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The solidarity clause –
its present and future effects
from a constitutional perspective

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Summary

The solidarity clause was drafted a year after the terrorist attack in New York in 2001 and was informally further substantiated after the terrorist attack in Madrid in 2004. It became evident that terrorism is also a real and current threat to the Member States of the EU.

The solidarity clause is now a part of the Constitutional Treaty (CT), which at the moment is subject to ratification in the different Member States. The provision stipulates an obligation for the Member States of the EU to assist a Member State which is the object of a terrorist attack. The solidarity clause was intended to gather all EU instruments in order to combat terrorism in a flexible and efficient way. However, the general wording of the provision also results in some implications from a legal point of view.

The character of the solidarity clause illustrates how it is at times difficult to establish the borderline between the political and legal aspects of EU. The solidarity clause appears to be merely a provision of political value ensuring that the Member States will assist each other in times of crises. In reality the solidarity clause, as a treaty provision under the jurisdiction of ECJ, includes a binding legal obligation. The main implication from a legal point of view is that the solidarity clause, and all the other provisions for that matter, is a product of a compromise reached by the Member States' delegations. The wording of the provision is therefore very general and vague. Since the application of the solidarity clause can lead to joint police and military activity the provision needs to provide some legal certainty. The current wording of the solidarity clause can give rise to conflicts if some of the Member States starts to consider the provision as a legal instead of merely a political obligation.

The solidarity clause deals mainly with the horizontal relationship between the Member States. The provision does not explicitly confer rights to individuals and due to the general formulation it is not likely to have direct effect. The only way for ECJ to deal with the future implications of the solidarity clause is if there is an infringement of the provision as such, in other words if no assistance is provided or if a Member State considers that another Member State has not acted in accordance with the solidarity clause. Since the solidarity clause deals with politically sensitive issues and the obligation is mainly horizontal it is not unlikely that there will be an increase in the amount of cases where one Member State brings another before the ECJ. However, the ECJ has not previously been enthusiastic about dealing with politically sensitive issues. In the lack of further formal or informal more detailed arrangements in relation to the solidarity clause the potential conflicts have to be solved on a political level.

Due to the fact that the solidarity clause includes, at least in theory, a potential military commitment the greatest impact on Swedish affairs will from a legal point of view be the difficulty in maintaining a policy if non-alignment.

The CT contains an increase of supranational features, mainly in the area of freedom, security and justice. However, due to the mere existence of a solidarity clause and its focus on the intergovernmental relationship it can not be considered as step in the constitutionalisation of the EU.

Preface

The future of the CT is uncertain, especially now as the French voters have turned down the CT and the same result is expected in the referendum in the Netherlands. However, it is not over until the fat lady sings..., which she has not done yet. The French referendum does not automatically mean the end of the CT. Due to the enlargement and the development of the EU in general, there is a need to replace the current Treaties with something else. Terrorism is one of the major security threats of our time. At a future drafting table, questions related to the solidarity clause are deemed to be revitalised in one way or another. Therefore it is important to be aware of potential implications in future discussions.

During the process of writing this thesis I have met people who has assisted me in various ways. First of all I would like to thank my supervisor Ola Zetterquist for all the good advise and encouragement along the way. I also want to thank everyone at the legal department of the Ministry of Defence in Stockholm, especially Staffan Agélii who has assisted me with material and always had the time to answer my questions. Finally, I want to thank Erik Wennerström, Director for International Relations at Ministry of Justice, for very interesting discussions and information. A special thanks to my family for all the support during my law studies.

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Abbreviations

CEPOL	European Police College
CFSP	Common Foreign and Security Policy
COSI	Standing Committee on Internal Security
CT	Constitutional Treaty
EC	European Community
ECJ	European Court of Justice
ESDP	European Security and Defence Policy
EU	European Union
Europol	European Police Office
FSJ	Freedom, Security and Justice
JHA	Justice and Home Affairs
NATO	North Atlantic Treaty Organization
TEC	Treaty on European Community
TEU	Treaty on European Union
WEU	Western European Union

1 Introduction

1.1 General

Since the very beginning, the EC-project has depended on sovereign States' voluntary will to participate. However, over time the project has evolved to an ever closer union of constitutional character.¹ The maintenance of national sovereignty is and has been a question of debate throughout the development of the Community.² Today, the question of sovereignty is widely discussed in relation to the Constitutional Treaty (CT).

The Member States have gradually given up legislative powers in various areas to the Community institutions. However, some legislative powers are considered to be so closely linked to the autonomy of a Member State that they cannot be delegated to the Union without the loss of national sovereignty. Historically, the right to preserve peace and security from internal and external threats has been emphasised in legal philosophy as being one such precondition of a sovereign State.³

If the CT, which was ratified by the European Council on the 17-18 June 2004 and amended on the 29 October 2004, is accepted by all the Member States it will result in some changes in the area of the present pillars II (including CFSP and ESDP) and III (FSJ). One of the changes in CT in relation to existing EU treaties consists of the so-called *solidarity clause* in article I-43 CT. The provision states that the Member States of the EU shall assist each other in a spirit of solidarity in event of a terrorist attack, natural disaster or a man-made disaster. The solidarity clause is designed to cover a broad range of legal fields and is formulated in very general terms.

As a result of attending seminars held by the Swedish government concerning the CT, it became clear to me that the scrutinisation of the solidarity clause is of such vital importance from a constitutional perspective. During my visit to Stockholm, I met people who dealt with CT

¹ G. Federico Mancini, *Europe: The case for statehood*, European Law Journal vol 4 No1, Oxford 1998, p 39.

² See Alan Dashwood, *The relationship between the Member States and the European Union/European Community* p 355 who find it clear that the EU today consists of sovereign Member States while Neal MacCormick believes that we have a "post sovereign" Europe- a Europe of no longer absolutely sovereign states see *Questioning Sovereignty*, Oxford Press 1999 p 142.

³ Thomas Hobbes, *Leviathan*, Cambridge University Press 1996, Chapter XVIII p 124... "And because of the End of this institution , is the Peace and Defence of them all; and whosoever has the right to the End, has right to the Means; it belongeth of Right , to whatsoever Man or Assembly that hath the Sovereignty, to be Judge both of meanes of Peace and Defence; and also of hinderancés, and disturbances of the same; and to do whatsoever he shall think necessary to be done, both beforehand for the preserving of Peace and Security are lost , for the recovery of the same."

issues on a daily basis. For different reasons, the solidarity clause was not touched upon to any great extent during the seminars I attended. However, during some informal discussions there were opinions expressed concerning the provision. Some people held that it was a complicated article. Others said that since the provision left a large margin of discretion it was merely expressing a political obligation. Moreover, it would be respected to a larger extent if it was a treaty provision, but not constitute any future legal obligations in reality.

At first glance, the latter argument may seem logical. However, at a closer look, at the provision and the legal framework in which it is produced, the same argument underestimates the problems that might result from the solidarity clause. The provision is complex for several reasons. First of all the provision contains a political obligation for Member States but at the same time it is included in what might become a legally binding instrument. The article is covering a broad range of legal fields. Finally the provision is included in the jurisdiction of the ECJ. The solidarity clause is therefore an example of the new and potentially problematic legal situations that can arise when the present pillar structure is removed. The complexity of the solidarity clause is especially apparent when it is applied in relation to terrorism, due to the above described features as well as the fact that the notion of terrorism is very dynamic and subject to change depending on the political climate. Moreover, means of combating terrorism are under constant development.

In recent years there have been some disagreements between EU Member States concerning the interpretation of the Stability and Growth Pact and most recently EU's position concerning the war in Iraq. The principle that all Member States shall be equal within the Union has been debated and the legitimacy of the EU- project has, due to the disagreements, at times been called into question. The future impact of the solidarity clause is difficult to predict. It was held during the drafting process of the solidarity clause that it would be an advantage to have a provision enabling the EU to act with all instruments it possesses in times of crises. Due to that same fact, the wide and general scope of the article, there is a risk that the provision will not be able to function as a justiciable legal rule. Ultimately, in a worst case scenario, because the solidarity clause deals with security issues which are very closely linked to the sovereignty of the Member States, the provision can constitute a ticking bomb either because the Member States can not agree on how the provision should be used or that it in reality limits the Member States' ability to act freely on decisions perceived as of vital importance to the State.

Instead of the provision being used to deal with situations of crises it can, when push comes to shove, give rise to new conflicts within the EU, like the ones mentioned above, with a potential legitimacy loss of the EU project as a result.

1.2 The objective

It would be impossible for this thesis to provide exhaustive answers as to how the solidarity clause will be applied in the future. Instead the main objective of this thesis is to analyse, from a legal point of view, the implications the solidarity clause might give rise to in constitutional law. Awareness of these problems today will naturally decrease the risk of unwanted surprises and legal implications in the future.

In exploring the implications of the solidarity clause this thesis will deal with the *transition of the solidarity obligation*, from being a politically obliging statement to a potentially legally binding provision in the CT. In relation to the transitional background of the provision, the question arises if the *solidarity clause in reality constitutes a substantial difference from the situation today*.

Furthermore, there is a need to scrutinise *how the solidarity clause is defined* in the CT and *what obligations it includes* for the Member States. According to the CT, the ECJ has a role to play in relation to the solidarity clause. *The role of the ECJ* will be scrutinised in relation to the definition and extent of the solidarity clause.

Throughout Europe there is a general discussion going on as to whether the Union is moving in a constitutionalising direction. Therefore this thesis will *de lege ferenda* touch upon the question of whether the solidarity clause is curtailing the sovereignty of the Member States to a further degree and consequently is a step *towards further constitutionalisation of the EU*.

1.3 Delimitations

This thesis will focus mainly on the effects of the solidarity clause in relation to terrorism, even if the provision according to its wording can be used in many different situations. The legal fields which will be scrutinised in relation to the solidarity clause will mainly be police cooperation and ESDP. In the event of a terrorist attack, the solidarity clause will probably also affect the area of civil protection. The reason for not scrutinising the solidarity clause's effects in relation to civil protection is the fact that civil protection currently is a part of the supranational community order and is not as closely linked to national sovereignty as legislation concerning police and military forces.⁴

As a point of departure the discussions in this thesis, concerning the consequences of the solidarity clause in relation to the situation today, will mainly be focused on the impact on the Swedish situation. However, some

⁴ http://europa.eu.int/comm/environment/civil/prote/cp01_en.htm (050613) Civil protection falls under the policy area of environment which is a part of the present first pillar.

of the consequences of the solidarity clause will probably apply equally to all the Member States.

1.4 Method

There is not, to my knowledge, an abundance of published material which focuses specifically on the solidarity clause. Thus, the material used will consist of literature and articles covering the CT in general and the subsequent changes in the fields of ESDP and FSJ. Also the responses from different authorities in Sweden to the inquiries sent out from the Swedish government will be used to illustrate the broader discussion presently going on in Sweden.

In order to meet the objectives of this thesis a traditional legal dogmatic method is used. The literature and articles concerning the CT and its consequences for the jurisdiction of the ECJ, the police cooperation and the cooperation in the ESDP field will be compared with the wording of the solidarity clause and the factual situation today as it is produced in EU key and working documents. As a supplement to written material, information from an interview conducted at the Swedish Ministry of Justice as well as seminars held by the government in Stockholm the on the 11th of May will be used.

1.5 Outline

Firstly, this thesis deals with the background of the solidarity clause. Secondly, it touches upon the definition of the provision as well as its legal status and the role of ECJ in relation to the solidarity clause. Thirdly, this thesis describes the impact of the solidarity clause in relation to ESDP and police cooperation. Finally the constitutional character of the solidarity clause is addressed. In the last chapter some final remarks and conclusions will be presented.

2 Background

2.1 The legal characterisation of the CT- a constitution or a treaty

The solidarity clause is presented as a part of the CT. Thus, in order to comprehend the essence of the solidarity provision there is a need to scrutinise the framework in which it is produced.

Ever since the ECJ established the new legal order in *Van Gend en Loos*, which laid the foundation for a constitutional nature for the EU, there has been a division of opinions concerning the character of the EU project.⁵ Some argue that only states can have a constitution.⁶ Consequently, EU can not have a constitution, regardless of how much competence is transferred simply due to the fact that EU is not a state. Others argue that the EU, due to its institutions and abilities to legislate legally binding rules for states and individuals, already has a constitution.⁷

The concept *constitution* can be described as a written document or text which outlines the powers of its parliament, government, courts and other important national institutions.⁸ The *function* of a constitution partly depends on the context in which it was drafted. The purpose can be to provide legitimacy or moral authority to the institutions of the newly independent state.⁹ Another function of a constitution can be to integrate peoples and communities in a certain way.¹⁰

⁵ Case 26/62, *NV Algemene Transporten Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1. “The Community constitutes a new legal order of international law for the benefit of which the Member States have limited their sovereign rights, albeit within limited fields, and the subject of which comprises not only Member States but also their nationals.”

⁶ A.V.Dicey, *Introduction to the Study of the Law of the Constitution*, Liberty Fund, 1982 [1915] pp 39. The parliaments of the British colonies were called “legislatures” but were not in reality considered as constituent sovereign bodies.

⁷ See Neal MacCormick, *Beyond the Sovereign State*, *The Modern Law Review* vol. 56, Oxford 1993 p 18 and *Questioning Sovereignty*, Oxford University Press 1999 p 121.

⁸ Eric Barendt, p 2 However, since some countries do not have a written constitution, e.g. the United Kingdom, the term constitution can have a broader meaning. Thus, a constitution can also be defined as a collection of legal and non-legal rules which compose the system of government, e.g. the rules outlining the powers of ministers and Parliament and regulating the relationship between them (the non-legal rules consists of customs or conventions and differs from the formal definition of legal rules by being regarded as imposing obligations without being enforceable).

⁹ *Ibid*, p 2 e.g. post- colonial constitutions like the constitutions of India (1950) and Nigeria (1963).

¹⁰ *Ibid*, p 3 e.g. the federal United States Constitution (1787). Constitutions can be drafted in order to implement fundamental principles of a new system of government e.g. constitutions of France (1791) and Spain (1978). Finally, the purpose of a constitution can also be to make a fresh start after the experience of totalitarian regimes e.g. constitutions of

The concept of sovereignty involves the notion of an absolute political power within a community.¹¹ However, in the relations between states there does not exist a supreme authority in this sense. In an international context the theory of sovereignty implies a claim to independence.¹² On the other hand, the classical idea of a constitution is that a constitution appoints a common legislator a common judge for its members.¹³ Some are of the opinion that the EU today clearly consists of sovereign Member States because the Member States retain their status as sovereign states under international law.¹⁴ Others take a more nuanced stand claiming that the Member States are no longer sovereign in the traditional sense.¹⁵

Constitutions are important since they confer legitimacy on the legal and political order due to the fact that a constitution involves a claim of obedience to those institutions that it establishes. Furthermore, no one can nullify a constitution except in accordance with the provisions of the constitution. A treaty on the other hand will always be dependent on the sovereign Member States for such legitimacy. Therefore, it is important to establish if the CT is a constitution or a treaty.¹⁶

The legitimacy of a constitution can be of a formal or material character. The first notion focuses on the logical structure of norms in a legal system. The latter focuses on the moral values that the constitution intends to protect.¹⁷

Japan (1946) and Germany (1949) which are characterised by the strong protection for individual rights.

¹¹ F. H. Hinsley, *Sovereignty*, second edition, Cambridge University Press 1986

¹² *Ibid.*, p 158-214 Historically, there was a delay in applying the concept of sovereignty in the relation between states due to the inability in conceiving the world as being composed of separate political communities. In the thirteenth century the notion of Europe being a single entity ruled by a theocratic universal authority was attacked and by the fourteenth century the kingdoms of Europe had become sufficiently distinct from each other. In the modern time tendencies towards a growth of an ever closer association between the political community and the state, the rise of a centralized state. In international practice the existence of a sovereign authority within the separate community is universally recognised as a precondition and the essential qualification for its membership of the international community.

¹³ Ola Zetterquist, *Suveränt fördrag eller postsuverän konstitution, ur en konstitution för Europa*, SIEPS Stockholm 2004 p 116.

¹⁴ Alan Dashwood, *The relationship between the Member States and the European Union/European Community*, p 355.

¹⁵ Neal MacCormick p 142 discussing the post- sovereign Europe.

¹⁶ Ola Zetterquist pp 115 refers to Henry Bracton, *de Legibus Et Consuetudinibus Angliae* [1239], William Hein, 1990, Vol 1 Kap VIII s 39 “ But the king himself ought not to be the subject to man , but subject to God and to the law, for the law makes the king.”

¹⁷ *Ibid.*, p 116.

2.1.1 Formal Legitimacy

According to the Austrian philosopher Hans Kelsen, the legal system consists of legal norms structured in a legal system. In order to be considered as a legal norm it must stipulate a sanction which only the Member States can provide.¹⁸ It is the State as an institution that gives the legal rules meaning and content.¹⁹

A legal norm derives its validity and legitimacy from a superior norm. The highest norm in the legal system is the constitution. The constitution has been established and derives its legitimacy from a hypothetical norm, the basic norm. Kelsen's theory intends to create unity within a legal system in the sense that it provides for authoritative resolution of conflicts between norms that belong to the system.²⁰

However, the CT as such does not provide unity. Rather the opposite. The CT is quite ambiguous. Some articles indicate features of supranational centralisation. For instance article I-6 CT which formulates the principle of supremacy of EU-law, initially established in the case of *Costa ENEL*.²¹ Other articles in the CT protect national sovereignty and emphasises intergovernmental cooperation, e.g. the above described article I-5 CT which regulates the relationship between the Union and the Member States.

According to Kelsen, the sphere and reason of validity of the national legal orders are determined by international law.²² Thus, the basic norm of the international legal order is also the ultimate reason for validity of national legal orders.²³ Consequently, provided that international law is considered to be a valid legal order a pluralistic view is in contradiction to the notion of positive law due to the existence of one exclusive basic norm.²⁴

¹⁸ Hans Kelsen, p 45.

¹⁹ Ola Zetterquist p 125. According to this view it is only the Member States that can have real constitutions, since it is only the Member States that possess coercive measures.

²⁰ Hans Kelsen, *Theory of Law and State*, Harvard University Press 1946 p 110.

²¹ Article I-6 CT reads; "The Constitution, and law adopted by the Union's Institutions in exercising competence conferred on it, shall have *primacy* over the law of the Member States." (emphasis added). 6/64, *Costa v ENEL*, ECR [1964] 585 vid 594. The doctrine of supremacy developed in *Case 11/70 Internationale Handelgesellschaft* [1970] ECR 1125 were ECJ concluded that EC-law is superior even in relation to the Member States' constitutional law.

²² Hans Kelsen p 367.

²³ *Ibid.*, p 367-370. The basic norm of international law is the norm *pacta sunt servanda*, which is a norm of general international law. General international law is created by customs constituted by acts of Member States.

²⁴ *Ibid.*, p 363 the pluralistic view is also untenable on logical grounds: International and national law cannot be different and mutually independent systems of norms if the norms of both systems are considered to be valid for the same space, and at the same time. It is not logically possible to assume that simultaneous valid norms belong to different mutually independent systems. See also Neil MacCormick, *Questioning Sovereignty*, Oxford University Press, New York 1999, p 115 who agrees that international law, including the Community legal order, is validated by the international law norm *pacta sunt servanda*. Furthermore, with the reference to the principle of supremacy, since the Treaties and norms

The CT does not replace or repeal national constitutions. Therefore, it can be regarded as complementary in relation to the Member States' constitutions. Article I-60 CT even provides the possibility for the Member States to unilaterally leave the EU as such which implies that it is not a constitution.²⁵

This parallel character of the CT implies that there is still a risk for colliding norms. Consequently, according to a Kelsenian view, the CT cannot be regarded as the basic norm in relation to the national constitutions of the Member States.

However, according to ECJ, there already exists a constitutional pluralism, which from the wording of the CT will remain within the EU. The Kelsen theory does not provide any solutions for the problems that might arise from constitutional pluralism.²⁶ If formal legitimacy cannot be used in order to declare the CT independently legitimate as the constitution of Europe, attention must be given to the moral arguments and the material legitimacy of the constitution.²⁷

2.1.2 Material Legitimacy

In a moral sense a constitution determines the extent of the *political obligation*. In other words, who shall be obeyed in a society, why and to what extent. Two main theories have been discussed in relation to the constitutional pluralism within the EU; the theories of *popular sovereignty* and *constitutionalism*.²⁸

In the CT both of these theories are expressed in article 2 under the heading "The Unions Values". Article I-2 states "The Union is founded on the values of respect for human dignity, liberty, *democracy*, equality, *the rule of law* and the *respect for human rights*. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination." (emphasis added).

validity made under the treaties and interpretative principles acknowledged by the ECJ, are now recognised as part of the law of each Member State, there is not two parallel legal orders existing. See also T.C. Hartley, *Constitutional problems of the European Union*, p 127 who is of the opposite opinion. The fact that the "super-rule", which resolves conflicting norms, in Member State Law is not exactly the same as Community law indicates that they constitute two separate legal systems.

²⁵ Such a provision is probably more likely found in treaties rather than constitutions e.g. article 13 in the North Atlantic Treaty.

²⁶ Ola Zetterquist p 125.

²⁷ S. Douglas-Scott, *Constitutional law of the European Union*, Longman/Pearson Education, 2002 p 521.

²⁸ Ola Zetterquist p 128. The theories have emanated from the political philosophy of the Enlightenment.

According to the theory of popular sovereignty a constitution shall secure the will of them understood as the majority of the people. In article 2 in the CT the theory of popular sovereignty is expressed by referring to democracy as one of the fundamental values in the Union. There are also other provisions in the CT that illustrate the theory of popular sovereignty such as article I-45.1, which states that “*The working of the Union shall be founded on the principle of representative democracy*”. A state is vital in the theory of popular sovereignty, since it is the state that shall supply the coercive measures in order for the will of the people to be secured.²⁹

In accordance with the theory of constitutionalism the purpose of a constitution is to protect individual rights. Unlimited power results in the individual being dependent on the public authority. Dependence is only acceptable if a person is unable to survive on his or her own. A part from that, dependence on the public authority is considered as the ultimate threat to the individual’s autonomy. In order to avoid unlimited public power the appointed legislator needs to be balanced by other institutions or processes.³⁰ The constitutionalist theory is expressed in article I-2 CT by the reference to the protection of human rights and the rule of law. In general the constitutionalist theory has been expressed in the case law of ECJ, in the area of the common market and in the field of European integration in general, where rights for the individuals have a central importance.³¹

Even though there are some references made to the notion of democracy in the CT, the document can hardly be recognised as being based on the theory of popular sovereignty.³² The theory of popular sovereignty prerequisites that there is a state in which common goals and values can be expressed and put into common action. The only way to build the CT on such a theory would be to create a European State with a strong European Parliament. Efforts have been made during the past years to increase the European Parliaments role in the decision procedures. However, some hold the view that the European Union is not, and lacks any present capability to become, a validly democratic entity. The argument is that democracy requires a common sense of belonging to one polity expressed in common press and other media, shared political parties and a common political debate, all of which do not exist in Europe.³³

²⁹ Ola Zetterquist p 131.

³⁰ Ibid, pp 132. By a division and balancing of powers the political system becomes more reliable and the individual’s autonomy is the more efficiently secured.

³¹ E.g. the cases of Franchovich, Van Gend en Loos, Costa ENEL.

³² Ola Zetterquist p 134.

³³ Neal MacCormick, Questioning Sovereignty pp 143 refers to BvR 2134/92 and for an english version of the case report see [1994] 1 CMLR 57. See also Ola Zetterquist p 137. The lack of such a development is probably caused by the fear of a corresponding lack of democracy and individual influence on the Member State level and ultimately the fear of EU becoming a United States of Europe.

Instead, the striking feature of the whole EU-project has been the division of power typical of constitutionalism. Examples of this are found in the general principles of law, like the principles of subsidiarity and proportionality, as well as in the division of power between the institutions of the EU.³⁴ Another example of how constitutionalism is furthered in the CT is the incorporation of the Charter of Fundamental Rights resulting in a more visible protection of human rights.³⁵

Even if the CT can be considered to be based to a larger extent on the theory of constitutionalism than popular sovereignty, there are a few problems still yet to be solved. Firstly, in the theory of constitutionalism a precondition for a constitution is that it is universal to all its members. The possibility of unilateral withdrawal from the Union stipulated in Article I-60 CT is in contradiction to the notion of a constitution's universal applicability.³⁶ Another issue is the tradition of the restrictive approach concerning the right for an individual to instigate a procedure directed at the ECJ.³⁷ In a constitutionalist perspective there is a need for a strong court in order to secure the individual's rights. Today, due to the restrictiveness in the case-law from ECJ and the non-existence of a dramatic change in the CT, the CT doesn't fulfil the criteria that the constitutionalism sets up for material legitimacy.³⁸ Consequently, according to this view, the CT cannot be considered as a constitution in the traditional sense.

2.2 The genesis of the solidarity clause

The proposal to have a mutual assistance clause is not novel.³⁹ Such a notion actually predated the whole EU project as it was one of the main aims in the Brussels Treaty of 1948. Article V of the WEU (modified Brussels Treaty of 1954 reads: "If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provision of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power." In 1997 a group of EU Member States, lead by France and Germany, proposed a merger of WEU and the EU, which would effectively have resulted in an incorporation of the mutual assistance clause in the EU legislation. However, due to

³⁴ Ola Zetterquist p 135 e.g. the opportunity the ECJ has to review and nullify legislation from the other institutions. Some of these features are increased in the CT, for instance the national parliaments will according to the CT be more involved in the application of the subsidiarity principle.

³⁵ Ibid, p 135.

³⁶ Ibid, pp 140.

³⁷ See Case 25/62 Plaumann & Co. v. Commission [1963] ECR 207. The Plaumann doctrine was upheld by the ECJ in UPA v. Council Case C-50-00P 21 March 2002.

³⁸ Ola Zetterquist p 140.

³⁹ Jolyon Howorth, *The European Draft Constitutional Treaty and the future of the European Defence initiative: A question of flexibility*, European Foreign Affairs Review 2004 volume 9 p 492.

opposition e.g. from the British government, such a merger never took place.⁴⁰

During the 1990s, conflicts between States or ethnic groups were considered to be the main threats to peace and security in Europe.⁴¹ However, as a result of the events of 11 September 2001 it became clear that security needed to be ensured not only outside the Union, but also within the EU borders.⁴² It also became apparent that the Petersberg tasks in article 17 TEU did not include a mutual assistance clause.⁴³

As a response to the “new” threat of terrorism a working group on defence suggested that the CT should include a solidarity clause. The working group on defence held that in order to cope with threats of terrorism the whole range of instruments available in the EU must be used. By spelling out and enhancing the principle of solidarity, the working group envisaged a situation with a pool of specialised civilian or military civil-protection units identified by the Member States which would take part in joint training and intervention coordination programmes. Such programmes would lead to a more effective intervention in event of a natural or humanitarian disaster within the EU.⁴⁴ The working group made reference in this regard to the collective defence clause, to which some of the Member States, who are also members of NATO, are bound.⁴⁵

Previously, the Member States had expressed a general will to enhance and further develop the solidarity within the Union, which is manifested in the preamble of the TEU.⁴⁶ The preamble stipulates a desire to deepen the solidarity between the European people, while respecting their history, culture and traditions. However, a proposal to implement a specific clause in the CT was very controversial. Various opinions from the delegations of the Member States were put forward. Several Member States agreed that it would be useful to have some sort of commitment, which in any case reflected the existing general commitments to solidarity in the Treaty. Some delegations recognised the fact that not all Member States would be able to

⁴⁰ Ibid.

⁴¹ Which had been witnessed during the 90:s in Western Balkans.

⁴² Final report of Working Group VIII-Defence, Brussels 16th of December 2002 p 14.

⁴³ Jolyon Howorth p 492 and Hazel Smith, *European Union Foreign Policy What it is and What it Does*, London 2002 p 114. The Petersberg functions consist of humanitarian and rescue mission as well as peace-keeping and combat missions in crisis management situations.

⁴⁴ Final report of Working Group VIII-Defence, Brussels 16th of December 2002 p 14.

⁴⁵ Article 5 in the North Atlantic Treaty states that “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.”

⁴⁶ Ds 2004:52 *Fördraget om upprättande av en konstitution för Europa* p 320.

sign on to such a commitment and that there was a need for an opt-in or opt-out provision. Other Member States suggested that any such provision would depend in part on the future of a collective defence guaranteed within the WEU. Some Member States said that they did not wish to see any form of collective commitment. Some Member States argued that it even would be politically unacceptable to have such a provision in the treaty. Others preferred not to include anything which might undermine existing commitments, such as those within NATO.⁴⁷

After the terrorist attack in Madrid in March 2004 the discussions concerning how to prevent and combat terrorism were intensified and the European Council declared itself willing to act in the spirit of the solidarity clause even though the negotiations concerning the CT weren't finalised.⁴⁸

⁴⁷ Jolyon Howorth, p 493.

⁴⁸ <http://www.statewatch.org/news/2004/mar/eu-terr-decl.pdf> *Declaration on combating terrorism*, Brussels 25th of March 2004 pp 3. Measures discussed were e.g. to act jointly in assistance of victims, further existing cooperation, strengthening border controls and document security, sharing of intelligence, preventing the financing of terrorism and finally measures to protect transport and population.

3 The solidarity clause

Before the solidarity clause was drafted there had been very few documents relating and extending over sectors as a whole in relation to terrorism. Instead, there had been legislation covering more specific fields like plan of action in relation to civil protection and directives on safety measures in chemical plants and industries.⁴⁹ The wording of the article represents the compromise that all the Member States have managed to agree upon. The provision is therefore a bit vague and general in its character.⁵⁰

3.1 The definition and scope of the solidarity clause

The solidarity clause is found in article I-43 in the CT and reads;

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. The detailed arrangements for implementing this provision are set out in Article III-329.

As to the wording of the solidarity clause it covers three *types of situations*, namely *terrorist attacks*, *natural disasters* and *other man-made disasters*.

⁴⁹ Helén Jarlsvik, *Ett europeiskt krisberedskapssystem och dess nationella implikationer*, FOI Memo 1081 november 2004, pp 8.

<http://www.krisberedskapsmyndigheten.se/4591.epibrw>

⁵⁰ Helén Jarlsvik, Maria Oredsson, *Solidaritetsklausulen, konsekvenser för den europeiska säkerhets- och försvarspolitiken*, FOI Memo 1068, oktober 2004, p 7.

3.1.1 Terrorist attack

The international community has tried for decades to come up with a harmonious definition of terrorism without any substantial result.⁵¹ Within the EU there has been a unification of rules and sanctions concerning terrorist offences through a Council framework decision within pillar III. The terrorist definition covers individuals and organisations as potential actors engaging in terrorist activity. However, States cannot, according to the definition, be held accountable as an organ performing terrorist attacks.⁵²

The definition of terrorism set forward in the Council Framework decision probably cannot be used in relation to the application of the solidarity clause. For instance a single individual throwing a bomb would fall under the terrorism definition in the framework decision. In order to apply the solidarity clause there needs to be a substantial supplementing element. In order for the terrorist attack criteria to be fulfilled it will probably require that the government or a part of the population, for example in a capital, of a Member State is threatened.⁵³

3.1.2 Territory of a Member State

Concerning terrorist attacks the solidarity clause includes measures taken within the *territory* of a Member State. From the wording it also seems that the EU can employ measures against a country outside the EU in order to protect institutions and the civilian population from a terrorist attack. Thus, application of the solidarity clause is not restricted to the territory of the Union. It is therefore possible that the actual scope of the solidarity clause can extend to apply to preventing a terrorist attack in a country outside the EU even if it isn't a potential or actual threat towards EU, its Member States or its inhabitants. However, such an interpretation might seem to be in conflict with the otherwise EU focused wording of the provision which states "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."(emphasis added).⁵⁴

3.1.3 Instruments

The solidarity clause does not explicitly apply to a specific legal field to a greater extent than any other legal field, even though the provision emerged

⁵¹ Kriangsak Kittichaisaree, *International Criminal Law*, Oxford 2002, pp 227.

⁵² Council framework decision of June 13th 2002 on combating terrorism.

⁵³ Erik Wennerström, Director for International Relations, Ministry of Justice, Stockholm 050511.

⁵⁴ Helén Jarlsvik, Maria Oredsson pp 9.

from the defence working group. This is implied by the wording that *all* the instruments at the union's disposal shall be mobilised.⁵⁵

The solidarity clause does not really define exactly *which* EU instruments are intended to be used in event of a terrorist attack. In the European Security Strategy from 2003 it is held that a terrorist threat has to be handled through a mix of intelligence, police, military, judicial and other instruments.⁵⁶

3.2 The legal status of the solidarity clause

There seems to be some confusion concerning the labelling of the solidarity clause.⁵⁷ The question arises if it is contradictory to refer to the solidarity clause as a political principle when it has been drafted as a treaty provision in the CT.

Since late March 2004 there exists a political obligation for the Member States in accordance with the *declaration on solidarity against terrorism*. In the declaration the Heads of State or Government of the Member States, and at that time the acceding States, declared that they shall act jointly and in the spirit of solidarity if one of them is the victim of a terrorist attack. They shall mobilise all the instruments at their disposal, including military resources. Finally the declaration states that it shall be for each Member State or acceding State to the Union to choose the most appropriate means to comply with this solidarity commitment toward the affected State.⁵⁸

There is a similar clarification of the solidarity clause annexed to the constitution stating that article I-43 and III-329 is not intended to influence another Member States' right to choose the most appropriate way of fulfilling the solidarity commitment. The text formulated by the European Council is quite similar to the text the Member States previously had agreed upon and incorporated in the CT. However, since the CT isn't ratified, the Member States are not bound by the solidarity clause in a legal sense.

Thus, to refer to the solidarity clause as a political obligation or a political principle today would be correct since the provision is not yet in force. However, the fact that the political obligation is implemented in the CT indicates that the solidarity clause has potential to entail more than a political obligation. In order to establish how the solidarity commitment

⁵⁵ Hélen Jarlsvik p 10.

⁵⁶ European Security Strategy, A secure Europe in a better world, Brussels 12 December 2003 pp 11.

⁵⁷ Hélen Jarlsvik , the solidarity provision is referred to as a political principle see p 30. See also http://www.cor.eu.int/document/sv/deve_information_note_sv.pdf

(050612)Europeiska Unionen regionkommittén, PM inför seminariet inom utskottet för hållbar utveckling "Räddningstjänst och gränsöverskridande samarbete" Bryssel den 19 maj 2005 p 5 the solidarity provision is referred to as closely connected with the solidarity principle.

⁵⁸ *Declaration on combating terrorism*.

shall be characterised in this context the initial posed question needs to be explored further.

3.2.1 Principles and legal rules

A distinction needs to be made concerning the character of the solidarity clause as being a political principle, legal principle or legal rule. Such a distinction is vital for the enforcement and applicability of the solidarity clause.⁵⁹

In order for a provision to be considered as a legal rule the formal criteria of the provision being enforceable and subject to a court's interpretation must be fulfilled.⁶⁰ The philosopher Ronald Dworkin makes a distinction between rules and principles. Dworkin argues that a rule is black and white in its character while a principle has weight of different degrees and therefore is judged upon by the court in relation to other competing interests.⁶¹ General principles of Community law constitute a specific category of principles.⁶² One way of classifying general principles of community law from other principles is on the bases of the *function* of the principle.⁶³ The function of a general principle is to interfere with the judicial review, to fill in the gaps and to regulate the relationship between the Member States and the Community institutions. On the basis of such functions the general principles can be divided into *operative principles, complete principles and regulative principles*.⁶⁴

In this categorisation the principle of solidarity would fall under the heading regulative principles, and more specific the solidarity principle would

⁵⁹ G. Federico Mancini, *The making of a constitution for Europe*, Common Market Law Review vol. 26 1989, p 613 When democracy advances and politics asserts their claims, judges are bound to take a step back. The Court is likely to extend the area of problems which it feels should be solved by the political institutions.

⁶⁰ Eric Barendt, *An Introduction to Constitutional Law*, Oxford University Press 1998, p 3.

⁶¹ R. Dworkin, *Law's Empire*, Harvard University Press 1993 p 7 and p 179. Law exists as a plain fact and what the law is in no way depends of what it should be. Concerning principles a compromise shall be reached in regard to different interests. According to this view the European Convention on Human Rights can be considered as an expression of the latter since different rights are weighted in relation to other interests.

⁶² Xavier Groussot, *Creation, Development and Impact of the General principles of Community law: towards a jus commune europaeum*, Faculty of Law, Lunds university 2005 p 12.

⁶³ Xavier Groussot, p 16. Distinction can also be made on the basis of origin of the principle. Xavier Groussot refers i.e. to Schermers, *Judicial protection in the european communities*, Kluwer, 1976. Xavier Groussot p 14 Some doctrinal scholars have defined general principles on the basis of a classification theory of their own Xavier Groussot refers to Usher, *General Principles of EC law*, Longman, 1998 and Tridimas, *The General Principles of EC law*, Oxford, 1999.

⁶⁴ Xavier Groussot, p 16.

constitute an *institutional principle*.⁶⁵ In the doctrine the general principles of institutional law are defined as serving to regulate the relations between the institutions, rather than protect the position of individuals. Furthermore, there has been made a two fold definition, horizontal institutional principles (between the institutions of the Community) and vertical institutional principles (between the Community and the Member States' institutions).⁶⁶

The regulative principles have a clear constitutional aspect, since they regulate the relationship between the community and the national legal order.⁶⁷ In general terms, the regulative principles are not necessarily enforceable.⁶⁸ However, there are regulative principles, e.g. the principles of subsidiarity and loyalty, that are enforceable.⁶⁹

In a case from 1973, *Commission v Italy*, concerning the failure of the Italian government to ensure the effective application of regulation No 1975/69 and regulation No 2195/69, ECJ stated that “This failure in the *duty of solidarity* accepted by the Member States by the fact of their adherence to the Community strikes at the fundamental basis of the community legal order”.⁷⁰ (emphasis added). The ECJ furthermore stated, “For a State unilaterally to break, according to its own conception of national interest, the equilibrium between advantages and obligations flowing from its adherence to the Community brings into question the equality of the Member States before Community law and creates discrimination at the expense of their nationals, and above all of the nationals of the State itself which places itself outside the Community rules.”⁷¹

Opposite to the definition of an institutional principle to regulate the relationship between institutions it is clear that the duty of solidarity was in the *Commission v Italy* case used to ensure the efficiency of Community

⁶⁵ Xavier Groussot p 21, The principle of subsidiarity, which means that a decision shall be made on the most efficient political level which is closest to the citizens, is also as well as the principle of justiciability (direct effect), the principle of supremacy and the principle of loyalty, defined as a regulative principle according to above mentioned categorisation.

⁶⁶Xavier Groussot p 21 refers to De Witte, *General principles of Institutional Law*, In Bernitz and Negelius (eds.), Kluwer 2000, pp. 143-159.

⁶⁷ Xavier Groussot, p 21.

⁶⁸ Ibid, p 22. See Case C-353/92 *Greece v the Commission* [1994] ECR I-3411 at p 3451 The ECJ stated that the principle of Community preference may be taken into account by Community institutions as an element in the common agricultural policy, it nevertheless cannot affect their decision until all the economic factors influencing world trade have been evaluated. Community preference is not in any case a legal requirement the violation of which would result in the invalidity of the measures concerned.

⁶⁹ Xavier Groussot pp 22. This can be explained by the fact that a regulative principle can belong to an operative class and vice versa. *Operative principles* makes it possible to review the acts of the institutions and Member States. (own emphasis). Therefore, in that respect the operative principles may be regarded as vectors of the legitimacy. Thus, the principle of subsidiarity overlaps with the operative class. Also the principle of loyalty, which shall ensure the efficiency of the EC-legal order, has to be studied closely in relation to the operative principles.

⁷⁰ Case 39/72 *Commission v. Italy* [1973] ECR 101 at p 116.

⁷¹ Ibid.

law and to ensure the individuals right of non-discrimination in relation to the application of aforementioned regulation. Using the principle of solidarity this way it could be concluded that there is some relation to the operative class, which would make the principle of solidarity enforceable. However, the question arises why the duty of solidarity is used by the court in this context instead of the principle of loyalty. One explanation can be the fact that the ECJ started to intensively use the principle of loyalty first in the 1980s.⁷² The fact that the ECJ referred to the duty of solidarity in a case, which does not substantially differ from later cases where references to the principle of loyalty have been used, indicates that there are no preconditions for the specific use of the duty of solidarity in relation to the principle of loyalty formulated in case law.⁷³ Thus, it can also be argued that since the principle of solidarity is so rarely used, the content and scope of the principle remains unestablished. It can therefore appear as the content of the principle of solidarity and the principle of loyalty are equal, but that the latter is *lex specialis* in the case law of the ECJ.

The principle of loyalty is an example of how a principle also exists as a substantial treaty provision (presently article 10 in the TEC, proposed article I-5.2 in the CT).⁷⁴ Even if the principle of solidarity appeared in the preamble of the TEU, it is first in the CT that it appears in treaty provisions (article I-2 and article I-43). From the different wordings of the provisions it can be concluded that the solidarity provision is more specific as to which situation it will apply and is in that sense *lex specialis* in relation to the wording of the loyalty provision. Another general difference is that case law shows that the loyalty principle and provision mainly has been used to secure the vertical relationship between the Community and Member States.⁷⁵ The wording of the solidarity provision focuses mainly on the horizontal relationship obligations between Member States.

⁷² Xavier Groussot p 33.

⁷³ Case C-265/95, *Commission v France*, 1997 ECR I-6959 para 32 ECJ ruled that article 30 (now article 28) EC requires Member States not merely themselves to abstain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also, when read with article 5 (now article 10) of the Treaty, to take all necessary and appropriate measures that the fundamental freedom is respected on their territory.

⁷⁴ Article I-5.2 CT states that “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 Constitution. The Member States shall take any appropriate measure, general or particular, *to ensure fulfilment of the obligations* arising out of the Constitution or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could *jeopardise the attainment of the Union's objectives.*” (emphasis added). The wording is similar to the one in article 10 TEC. However, the first sentence has been added in I-5.2 CT.

⁷⁵ See Case 14/83 *Von Colson & Kamann v. Land Nordrhein-Westfalen*, 1984 ECR 1891, Case C- 106/89 *Marleasing v. La Comercial Internacionalde Alimentación*, 1990 E.C.R I-4135 and Case 6&9/90 *Francovich and Bonifaci v. Italy*, 1991 ECR I-5357. The ECJ fills significant gaps in Community law and secures the Community efficiency, in cases Community efficiency can not be secured by i.e. direct effect. However, the first sentence of the provision also includes a margin for horizontal regulation between the Member States which has also been illustrated in case-law see Case 141/78 *French Republic v.*

In conclusion, to answer the initially posed question, the solidarity clause fulfils the criteria of becoming a formal legal rule. The fact that the solidarity provision is under the jurisdiction of the ECJ indicates that it is likely to be enforceable as a treaty provision. Furthermore, the question arises if the solidarity clause is codifying the principle of solidarity and will, like the principle of loyalty and the loyalty provision, have a corresponding content. The definition of the principle of solidarity as an institutional principle in the doctrine is well in line with the wording of the solidarity provision. However, the way the principle of solidarity has been used by the ECJ is with the objective of ensuring the efficiency of Community law and the individual's rights of non-discrimination. Case-law has shown that the principle of solidarity is enforceable in order to pursue an objective which is not to be found in the solidarity clause. In this context there is not a material correspondence between the principle of solidarity and the solidarity provision. Therefore, the solidarity clause can be a legal rule, an enforceable principle of solidarity and a political principle all at the same time. If future case-law on the principle of solidarity develops in accordance with the case *Commission v Italy* the solidarity clause will merely exist as a legal provision and a political principle. The former alternative would result in a larger margin of discretion for ECJ in the sense of having the possibility to judge upon the solidarity clause in relation to different interests.

3.2.2 Does the solidarity clause have direct effect?

The fact that the ECJ has jurisdiction in relation to the solidarity clause indicates that the provision theoretically can be applied in a vertical context. Therefore there is a need to scrutinise if the solidarity clause, as it may affect individuals, can have direct effect.

ECJ and subsequently EU-law have over the years created rights for individuals that they can invoke in national courts.⁷⁶ In the early years the market freedoms were the context of the principle of direct effect.⁷⁷

United Kingdom of Great Britain and Northern Ireland [1979] ECR 2923 at p 2942. Consequently the line between the loyalty provision and the solidarity provision is not distinct. The loyalty principle has been used to regulate the horizontal relation between Member States while the mere fact that the solidarity clause falls under the jurisdiction of ECJ implicates it in theory can be used to regulate the vertical relation between the Union and Member States.

⁷⁶ Francis G Jacobs, *The evolution of the European legal order*, Common Market Law Review, volume 41, 2004 p 306. In a EU context, according to Hohfeld's classical definition of rights, an individuals right correspond to a Member States duty to respect the right See Wesley N Hohfeld, *Fundamental legal conceptions*, Yale University Press 1919 pp 36.

⁷⁷ Francis G Jacobs, *The evolution of the European legal order*, p 307. See also Alan Dashwood, p 365. Since the pillar structure is removed in the CT general principles of law, like direct effect applies also to other fields of law e.g. CFSP issues, which are covered by the solidarity clause.

The first time the doctrine of direct effect was formulated by the ECJ was in the case *Van Gend en Loos*, which concerned a stand still clause on customs duties. In *Van Gend en Loos* some requirements were posed in order for a treaty provision to have direct effect.⁷⁸ ECJ's more recent case law suggests that the requirements in *Van Gend en Loos* are a little more than the actual conditions for justiciability.⁷⁹ In order for a treaty provision to be directly effective it needs to fulfil two criteria. Firstly, the provision needs to be *sufficiently clear and precise*, and secondly the provision needs to be *unconditional*.⁸⁰

When determining whether or not the solidarity clause has direct effect the spirit, general scheme and wording of the provision has to be considered in the light of the criteria initially established in *Van Gend en Loos*.

The solidarity clause is probably does not have direct effect due to the fact that it is too generally formulated. Like the loyalty provision the solidarity clause sets up general objectives that the Member States shall met. However, there are no uniform requirements concerning how these objectives shall be fulfilled. Moreover, the solidarity clause is not unconditional since in reality its enforcement very much will rely on decisions made by Member States and perhaps also on decisions of the EU institutions.⁸¹

The main reasons for establishing the notion of direct effect in the first place seems to have been effectiveness, legal integration and a uniform

⁷⁸ Case 26/62 *Van Gend en Loos* at p 13 The article must be clear, negative, unconditional, containing no reservation on the part of the Member State, and not be dependent on any national implementing measures.

⁷⁹ Paul Craig and Gráinne de Búrca, pp 185 An example of the more relaxed application is the *Defrenne*-case where the ECJ stated that the non-discrimination principle had direct effect. The obligation in this case was positive rather than negative.

⁸⁰ T.C. Hartley, *The foundations of European Community Law* 4th ed, Oxford university press 1998 pp 191. Community law is often unclear and ambiguous. This fact alone does not prevent the provision from having direct effect as once the ECJ has interpreted it the ambiguities will be resolved. The difficulty is therefore when the provision is formulated in a general way and lacks *precision*. For instance the loyalty provision in article 10 TEC is an example of a provision that merely lays down a general policy or objective to be pursued without specifying the appropriate means to attain it and therefore the provision cannot be directly effective by itself (However, opposite opinions have been expressed stating that it is probable that the provision itself has direct effect see Eric F. Hinton, *Strengthening the effectiveness of community law: direct effect, article 5 EC, and the European court of justice*, *International law and politics* Vol 31:307 p. 321 (also referring to Lang, *Core of Constitutional law* p 44)). The *unconditional* requirement for direct effect means that the right must not be dependent on something within the control of some independent authority, like the Community institutions, or the Member State itself. In particular, it must not be dependent on the judgement or discretion of any such body.

⁸¹ The fact that it is up to each Member State how to fulfil the obligation presupposes a decision on the Member State level concerning how the aid shall be provided and due to the development of COSI, there might also be a decision on the Union level before the solidarity clause can be applied.

application of EC-law.⁸² Looking at the spirit, the general scheme and the character of the solidarity provision it shows that the purpose of the provision is not to ensure efficient and uniform application of EU-law. Instead the provision encourages different applications of the provision in different Member States depending on what kind of aid is needed and what each Member State wishes to provide.

In the light of aforementioned circumstances the solidarity clause does not have the characteristics needed and will most likely not have direct effect. However, if the provision has direct effect or not will ultimately be a question for the ECJ.

3.3 ECJ's role in relation to the solidarity clause

In the CT the jurisdiction of the ECJ will be broadly extended and also cover the area of FSJ and parts of CFSP.⁸³ In the drafting process of the CT some Member States wished to exempt the solidarity clause from ECJ's jurisdiction.⁸⁴ Despite these views, the solidarity clause has not been excluded from the jurisdiction of ECJ in the CT.⁸⁵

The question arises as to what approach ECJ will have when dealing with this specific provision. Since there is no requirement on uniformity in the application of the provision, in reality the question will arise in situations when a Member State refuses to help another Member State that asks for assistance.⁸⁶ Another situation when the ECJ could be involved is if a Member State asks for assistance from the other Member States to act

⁸² Paul Craig and Grainne de Búrca *EU Law, text, cases, and materials third edition*, Oxford University Press 2003 pp 185 see also Francis G Jacobs, *The evolution of the European legal order*, p 311 However, there are also limits on direct effect which are mainly imposed by respect for the procedural autonomy of the legal orders of the Member States. Furthermore a Member State is not bound in all circumstances to invoke EC-law of its own motion.

⁸³ Francis G Jacobs, *The evolution of the European legal order*, p 316.

⁸⁴ Conference of the representatives of the governments of the Member States, IGC 2003 Non-institutional issues; including amendments in the economic and financial field, Brussels 24 October 2003 p 17 <http://ue.eu.int/igcpdf/en/03/cg00/cg00037.en03.pdf>

⁸⁵ See Article III-376 which states that e.g. articles I-40 and I-41 are excluded from the jurisdiction of the ECJ. The aforementioned articles concerns CFSP issues.

⁸⁶ The purpose of the preliminary ruling mechanism is to secure a uniform application of EU-law. Even though the solidarity clause is not likely to have direct effect and even though there is no requirement of a unified application of the provision, possibility for national courts to ask for preliminary rulings concerning the interpretation of the solidarity clause cannot be excluded. The fact that the solidarity clause is a treaty provision under ECJ's jurisdiction means that ECJ has an exclusive right of the interpretation. However, due to the horizontal application of the solidarity clause those parts of the provision that need clarification, like how a terrorist attack shall be defined, probably will be handled on a government level.

preemptively since it is not established whether or not the solidarity provision covers such action. A third situation would be when a Member State, after being the subject of a terrorist attack, wants assistance in the spirit of solidarity in order to eliminate further internal or external threats. Due to the fact that there is no unified definition of what a terrorist attack is in this context it can be a task for ECJ to decide what elements are needed in order for the criteria to be fulfilled.

The application of the solidarity clause will involve foreign policies in the different Member States. The conduct of foreign policy is seen as a powerful symbol of sovereignty and statehood.⁸⁷ The fact that most CFSP issues are excluded from the jurisdiction of the ECJ indicates that ECJ will probably not deal with issues in the solidarity clause in direct relation to CFSP. Also the ECJ's way of handling the principle of subsidiarity illustrates that ECJ has shown a reluctance to apply a heavily political principle in a substantial manner.⁸⁸ The ECJ's position in relation to politically sensitive rules can be considered as an expression of the so-called *political question doctrine*, which has been developed in the American constitutional jurisprudence.⁸⁹ According to this doctrine courts are not at all competent to try political questions, which is illustrated by the fact that foreign policy issues in general are considered to be outside the jurisdiction of any court.⁹⁰ Therefore, there might be a division in the ECJ's application. The solidarity clause will probably more frequently be used concerning civil protection and FSJ issues, which ECJ feels more comfortable in handling than politically related issues like ESDP.

In order for such questions to reach the ECJ a Member State needs to clearly infringe the obligation of solidarity, for instance not provide any assistance even if it has been requested to do so by another Member State, in order for the Commission to take action according to Article III-360 CT (present article 226 TEC). Another option is for the over-looked Member State itself to bring action against another Member State in accordance with Article III-361 CT (present article 227 TEC).⁹¹ Depending on the future, more detailed

⁸⁷ Marise Cremona, *The draft constitutional treaty: External relations and external action*, Common market law review vol. 40 Kluwer law International, Netherlands 2003 p 1352.

⁸⁸ Alan Dashwood, *The relationship between the Member States and the European Union/European Community*, p 368 ECJ's case law in relation to the subsidiarity principle shows that annulment of a measure on the ground that it offends against principle of subsidiarity is likely to occur only in extreme circumstances, See Case C-84/94, *United Kingdom v. Council* (Working Time Directive), [1996] ECR I-5793.

⁸⁹ Joakim Nergelius, *Law and politics*, Justice, morality and society a tribute to Alexander Peczenik, Lund 1997 p 309. The political question doctrine can be considered as an expression of the restriction Dworkin puts on the judge's moral reading of the constitution.

⁹⁰ *Ibid.*, pp 309 Not all countries accept the political question doctrine, e.g. the German Constitutional Court has taken a stand on many political questions including foreign policy issues like the participation of German soldiers in UN military operations. Such a question would never be tried by a court in the USA.

⁹¹ However, due to the interest of maintaining good relations within the EU there have been very few cases under present article 227 TEC see Paul Craig, Gráinne de Búrca p 429. Perhaps the solidarity clause, which entails sensitive legal fields and mainly regulates the relationship between the Member States, results in an increase of article 227 cases.

arrangements in relation to the solidarity clause and on the de facto implementation until then, the ECJ will have more substantial grounds to found their judgements upon. Consequently, the Member States will then have more information concerning how extensive their expectations can be. Until there is more detailed secondary legislation, the legal interpretation is likely to be influenced by the political climate and the agreements on the European Council level.⁹²

3.4 The enforcement of the solidarity clause

Article III- 329 in the CT, concerning the implementation of the solidarity clause states:

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 on 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 purpose 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.

According to this article the solidarity clause shall be implemented by a *European decision* adopted by the Council after a joint proposal of the Commission and the future EU Minister of Foreign Affairs. According to Article I-33 a European decision is a non-legislative act which is completely binding.⁹³ What the European decision will entail will probably depend the

⁹² Erik Wennerström, Director for International Relations, Ministry of Justice, Stockholm 050511.

⁹³ See the difference between the legal acts and non-legal acts in article I-33 CT.

field of interest of the future EU Minister of Foreign Affairs. The Commission's proposals are likely to refer to community interests. However, it will all boil down to what can be agreed upon in the Council. Some Member States, like France, are likely to oppose that the future application of the solidarity clause will be decided by community interests.⁹⁴

Since there is no EU foreign minister appointed, formal enforcement arrangements of the solidarity clause cannot be put forward. However, the European Council has in a declaration after the Madrid attack stated that the spirit of the solidarity clause shall be decisive for the actions of the Member States.⁹⁵ Consequently, there is a margin for a further informal development, of the more detailed provisions concerning the solidarity clause. Thus, there can be a de facto enforcement of the solidarity clause even before the clause as such enters into force.⁹⁶

One example of an informal further development is the *EU Solidarity Programme on the consequences of terrorist threats and attacks*, which has been adopted by the Council and Commission.⁹⁷ However, the EU Solidarity Programme constitutes a political instrument. Thus, the programme will only have legal consequences if it is implemented by a legal instrument. The Solidarity Programme is a result of the meetings of the European Council in Ghent and Laeken, which followed the 11 September terrorist attacks. The Council and Commission were asked to prepare a programme to improve the cooperation regarding chemical and biological threats. The CBRN- programme was adopted by the Commission and Council in December 2002.⁹⁸

Following the terrorist attack in Madrid in March 2004 the European Council adopted the above mentioned *Declaration on combating terrorism*. In order to convert the notion of solidarity into concrete action the European

⁹⁴ Erik Wennerström, Director for International Relations, Ministry of Justice, Stockholm 050511.

⁹⁵ *Declaration on combating terrorism*, p 2.

⁹⁶ Helén Jarlsvik, Maria Oredsson p 4. Informal further development of the solidarity clause has so far mainly been done in the area of civil protection see *supra note 74* as well as Communication from the Commission to the Council and the European Parliament Preparedness and consequence management in the fight against terrorism COM(2004)701 final, Brussels 20.10.2004 and Communication from the Commission to the Council and the European Parliament Critical Infrastructure Protection in the fight against terrorism COM (2004) 702 final, Brussels 20.10.2004.

⁹⁷ Another example is the fact that the solidarity clause has de facto been explicitly used by the Council. In order for the Member States to be encouraged to extend and deepened the content of the database of military assets and resources concerning protection of the civil population against the repercussions of an terrorist attack, the Council made a references to the European Council's statement in March 2004 concerning the solidarity clause importance in relation to the combat against terrorism. Bulletin EU <http://europa.eu.int/abc/doc/off/bull/sv/200405/p106005.htm> (050502)

⁹⁸ *EU Solidarity Programme on the consequences of terrorist threats and attacks*, Brussels, 1 December 2004 pp 5.

Council stated that there needed to be a further development and implementation of the EU Health Security and CBRN Programmes.⁹⁹

The European Council has also invited the Council and the Commission to assess the capabilities of Member States concerning preventing and coping with the consequences of any type of terrorist attack, to identify best practice and to propose the necessary measures.¹⁰⁰

The Solidarity Programme is based on the CBRN programme but the scope is extended in order to deal with all terrorist threats. Some new elements have also been added from the Hague programme and from the above mentioned declaration and conclusion from the European Council.¹⁰¹

The overall aim of the Solidarity Programme is to increase the effectiveness of the measures taken at national and EU levels in order to prevent and limit the consequences of terrorist threats and attacks. The Solidarity Programme also sets out some strategic goals, for instance, in areas like risk assessment and analysis, preventive measures and detection and identification. The goals will be obtained through a) improved cooperation and coordination between the Member States, the Council and the Commission, b) facilitating the provision of practical assistance to the member states at their request c) an optimal, coordinated and inter-disciplinary use of EU instruments that will be reviewed within the programme in order to find and eliminate inconsistencies and, d) creating new instruments, if necessary.¹⁰²

3.5 The decision procedures in relation to the solidarity clause

At the moment it is unclear whether a decision will be reached on an EU level before an operative mission takes place on the basis of the solidarity clause or if the Member States will conduct such missions on the basis of bilateral agreements. The decision procedures might be included in the detailed arrangements put forward by the EU foreign minister. However, there is no indication that the future decision procedures when applying the solidarity clause would differ from the ones used today in the various fields

⁹⁹ *Declaration on combating terrorism* p 11.

¹⁰⁰ Furthermore, the European Council stated that the existing cooperation on civil protection should be enhanced, reflecting the will of Member States to act in solidarity in the case of a terrorist attack in any Member State or in the case of an attack against EU citizens living abroad. See *European Council conclusion on the Fight against Terrorism* of 17-18 June 2004.

¹⁰¹ *The EU Solidarity Programme* pp 5.

¹⁰² *The EU Solidarity Programme*, pp 8.

dealing with combating terrorism.¹⁰³ However, the CT provides for increased possibilities of qualified majority decisions under FJS.¹⁰⁴

¹⁰³ Hélen Jarlsvik och Maria Oredsson., p 10.

¹⁰⁴ Decisions concerning operative activity will be made by a unanimous Council, after the Parliament has been heard.

4 The impact of the solidarity clause

4.1 ESDP

4.1.1 Recent developments of ESDP

The Union's difficulties in intervening in the Balkans during the 1990s illustrates the fact that EU has had security aspects but at the same time lacked common security abilities. In the late 90s a common defence and security policy (ESDP) was developed within the Union. The ESDP consists of the so-called Petersberg tasks incorporated in article 17 TEU.¹⁰⁵ The Petersberg tasks includes humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking. However, since the Member States could not agree upon having a full fledged common defence, article 17 TEU does not consist of any firm commitments.¹⁰⁶ So far the ESDP instruments have been used for police missions and peacekeeping operations.¹⁰⁷

Many elements of the ESDP have remained unchanged in the CT, like the requirement of unanimous decisions within the ESDP framework and the respect for security policies of the Member States including their commitments towards NATO. Ultimately, the Member States still have to show a political will and submit the resources which are needed in order for ESDP to be operative.¹⁰⁸ However there are some changes presented in the CT. First of all the objective is defined more in detail. The objective of the ESDP is according to article I-41.1 CT to "...provide the Union with an operational capacity drawing on civil and military assets. The Union may use them on missions *outside* the Union for peacekeeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States." (added emphasis). Article III-309 CT states that all the tasks under ESDP can be used in the fight against terrorism and also be used to support the

¹⁰⁵ The Petersberg Tasks had also been a part of the WEU.

¹⁰⁶ See the wording of article 17 TEU "... the progressive framing of a common defence policy, which might lead to a common defence, should the European Council so decide." Marise Cremona, p 1359.

¹⁰⁷ E.g. the EU police force, which replaced the UN police force in Bosnia Herzegovina 2003, and the peacekeeping mission Althea Bosnia Herzegovina

http://ue.eu.int/cms3_fo/showPage.asp?id=745&lang=EN

¹⁰⁸ Helén Jarlsvik, Maria Oredsson p 7.

fight against terrorism in the territory of a third country. From the wording of article I-41 CT it seems that the ESDP instruments only can be used outside the union and the wording in article III-309 does not explicitly state that the instruments can be used internally. Thus, it isn't clear whether the ESDP framework covers the fight against terrorism within the EU borders.¹⁰⁹

Secondly, the changed wording in article I- 41.2, concerning if the ESDP in the future will result in a common defence, has caused some controversy. The article I-41.2 states that "The common security and defence policy shall include the progressive framing of a common Union defence policy. This *will* lead to a common defence, when the European Council, acting unanimously, so decides. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements." Some people interpret the wording of the provision I-41.2 CT as indicating that there will be a common defence in the future.¹¹⁰ Others interpret the same provision, with reference to the second sentence, as not constituting any substantial difference from the situation in TEU.¹¹¹

Thirdly, and maybe most importantly, a new element in relation to article 17 TEU is formulated. Article I-41.7 states that "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." This is very similar to the provision set forward within the framework of WEU mentioned above. Unlike the provision in the Brussels Treaty article I-41.7 is not unconditional, which makes it possible for a Member State to maintain their non-aligned position.

4.1.2 The effects of the solidarity clause in relation to ESDP

In comparison to the definition of the scope of ESDP the solidarity clause provides for measures both inside and outside the EU borders.¹¹² From the wording of the solidarity clause four different types of measures can be distinguished in relation to ESDP, namely, preventive measures against terrorism in general, preventive measures against a specific terrorist threat, measures to fend off a terrorist attack and finally consequence management

¹⁰⁹ Helén Jarlsvik, Maria Oredsson p 6 For instance, the Swedish government tends to argue that the words "can use" should be interpreted as "can only use" which would exclude the internal fight against terrorism from the scope of ESDP.

¹¹⁰ Pär Eriksson, Försvaret klarar inte Europas krav, Framsyn 2003 part 5, http://www.foi.se/FOI/templates/Page_574.aspx

¹¹¹ Marise Cremona p 1359, The *will* requirement is undermined by the second sentence in article I-41. Therefore the consequences of the *will* requirement in relation to the *might* requirement in article 17 TEU will not be a substantial difference in reality.

¹¹² Hélen Jarlsvik, Maria Oredsson p 9.

measures. The two former categories of measures are typically externally conducted outside the EU and the two latter are more likely internally performed within the EU.

The first category, *preventive measures against terrorism in general*, before there exists a specific threat, covers military and civil peacekeeping missions that contribute to strengthen democracy and regional stability in order to diminish the breeding ground for terrorism. The solidarity clause will probably not have much impact on this category since the measures are similar to the Petersberg tasks which already enable preventive measures against terrorism in general.¹¹³

The second category *preventive measures against a specific terrorist threat* includes, e.g. operations against training camps of terrorist groups or a mission due to a threat to spread weapons of mass destruction in a region outside of EU. It is also possible to argue that more offensive external preemptive measures are covered by the solidarity clause. If there was a UN mandate the US operation in Afghanistan would be comparable to the Petersberg tasks. In Europe there is a general scepticism towards preemptive military strikes. Previously, due to the fact that the main focus of ESDP has been crisis management, the Petersberg tasks have not been interpreted as including an offensive dimension.¹¹⁴

The third category *internal fend-off measures* can either be a response to a *specific threat* or *preparation* to be able to act immediately if a specific threat is realised. Such specific threats can be a suspected terrorist about to place a bomb under a car, a hijacked plane with nuclear and chemical weapons or if a plane is about to crash into a central building in a Member State. The preparatory measures can be to intensify border controls and supervise important means of communications in times of increased risks of terrorist attacks. Some would argue that it is not likely that ESDP will be used in these situations for several reasons. First of all the Member States are likely to try to resolve problems on their own territory by themselves. To ask for external help, especially military help is politically sensitive.¹¹⁵ Secondly, other instruments than military would probably more likely be used like police and customs. Thirdly, if the attack is too massive to be handled by the Member State or by police cooperation between the Member States, it is more likely that the NATO framework would be used if the Member State in question is a NATO ally. However, it cannot be excluded that ESDP could be used for these types of purposes.¹¹⁶

The final situation where the solidarity clause can have impact on ESDP is *consequence management measures*. These measures can be search and

¹¹³ H len Jarlsvik, Maria Oredsson p 13. The police mission in Bosnia is another e.g. of how the local police force was assisted in dealing with terrorism related issues.

¹¹⁴ Ibid, pp 13.

¹¹⁵ Article I-5 CT states that internal security is a Member State affair and part of the national identity.

¹¹⁶ H len Jarlsvik, Maria Oredsson, p 15.

rescue, sanitary, and different types of health and medical operations. Primarily civil protection will be used to deal with these types of issues. However, the work within the ESDP resulted in a database over national military resources that can be used in these types of situations within the framework of civil protection.¹¹⁷

It can be concluded that the most visible impact the solidarity clause has in relation to ESDP is in the third category, namely that provision opens up for the possibility to use ESDP in an internal context. Even if it is politically sensitive for a Member State to ask for e.g. military assistance within their own territory some situations might be difficult to handle on a national level with only national resources. Not all Member States are NATO members and therefore it is not obvious that the operations will be conducted through the NATO framework rather than the ESDP framework.

Article 5 in the North Atlantic Treaty is generally defined as a *mutual defence clause*.¹¹⁸ Article V in the Brussels Treaty and I - 41.7 CT have been referred to as *mutual assistance clauses* as well as *mutual defence clauses*.¹¹⁹ Both article V in the Brussels treaty and article I- 41.7 CT emphasise aid and assistance, with the difference that the former is unconditional. Article 5 in the North Atlantic Treaty on the other hand stipulates that an armed attack against one Member State shall be considered as an armed attack against them all.

In the literature it has been held that there is a need for a legal distinction between “mutual defence”, “mutual assistance” and solidarity due to the fact that the notions in practice often are confused. It has been argued that although the NATO article 5 and the WEU article V commitments are often referred to as “mutual defence” clauses, they are strictly speaking “mutual assistance” mechanisms.¹²⁰ However, from a literal point of view the term mutual assistance clause seems to focus on States providing assistance and aid to one another. This does not mean that they automatically participate in a mutual defence. However, due to the fact that all three provisions refer to the right of individual or collective self- defence recognised by Article 51 of the Charter of the United Nations, they are to be defined as mutual defence

¹¹⁷ H len Jarlsvik, Maria Oredsson pp 15, PSC Report to the Council on modalities, procedures and criteria for making available to the Community Civil Protection Mechanism the content of the database of military assets and capabilities relevant to the protection of civilian populations against the effects of terrorist attacks, including CBRN, Brussels 11 May 2004.

¹¹⁸ RTE News, NATO invokes mutual defence clause, 2 October 2001, <http://www.rte.ie/news/2001/1002/natoreax.html> (050521) and Irish examiner, NATO invokes mutual defence clause for the first time, 3 October 2001, <http://archives.tcm.ie/irishexaminer/2001/10/03/story13997.asp> (050521)

¹¹⁹ Assembly of WEU, press release 2004, Celebrations marking the 50th anniversary of the modification of the Brussels Treaty: -continued relevance of collective defence in the age of terrorism- <http://www.assembly-weu.org/en/presse/cp/2004/25.html> and BBC News, EU’s defence plans baffle NATO by Angus Roxburgh, <http://news.bbc.co.uk/1/hi/world/europe/3287009.stm> (050521).

¹²⁰ Jolyon Howorth p 492.

clauses. From a literal point of view I cannot see how the three mentioned provisions are an expression of strictly mutual assistance mechanisms. The solidarity clause on the other hand does not contain any references to a right to collective self defence, nor is it connected solely to defence issues. According to a literal distinction the solidarity clause is more focused on assistance and can therefore be characterised as a mutual assistance clause.

The first time NATO formally invoked its mutual defence clause was after the September 11th terrorist attack in 2001.¹²¹ Since a terrorist attack can be considered to be an armed attack the dividing line between the solidarity clause and article I-41.7 can prove to be very thin.¹²²

The Swedish government has held that Sweden is military non-aligned in the sense that Sweden does not enter into legally binding agreements stipulating defence guarantees. However, the government finds no contradiction between the non-aligned policy and the strong sense of solidarity amongst EU Member States. Moreover, the government maintains that it is difficult to imagine that Sweden would take a neutral stand in event of an armed attack against another EU-country and that it is equally difficult to conceive that the other Member States would not act in the same way.¹²³ This statement makes a distinction between being non-aligned in a legal, political and moral sense. The government's argument is that Sweden is legally non-allied but is part of the EU political and moral alliance.

Furthermore, the Swedish government has held that the defence policy by nature belongs to the most sensitive areas of sovereignty and utilises mainly national resources. Therefore, it is for the national authorities to decide on participation in an operation.¹²⁴ It is true that the CT, in article I-41-7, provides an exemption for Sweden in situations where Sweden wants to uphold a non-aligned position. It is also true that the Swedish government can decide to assist another Member State in need by means other than military assistance in relation to the solidarity clause. However, it is not true that the distinction of being a political and moral ally as compared to a legally bound ally is so easily made. The terrorist attack in Madrid was an example of how a country is able to deal with the consequences on its own.¹²⁵ However, suppose a situation where a Member State, which is not a member of NATO, is the victim of a terrorist attack and that the threat is still eminent. Like in the U.S after September 11th, the only assistance the Member State asks for is military assistance. If the situation is considered to be an armed attack and the mutual defence clause in article I-41.7 CT is applied, Sweden can get out such a request by invoking the exemption concerning respect for the Member States security policies. However, if the

¹²¹ Irish Examiner, <http://archives.tcm.ie/irishe Examiner/2001/10/03/story13997.asp>

¹²² Assembly of WEU, press releases 2004 <http://www.assembly-weu.org/en/presse/cp/2004/25.html>.

¹²³ Prop 2004/05:5, Vårt framtida försvar – försvarspolitisk inriktning 2005-2007 p 23.

¹²⁴ Final report of working group VIII, defence, Brussels, 16th December 2002 p 10.

¹²⁵ Hélien Jarlsvik, Maria Oredsson p 15.

Member State in question invokes article I-43 CT instead the only way to fulfil the solidarity requirement is to send military resources. Since the solidarity clause is a legally binding and an invocable rule, which article I-41.7 CT is not, Sweden can not refuse to send military resources without the risk of infringing the provision. Sweden has entered into a legally binding agreement containing an obligation to fulfil a solidarity commitment which potentially can mean an obligation to send military resources to another Member State. Subsequently the distinction between military and political alliances becomes quite blurred.

4.2 Police cooperation within FSJ

4.2.1 The recent development of police cooperation

International crime cooperation was not part of the EC-treaty. However, it became evident that the right to free movement also included people involved in criminal activity. Consequently, there was a need for police and judicial cooperation in the fight against international crime in order to ensure the security and a well functioning common market. Small steps were taken in the Single European Act (SEA).¹²⁶ However, the development of operative police cooperation started when the European Drugs Unit was established in January 1994. On the basis of article K.3 TEU the European Drugs Unit became European Police Office (Europol) in 1995.¹²⁷ Europol began to operate on the 1st of July 1999 when all the Member States had ratified the Europol Convention.¹²⁸ In the treaty of Amsterdam in 1997, the international crime cooperation was labelled as a part of the area freedom, security and justice (FSJ), which indicates that the field of law was no longer merely a support function to the common market but had a significant value of its own.¹²⁹

In the Tampere European Council Presidency Conclusion in 1999, goals for the coming five years were formulated. The European Council called for the establishment of a European Police Chiefs operational Task Force to exchange information, experiences and best practices in cooperation with Europol. Moreover, the European Police College should be established for the training of senior law enforcement officials. There was also a need for setting up Joint Investigative Teams to carry out criminal investigations in one or more of the Member States setting up the team e.g. in regards to terrorism. Furthermore, the European Council called for an establishment of

¹²⁶ http://europa.eu.int/abc/12lessons/index10_sv.htm

¹²⁷ Council Act of 26 July 1995 drawing up the Convention on the establishment of a European Police Office (Europol Convention) [Official Journal C 316 of 27.11.1995].

¹²⁸ http://www.eu-upplysningen.se/templates/EUU/standardRightMenuTemplate_2649.aspx.

¹²⁹ Seminar - Gamla och nya lagstiftare- om EU och straffrätten, Stockholm 050511.

a unit, Eurojust, composed of national prosecutors, magistrates or police officers. The objective of Eurojust should be to facilitate the proper coordination of national prosecuting authorities and of supporting criminal investigations in organised crime cases, based on Europol's analysis. Finally, the European Council stressed Europol had a key role in supporting a unionwide crime prevention, investigation and analysis and that the role of Europol needed to be strengthened.¹³⁰

As a result of the Tampere European Council meetings European Police Chiefs Task Force, European Police College and Eurojust are now established. Since 2002, as a counter terrorism measure, the competent authorities of two or more Member States have the possibility to set up Joint Investigation Teams for a specific purpose and a limited period of time.¹³¹

After September 11th Europol was given a central role in the counter terrorism work. Europol has handled the collecting, sharing and analysing of information as well as producing a report annually on the trends and situation of terrorist activity in the EU. Europol has also, if requested by a Member State, the possibility to participate in the Joint Investigation Teams.¹³² In 2002 the Council stressed, concerning an enhanced struggle against terrorism, the importance of an intensified cooperation between Europol and the authorities in a Member State responsible for combating terrorism.¹³³ However, Europol has not really managed to live up to the expectations set out in the Tampere Conclusions. In the Hague Programme, which follows the Tampere programme, it is stressed that further enhancement of Europol should be made.¹³⁴

The scope of the police cooperation set out in article III-275 CT is not particularly widen in relation to the wording of article 30 TEU. However as a consequence of the removed pillar structure, European laws and framework laws (which are presently called regulations and directives) will

¹³⁰Tampere European Council 15-16.10.1999 Conclusions of the Presidency, http://www.europarl.eu.int/summits/tam_en.htm. (050523)

¹³¹ Council Framework Decision of 13 June 2002 on joint investigation teams. However, very few Member States has fully complied with the framework decision and instead informal teams are operating see the Commission's report on national measures taken to comply with the Council Framework Decision of 13 June 2002 on Joint Investigation Teams COM (2004) 858 final, Brussels 7.1.2005.

¹³² EU Counter Terrorism efforts in JHA field, [http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/04/59&format=\(050316\)](http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/04/59&format=(050316))

¹³³ Council Recommendation of 28 November 2002 on terrorist profiles http://europa.eu.int/comm/justice_home/news/information_dossiers/terrorism_2004/documents_en.htm (050531)

¹³⁴ The Hague Programme *strengthening freedom, security and justice in the European Union*, Brussels, 5 November 2004 p 29 and p 31. The European Council encourages the Member States to enable Europol in cooperation with Eurojust to play a key role in the fight against terrorism by ratifying and effectively implementing the necessary legal instruments by the end of 2004, encouraging good cooperation between their competent national authorities and Europol and providing all necessary high quality information to Europol in due time. See also article III-276 CT which specifies the tasks of Europol.

be used instead of the present third pillar instruments (framework decisions, decisions and common positions).¹³⁵ European laws and framework laws are directly applicable and can have direct effect, features that third pillar instruments have not had. Furthermore, European laws and framework laws can be decided by qualified majority decisions while, in general, framework decisions need to be decided by unanimity. However, concerning operational cooperation between authorities it is stipulated in article III-275.3 CT that the Council shall act unanimously after consulting the European Parliament.

When drafting the CT there were discussions concerning how the operative cooperation could be further improved in order to fight terrorism in a more effective way. According to article III- 261 CT a permanent committee in the Council (COSI) shall be established. COSI shall have the task to deal with questions concerning internal security. The committee shall also play a key role when applying the solidarity clause. However, the working group emphasised that there ought to be a clear distinction between the legislative and the operative tasks concerning police and judicial cooperation, in order to make it clear when the Council acts as a legislator and when it performs executive functions.¹³⁶

The discussions are still going on concerning the existence of COSI and its tasks. The Swedish national police board emphasises that information exchange is the basis of all operative police cooperation. Due to the transparency policy of the Council, which means that the documents are accessible to the general public, there will be difficulties in exchanging operative information in COSI.¹³⁷ The discussions have been complicated due to the fact that there are different ways of defining operative abilities or powers amongst the different Member States. Some Member States are of the opinion that all tasks that are not legislative tasks are to be defined as operative ones while other Member States are of the opinion that operative activity is the labelling of more specific assignments.¹³⁸ Furthermore, there might be problems in the distinction of the tasks of COSI in relation to Eurojust, Police Chiefs Task Force, CEPOL and especially in relation to Europol, whose tasks according to article III-276 CT are to handle “The coordination, organisation and implementation of investigative and operational action carried out jointly with the Member States' competent authorities or in the context of joint investigative teams, where appropriate

¹³⁵ Jörg Monar, *Justice and Home Affairs*, JCMS vol.412003 p 132.

¹³⁶ Ds 2003:36, *Europeiska konventet om EU:s framtid* pp 85.

¹³⁷ Rikspolisstyrelsen, remissvar 2005-03-21 INT-009-274/05 ang.

Departementspromemorien *Fördraget om upprättande av en konstitution för Europa* (Ds 2004:52) del 1-4, pp 4.

¹³⁸ Erik Wennerström, LL.M. Director for International Relations, Ministry of Justice, Stockholm 050511.

in liaison with Eurojust”. The vague scope of COSI can therefore lead to inefficiencies in the work of the other different organs.¹³⁹

4.2.2 The effects of the solidarity clause in relation to operative police cooperation

Over the past years the EU has increased its role in police cooperation and the Hague programme states that this development will continue with the firmer establishment of a common area of FSJ by the CT.¹⁴⁰ There are two differences regarding the application of the solidarity clause in relation to ESDP and police cooperation.

First of all, police cooperation is mainly intended to be employed to secure the internal security within EU. By using the same categorisation as the one above, it can be concluded that police cooperation in relation to the solidarity clause is likely to be used in two situations namely *internal fend-off measures* and *consequence management measures*.

Secondly, unlike the ESDP field, there are instruments that the EU can employ within the area of FSJ. It is therefore likely that a decision in this field will be reached at the EU level and that the margin for bilateral arrangements is not as wide. This is illustrated by the fact that information exchange, essential for operative missions, in the CT will be done on the basis of European laws or framework laws decided by qualified majority. Furthermore, the coordination of the solidarity clause and internal security in general is going to be handled by COSI on an EU level.

The Swedish National Police Board has held that although there is a need for a further development of police cooperation within the Union it is important that national interests are secured.¹⁴¹ The question arises as to where the dividing line is between the Unions and the Member States competences. In this regard it is important to notice the content of article I-5.1 CT which states that “The Union shall respect the equality of Member States before the constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local selfgovernment. *It shall respect their State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.*” (added emphasis).

¹³⁹ Rikspolisstyrelsen, remissvar 2005-03-21 INT-009-274/05 ang.

Departementspromemorierian *Fördraget om upprättande av en konstitution för Europa* (Ds 2004:52) del 1-4, pp 4.

¹⁴⁰ The Hague Programme, *strengthening freedom, security and justice in the European Union*, Brussels, 5 November 2004 p 11.

¹⁴¹ Rikspolisstyrelsens remissvar. See also Ds 2003:36 *Europeiska konventet om EU:s framtid* p 87 The Swedish government has argued that since police issues are so closely linked to national interests it should be, as a main rule, up to the national state to determine how the police force shall be organised as long as it is organised in a way that makes it possible to take part in the international cooperation.

The Swedish National Police Board finds that there is not a clear division between the competence of the Union and the Member States. Article 5 speaks of *national security* while article III-262 states that the Member States responsibility of maintaining law and order and protecting the *internal security* which can refer to the Unions internal security. The lack of definitions might according to the Swedish Police Board lead to future application problems.¹⁴²

In the event of a terrorist attack the solidarity clause probably will not cause any implications in this respect due to the fact that it is up to the Member State which is the subject of the terrorist attack to ask for assistance. However, the first sentence of subsection a) in the solidarity provision states that the Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to *prevent the terrorist threat in the territory of the Member States*. From the wording of that sentence EU instruments can be employed externally in order to eliminate breeding grounds for terrorism as mentioned above. However, it is also possible to interpret the same sentence as using EU instruments in order to prevent terrorist threats *in* the territory of a Member State. In that latter context, since the above referred sentence does not include the criteria of a Member States request for assistance, it can be concluded that the solidarity clause might stand in conflict with the Member States' exclusive right to territorial integrity and national security in article I-5 CT. However, there are other safeguards in the CT to ensure that the territorial integrity remains the competence of Member States e.g. article III-277 which states that "A European law or framework law of the Council shall lay down the conditions and limitations under which the competent authorities of the Member States referred to in Articles III-270 and III-275 may operate in the territory of another Member State *in liaison and in agreement with the authorities of that State*. The Council shall act *unanimously* after consulting the European Parliament." (emphasis added). Furthermore, all Member States have a veto regarding operative measures since these shall be decided unanimously. Finally, the territorial integrity is ensured by the fact that that only Member States, and not the EU, have coercive measures.

In conclusion, even if other provisions in CT aims to ensure the territorial integrity the Swedish National Police Board's point is well founded. If terms like *internal security* and *national security* appears in provisions with similar objectives, application problems might be the result. In this context the solidarity clause does not necessarily help to resolve ambiguousness in relation to territorial integrity.

¹⁴² Rikspolisstyrelsens remissvar. However, see the non-exhaustive list of what the international security shall entail in relation to COSI, The Council of the European Union discussion paper on the future Standing Committee on Internal Security (COSI)-Constitutional Treaty, art III-261 6622/05, Brussels, 21 February 2005 <http://www.statewatch.org/news/2005/may/6626.05.pdf> (050531)

5 Is the solidarity clause a step towards a constitutionalisation of the EU?

The solidarity clause has been established and derives its legitimacy from the Heads of States of each Member State, as a political obligation since the 25th of March 2004 and as a treaty provision since the 17-18th of June 2004. Thus, the solidarity clause is indisputably valid under international law and the principle of *pacta sunt servanda*. The way to fulfil the solidarity clause, as touched upon above, is for each Member State to decide and the solidarity provision does not extinguish the Member States responsibilities in accordance with other treaties.¹⁴³ Consequently, there exists a plurality of rules in the legal fields that the solidarity clause covers. The solidarity clause has not eliminated the risk of conflicting norms. As mentioned above the Kelsenian theory does not provide any solutions for the conflicts that might arise from a pluralistic view. In a formal sense the solidarity clause does not have the features of a constitutional provision if one holds the CT to be a treaty.

In the perspective of material legitimacy and the theory of popular sovereignty, it can be concluded that the solidarity clause is not a product of the will of the European people. As mentioned in chapter 2 in this thesis, it can be argued that there is no European demos, no sense of belonging to one polity within EU. There is no common press or shared political parties in which the European citizens can act jointly and express themselves. Consequently, the solidarity clause cannot be considered as a step towards a European state based on common goals and values. Furthermore, according to article III-276 CT, no coercive measures are transferred to the EU in order to secure the popular will.

On the 15th of February 2003 the largest demonstration in history took place and was carried out by the popular opposition to the war in Iraq. The four most important venues were all located in coalition countries, namely Rome, Barcelona, London and Madrid.¹⁴⁴ Even though governments have a mandate to govern a country under a certain period of time and cannot base their decisions on demonstrations and the temporary expression of public opinion, demonstrations like the above mentioned clearly indicates that there might be a problem as to the legitimacy of the government's action. Due to the fact that the solidarity clause mainly focuses on the horizontal relationship between the Member States and with experience of the war in

¹⁴³ Similar provisions is part of international treaties (see article V Brussels Treaty and article 5 North Atlantic Treaty). Those mutual defence clauses have not transformed the treaties they are a part of into constitutions.

¹⁴⁴ Erik Jones, *The politics of Europe 2003: differences and disagreements*, Industrial Relations Journal vol.35 Blackwell Publishing Ltd. 2004 pp 489.

Iraq in mind, it is likely that a future application of the solidarity clause will depend on the political climate and the interest of maintaining good international relations.

The horizontal application of the solidarity clause will also give rise to implications in the perspective of constitutionalism. The solidarity clause does not confer rights on the individuals and is not likely to provide individuals the right to invoke the solidarity clause in national courts. Although the ECJ can exercise jurisdiction of the solidarity clause in a formal sense the actual impact of that jurisdiction is uncertain. As mentioned above, in accordance with the political question doctrine and the previous approach of the ECJ concerning political issues, ECJ might decline to act as a supreme authority in relation to the solidarity clause leaving its interpretation to the political institutions.

As been witnessed after the previous terrorist attacks, measures used in the combat against terrorism are likely to affect rights of individuals.¹⁴⁵ There is a substantial risk that human rights and the rule of law will not be secured on a EU level due to the fact that ECJ is likely to be reluctant to exercise jurisdiction in relation to the solidarity clause. In this sense from a constitutional perspective, it would be better for the individuals if ECJ could secure their rights by applying the solidarity clause vertically. However, from the wording of the provision such an application is not easily made.

Consequently, the solidarity clause can not be considered as a provision containing constitutional elements either in a formal or material sense.

Finally, from a literal point of view a prerequisite for mutual assistance provision, like the solidarity clause, is that there does not already exist unified means of resources. A solidarity clause is not likely to be a part of a constitution in a traditional sense. Because a sovereign state has taxing rights all the resources in a country belongs to the sovereign state and is divided by parliament in relation to the country's needs. Therefore, a solidarity clause has no function in a constitution and can never be a step in a constitutionalising direction.

¹⁴⁵ http://www.quickresponse.nu/veckans_nyheter/day.asp?ar=2001&vecka=46 For instance in Sweden freezing of bank accounts belonging to Somlian citizens on the request of U.S authorities raised attention in the media.

6 Concluding remarks

There is no simple and clear answer to the question of the effects of the solidarity clause. The solidarity clause illustrates that the dividing line between law and politics is not always clear.¹⁴⁶

Concerning the *transition of the solidarity commitment, from a political obligation to a legal rule*, it can be concluded there are divided opinions concerning whether the obligation of solidarity today exists only as a political obligation. According to case-law there is an existing principle of solidarity which is enforceable but with a content that differs from the solidarity clause. In the literature the principle of solidarity is defined as an institutional principle with a horizontal application similar to the solidarity clause. If the latter interpretation is correct it would mean that the solidarity commitment today exists as both a political obligation and an enforceable principle of solidarity. However, if the former interpretation from ECJ's case-law shall be considered as predominant the solidarity obligation is today strictly political and not legally enforceable. However, in any case the solidarity clause fulfils the formal requirements to become a legally binding treaty provision once the CT is ratified by all the Member States.

Since the solidarity clause has never been used in practice it is difficult to establish *the actual scope* of the provision. The specific and exact scope of the solidarity clause will probably not be clear until a specific threat situation occurs in Europe.¹⁴⁷ The solidarity clause is widely and generally defined, which makes the provision flexible and easy to adapt to different situations. However, it might also lead to some undesirable implications. Its content leaves many questions yet to be answered. For instance it is difficult to predict which *situations* the solidarity clause actually will cover. As a result some confusion might arise concerning which situations a Member State has a rightful claim to assistance. The absence of a unified definition of terrorism can make the solidarity clause flexible to political changes in the view of what terrorism entails. However, if the provision shall be the basis for police and military action there needs to be a certain degree of legal certainty as regards to when those measures can come in to play. Without a unified, manifest and concrete definition of what a *terrorist threat* or a *terrorist attack* is in relation to the application of the solidarity clause there will be an unfortunate lack of legal certainty.

The solidarity clause does not give clear guidance concerning its *territorial application*. From the wording of the first subsection of the provision, which states that the Union shall mobilise all instruments at its disposal to *protect democratic institutions and the civil population from any terrorist*

¹⁴⁶ E.g. the mutual defence clause in article I-41.7 CT and the solidarity clause covering the same area but contain different legal and political implications.

¹⁴⁷ Hélen Jarlsvik , Maria Oredsson p 9.

attack, it can be concluded that the application of the solidarity clause is not necessarily restricted to the territory of the EU or the protection of EU citizens. It is unclear from the reading of the provision if the solidarity clause also applies to situations where there is no direct link to a threat directed towards the EU or its citizens.¹⁴⁸ From the wording it is even theoretically possible to apply the solidarity clause to preemptive strike situations. However, due to the present scepticism amongst the Member States in general the ECJ will probably not find preemptive strikes to be covered by the solidarity obligation.

Thus, another unanswered question is how *far reaching and obliging* the solidarity clause will be for the Member States. It is unclear whether an action based on the solidarity clause will depend on a prior decision on the EU level or if it can be handled through bilateral agreements. Article III-329 CT stipulates that the Member States shall coordinate between themselves in the Council before assisting another Member State, which indicate that the solidarity clause can not be applied merely on a bilateral basis outside the EU framework. It can be argued that a decision on the EU level is a precondition to fulfil the wording of the provision that the Member States shall *act jointly* and that the *union* shall mobilise all instruments. However, it is possible to come to a different conclusion, namely that a decision on an EU level is incompatible with the wording of the annex to the constitution. The wording of the annex to the constitution gives the impression that the Member States are free in the sense that they fully control which means shall be used in order to fulfil the solidarity obligation towards the other Member States. A prior decision at the EU level, depending on how it is formulated, can be considered as an infringement on the Member States freedom to choose the means independently.

Since the solidarity clause is so vague and lacks preciseness the provision is not likely to have *direct effect* and consequently individuals will not be able to invoke the provision before a national court. Even if the solidarity clause was a sufficiently clear, precise and unconditional provision a national court would still have problems in applying the solidarity clause due to the fact that it entails a wide range of different instruments, including foreign policy issues. Furthermore, the ECJ has illustrated in its case law that it is reluctant to deal with political issues. In accordance with the political question doctrine, it is not very likely that the ECJ will deal with foreign policy issues in the future. Instead, there might be a division in ECJ:s jurisdiction between the ESDP field and the other legal fields in relation to the solidarity clause. However, article I-43 CT has not in any part been exempted from the ECJ:s jurisdiction and it is therefore theoretically possible that ECJ in the future might deal even with ESDP issues in relation to the solidarity clause.

¹⁴⁸ However, the initial part of the provision stated that the Member States shall act jointly in the spirit of solidarity *if a Member State is the object* of a terrorist attack, which could lead to the interpretation that there needs to be a concrete link to a Member State in order for the solidarity clause to apply.

The loyalty provision is an illustrative example of how an obligation can have a greater future effect than was expected when it was drafted.¹⁴⁹

It is difficult to predict *the actual future impact* of the solidarity clause for Sweden (or other Member States for that matter). The factual development of the solidarity clause will depend on different factors, especially future events in the field of terrorism. Since the European Council has emphasised that there is a need for the solidarity clause to become concretised there is a margin for a *de facto implementation*. An example is the above mentioned EU Solidarity Programme, which isn't legally binding yet. The point that needs to be stressed is that the solidarity clause can actually be given a certain meaning in various legal fields before it is implemented in accordance with article III-329 CT.

From the wording of the solidarity clause it will, concerning *ESDP*, be difficult to maintain the Swedish non-aligned policy. A situation can arise where the only assistance requested is military assistance. Since the sole way to fulfil the solidarity commitment is to obey the request, the annex stipulating the voluntary basis for means of assistance will not come into play. Consequently, Sweden has accepted what might become a formal legal rule containing a general obligation of mutual assistance, with no exemption, and with potential military implication as a result. The governments distinction between Sweden being a political and moral ally of the EU and legally non-aligned is in this perspective difficult to uphold.

The impact of the solidarity clause concerning *police cooperation* will probably not be that extensive. The CT as such provides for an extensive development in the area of FSJ. However, the interpretation of the wording of the solidarity clause can open up for possibilities of using EU instruments in the territory of a Member State under the pretext of an existing terrorist threat towards the territory of the Member States of the Union. Such an interpretation can give rise to difficulties in establishing the division of competences between the Union and the Member States, and ultimately be in conflict with the national identity of the Member States formulated in article I-5 CT.

As to the discussion of *Europe moving towards in a constitutionalising direction* it can be concluded that due to several reasons the solidarity clause is not a step in that direction. First of all, the very existence of a mutual assistance obligation indicates that there needs to be a division of resources which, in event of a terrorist attack, shall be transferred to the EU for a common cause. Since the Union does not have any independent taxing power over individuals and corporations such a division of resources

¹⁴⁹ Eric F Hinton p 320, refers to Leo Flynn, the Private Enforcement of Constitutional Norms Against Private Parties: Observations from the European Union's Experience. It is probable that the loyalty provision was not seen by the founders of the Community as more than a political statement.

exists.¹⁵⁰ A similar solidarity clause is unlikely to be found in a national constitution due to the fact that a sovereign state handles all the country's resources, which are then divided by Parliament in accordance with the country's needs. Thus, all the resources are unified and therefore there is no need to have a mutual assistance clause stating that all the cities in a country shall transfer resources in event of a terrorist attack in another city in the same country.

Secondly, the solidarity clause is not part of a constitution that excludes the application of all other Member States' existing constitutions. The provision itself does not stipulate a specific unified application, rather the opposite it leaves these decisions in the hands of the Member States. The solidarity clause respects the obligations some Member States have derived from other international agreements thus strengthening the intergovernmental character of the EU.

Thirdly, the solidarity clause will not have a similar function as the loyalty provision to fill gaps and ensure the efficiency of Community law. The solidarity clause does not explicitly confer rights on individuals and is not likely to have direct effect. The solidarity clause has mainly a horizontal dimension regulating the relationship between the Member States. As a consequence of the fact that ECJ has jurisdiction, there is in a formal sense a possible vertical dimension of the solidarity provision regulating the relationship between the Union and the States. However, in retrospect considering the previous case-law of the ECJ as well as the political question doctrine, ECJ will probably not exercise its extended jurisdiction especially in relation to foreign policy issues. Therefore, the vertical dimension might not be very substantial in reality.¹⁵¹ Consequently, there is a substantial risk that human rights and the rule of law, which might be affected by the solidarity clause, will not be sufficiently secured. In the general discussion amongst EU critics, maintenance of national sovereignty and the promotion of intergovernmental cooperation instead of participating in a supranational order have been argued as means to secure the individuals' rights.¹⁵² Ironically, in relation to the solidarity clause the individuals' rights would likely be better secured in a more supranational structure with ECJ as the supreme authority even in these issues.

¹⁵⁰ Eric Barendt, p 83 The lack of taxing right is one of the elements that the Union differs from a typical federation.

¹⁵¹ However, if the ECJ would deter from previous case-law and give the solidarity clause a more vertical aspect there is a theoretical possibility from a legal point that a Member State could be held liable to pay damages for refusing to provide the requested assistance. In other words, if Sweden does not send military assistance, and if that is the only aid requested, there is a possibility that Sweden would have to pay damages for infringing the solidarity clause.

¹⁵² See Vansterpartiet's discussion concerning how the EU politics concerning economic issues is contradictory to women's right to non-discrimination.

http://www.vansterpartiet.se/PUB_EuEmu/217.3887.cs (050616)

In the 1950:s there were plans for creating a more political Community.¹⁵³ The same tendencies are now becoming discernible. The solidarity clause can be seen as illustrating a higher degree of politisation within the Union. Implementing the solidarity clause in the CT can clearly manifests a will of the Member States to develop the notion of solidarity in to something more substantial and concrete. However, the different descriptions used in relation to the solidarity clause, indicates that there might not be a unified clear will amongst the Member States to give the provision a substantial content, or at least not a unified opinion of what the content shall entail. The solidarity clause illustrates the problems of seeking common ground in the legislative process by compromising on clear obligations.

As Hobbes would put it, “Unnecessary Lawes are not good Lawes; but trapps for Mony: which where the right of Sovereign Power is acknowledged, are superfluous; and where it is not acknowledged, insufficient to defend the People”.¹⁵⁴

¹⁵³ Hazel Smith, p 43. In October 1950 France proposed setting up a European army that would be fully integrated under supranational control. A European Political Community should be established in order to exert democratic control over such an army. Ironically, in 1954 France was the only Member State that refused to ratify the European Defence Community Treaty, which included the establishment of the European Political Community. Therefore the European Political Community never became a reality.

¹⁵⁴ Hobbes Leviathan p 240.

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