitarian assistance, which is instead explicitly acknowledged by Regulation 1257/96 on humanitarian aid<sup>589</sup>. Hence, either the EU legal order does limit such a right to those leaving in third countries instead of recognising its universal application or, more likely, it does not fully acknowledge humanitarian assistance as a right *stricto sensu* able to establish corresponding duties. Otherwise, it would have been specified in the preamble of the legal instruments having a domestic scope and, consequently, an obligation to ask for or to authorise the provision of external assistance would have been incorporated or at least visibly deduced. In this case, the eventual violation of such obligations could be sanctioned through an infringing procedure against the victim State.

In the absence of such an orientation, it is unlikely that a negligent behaviour can be punished by the EU Court of Justice for the manifest violation of EU law, considering that neither the right to humanitarian assistance nor an explicit duty to seek for assistance on Member States have been set<sup>590</sup>. This confirms the actual extremely State-centred perspective which entrusts the affected Member State both with the privilege and with the duty to protect its population. Such a configuration entirely reflects that proposed by current international law and enshrined in draft article 10 as elaborated by the International Law Commission.

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<sup>589</sup> See, Regulation 1257/96, cit., Preamble: "Whereas people in distress, victims of natural disasters, wars and outbreaks of fighting, or other comparable exceptional circumstances have a *right to international humanitarian assistance* where their own authorities prove unable to provide effective relief" [emphasis added].

<sup>590</sup> It is necessary to recall that, as sets by the CJEU in *Brasserie du pêcheur et Factortame*, "the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State concerned manifestly and gravely disregarded the limits on its discretion". See, CJEU, Joint cases C-46/93 and C-48/93, *Brasserie du Pêcheur v. Germany* and *R (Factortame) v. SS for Transport*, 5 March 1996, EU:C:1996:79, points 55-56.

In principle, such an orientation may be acceptable and reflects the idea that the principle of solidarity is dependent on the special meaning of subsidiarity and on the principle that each Member State takes its full individual responsibility. However, after deduction of the fact that solidarity requires a certain degree of responsibility, without a clear duty to provide for assistance (even in last resort) and the enforcement of the solidarity clause, the risk is to incline the balance more towards the duties of the affected State, rather than creating an equilibrium between mutual obligations, thus resulting in a subsidiary and discretion-based solidarity also at EU level to the detriment of the affected population. Moreover, although the absence of an obligation to provide for assistance within the EU legal order does not jeopardise the actual provision of assistance, it has to be acknowledged that, from a legal point of view, such a deficiency says a lot about the Member States' intention to be constrained by genuine duties of solidarity even in circumstances wherein it is expressly mentioned in the Treaties and, more in general, about the challenges the principle of solidarity has to face within the EU legal framework<sup>591</sup>.

#### *4. Perspectives concerning solidarity within the EU legal order*

In the fragmented and complex landscape of EU legislation, it is not an easy task to define meaning and scope of solidarity. The present work has, nonetheless, widely suggested that the improvements of the legal instruments for preventing and protecting against natural or man-made disasters have been deemed necessary for responding to an issue of common interest even though there are some States more prone to be affected by these events.

This notwithstanding, solidarity in *subjecta materia* has not fully expressed its potentiality and its overriding trait is very much embedded in its functional role rather than in the normative one. After all, even the solidarity clause, which is part of primary law, has proved difficult to be implemented and activated despite the

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<sup>591</sup> In this regard, Lalande had already argued that “*le mot solidarité ne peut désigner un devoir, mais seulement le fondement d’un devoir*”, in A. Lalande, *Vocabulaire technique et critique de la philosophie*, Paris, PUF, 1983, XIV ed., p. 1006.

number of favourable occasions. If one were to generalise the insights gained in the present work, one could see a pattern to be used for an appropriate understanding of the health status of solidarity in the European Union which is now facing a number of profound challenges –originating both externally and internally – that risk undermining its existence.

In general terms, solidarity as conceived in the EU legal order should be the corrective element to the tension between a high degree of supranational integration and a simultaneous heterogeneity of interests between the Member States<sup>592</sup>. It should be more than the sum of its interests and not just an arena used to ensure national advantages; or, as suggested by Jacques Delors, it should not be “based on pure generosity, but on enlightened self-interest”<sup>593</sup>. But, as the present work has further underscored, the concept of solidarity in the EU is still weak and rarely specified in its deep essence. In particular, the major problem is to understand the principle of solidarity as source of law, thereby giving it legal substance and making it foundation of concrete legal duties<sup>594</sup>. And, it is exactly multifunctional and cross-cutting character of this valuable notion which makes it uncertain with regard to the exact legal status of the corresponding principle<sup>595</sup>.

As already mentioned in this research, the scarce judicial activism or, at least, the more prudent positions recently assumed by the CJEU have contributed to question about the future of the principle of solidarity within the EU legal order<sup>596</sup>. One may understand the Court’s reluctance in employing solidarity as a

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<sup>592</sup> See, J. Bast, “Deepening Supranational Integration: Interstate Solidarity in EU Migration Law”, in *European Public Law*, Vol.22, 2016, p.303.

<sup>593</sup> See, S. Fernandes, E. Rubio, *Solidarity within the Euro-zone: how much, what for, for how long?*, Notre Europe Report, 2012, p. 10. Available at [www.notreeurope.eu/uploads/tx\\_publication/SolidarityEMU\\_S.Fernandes-E.Rubio\\_NE\\_Feb2012.pdf](http://www.notreeurope.eu/uploads/tx_publication/SolidarityEMU_S.Fernandes-E.Rubio_NE_Feb2012.pdf)

<sup>594</sup> See, A. Berramdane, “Solidarité, loyauté dans le droit de l’Union européenne”, cit., pp. 66-68.

<sup>595</sup> See, 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.

<sup>596</sup> In this regard, it is significant the lack of any reference to the principle of solidarity by the very Court in its judgement in *A.S. v. Republic of Slovenia*, by considering not only the opinion of AG Sharpston, but also the contextual AG Bot’s Opinion on *Slovakia and Hungary v. Council case (infra, note 21)*. See, CJEU, Case C-490/16, *A.S. v. Republic of Slovenia*, 26 July 2017, ECLI:EU:C:2017:585.

legal instrument by considering the fact that solidarity is a politically loaded concept which suffers from the latent and evident conflicts among Member States. In effect, the first and foremost responsible of such impasse are evidently the EU Members which, also within the EU legal order, remain hostile to the establishment of specific duties of solidarity in emergency situations because this would produce a *de facto* compression of their discretion in deciding when to show solidarity. And, the fact that States are inclined to preserve their prerogatives and to defend their sovereignty is quite evident also with regard to other substantive areas where solidarity bears the intensive role to solve the asymmetric distribution of burdens occurring in circumstances where the suffering countries are not responsible for their situation<sup>597</sup>.

In this sense, the difficulties met in the management of the current migrant crisis and in the improvement of the EU common policy on asylum are quite illustrative. According to the Treaties, and mainly to Article 80 TFEU, the notion of solidarity should result in the establishment of a “*système de solidarité obligatoire et irrévocable*” in order to tackle such a common challenge<sup>598</sup>. Hence, the principle of solidarity, as concretized by Article 80 TFEU, should be used as a legal benchmark against which the acts of the EU institutions and any implementing acts taken at the level of the Member States must be measured<sup>599</sup>.

Albeit this and the fact that the EU and its Member States have made repeated pledges to live up to the current challenge on the massive influx of migrants, most of the EU governments have not followed such claims by rejecting the establishment of an effective and overall EU-wide mechanism based on burden-

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<sup>597</sup> See, U. Steinvoth, “Applying the idea of solidarity to Europe”, in A. Grimm, S. My Giang (eds.), *Solidarity in the European Union. A Fundamental Value in Crisis*, cit., p. 12.

<sup>598</sup> In this regard, it is meaningful the appeal presented by Hungary and Slovakia for the annulment of Decision 1601/2015 adopted on 22 September 2015 by the Council of the EU and establishing an infra-EU relocation scheme for persons in need of international protection, see Case C-643/15, *Slovak Republic v. Council*, and Case C-647/15, *Hungary v. Council*. For comments, see K. Groenenduk, B. Nagy, “Hungary’s appeal against relocation to the CJEU: upfront attack or rear-guard battle?”, in *EU Immigration and Asylum Law and Policy*, 2015; Z. Vikarska, “The Slovak Challenge to the Asylum-Seekers’ Relocation Decision: A Balancing Act”, in *EU Law Analysis*, 2015; A. Di Pascale, “Il ricollocamento: appena nato è già finito?”, in *Rivista Eurojus.it*.

<sup>599</sup> See 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. 325.

sharing as genuine expression of solidarity among States<sup>600</sup>. This also because, even though one may support the existence of a system of compulsory solidarity, the margin of discretion that Member States still enjoy when concretising solidarity in the context of asylum policy is very wider than in the case regarding other principles. In this field, solidarity could be indeed ‘operationalised’ in many different ways, ranging from hosting relocated asylum seekers and/or refugees to payments to common funds to be distributed on the basis of the number of refugees being hosted, and including the adoption of common policies as well as the provision of technical and administrative assistance. As a result, some Member States want 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, it is extremely revealing the action brought by the Slovak Republic and Hungary before the CJEU to challenge the legality of Council Decision 2015/1601<sup>601</sup> on the relocation of 120.000 asylum seekers from Greece and Italy to other Member States according to the Member States’ relative absorption capacities.

Remarkably, exactly in response to the mentioned action, both the opinion issued by Advocate General Bot<sup>602</sup> and the long-awaited Court’s judgement<sup>603</sup>, which has rejected Slovakia and Hungary’s appeal, have given an important impulse to the principle of solidarity and, in specific terms, partially silenced the opposition

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<sup>600</sup> 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”, 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*, Vol. 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*, Vol. 22, 2016, pp. 448–469.

<sup>601</sup> See, Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, *OJ L* 248, 24 September 2015.

<sup>602</sup> See, 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.

<sup>603</sup> See, CJEU, Joined Cases C-643/15 and C-657/15, *Slovak Republic and Hungary v. Council*, 6 September 2017, ECLI:EU:C:2017:618.

of the so-called Visegrád Group to compulsory refugee relocation<sup>604</sup>. In particular, it is noteworthy the reasoning proposed by the AG who has forcefully underlined that solidarity is not only “founding and existential value of the Union”<sup>605</sup>, but has a “specific content and a binding nature”<sup>606</sup>. 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 binding nature is even more pressing “to confer a practical content on the principle of solidarity and fair sharing of responsibility between Member States”<sup>607</sup>. Indeed, whether solidarity is conceived as “bedrock of the European project”<sup>608</sup>, it cannot be based only on consent and voluntary commitments of Member States.

Even if with less emphasis, the Court’s judges have issued the same position not only by mentioning several times solidarity as guiding principle in the elaboration of specific measures, but also – in a revolutionary way – by explicitly referring to its inherent capacity of imposing binding obligations on Member States<sup>609</sup>. Moreover, with reference to the arguments addressed in the present work, it is noteworthy the observation whereby the application of strict conditions for relocation would be incompatible with the imperative measures enshrined in the Council Decision at stake and, significantly, with the principle of solidarity laid down in Article 80 TFEU<sup>610</sup>. The Court has thus found that, in certain circumstances, the conditionality and solidarity cannot operate alongside when the affected State is not responsible for the event occurred.

By considering that the Court had so far refrained from employing the principle of solidarity in these terms and from assigning it a clear legal status, the conclusions

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<sup>604</sup> For some insights on the perspective of the Visegrad Group on migration issues, see J. Segeš Frelak, “Solidarity in European Migration Policy: The Perspective of the Visegrád States”, in A. Grimm, S. My Giang (eds.), *Solidarity in the European Union. A Fundamental Value in Crisis*, cit., pp. 81-95.

<sup>605</sup> See, Opinion of the Advocate General Bot delivered on 26 July 2017, cit., point 18.

<sup>606</sup> *Ibid.*, point 23.

<sup>607</sup> *Ibid.*, point 22.

<sup>608</sup> See, B. Favreau, *La Charte des droits fondamentaux de l’Union européenne après le traité de Lisbonne*, Bruylant, 2010, p. 13.

<sup>609</sup> See, CJEU, *Slovak Republic and Hungary v. Council*, cit., points 252-253.

<sup>610</sup> *Ibid.*, point 304.

reached by the CJEU are thus extremely relevant for the future perspectives. Indeed, it would be wrong to conclude that, because of its limited enforceability, solidarity does not have legal effects, but is merely a non-compulsory source of policy inspiration and moral orientation. Rather, in the light of recent case-law, it is possible to state that the principle in question is at an evolutionary stage towards its full accomplishment and has to be potentiated. Like the EU integration process, solidarity experiences a slow process of creation.

In this regard, the multiplication of references to solidarity in the provisions of the Treaties, with the entry into force of the Treaty of Lisbon, 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 the principle. Indeed, it has to be recalled that the EU system respond to a stronger dynamic of integration fuelled, *inter alia*, by the notion of solidarity which – both as objective and as “*esprit constitutif*”<sup>611</sup> 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<sup>612</sup>. 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*”<sup>613</sup>.

The crises the EU is confronting with offer a major opportunity to ask what solidarity implies with regard to concrete problems, rather than in the abstract theoretical vacuum. While this may represent a challenge for the principle of State sovereignty, it could be also the element triggering the evolution of the current EU legal system towards a ‘more Union’ framework capable of being expression of major solidarity among Member States and between them and the EU institutions. And, today it is up to all these actors to advance the need for solidarity for the purpose of the very EU integration process which is to a large extent based on a

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<sup>611</sup> See, A. Levade, “La valeur constitutionnelle du principe de solidarité”, cit., p. 17.

<sup>612</sup> See, R. Bieber, F. Maiani, “Sans solidarité point d’Union européenne”, cit., p. 295.

<sup>613</sup> See, P. Pescatore, “Les Objectifs de la Communauté européenne comme principes d’interprétation dans la jurisprudence de la Cour de Justice”, cit., p. 351.

requirement for solidarity between the Member States which have decided to take part in that project.

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