

**THE LEGALITY OF THE NEW FUNCTIONS OF
THE WESTERN EUROPEAN UNION
THE ATTRIBUTION OF POWERS RECONSIDERED ON
THE OCCASION OF THE 50TH ANNIVERSARY OF
THE BRUSSELS TREATY**

Ramses A. WESSEL

Research Fellow, Department of the Law of International Organizations
Utrecht University

1. Introduction

Ever since the attempts in the 1950s to increase defence cooperation between Western European states in a manner surpassing intergovernmental cooperation proper, and independent from the Northern American partners, the issue from time to time reappeared on the political agenda. After 1954, it seemed as though the application of the concept of supranationality to issues concerning foreign policy and defence, the core of the state, has been too ambitious, Western European states turned their attention to less binding forms of cooperation. In the European Community in particular, "European Political Cooperation" (EPC) developed into a useful forum within which to coordinate the often divergent foreign policies of the member states. However, attempts to extend EPC to defence issues failed, and the Single European Act of 1986 only provided that "closer co-operation on questions of European security would contribute in an essential way to the development of a European identity [...]", although at the same time the treaty partners were "ready to co-ordinate their positions more closely on the *political* and *economic* aspects of security."¹

The most recent phase of this ongoing quest to consolidate Western European defence cooperation saw the light of day on November 1st, 1993, with the entry into force of the Treaty on European Union. A closer defence cooperation is planned to take place in three stages: 1° currently by requesting the Western European Union (WEU) to elaborate and implement decisions and actions of the Union which have defence implications (Art. J.4, 2); 2° "eventually" the establishment of a *common defence pol-*

¹ Single European Act, Article 30(6a), emphasis added.

icy; 3° which "in time" could lead to an actual *common defence* (Art. J.4, 1). This shows that now defence issues are for the larger part still carefully kept out of the European Union. The Western European Union was rediscovered as a means of overcoming the unwillingness of certain member states to add defence cooperation to the range of new issues the European Union has been allowed to handle since its creation. The Treaty of Amsterdam of 2 October 1997 confirmed this situation. Article 17 (of the consolidated version) of the new Treaty on European Union provides that the European Union will avail itself of WEU to elaborate and implement decisions and actions of the Union which will have defence implications.

WEU's reaction to the sudden jacking up of its status can be found in a special declaration annexed to the Maastricht Treaty: "WEU is prepared, at the request of the European Union, to elaborate and implement decisions and actions of the Union which have defence implications."¹ WEU wasted no time before taking the opportunity to increase its role and in June 1992 the WEU Council of Ministers adopted the "Petersberg Declaration"², in order to redefine its objectives and possibilities. In this declaration WEU stresses its potential to implement conflict prevention and crisis management measures taken in the framework of the CSCE/OSCE or the United Nations. The necessary strengthening of its operational role is reflected in the fact that military units operating in the framework of WEU could be employed for humanitarian and rescue tasks, peace keeping tasks, and tasks of combat forces in crisis management, including peace-making. These "Petersberg tasks" then found their way into the Treaty of Amsterdam. After the entry into force of this treaty, these tasks may officially be subject of a decision of the European Union (in which case the Union "will avail itself of WEU").

The question can be posed as to whether WEU, in extending its functions to peace-keeping and even peace-making, is not acting *ultra vires*. After all, while *states* are free to act as long as this is in accordance with international law, *international organizations* are competent to act only as far as powers have been attributed to them by the member states (the doctrine of attributed competences).³ This chapter will address the question of whether the modified Brussels Treaty allows for the implementation of those new tasks that were assigned to WEU by itself.

¹ Declaration on the role of WEU, adopted in Maastricht, December 1991. See for the WEU documents: Arie BLOED and Ramses A. WESSEL, *The Changing Functions of the Western European Union (WEU) Introduction and Basic Documents*, Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1994.

² BLOED and WESSEL (1994), Document 29.

³ H. G. SCHERMERS and N. M. BLOKKER, *International Institutional Law*, The Hague, 1995, 3rd revised edition, p. 141.

2. From Collective Defence to Collective Security

The modified Brussels Treaty of 1954 encompasses cooperation commitments in the economic, social and cultural fields, while at the same time providing for a collective defence arrangement. The reference to German aggression in the original treaty of 1948 was replaced by the more neutral intention "to promote the unity and to encourage the progressive integration of Europe." Despite the intention of the treaty to deal with almost all aspects of European integration at the same time, the defence aspect of WEU is effectively the only side which has not been subsequently abandoned. The developments in other European organizations (European Community, Council of Europe) resulted in the fact that the initial nucleus of the modified Brussels Treaty – Article v, concerning collective defence – remained as the most important responsibility for WEU. Article v provides:

"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 provisions 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."¹

Despite the fact that this provision leaves some room for the member states to decide to what extent they will afford military and other aid ("in their power"), the article is more compelling than its counterpart in the North Atlantic Treaty. After all, Article 5 of the NATO-Treaty leaves the choice of means to the discretion of the member state: "... such action as it deems necessary, including the use of armed force...". There, military assistance is just one of the possible actions available to NATO.

Nevertheless, WEU was never given the opportunity to build-up a military organization comparable to NATO to make Article v operational. Ever since the 1950s WEU's fate depended on the developments that took place in the European Communities and the connected European Political Cooperation (EPC). In 1984 the failure of the 1981 "Genscher-Colombo initiative" to place defence issues under the umbrella of EPC led President Mitterrand to take an initiative to reactivate WEU², but it took until 1988 before the organization embarked on its first course: operation "Cleansweep", a mine-hunting operation in the Persian Gulf.³ Military contributions were made by France, the United Kingdom, Italy, Belgium and the Netherlands, while the Federal Republic of Germany and Luxembourg supported the action in other ways.

¹ BLOED and WESSEL (1994), Document 1.

² See the Communiqués of the WEU Council meetings in Paris (12 June 1984), Rome (26-27 October 1984) and Bonn (22-23 April 1985); the last two are published in BLOED and WESSEL (1994), Documents 7 and 8.

³ See BLOED and WESSEL (1994) at xxvii and Document 12.

This WEU operation had a follow-up during the second Gulf War. On 21 August 1990 the Council of Ministers met in Paris.¹ This meeting resulted in the first meeting of the chiefs of staff since 1954. It took place on 27 August 1990 and dealt with the more operational aspects. With the exceptions of Luxembourg and Germany, all WEU members contributed vessels to be used in "Operation Desert Storm".

The aim of close operational cooperation in the Gulf was to secure compliance with measures decided upon by the United Nations, to protect the forces of member states and to facilitate cooperation with other countries deploying forces in the region, including US forces. An *ad hoc* group of representatives of Foreign and Defence Ministers was made responsible for coordination in the capitals and in the region, with the support of the Chiefs of Defence Staff. The WEU Permanent Council, at the time sitting in London, monitored developments and was prepared to meet as necessary in the light of events. In the areas of action assigned to them in the region, WEU countries deployed more or less the same number of vessels as the US navy.

After the cessation of hostilities, WEU continued its mission of coordinating mine-clearance operations in Gulf waters and contributed to the humanitarian actions regarding Kurdish refugees in Northern Iraq.

This WEU action during the Gulf War enabled procedures to be tried out which were later to be used in the context of the Yugoslav crisis. The Yugoslav conflict also encouraged WEU to coordinate the activities of its members. After discussions about sending a force to protect EC observers that took place during the extraordinary meeting of the Council on 19 September 1991 within the margins of a meeting of the European Political Cooperation, the WEU Council stated on 18 November 1991 that it was prepared to take part in operations to establish humanitarian corridors, and in peace-keeping operations the moment the parties concerned agreed and a cease-fire was realized.² The Bonn meeting of 19 June 1992 reaffirmed WEU's willingness to help ensure effective implementation of Security Council resolutions relating to the conflict in the former Yugoslavia.³ Apart from these military operations, WEU was asked to assist in the administration of the city of Mostar (with *gendarmierie*-like troops),⁴ and to support the Albanian authorities in the reconstruction of the Albanian police force.⁵

¹ BLOED and WESSEL (1994), Document 16.

² BLOED and WESSEL (1994), Document 27.

³ BLOED and WESSEL (1994), Document 30.

⁴ Decision of 12 December 1994, OJ L 326, 17.12.94.

⁵ The Multinational Advisory Police Element (MAPE) was decided on by the WEU Council on 2 May 1997.

However, WEU's first military operation in Europe began on the basis of a decision taken on 10 July 1992 at an extraordinary meeting of the Council within the margins of a CSCE Summit in Helsinki.¹ This was aimed at monitoring the embargo against Serbia and Montenegro. WEU did not act in isolation: all actions took place in cooperation with (and to a certain extent under the supervision of) NATO. The Rome meeting of the Council on 20 November 1992 reaffirmed the need to ensure the implementation of the embargo², and WEU actively participated in operation "Sharp Guard".

Although none of these tasks could be seen as necessary with regard to the collective defence of the territory of the WEU member states, Ministers did not give much thought to this. The fact is that in the 1992 Petersberg Declaration they formally confirmed that functions of WEU beyond extended collective defence. Furthermore, in the Kirchberg Declaration of 9 May 1994 they asked the Permanent Council to begin work on the formulation of a common European defence policy. This was presented at the Noordwijk meeting on 14 November 1994 and is annexed to the Noordwijk Declaration. Of these "Preliminary Conclusions" some elements should be mentioned here. First of all it is made absolutely clear that a common European defence policy (CEDP) should enhance both collective defence obligations and "an active engagement in conflict prevention and crisis management in Europe and elsewhere [...]" According to the Conclusions, the execution of peacekeeping and other crisis management measures can take place under the authority of the UN Security Council or the OSCE. Second, the focus is on the need for planning requirements and operational capabilities, which at the moment are virtually non-existent in WEU. Third, apart from wishing to develop its own command and control structures, WEU misses no opportunity to declare that this is all happening, not in competition to NATO, but as a means of strengthening WEU's new status as the European pillar of NATO. The NATO Summit of January 1994³ declared in this respect that NATO forces should be "separable but not separate", meaning that units assigned to NATO may be put under WEU command, a concept reflected in NATO's Combined Joint Task Forces (CJTF). Furthermore, the infrastructure and logistics of NATO may be used in these situations. This being the case, the current development to duplicate many of NATO's operational arrangements (for instance the independent European Satellite Centre, the Planning Cell or the Military Committee) does not make too much sense.⁴

¹ BLOED and WESSEL (1994), Document 33.

² BLOED and WESSEL (1994), Document 36.

³ BLOED and WESSEL (1994), Document 44.

⁴ It is interesting to note that already in the modified Brussels Treaty it was set out that the WEU members would "work in close co-operation with the North Atlantic Treaty Organisation" and that "the Council and its Agency will rely on the appropriate military authorities of NATO for information and advice on military matters" (Art. IV).

3. Legal Bases in the Brussels Treaty for WEU's New Functions

The key question in this article is whether the modified Brussels Treaty provides enough room for WEU to justify its recent and future operations. In the law of international organizations three possibilities are usually offered for the identification of the competences of the organization. On the basis of the doctrine of attributed competences, organizations can have powers that are either explicitly attributed to them in their constituent treaty (*explicit powers*), implicitly included in the constituent treaty (*implied powers*), or developed and accepted in practice (*customary powers*).¹

A. Explicit Powers

It is perfectly clear that the modified Brussels Treaty provides no explicit basis for an implementation of the Petersberg tasks.² Article v relates to collective defence in case of "an armed attack in Europe", and lacks a competence conferring power to use WEU for other tasks. Another possibility could be found in Article VIII, paragraph 3, which provides:

"At the request of any of the High Contracting Parties the Council shall be immediately convened in order to permit Them to consult with regard to any situation which may constitute a threat to the peace, in whatever area this threat should arise, or a danger to economic stability."

This provision was referred to by the WEU Council as a basis for some of WEU's new tasks. At an extraordinary meeting in Paris in 1991 on the role and place of WEU in the new European security architecture, the Council in stressing the institutional advantages of WEU stated *inter alia*: "Its Treaty (Article VIII.3) places no geographical restrictions on its competences (which has enabled it to play a role coordinating military activities in the Gulf)".³ Article VIII.3 indeed seems to offer the possibility

¹ Cf. Niels BLOKKER, *Is the Authorization Authorized? Towards More Control by the UN Security Council over Operations by "Coalitions of the Able and Willing"*, unpublished paper, 1998.

² The need to look for explicit powers was acknowledged by the International Court of Justice in the *Nuclear Weapons (WHO)* Advisory Opinion, ICJ Reports 1996, p. 76: "in order to delineate the field of activity or the area of competence of an international organization, one must first refer to the relevant rules of the organization and, in the first place, to its constitution".

³ Extraordinary Meeting of the Council of Ministers, Paris, 22 February 1991; in BLOED and WESSEL (1994), Document 20. With respect to Article VIII.3, the text of the new WEU information booklet (drafted by the Assembly of WEU in Document 1583 on 25 November 1997) states: "[...] this clause created the framework for WEU-coordinated mine-sweeping operations in the Persian Gulf in 1987-88 and 1990-91. It also enabled WEU monitoring of the United Nations embargoes in the Gulf, the Red Sea, the Adriatic and on the Danube and would also, had the Council given its approval, have provided a basis for humanitarian operations in the Great lakes region of Africa in 1994 and 1996, at the request of France, and in Albania in 1997, at the request of Italy".

for the WEU Council to function as a forum for consultation with regard to security issues that go beyond Article v. However, the competence to coordinate military operations or the Petersberg tasks is not explicitly attributed to WEU under Article VIII.

B. Implied Powers

Competences of international organizations may however also be implicitly included in the constituent treaty. This was, for instance, recognized by the International Court of Justice when it was asked to identify some competences of the United Nations: "... the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent document [...]".¹ While the Court seems to favour a broad approach to implied powers (taking the purposes of the organization as a starting point), others have pointed to a more narrow definition. In this respect the dissenting opinion of Judge Hackworth in the *Reparation-case* is illustrative: "powers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are "necessary" to the exercise of powers expressly granted".² Regardless of the preference for either the broad or the narrow definition, doctrine holds that there are four limits to the scope of implied powers:³ 1° the implied powers concerned must be necessary and essential for the organization to perform its functions; 2° implied powers may not contradict explicit powers in the area concerned; 3° the use of implied powers may not violate fundamental rules and principles of international law; and 4° implied powers may not change the distribution of functions within an organization.

It is difficult to find a lead in the modified Brussels Treaty for further argumentation regarding an implied basis for the Petersberg tasks. Neither the purposes of the organization, nor the explicit competences seem to offer sufficient clues for WEU operations beyond collective defence, keeping in mind the mentioned criteria. The purpose in the preamble to the modified Brussels Treaty "to afford assistance to each other, in accordance with the Charter of the United Nations, in maintaining international peace and security and in resisting any policy of aggression" only confirms

¹ *Reparations for injuries suffered in the service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports 1949, p. 180. This line of reasoning was recently confirmed by the Court in the *Nuclear Weapons (WHO)* Opinion (p. 19), when it stated with regard to the competence of the World Health Organization to address the legality of the use of nuclear weapons: "such competence could not be deemed a necessary implication of the constitution of the Organization in the light of the purposes assigned to it by its Member States".

² *Reparation-case*, ICJ Reports 1949, p. 198. See also BLOKKER (1998) p. 10.

³ See BLOKKER (1998) pp. 11-13.

WEU's status as a collective defence organization. Obvious implied powers in this respect would allow the organization only to go as far as to prepare itself for defence against aggression in the form of training, armaments coordination and decisions concerning strategies.¹

Another clue could be found in Article VIII, paragraph 1, which mentions "the purposes of strengthening peace and security and of promoting unity and of encouraging the progressive integration of Europe [...]". However, this purpose is explicitly mentioned as a reason to establish the WEU Council, which, according to the same provision can only deal with matters concerning the execution of the modified Brussels Treaty (plus Protocols and Annexes). As already mentioned, paragraph 3 of Article VIII explicitly allows for consultations within the Council with regard to any situation which may constitute a threat to the peace, and even allows for extra-European threats to appear on the agenda ("in whatever area this threat should arise"). In this respect WEU indeed seems competent to discuss issues "out-of-area"; the geographical limitation in Article V ("an armed attack in Europe") relates to the collective defence obligation only.

On the basis of Article VIII.3 one may probably go as far as to assert that when consultations are allowed, the outcome of these consultations in the form of a joint policy of the member states is allowed as well. There is indeed not much sense in forbidding the WEU Council to be used as a forum for the planning of joint actions, when the same states would be allowed to make plans in any local Brussels bar (leaving aside the probably different outcomes). However, Article VIII.3 does not allow for the WEU *itself* to engage in military operations and the proper outcome of a consultation meeting should therefore be a decision taken by the WEU member states "in the framework of a Council meeting" (compare the habit within the European Union when it is convenient for ministers to make use of their Council meeting to agree on issues that are outside the EU competence).

C. Customary Powers

A last possibility then may be offered by any customary powers that have been developed by WEU. The International Court of Justice in the *Reparation*-case already referred to "the purposes and functions as developed in practice".² Moreover, Article

¹ It is questionable, however, whether even WEU's function with regard to the verification of arms control and disarmament measures, that was assigned to it the Treaty on Conventional Forces in Europe (CFE) could be seen as being implied in the collective defence function (see the preamble and Article II 1. (a) of the CFE Treaty).

² *Reparation-case* p. 180.

31(3)(b) of the Vienna Convention on the Law of Treaties mentions as a canon of interpretation: "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". The difference with implied powers is that customary powers postdate the constitution; during the life of the organization, member states may consent to new powers for it.¹ However, the identification of customary norms in international law is difficult. There must be a general practice, which is accepted as law. In 1950 the International Court of Justice defined general practice as

"a constant and uniform usage practised by States in question".²

In 1969 the Court added:

"an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked [...]".³

Despite the actions WEU has been involved in since 1988, it remains questionable whether this is enough to establish a general practice. The actions were certainly not "extensive and virtually uniform". In many cases WEU as an organization was only involved in the coordination of the actions – facilitating the operations of its member states. What has been extensive and virtually uniform however is the continuing focus on the new tasks in all Council documents and in many documents prepared by the WEU Assembly. While one could argue that these documents express one element of "custom" only (the *opinio iuris*) and not the practice, the recent opinion of the International Court in the *Nuclear Weapons (WHO)*-case somewhat supports the view that the practice of an organization may also be reflected in the documents produced by it. In the Advisory Opinion the Court extensively referred to resolutions of the World Health Assembly as evidence of the practice of the WHO.⁴

It is admitted that these arguments still form a shaky basis for the far-reaching peace-keeping and peace-making operations that WEU is planning to engage in. We are not just talking about minor adaptations to the original tasks of the organization,

¹ BLOKKER (1998) p. 13.

² *Asylum-case*, ICJ Reports 1950, p. 276.

³ The *North Sea Continental Shelf-cases*, ICJ Reports 1969, p. 43.

⁴ Cf. BLOKKER (1998) p. 19. On the other hand, Amerasinghe argued that "[s]uch practice may have been a factor to be taken into account but it could not of itself correct what was clearly *ultra vires* from other primary indications into an *intra vires* act. Were this not the position organizations would by consistent subsequent practice virtually *amend* their constitutions". C. F. AMERASINGHE, "The Advisory Opinion of the International Court of Justice in the *WHO Nuclear Weapons case: A Critique*", *Leiden Journal of International Law* 10, 1997, pp. 525-539, at p. 534.

completely new functions have been invented by the ministers in their communiqués, at times even indicating the redundancy of Article v. ¹ As many international lawyers would argue, these communiqués are not to be seen as treaties that can be used to modify the original treaty. ² In contrast to 1954 no Protocols were adopted to carry through the necessary changes.

On the other hand, there seems to be a way out in this respect. The Treaty on European Union of 2 February 1992 implicitly refers to WEU's new functions where it states:

"The Union requests the Western European Union (WEU), which is an integral part of the development of the Union, to elaborate and implement decisions and actions of the Union which have defence implications."

Despite the fact that this provision refers to "defence implications" only, it seems logical not to interpret this article as implicating that the member states will in first instance use the EU instead of the WEU in case of an armed attack on Europe. Moreover, attached to the Final Act adopted in Maastricht is also a Declaration of the members of the WEU, ³ in which they agree to develop a genuine European security and defence identity. All members of the WEU are at the same time members of the European Union and it was thus possible for the parliaments of the WEU member states to take the new functions of WEU into account in the discussion on the Treaty of European Union in 1992-93. ⁴ The Petersberg Declaration (19 June 1992) was announced in time to be taken into consideration by all parliaments when they discussed the new status of WEU on the basis of the EU-Treaty. An explicit possibility for national parliaments to stop their ministers from attributing more powers to WEU was provided by the accession of Greece. The "Protocol of accession of the Hellenic Republic to Western European Union together with an Annex" was signed in Rome on 20 November 1992. Its preamble contains the following considerations:

¹ On the diminished interest of the Council for Article v matters, see the Report *WEU after Amsterdam: the European security and defence identity and the application of Article v of the Modified Brussels Treaty in reply to the annual report of the Council*, Assembly of the Western European Union (Mr Vrettos), Document 1584, 19 November 1997.

² See for instance Eric P. J. MYJER, "Is 'out-of-area'-optreden geoorloofd?", *Nederlands Juristenblad*, 5 December 1991, pp. 1743-1745. MYJER denies the possibility of "out-of-area" actions by WEU because this would conflict with the provisions of the UN Charter (in particular Article 2(4)) and because the Brussels Treaty was never intended to serve this purpose. *Contra* G. NOLTE, "Die 'neuen Aufgaben' von NATO und WEU: Völker- und verfassungsrechtliche Fragen", *ZaöRv*, 1994, pp. 95-110, at p. 98. Nolte seems to assert that informal modifications of the constitutional treaty by the WEU Council are allowed by international law, but that national procedures may be an obstacle.

³ BLOED and WESSEL (1994), Document 28.

⁴ Cf. J. A. FROWEN, "Die Europäische Union mit WEU als Sicherheitssystem", in: O. DUE, M. LUTTER, J. SCHWARZE (Hrsg.), *Festschrift für Ulrich Everling*, 1995, pp. 315-326, at pp. 322-325.

"Noting that the Hellenic Republic accepts the agreements, decisions and rules adopted in conformity with the Treaty and the Declarations starting with the Rome Declaration of 27 October 1984;

Noting that the Hellenic Republic undertakes to develop WEU as the defence component of the European Union and as the means to strengthen the European pillar of the Atlantic Alliance [...] and accepts in full the Petersberg Declaration, in particular its Part III, issued on 19 June 1992." [emphasis added]

Even on this occasion none of the national parliaments sounded the alarm, which leads to the conclusion that by now all WEU member states (governments as well as parliaments) have accepted the new functions that were gradually attributed to WEU.

4. WEU as a "Regional Arrangement"

The inclusion in the Petersberg Declaration of the possibility for WEU to engage in peace-making operations brings about one additional question. The Charter of the United Nations is quite clear on the prohibition of the use of force (Article 2, paragraph 4). Exceptions can be found in the provisions on (collective) self-defence (Article 51) and in actions by the Security Council on the basis of Article 42. In addition, Article 53 allows for the Security Council to "utilize [...] regional arrangements or agencies for enforcement action under its authority". The problem is that there are no indications that WEU was intended to be a "regional arrangement" in this sense. The references in the modified Brussels Treaty to the UN Charter relate to collective defence only. ¹

On the other hand, the concept of "regional arrangements" is not defined by the Charter and it seems up to the regional organizations to proclaim themselves "regional arrangement" – as was for instance done by the Organization of American States in 1948 and the Arab League in 1945. ² According to the UN Secretary-General this situation was intended by the Charter:

"The Charter deliberately provides no precise definition of regional arrangements and agencies, thus allowing useful flexibility for undertakings by a group of States to deal with a

¹ Indeed, the history of the Brussels Treaty makes clear that WEU originally was not intended to be a regional arrangement in the sense of the UN Charter. See for instance W. KRIEGER, "Gründung und Entwicklung des Brüsseler Paktes", in: N. WIGGERHAUS and N. G. FOERSTER (Hrsg.), *Die westliche Sicherheitsgemeinschaft*, 1988.

² Nolte (1994, at p. 107) pointed at the fact that in the OAS a multinational force to deal with an internal conflict was based on the general purposes of the treaty only. There existed a new situation that could not have been foreseen at the time of the conclusion of the treaty. Similarly, the Arab League based troops in Lebanon from 1977-1983, the Organization of African States in Chad from 1981-1982 and the Economic Community of Western African States did the same in Liberia (since 1990).

matter appropriate for regional action which also could contribute to the maintenance of international peace and security. Such associations or entities could include treaty-based organizations, whether created before or after the founding of the United Nations, regional organizations for mutual security and defence, organizations for general regional development or for cooperation on a particular economic topic or function, and groups created to deal with a specific political, economic or social issue of concern".¹

The Secretary-General even explicitly hinted at the possible "emergence" of new regional arrangements in Europe:

"[F]or dealing with new kinds of security challenges, regional arrangements or agencies can render assistance of great value. [...] This presupposes the existence of the relationship between the United Nations and regional arrangements envisaged in Chapter VIII of the Charter. The diffusion of tensions between States and the pacific settlement of local disputes are, in many cases, matters appropriate for regional action. The proviso, however, is that efforts of regional agencies should be in harmony with those of the United Nations and in accordance with the Charter. This applies equally to regional arrangements in all areas of the globe, including those which might emerge in Europe".²

It would thus be too easy to deny WEU a new identity as a regional arrangement solely on the basis of its own constitution. However, the implications of the acceptance of a new role for WEU in this sense are not to be interpreted of too easily either. According to Article 52 of the UN Charter, the activities of regional arrangements or agencies are to be consistent with the purposes and principles of the United Nations. Moreover, regional arrangements have a primary function in the pacific settlement of local disputes; they shall make every effort in that respect before referring the dispute to the Security Council.³ One could argue that the time has arrived for WEU to draw up some new procedures to this end. Neither Article VIII.3 nor Article X seems sufficient to enable WEU to fulfil this task in a legally coherent manner.⁴

A second consequence of accepting WEU's identity as a regional arrangement should always be kept in mind. Article 53 of the UN Charter presents regional

¹ An Agenda for Peace (1992). See on the concept of regional arrangements also Th. J. W. SNEEK, "The OSCE in the New Europe: From Process to Regional Arrangement", *Indiana International & Comparative Law Review*, 1994, No. 1, pp. 1-73.

² Report of the Secretary-General on the Work of the Organization. *Secretary Gen. Rep. 21*, 1990, at p. 21.

³ Local disputes are commonly understood as disputes exclusively involving states which are parties to the regional arrangement or agency. Compare in that respect also Articles 34 and 35 of the Charter. See also SNEEK (1994) p. 52.

⁴ Article X refers to the determination of the High Contracting parties to settle disputes only by peaceful means, but does not contain a procedural role for WEU in this respect. On the other hand, one of WEU's original functions was the arms control of its own members. See Protocol No. III on the Control of Armaments, Signed in Paris on 23 October 1954. BLOED and WESSEL (1994), Document 4. Compare also Protocol IV on the Agency of WEU for the control of armaments (Document 5).

arrangements as entities that may be utilized by the Security Council for enforcement action *under its authority*. Even for regional arrangements an authorization of the Security Council to take enforcement action is necessary.¹

Article 54, finally, provides that the Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements of by regional agencies for the maintenance of international peace and security.

5. Conclusions

As the Brussels Treaty remembers its fiftieth anniversary, we should remember that Article XII of the modified Treaty provides that

"[a]fter the expiry of the period of fifty years, each of the High Contracting Parties shall have the right to cease to be a party thereto provided that he shall have previously given one year's notice of denunciation to the Belgian Government".²

The contents of this provision – that was included as Article X in the original Treaty of 1948 – were not modified by the Paris Protocols in 1954, which means that member states are free to leave WEU as from 25 August 1998 (fifty years after the entry into force of the Brussels Treaty), provided that they informed the Belgian Government of their intention before 25 August last year.³ To my knowledge none of the present WEU members has announced its denunciation. On the contrary, the recently adopted Erfurt Declaration (18 November 1997) states:

"Although political circumstances have dramatically changed since the signature of the modified Treaty, Ministers agreed that it continues to form a valuable part of the European security architecture".

¹ Article 53 mentions one exception: measures against renewal of aggressive policy on the part of an enemy state (that is: any state which during the Second World War has been an enemy of any signatory of the present Charter). However, the definition of "enemy state" already points at the outmoded nature of this provision.

² The WEU Assembly held the strong opinion that the first possibility for member states to leave WEU would be in 2004 (fifty years after 1954). See in particular the report *Interpretation of Article XII of the modified Brussels Treaty*, Assembly of the Western European Union (Mr. Goerens), Doc. 1369, 24 May 1993. The modified Brussels Treaty indeed forms the basis for WEU, but the accession of Germany and Italy in 1954 only called for some additional safeguards. There is no reason to assume that the Protocols in 1954 made an end to the original Brussels Treaty; as the first Protocol clearly indicates, it modified and completed the Brussels Treaty. This was confirmed by the Council in a reply to the Assembly: "the period of 50 years specified in Article XII of the modified Brussels Treaty, formerly Article X of the treaty signed in Brussels on 17 March 1948, runs from the date on which the treaty [...] came into force i.e. 25 August 1948, date of the deposit of the last instrument of ratification [...]".

Statements like these and the continuing efforts of some member states to work towards a future merger of the WEU and the European Union are reasons not to ignore the existence of WEU in the European security system. As to the legality of its new functions, there are reasons to conclude on the existence of customary powers as well as there are enough indications that all member states (including their parliaments) have accepted the new competences of WEU. However, to define clearly the scope of the powers attributed to WEU, a codification of custom as developed during the past decade in a new modified Treaty, taking account of WEU's possible new identity as a regional arrangement, would certainly contribute to the transparency of the competences of WEU today.