Civil Protection in Europe and the Lisbon ‘solidarity clause’: 
A genuine legal concept or a paper exercise

Theodore Konstadinides
Abstract

This working paper will attempt to provide an insight into the origins and added value of the principle of solidarity in the context of the EU’s security strategy. To that effect, it will discuss the ways in which the Article 222 TFEU ‘solidarity clause’ has broadened the notion of ‘threat’ in Europe. It will further attempt to assess the significance of the ‘solidarity clause’ vis-à-vis the level of commitment required by Member States for its coherent implementation. It will then compare the Lisbon ‘solidarity clause’ with the so-called ‘mutual defence clause’ of Article 42 (7) TEU and finally point into certain 'grey areas' that may have a diminution effect upon the political message concerning the EU as a community based on solidarity.

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Civil Protection in Europe and the Lisbon ‘solidarity clause’:
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1 Introduction

The enhancement of civil protection at European level through solidarity and mutual aid between Member States has shaped the debate about the particular nature of defence matters vis-à-vis non-conventional threats to the EU’s security and stability. Recent natural and manmade disasters within and outside the territorial boundaries of Europe have generated a growing tendency within the EU to advance its prevention, mitigation and response capabilities by using existing means and military capacities. Indeed, the coming into force of the Treaty of Lisbon has seen European security law expanding beyond the margins of the Common Security and Defence Policy (CSDP) by bridging military and civilian crisis management. The general provisions on the EU’s external action elaborated in Article 21 TEU are extensive and encompass all areas of traditional foreign policy, putting emphasis on security, peace, conflict prevention and assistance in case of natural and man-made disasters. A glance at both Title V of the TEU and Title VII of the TFEU is sufficient to establish that the EU security model now encompasses a wide array of security policies: from military operations to civil cooperation and joint EU action in case of terrorist attacks suffered by Member States. To put it differently, there is an air of convergence blowing in the Treaty of Lisbon regarding ‘hard’ and ‘soft’ defence. Krieger comments that ‘the classic differentiation between security missions, such as the Petersberg tasks, collective self-defence, and police actions has start[ed] to blur.’

Indeed, the EU’s commitment to ‘protect its citizens’ found in Article 3 (5) TEU as well as the addition of ‘grey areas’ such as the fight

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1 The so-called Petersberg Tasks were set out in the Petersberg Declaration adopted at the Ministerial Council of the Western European Union (WEU) in Bonn on 19 June 1992. They were later copied into Article 17 TEU of the Treaty of Amsterdam which referred among else to ‘tasks of combat forces in crisis management, including peace-making’. See A. Bloed, R.A. Wessel (eds.), The Changing Functions of the Western European Union: Introduction and Basic Documents, (Dordrecht: Martinus Nijhoff Publishers, 1994) p.137.

against terrorism in Article 43 TEU has added to the ‘fuzziness’ of competence delimitation between those aspects of security tied within EU external relations and those related to judicial cooperation in criminal matters.

The utilization of military capabilities for the implementation and enforcement of civilian aims, owes largely to the security connotation attributed to EU legal values, such as solidarity and mutual assistance between Member States. These values, spread over different provisions of the TEU and the TFEU, are ambitiously exported internationally by the Treaty of Lisbon. Solidarity, for instance, constitutes one of the jewels to the crown of European integration. In the context of the former EC Treaty it was primarily associated with the internal market, economic and social cohesion, and industrial relations. As such, it proved to be fundamental in the development of the concept of ‘social Europe’. Conversely, in connection to the TEU, solidarity in the form of mutual aid has played an important role in shaping the EU’s external and security policy ‘actively and unreservedly’. Post-Lisbon, mutual solidarity appears in Article 67 (2) TFEU (framing a common policy on asylum, immigration and external border control), Article 122 TFEU (financial assistance in cases of severe difficulties caused by natural disasters or exceptional occurrences), and Article 194 TFEU (Union policy on energy). In the area of security and defence, solidarity has acquired a new legal dimension, which not only has it consolidated the old collective defence provisions of the WEU and NATO Treaties but it has also formulated an EU response to events such as 9/11, the more recent terrorist bombings of Madrid and London, earthquakes and pandemics.

Two provisions introduced by the Treaty of Lisbon are preoccupied with solidarity in the field of security and defence. First, Article 42 (7) TEU, the so-called ‘mutual aid and assistance clause’ or ‘mutual defence clause’, consists of a replica of the historic WEU and NATO military alliance etiquette. It concerns solidarity in the event of armed aggression and encompasses the collective obligation of Member States to assist one another in the event of attack on their territory by deploying their military assets. Second, and most relevant to this analysis, Article 222 TFEU, the so-called ‘solidarity clause’, distinguishes the EU’s code of conduct from traditional intergovernmental military alliances. It constitutes an express commitment of Member States to assist each other in the
event of a terrorist attack or natural and manmade disaster. It is worth noting from the outset that at the time of writing both provisions have not yet been used. This renders certain conclusions made hereafter speculative.

Despite public awareness campaigns related to terrorist attacks, cyber attacks and large-scale natural disasters, little legal academic commentary has taken place post-Lisbon on the merits of civil protection cooperation and disaster response capacities at EU level and beyond. This article will therefore attempt to provide an insight to the origins and added value of the Treaty’s Article 222 TFEU ‘solidarity clause’ in the context of the EU’s internal and external security strategy. To that effect, this contribution will discuss the role of this new provision as a means of broadening the notion of ‘threat’ in Europe. It will further attempt to assess the significance of the ‘solidarity clause’ vis-à-vis its legal geography in the Treaty and the level of commitment required by Member States for its coherent implementation. It will then briefly compare the Lisbon ‘solidarity clause’ with the so-called ‘mutual defence clause’ of Article 42 (7) TEU and finally point into certain legal ‘grey areas’ that may have a diminution effect upon the potential of the EU as a community based on solidarity.

1.1 Solidarity in the Context of the EU Internal Security Strategy

1.1.1 The EU solidarity clause as envisaged in the EU Constitutional Treaty

This section will explore the origins and function of the so-called EU ‘solidarity clause’, first introduced by the now deceased EU Constitutional Treaty. As it was the case with the majority of reforms proposed by the original EU Constitutional Treaty, the ‘solidarity clause’ was carried over to the Treaty of Lisbon. There was consensus among Member States in requiring the use of all instruments available to the EU, such as military resources, police and

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judicial cooperation for the protection of civilian population, and
democratic institutions in the event of a terrorist attack or other
disaster. This may be viewed as a challenge to the traditional notion
of criminal law being firmly attached to national structures, in par-
ticular the criminal justice system, the police forces and the secret
intelligence services of the individual Member States. For instance
in his comments on the preliminary draft final report of the European
Convention’s Working Group VIII on Defence, Kvist stressed that ‘it could be noted that in Sweden….military means
cannot be used to solve internal security problems. This is a duty
for the police.’5 Despite such reservations, it shall be emphasised
that there was an inclination in Europe to the prospect of an ex-
press solidarity commitment inserted in the Treaty, in order to ad-
dress the threat of terrorism.6 The desire for a new provision spell-
ing out the solidarity principle between Member States as a way of
rationalising collective responses towards a range of new threats,
contributed to the intensification of EU internal security. The EU
Constitutional Treaty provided that military resources should ac-
quire a complementary role in enhancing the EU’s preparedness in
responding to unforeseen threats. One can only empathise with the
words of a commentator explaining that the ‘reciprocal intrusive-
ness’ that EU membership implies make for ‘a powerful sense of
solidarity’.7

Almost ten years ago, in view of the evolving threat of terrorism,
the European Convention which drafted the EU Constitutional
Treaty started discussing the necessity of developing a set of in-
struments to support national efforts related to disaster manage-
ment. One cannot overlook the impact of the abovementioned
Working Group VIII debates on the development of collective
security instruments as a means of ‘optimising the interdisciplinary
character of the Union’s approach, in order to respond effectively
to new challenges and to indicate clearly what distinguishes the

5 Working Group VIII, Working document 38, WG VIII - WD 38, Brussels, 4 Decem-
ber 2002.
6 Working Group VIII, Final Report, CONV 461/02, WG VIII 22, Brussels, 16 De-
7 A. Biscop, The European Security Strategy: A Global Agenda for Positive Power
European Union from a military alliance.” Equally, the EU Constitutional Treaty comprised the first effort at EU level to textually extend the missions in which the EU could jointly employ military and civilian means under the auspices of the CSDP (which was then called ESDP) within the EU in order to counter terrorism. In the CSDP context, this went beyond the Petersberg Tasks, which according to Article 17 (2) TEU of the Treaty of Nice included humanitarian and rescue tasks, peacekeeping and tasks of combat forces in crisis management. Browsing through the Constitutional Treaty’s provisions relating to the CSDP one could find new conditions for undertaking conflict prevention and post-conflict stabilisation tasks. For instance, according to Article III-309 (1), which was later copied into Lisbon’s Article 43 TEU, the Treaty provided that its CSDP tasks could contribute to the fight against terrorism. Most significantly, and as it has already been mentioned, the EU Constitutional Treaty contained a solidarity clause in Article I-43 (preserved in the first half of Lisbon’s Article 222 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 mobilize 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. The detailed arrangements for implementing this Article are set out in Article III-329.

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The EU Constitutional Treaty also provided that that the implementation of Article I-43 shall be pursued through the procedure laid down in Article III-329 (second half of Lisbon’s Article 222 TFEU):

1. 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.

2. The arrangements for the implementation by the Union of the solidarity clause referred to in Article I-43 shall be defined by a European decision adopted by the Council acting on a joint proposal by the Commission and the Union Minister for Foreign Affairs. The Council shall act in accordance with Article III-300(1) where this decision has defence implications. The European Parliament shall be informed.

   For the purposes of this paragraph and without prejudice to Article III-344, 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 III-261; the two committees shall, if necessary, submit joint opinions.

3. 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.

Hence, the ‘solidarity clause’ contained in the EU Constitutional Treaty was split into two provisions placed in different locations. At the time, Lenaerts and Gerard remarked about ‘the curious location’ within the Treaty of Article I-43, ‘among the provisions of Title V dedicated to the exercise of Union competences’.

It shall be clarified that Article I-43 was not designed as a mutual assistance clause and to that extent it did not constitute a

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clause on the defence of territorial integrity - i.e. a replica of Article V of the (WEU) Treaty of Brussels or Article 5 of the North Atlantic Treaty. For instance, in cases of armed attack, whilst NATO’s Article 5 foresees action ‘including the use of armed force’ such course of action was neither explicitly mentioned nor did it appear to be excluded from Articles I-43 and III-329. What is more the EU Constitutional Treaty provided its own flexible mutual defence clause in Article I-40 (7) which caused a political stir up within the so-called neutral\textsuperscript{10} and Atlanticist Member States (Denmark, the Netherlands, and the UK) vis-à-vis the degree of security commitment required by them in the unfortunate event of armed aggression against one of their counterparts. Conversely, Articles I-43 and III-329 were warmly received, primarily because they constituted provisions enabling the EU to engage into more realistic and viable projects related to the protection of the values embedded in democratic states and the protection of their citizens against threats from non-state entities. What is more, Member States came to realize that the protection of citizens and management of the consequences of a terrorist attack could not be possibly accomplished by unilateral action but by means of cooperation and establishment of a comprehensive European approach on security issues – i.e. balancing subsidiarity with solidarity.\textsuperscript{11}

Despite this positive vibe, in the absence of a threat assessment declaration, Member States had to deal with questions as to whether the ‘solidarity clause’ encompassed a real military defence guarantee. Indeed, Articles I-43 and III-329 were not aimed at assisting Member States to identify common EU risks and ways to counter them. They rather encompassed a broad political commitment which was as obligatory as any general security guarantee. At any rate, Article III-329 clarified that assistance shall be rendered at the request of the victim state’s political authorities. What is more, the Declaration on Articles I-43 and III-329 attached to the EU Constitutional Treaty mentioned that none of those provisions ‘is intended to affect the right of another Member State to choose the most appropriate means to comply with its own solidarity obliga-

\textsuperscript{10} Finland, Sweden, Austria, Ireland and Cyprus are not NATO members. See Nordic defence cooperation arrangement (NORDSUP) launched in 2009 between Finland, Norway and Sweden.

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tion towards that Member State.” This suggested a loose commitment, which at the time seems to have suited the non-aligned Member States for it confirmed that the EU had no aspirations of becoming a military alliance. Nonetheless, in the aftermath of the Madrid terrorist attack on 11 March 2004, which killed almost 200 civilians, effective intervention in the event of humanitarian disasters became imperative. These events led the EU to launch a Plan of Action to Combat Terrorism accompanied by an EU Declaration on Combating Terrorism of 25 March 2004. Both the Plan and the Declaration embodied a collective EU solidarity statement against terrorism and a ‘call to arms’ addressed to the Member States’ national authorities being the primary resources to carry out such a course of action with the assistance of EU bodies such as Europol and Eurojust.

As the above sentiment illustrates, the reforms suggested by Articles I-43 and III-329 were not called into question during the IGC negotiations at the Brussels European Council on 25 March 2004. On the contrary, the Madrid bombings strengthened the Member States’ determination to act jointly against terrorist threats. Accordingly, as already mentioned, the Heads of State or Government of the Member States agreed on a declaration on solidarity against terrorism, which drew inspiration from the relevant provisions of the EU Constitutional Treaty. The Declaration reads as follows:

In the spirit of the solidarity clause laid down in Article 42 of the draft Treaty establishing a Constitution for Europe, the Member States and the acceding States shall accordingly act jointly in a spirit of solidarity if one of them is the victim of a terrorist attack.

This interpretative, rather than legally binding, commitment triggered a debate on the future of civil protection within the EU. For instance Michael Barnier’s (Former French Foreign Minister) Report of 9 May 2006, which was presented to the Barroso Commis-

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sion made a number of recommendations for strengthening the EU civilian crisis management capabilities. The most significant aspect of his Report, entitled ‘For a European Civil Protection Force: Europe Aid’, was a proposal for a common civilian protection force designed to augment EU’s ability to deal with humanitarian crises both inside and outside the EU. Still, however, the responsibility of tackling these challenges lied on each individual Member State and the amount of resources it was willing to allocate to civil protection. As it was the case with the Solidarity Declaration there were not any concrete provisions conferring to the EU competence to act as a security guarantor. At this stage it was all down to the Member States acting jointly.

1.1.2 The EU solidarity clause in the Treaty of Lisbon
Before looking at the ‘solidarity clause’ in detail, it is prudent to mention that the Treaty of Lisbon has introduced a supporting competence in the area of civil protection under Article 6 TFEU. What is more, Title XXIII entitled Civil Protection provides through Article 196 (1) TFEU that ‘the Union shall encourage cooperation between Member States in order to improve the effectiveness of systems for preventing against natural or man-made disasters’. Accordingly, under Article 196 (2) TFEU, the European Parliament and the Council can establish supplementary measures to assist Member States achieving such objectives. The introduction of Article 222 TFEU constitutes a further development in the field of EU civil protection. As it was the case with Articles I-43 and III-329 of the EU Constitutional Treaty, Article 222 TFEU, which can be read in conjunction with Article 196 TFEU (cooperation between Member States), constitutes a soft mutual defence commitment for non-conventional threats to the Union’s security and stability. Textually, Article 222 TFEU merges together Articles I-43 and III-329 of the EU Constitutional Treaty and comprises what can be described as a verbose ‘solidarity’ provision. It states that the EU and its Member States ‘shall act jointly in a spirit of solidarity’. Hence, Article 222 TFEU addresses modern threats from non-state entities or natural or manmade disasters and provides, inter alia, for the mobilization of hard military resources in

order to prevent such threats and protect and assist Member States at their request.

It is therefore clear that Article 222 TFEU does not represent a clause on the defence of the EU’s territorial integrity, although one cannot deny that internal security has, in recent years, become increasingly dependent on external security. The Stockholm Programme made explicit reference to Article 222 TFEU. Under the broad headline ‘Political Priorities’, the European Council highlighted the value of ‘an internal security strategy’ as an important tool for achieving the objective of a ‘Europe that protects’ the lives and safety of its citizens. The Stockholm Programme also considered the main aspects of such strategy comprising judicial cooperation in criminal matters and the ‘solidarity clause’. It appears, therefore, clear that Article 222 TFEU may be utilized alongside other legal bases for speeding up the adoption of civil protection legislation in the name of solidarity. It remains to see whether the same may occur by employing Article 222 TFEU on its own as a legal basis for the development of new legislative proposals which aim at protecting civilian populations through cooperation.

In terms of the threat scenarios that Article 222 TFEU addresses, one can draw inspiration from the 2003 European Security Strategy drafted by the then High Representative Javier Solana. The Strategy lists the combating of proliferation of weapons of mass destruction, the fight against terrorism and organised crime, cyber security and energy security as high priority areas. Most significantly, for the purpose of this article, the Strategy mentions that ‘the increasing convergence of European interests and the strengthening of mutual solidarity of the EU makes us a more credible and effective actor.’ Yet, it does not provide EU Institutions with a direct mandate to develop defence policy instruments.

Other than countering various forms of criminal acts, Article 222 TFEU aims at boosting the role of the EU in crisis management by enhancing its response in situations equivalent to the ‘volcanic ash crisis’ of April 2010 and pandemics such as the H1N1 swine flu which hit the continent in April 2009. In all those events

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it will be possible for the EU to activate its civil protection mechanism. Yet, Article 222 TFEU seems to be placing a lot more emphasis on prevention and protection than on assistance following a disaster. The European Parliament has, for instance, emphasised that an EU Chemical, Biological, Radiological and Nuclear (CBRN) Action Plan would enable both the EU and its Member States to implement effectively the Article 222 TFEU solidarity clause in order to counter CBRN disasters, whether caused accidentally or intentionally.\(^{19}\) What remains unclear in Article 222 TFEU is the position taken in relation to mitigating or alleviating the damage following a disaster. To that effect the Council has been clear that ‘reinforcement of the Union’s disaster response capacity should be achieved through a balanced approach guided by two principles: national responsibility and EU solidarity’.\(^{20}\) What is more, Commission Decision 2010/481/EU establishing a civil protection mechanism, provides that EU civil protection operations need to extend to ground forest firefighting, flood containment and rescue modules.

The arrangements for implementing the solidarity clause under Article 222 TFEU are not different from those proposed by the EU Constitutional Treaty where EU Institutions and Member States shall act jointly in a spirit of cooperation. The Commission has to put together a proposal for the implementation of the solidarity clause jointly with the High Representative for Foreign Affairs and Security Policy (called the Union Minister for Foreign Affairs in the EU Constitutional Treaty). The Council will then decide by qualified majority unless the decision in question involves the use of military resources or has defence implications, in which case unanimity applies. Other actors in the process would involve the new (Article 71 TFEU) Standing Committee on Internal Security (COSI), which would assist the Council in the coordination of internal security operational actions (police and customs cooperation and judicial cooperation in criminal matters) but would not be involved in the preparation of legislation or the operations


\(^{20}\) Council of the European Union, Council Conclusions calling for civil protection capabilities to be enhanced by a European mutual assistance system building on the civil protection modular approach, Brussels, 28 November 2008, 16474/08.
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themselves. Moreover, in the event of a military response, the Political and Security Committee (PSC) would be authorized by the Council to take decisions related to the political control and strategic direction of the operation. In this case also, the Chairman of the PSC would participate in the Committee of Permanent Representatives II (COREPER II), which would be responsible for the preparation of legislative acts. Finally Eurojust, Europol and Frontex representatives would have the opportunity to attend COREPER’s meetings.

As with the relevant Declaration on Articles I-43 and III-329 of the EU Constitutional Treaty, Declaration No. 37 on Article 222 TFEU establishes that Member States are free to choose the most appropriate means to comply with their own solidarity obligation towards their counterparts. To put it plainly, it would be up to them to decide how they would assist another Member State. This is important when one considers the possible legal implications arising from a breach of Article 222 TFEU vis-a-vis the effect of such a breach upon the principle of sincere cooperation under Article 4(3) TEU. Furthermore, the European Commission and the High Representative have committed themselves to put together a proposal for the implementation arrangements of the Solidarity Clause within 2011. Last but not least, it is expected that by 2012 the Commission will have established the necessary links between sector-specific early warning and crisis cooperation functions (in the area of health, civil protection, nuclear risk monitoring, and terrorism) and will have utilized EU-led operational initiatives. These will presumably bring into the ‘civil protection equation’ both EU agencies and the European External Action Service, which will in turn contribute to information sharing and threat/risk assessment reports.


In terms of its location in the Treaty of Lisbon, it can be argued that Article 222 TFEU sits, somewhat, in isolation. 24 Perhaps this reflects the sentiment of the Treaty drafters that such a provision neither dovetails neatly with the European Union’s external action (Part Five, TFEU) nor does it sit comfortably in Section 2 of the TEU (CSDP), for instance, as an inherent part of Article 42 (7) TEU, which encompasses the collective obligation of Member States to assist one of their counterparts in the event of attack on their territory by deploying their military assets. This, of course, seems to negate the reality being, in the words of a commentator, that ‘the terrorism dimension of [C]SDP is today fast becoming a permanent field of EU policy’. 25 In other words, there is no obstacle in the TEU that would have prevented CSDP actions entailing the use of Member States’ armed forces to realise soft security objectives within the EU in times of emergency. As a result, one finds it hard to rationalise the existence of a separate ‘solidarity’ civil protection provision in the TFEU. This is especially since the implications Article 222 TFEU for EU Institutions and Member States have yet to be fully clarified.

There are a number of unanswered questions related to the nature of the objective of such a ‘soft’ solidarity commitment. This is especially since Article 222 TFEU stretches beyond the CSDP by also engaging with non-military instruments. For instance, there is nothing in Article 222 TFEU which suggests that the ‘solidarity clause’ extends to attacks carried out by state-sponsored terrorist groups (the so-called acts by legitimate liberation movements in Cuba, North Korea, and Syria) 26 or, so to call them, rogue states’ attacks. In these situations, the former pillar demarcation that Lisbon has taken pride of dissolving is as relevant as ever. This is because the fight against terrorism seems to concern equally the CFSP (and, by extension, CSDP actions) and the Criminal law acquis of the Treaty (e.g. Article 75 TFEU on smart sanctions and Article 83 TFEU on the definition of criminal offences). Perhaps a clearer demarcation of pillar-overarching areas would have been

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24 This is although the principle of solidarity rates high in the TFEU. See Article 67 TFEU, Article 122 TFEU, Article 194 TFEU; Article 214 TFEU.
desirable so that the two clauses would occupy different fields. For instance, Article 42 (7) TEU could deal with state violence against one or more Member States and state-sponsored terrorism through CSDP military means. On the other hand, Article 222 TFEU could focus on countering oppositional terrorism by non-state actors and serious crime through the EU Criminal law *acquis*. This leads us to the next section which studies the overlap between the TFEU ‘solidarity clause’ and the TEU ‘collective defence clause’.

### 1.2 The overlap between the TFEU ‘solidarity clause’ and the TEU ‘collective defence clause’

The Nice Treaty modified Amsterdam’s Article 17 TEU, which left all EU decisions with defence implications to the WEU, and deleted all references to it. By 1999, most of WEU’s functions were taken over by the EU and in 2010, having ‘accomplished its historical role’, the Treaty was terminated. This created a novel competence for the EU to operate within the full range of the Petersberg tasks. This development aside, the Treaties still lacked a collective assistance clause in the form of a Treaty-based commitment. With the coming into force of the Treaty of Lisbon, one can witness in Article 42 TEU the enhancement of the EU’s ability to implement decisions that have defence implications by extending the Petersberg tasks to include disarmament operations, humanitarian and rescue tasks, peacekeeping tasks, and tasks of combat forces in crisis management. At the same time, the Treaty of Lisbon has provided for the termination of the Modified Brussels Treaty 1949 (WEU) and the end of WEU operations by July 2011. Most significantly, using, what has been described as ‘a long tradition of collective defence clauses’, the Treaty of Lisbon introduced the abovementioned ‘solidarity clause’ of Article 222 TFEU.

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and a ‘mutual defence clause’ under Article 42 (7) TEU which comprise the ‘EU version’ of Article 5 of the Washington Treaty 1949 (NATO) and Article V of the Modified Brussels Treaty 1949 (WEU).

Both these provisions offer a joint commitment which goes beyond the NATO and WEU collective security provisions. Complementary to mutual cooperation in the case of an armed attack on one of the Member States, the Treaty of Lisbon has created a link between the CSDP and the external dimension of the Area of Freedom, Security and Justice vis-à-vis improving security by controlling serious criminal threats, both inside and outside the European continent. Before considering the similarities and differences between the two provisions we should provide a very brief account of the role of Article 42 (7) TEU, which has only been hinted so far in this article. This, so-called, ‘mutual defence clause’ commits Member States to the aid and assistance of their counterparts in case of armed aggression against them. The first paragraph of the Article reads as follows:

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.

The similarities with Article 5 of the Treaty of Washington are obvious, although Article 42 (7) TEU does not explicitly mention ‘the use of armed force’. What is more, contrary to NATO, the EU does not maintain strong military readiness structures or joint military planning. Thus, while such a military assistance obligation may at first glance be seen as a move towards EU military autonomy, a close interpretation of Article 42 (7) TEU puts into question the


role of the EU as a ‘defence organisation’.\(^{31}\) Obviously the EU defence cooperation capacities can change over time considering the potential of the European Defence Agency (Article 45 TEU) and the use of the newly-introduced permanent structured cooperation in defence, which features high among the Treaty of Lisbon provisions. Having said that, mutual assistance at EU level still has to be compromised with the broader security commitments of the Member States in NATO, especially those related to collective self-defence under Article 51 of the Washington Treaty 1949. The second paragraph of Article 42 (7) TEU is more explicit about the NATO-EU relationship. It reads:

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.

Hence, the clause’s activation falls upon each Member State individually and does not depend on the EU as a whole. This is because Article 42 (7) TEU does not aim at transferring any competence upon the EU Institutions but rather creates responsibilities between Member States. Equally when it comes to the implementation of Article 42 (7) TEU, the EU Institutions play no role since all relevant arrangements will have to be unanimously agreed among the Member States. As such, a lot depends on the Member States’ political consensus, especially within non-aligned countries, over the use of armed force under the EU banner.

Having briefly considered Article 42 (7) TEU, our focus will now shift towards a cross-examination of Article 42 (7) TEU and Article 222 TFEU. It can be argued that the military aspect of Lisbon’s internal security commitments under Article 222 TFEU has enriched the CSDP. Considering the erosion of the schism between internal and external security, a preliminary comment would be that Article 222 TFEU could have been expressly mentioned in Article 42 (7) TEU. For instance, Blockmans and Wessel argue that ‘it is somewhat peculiar that this clause [on solidarity] is separated

from the collective defence clause and is included in the TFEU (Art 222) rather than together with the ESDP provisions in the TEU.’

The above line of argument implies that a separate ‘defence’ clause was not necessary in the TFEU. It however, does not take into account that despite the confusing similarities between the two provisions there are also fundamental differences. On the one hand, Article 42 (7) TEU applies only in cases of ‘armed aggression’ against the territory of a Member State. As such, it constitutes in its entirety an intergovernmental device and does not foresee for the involvement of EU institutions by creating any sort of new supranational competences. 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. It is argued that 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.

1.3 Conclusions

The above study of the Lisbon provisions of Article 222 TFEU and Article 42 (7) TEU demonstrates that the EU’s threat spectrum has broadened in recent years. Not only that, but the EU’s wide range of security-enhancing instruments ranging from crisis management tasks to counter-terrorism capabilities are striving into become more coherent. Both Article 42 (7) TEU and Article 222 TFEU have introduced commitments amongst Member States to realize the whole spectrum of threat scenarios identified in the European Security Strategy. The list of ‘threat scenarios’ would need to be regularly updated through a threat assessment report put together by the European Council. This will determine the future use of the ‘clauses’, which may - in some cases - involve a parallel activation of Article 42 (7) TEU and Article 222 TFEU in cases where the threat is ambiguous. This, however, may be seen as

a weakness embedded in the clauses, which relates to their uncertain legal footing. In particular, the legal underpinnings of Article 222 TFEU, examined in some detail in this contribution, make one wonder whether in the absence of a solidarity provision in the Treaty of Lisbon, Member States would still be able to make such an open and vague request for assistance.

The above sentiment leads us to academic questions about the nature of collective security. As Bigo notes, ‘Security is not a technique that can be applied in a straightforward way; security requires judgements about the balance to be accorded to the values of solidarity, freedom, and equality.’ As such, the activation of the Treaty’s ‘solidarity clause’ concerns a reconciliation of the interests of those Member States seeking mutual solidarity by supporting the legal standing of Article 222 TFEU, those who wish to safeguard their neutral status in case solidarity mandates the use of force, and those seeking to ensure that committing themselves to EU security initiatives will not comprise an abuse of the ‘solidarity clause’ which will compromise the status of NATO. A successful political compromise of those different approaches to security at EU level will determine the EU’s readiness to crises. This is particularly important, given that for the first time ‘threat assessment’ will be carried at political level through the European Council and not by organisations such as Europol or agencies such as Frontex (border security). Additionally the clarification of Lisbon’s implementation language regarding how national authorities need to take on board their solidarity obligations vis-à-vis an indicative list of incidents where they have to act jointly in a spirit of cooperation will show whether the Article 222 TFEU ‘solidarity clause’ constitutes a genuine legal concept or a paper exercise.

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