



Migration and terrorism: the new frontiers for European solidarity

by Roderick Parkes

In the hours after the terrorist attacks in Paris, there was speculation that the French government might trigger the EU's 'solidarity clause', Article 222 of the Lisbon Treaty (TFEU), to secure mutual support. Just days earlier there had been speculation that 222 might be triggered in a separate case, by south-eastern member states seeking help with refugee flows. In the end, the crisis-hit governments all desisted – France resorting to Article 42.7 (TEU), the EU's mutual defence clause. But the apparent relevance of the solidarity clause to a range of home affairs problems with roots outside the EU raises questions about why it might be triggered – and what its effect might be.

Come 222: the origins

EU governments have traditionally taken a proactive approach to the problems facing their territory. They have deployed diplomatic, developmental and security missions across the EU's eastern and southern neighbourhood so as to deal with problems at the source. By cooperating with third countries in this way, they all but eliminated the threat of armed state aggression. No longer needing to prepare for risks to the homeland such as invasion or the fallout from a nuclear attack, EU member states were able

to 'civilianise' and lift border controls; they also shifted control of civil-protection systems from the army to local fire and ambulance services, and tailored them to a limited range of residual challenges such as terrorist attacks, forest fires or flooding.

It is against this backdrop that the idea for an EU solidarity clause first arose. In the wake of the 9/11 terrorist attacks, governments called for the EU to develop into a collective defence body and for it to formulate 'its own Article 5' echoing NATO's defence clause. But some policymakers felt the proposal was old-fashioned. The likelihood of war and invasion was remote, and the main threat to European territory came instead from a small number of *non-state* forces such as terror networks or the environment. They therefore proposed an alternative focus for mutual support in the EU: a member state facing a terrorist attack or other large-scale disaster such as a chemical spill or flood should be able to call on support – including civilianised military elements – from other members.

This idea eventually found form in Article 222 of the Lisbon Treaty. Building on the language used by the European Council in the wake of the terrorist attacks in Madrid in March 2004, this



solidarity clause provided a mechanism-of-last-resort atop the EU's burgeoning civil-protection apparatus, which today includes the Council's Integrated Political Crisis Response (IPCR) arrangements and the Commission's Civil Protection Mechanism (CPM). (The IPCR serves to expedite decision-making between member states during a crisis, while the CPM coordinates crisis-response across all EU member states as well as non-EU members including Iceland, Turkey, Serbia and the former Yugoslav Republic of Macedonia.) This apparatus has proved effective, and Article 222 has never been triggered – yet.

Article 222 TFEU: the solidarity clause

1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:

(a) - prevent the terrorist threat in the territory of the Member States;

- protect democratic institutions and the civilian population from any terrorist attack;

- assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;

(b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.

2. Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.

3. The arrangements for the implementation by the Union of the solidarity clause shall be defined by a decision [...]

4. The European Council shall regularly assess the threats facing the Union in order to enable the Union and its Member States to take effective action.

The EU's external security environment is, however, changing fast. This is reflected not just in the scale of the EU's home affairs problems, but

in their nature. The threat of state aggression has returned. Though EU members are still not at imminent risk of attack by another state, the growing use of 'hybrid warfare' in conflicts such as Ukraine's suggests that third countries might mobilise non-state forces to launch destabilising actions within the EU. Moreover, the terrorist group turned 'proto-state' the Islamic State of Iraq and the Levant (ISIL) is carrying out attacks in Europe in pursuit of its jihadist goals. All this blurs the distinction between state and non-state threats and, in turn, between Articles 42.7 and 222.

Furthermore, Article 222 has become relevant to problems not foreseen by its drafters. For instance migration flows did not, until recently, create strains on the EU in any way comparable to a natural disaster or a terrorist attack. Member states were able to dissipate the impact of migration by tackling its root causes at source and by spreading its effects more evenly. (They relocated refugees away from 'frontline' states like Malta, and harmonised their asylum standards so that refugees did not head *en masse* to the most favourable member state.) But today the large numbers of refugees fleeing war in the neighbourhood is placing acute strain on the EU's border zones, and the numerous illegal migrants who fall outside Europe's refugee-relocation schemes and are proving hard to expel.

Call 222: the Implementing Decision

Hostile developments outside the EU are thus creating new threats to the Union's internal security. This external context has, moreover, become harder to address. Conflict resolution in countries like Syria or Ukraine will require a combination of robust diplomatic pressure, massive financial investment, and military support or deterrence. Faced with this demanding environment, some member states are redeploying internally means which they formerly used abroad. Development funds are being used to welcome refugees, for instance, and naval and military capabilities are employed in border control. The 'outside' has come 'in'.

Against this backdrop, member states have sought clarity about Article 222. Most governments would like a solidarity clause which spurs a robust collective response to the new range of internal security crises facing the EU. But some have expressed concern that Article 222 might oblige them to respond to an internal security crisis by participating in risky interventions overseas. Others worry that they could be pressed into using at home tools of the kind they usually reserve for hostile situations

overseas. (A crisis-hit government might trigger the solidarity clause in response to a terrorist attack, for instance, and be offered the use of gendarmes or soldiers, potentially contravening national norms on the use of force on their own territory).

To address these fears, the EU has drafted secondary legislation. The Implementing Decision (2014/415/EU) addresses in detail the territorial scope of Article 222, and thereby the tricky question whether the solidarity clause might be applied to situations outside of the EU. The answer is that it does not: although a member state could trigger the solidarity clause in response to a disaster which has its *origins* outside the EU, the disaster itself must be on the territory of a member state, as must the collective response. Moreover, although the EU's foreign policy apparatus should be involved in implementing Article 222, it is to play a non-operational and principally informational role. The main task of the European External Action Service and HR/VP is to report on the external causes and effects of the crisis.

As to the policy tools which can be mobilised inside the EU, the Implementing Decision sets one main proviso – namely, that the crisis-hit member state has exhausted all resources available to it, both at the national level and through the EU's usual civil-protection apparatus. Thus, in the case of the migration crisis, the activation of the solidarity clause would only occur once the resources dedicated to the EU's new 'hotspot' border arrangements in the Balkans were exhausted. This would also have to be the case for the blankets, tents and camp beds pledged by at least 13 member states to Croatia and Slovenia under the CPM.

Lastly, the Implementing Decision lays down the procedure for invoking and implementing the solidarity clause. It requires for the political authorities of the crisis-hit state to declare their intention to trigger the clause to the rotating Presidency of the Council of the EU and to the Emergency Response Coordination Centre (the ERCC, situated in the Commission's humanitarian aid and civil protection department). The Council then coordinates the political and practical response. The Decision thus places the crisis-hit member state in the driving seat, ensuring that it will not be subject to

unwanted pressures to accept aid. But the Decision also prevents a member state from triggering the clause simply because it has not adequately built up its own national defences.

Catch 222: the link to CSDP

In the past weeks, member states have twice come close to activating Article 222. In late October, EU members experienced severe backlogs in their asylum-reception systems. This prevented refugees from moving up through transit countries Serbia and the former Yugoslav Republic of Macedonia, and created bottlenecks at points along the EU's south-eastern border.

Despite the strain, however, no member state triggered Article 222: the Commission quickly responded to the problem, carrying out a needs assessment. More funds were deployed to the Slovenian border, along with a contingent of police officers. More pertinently, it was also clear that the CPM was more relevant to addressing the Balkan bottlenecks than was the solidarity clause, since it includes non EU-members.

This lack of an external dimension to the solidarity clause also appears to have ruled out its application in the aftermath of the Paris attacks. The French government had not exhausted its own civil-protection capacity (as required by the Implementing Decision) and, more significantly, it wanted a form of support which lay beyond the clause's remit: military intervention outside the EU. This is one of the reasons why France instead employed Article 42.7, the so-called EU defence clause.

These two real-world cases raise questions about how the EU manages internal security shocks having root causes outside its territory and, more specifically, whether it is possible to link the solidarity clause with the EU's Common Security and Defence Policy (CSDP).

A legal mismatch currently hampers coordination between CSDP and the solidarity clause: if the clause is triggered, the EU's response must be confined to the territory of the member states; CSDP operations, by contrast, can be deployed only *outside* the Union.

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This legal separation between ‘inside’ and ‘outside’ is not entirely clear cut, of course. A member might try to trigger the solidarity clause if an overseas embassy is bombed by terrorists, say, or a consulate is managing a large-scale evacuation of citizens. It might even try if a ship flying its flag is subject to piracy or one of its commercial airlines is hijacked over the high seas. But such attempts would probably fail, as the Decision seems to rule out interpreting ‘member state territory’ in this broad manner.

Article 42.7 TEU: the defence clause

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. [...]

Nevertheless, CSDP might still come into play under Article 222. If military resources are deployed *inside* the EU, the decision-making and coordination structures of CSDP could play a helpful role. The Implementing Decision leaves much discretion to individual members here. It is they who decide what resources to make available in a crisis. (The Decision covers only the Union response and in no way encroaches upon the member states’ right under Article 222.2 to organise themselves as they see fit). But the Commission and High Representative would nevertheless be charged with seeking out all national resources of potential relevance, and the EU’s Military Staff could help coordinate the use of any military means.

Furthermore, an overseas CSDP mission might be set up as an *external complement* to the EU’s internal response. If Article 222 were invoked during the ongoing migration crisis, for instance, an existing CSDP mission in a country of origin might readily be repurposed. (The EU has, for instance, strengthened its EUCAP SAHEL Niger mission to control migration flows.) A CSDP mission might also be established along a transit route into the EU, as was the case with a EUNAVFOR mission which was created this year to patrol the international waters of the Mediterranean. With temperatures now dropping in the Balkans, there will probably be a discussion about whether a CSDP mission could play a civil-protection role close to home if the CPM’s capacities there were to be exhausted.

Beyond 222: solidarity as everyday practice

Does the EU actually have in place a solidarity article well-suited to today’s challenges? The EU’s security environment is drastically shifting, and the Union needs to ready itself for two different classes of internal security threat. On the one hand, the European homeland faces threats of a genuine non-state character, such as flooding, forest fires or industrial accidents. The EU can address these by means of civil-protection mechanisms. On the other, there are the terrorist attacks, man-made disasters and incidences of inter-state aggression, all increasingly directed by hostile foreign players. The response here will likely stretch to diplomatic and even military intervention abroad.

It would therefore be sensible for the EU to adapt its mutual-support Articles, paying particular attention to the link between CSDP and the solidarity clause. But expanding Articles 222 and 42.7 to cover too much might also bear risks. If mutual support is supplied by members only as a high-profile act under one of the Articles, solidarity will become a commodity and an object of trade-offs. A member state might, for instance, ‘cash in’ its show of solidarity in one crisis in return for support in another. Such transactions could cause political gridlock and even invite manipulation by third parties. A hostile actor could, for instance, create threats which fall between the legal fault-lines of Articles 222 and 42.7 or which sit tantalisingly below the threshold for triggering a clause.

Even more important than bolstering the two clauses, therefore, is the task of relegating them to the background. Articles 222 and 42.7 are designed as tools of last resort: the EU has workable everyday solidarity mechanisms integrated throughout its whole policy repertoire. These mechanisms consist of preventive external action to anticipate risks and eliminate them at source, and joint internal action designed to soften the impact of disasters inside the EU.

To this end, a rather overlooked section of the Implementing Decision may come in handy. It concerns the possibility of creating joint European threat assessments, and permits the European Council to request reports from the relevant EU institutions and agencies on risks it deems significant. This could provide the basis for a more anticipatory crisis response.

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