

## **THE STATE OF AFFAIRS IN EU SECURITY AND DEFENCE POLICY: THE BREAKTHROUGH IN THE TREATY OF NICE**

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### **ABSTRACT**

*The debate lasted for more than fifty years, but with the entry into force of the Treaty of Nice on 1 February 2003, 'Europe' finally succeeded in establishing its own security and defence policy – at least in a procedural sense. This article aims to provide insight into the new European Security and Defence Policy (ESDP), and in particular looks at the question of whether the Nice Treaty has turned the European Union into a fully-fledged security and defence organization. The transfer of the main institutions and competences of the Western European Union (WEU) to the EU potentially allows the latter to become more active in the field of military operations. However, this has implications for relations with NATO and the UN.*

### **1 INTRODUCTION**

The latest treaty modifying the existing European Union agreements met with serious criticism after it was signed on 26 February 2001 in the city of Nice under French guidance. Many observers pointed to the – almost exclusive – focus of the preceding Intergovernmental Conference (IGC) on institutional design, rather than on a substantive reparation of some major shortcomings, such as the lack of democratic accountability.<sup>2</sup> Indeed, institutional reform was the key task of the IGC as it had failed to reach consensus on that issue previously in Amsterdam. With ten to twelve candidate member states knocking at the door this was the first issue that had to be settled. In that atmosphere it went almost unnoticed that the IGC also dealt with another issue. After fifty years of regular attempts by some member states to extend the scope of the European Community/Union to issues of military security and defence, we were witnessing a final breakthrough at the turning of the decennium. Since the end of 1998 the European Union has been actively developing a European Security and Defence Policy (ESDP). The 1992 Treaty on European Union had already been an important first phase in this ongoing quest to consolidate Western European defence co-operation. A closer defence co-operation was planned in the original version of this treaty, albeit that its article J.4 clearly reflected the compromise, as it referred extremely carefully to 'the eventual framing of a common defence policy, which might in time lead to a common defence'. Another international organization, the Western European Union (WEU), would

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<sup>2</sup> See on the institutional changes for instance K. St. C. Bradley, 'Institutional Design in the Treaty of Nice' (2001) *CML Rev.* 1095–1124.

be requested to ‘elaborate and implement decisions and actions of the Union which have defence implications’. On the basis of this provision one could easily be led to believe that we would never witness the creation of a European Security and Defence Policy. Nevertheless, even this carefully phrased compromise obviously helped recalcitrant member states (the United Kingdom in particular) to get used to the idea of a future role for the EU in this area. The Amsterdam Treaty (1997, entry into force in 1999) turned article J.4 into article 17, and took another subtle step forward by formulating a common defence policy as an *objective* of the European Union, rather than a mere *possibility*.

Thus, the question was not how long this situation would last, but rather how the triangular relationship between the EU, the WEU and NATO could be shaped in such a way as to allow for the Union to put some flesh on the bones of the still rather skinny Common Foreign and Security Policy (CFSP), which indeed had remained largely rhetoric in nature. The breakthrough at the end of 1998 therefore came as a surprise to many observers and completely changed the institutional agenda in the years that followed. It also paved the way to yet another modification of article 17 of the EU Treaty, which became effective on 1 February 2003, with the entry into force of the Treaty of Nice. The present contribution deals with the legal aspects of the new competencies of the Union concerning the establishment of a European Security and Defence Policy. Section 2 will investigate the earlier attempts to include a common defence policy into the European Union’s objectives, as well as the events leading up to the new provisions in the Nice Treaty. Section 3 looks at the institutional and substantive arrangements in the recently modified Union Treaty and will try to answer the question of whether the European Union may, at last, be considered a security organization.

## **2 THE COMING OF AGE OF A EUROPEAN SECURITY AND DEFENCE POLICY**

### **2.1 The Struggle since the 1950s**

The current provisions in the Treaty on European Union are the result of more than fifty years of discussions among the states of western Europe and can only be comprehended while keeping their history in mind. The European Coal and Steel Community (ECSC, signed on 18 April 1951, but ended on 23 July 2003)<sup>3</sup> was one of the outcomes of the plan of the French Foreign Minister, Robert Schuman, to secure peace in Europe through economic co-operation.<sup>4</sup> It led to a common market for coal and steel, supervised by a ‘High Authority’, with six participating countries (the German Federal Republic, France, Italy and the three Benelux countries). Upon further proposals from the Belgian statesman Paul Henri Spaak, the

<sup>3</sup> According to its art. 97, the ECSC Treaty was concluded for fifty years.

<sup>4</sup> See on the Schuman Plan for instance W. Diebold, *The Schuman Plan: A Study in Economic Co-operation, 1950–1959* (1959). The analysis in the present chapter is partly based on E. Fursdon, *The European Defence Community: A History* (1980).

conclusion of the ECSC Treaty resulted in two additional treaties on 25 March 1957: the Treaty establishing the European Economic Community (EEC) and the Treaty establishing a European Atomic Energy Community (Euratom).

Apart from these developments in economic co-operation, two attempts in particular aimed at integration in other fields as well. Following the Schuman Plan of 9 May 1950 proposals for a Common Foreign and Security Policy *avant la lettre* reached the stage of elaborate draft treaties. In 1950 the Korean conflict triggered a number of politicians to come up with proposals for European defence co-operation. In August of that year in the United Kingdom, a discussion took place on the idea of a European army under a European minister of defence. This idea was followed by a plan by the French Minister of Defence, Pleven, in October. The Pleven Plan partly accepted the British proposal, but proposed to embed the European Ministry of Defence in an institutional structure comparable to that of the ECSC. This plan found its way into the treaty establishing the European Defence Community (EDC), which was signed by the ECSC member states on 27 May 1952.<sup>5</sup> The EDC would make possible German rearmament and the new European army would operate within the framework of the Atlantic Alliance. Apart from a collective defence clause (article 2) as the core of the treaty, the institutional system was comparable to the system used in the ECSC: the treaty introduced a commission (*'commissariat'*), a council, an assembly and a court. In the latter two cases the institutions were to be 'borrowed' from the ECSC. With today's careful approaches in mind, it remains interesting to note that according to the first article of the EDC Treaty, the community would have a 'supranational character'. It would have common institutions, common armed forces and a common budget. The Commissariat as well as the Council could take decisions by a majority of its members (articles 24 and 39) and the legal personality of the Community was undisputed (article 7).

Regardless of the fact that the treaty was signed, political objections were still apparent and ranged from criticism regarding the absence of a European defence policy and a connected foreign policy to the weak democratic character of the EDC.<sup>6</sup> In an attempt to meet these objections the six foreign ministers, on 10 September 1952, requested the Parliamentary Assembly (as foreseen in the treaty) to draft a Statute for a European Political Community. Under the leadership of Paul Henri Spaak the *'ad hoc'* Assembly produced the statute in March 1953. The institutions of the European Political Community (EPC) were to take over the powers of the existing ECSC and the future EDC and like these organizations, the EPC was presented as being 'supranational'. The EPC Statute – also labelled: the draft Treaty establishing the European Community – *inter alia* included provisions on a *co-ordinated* foreign policy, which might in time become a *common* policy. Together with the ECSC and the EDC the European Community was to form a

<sup>5</sup> *Traité instituant la Communauté Européenne de Défense*, signed in Paris, 27 May 1952.

<sup>6</sup> The latter has not been solved by the Nice Treaty either. See W. Wessels *et al.*, *The Parliamentary Dimension of CFSP/ESDP: Options for the European Convention*. Study submitted for the European Parliament, December 2002.

'legal union' (article 5). On another issue also there was less debate than today: According to its article 4, the Community (with its defence dimension) would possess legal personality.

However, on 30 August 1954 the French *Assemblée Nationale* resolved to adjourn the debate on the acceptance of the EDC Treaty, which also meant the end of the Statute on an EPC. The reasons therefore included the objections of a strong coalition of communists and Gaullists, a fear of a confrontation with growing German power within an EDC in which the United Kingdom would not participate,<sup>7</sup> and changes in the international situation (including the death of Stalin and the Korean Armistice in 1953). Despite the set-back in European integration resulting from the decision of the French parliament, a solution was found to make possible the admission of Germany to the Atlantic Alliance. The Brussels *Treaty on Economic, Social and Cultural Collaboration and Collective Self-Defence*<sup>8</sup> between the United Kingdom, France and the Benelux countries was modified, which provided, *inter alia* for the creation of the Western European Union (WEU) and the accession of Germany and Italy. Germany was allowed to proceed with rearmament under certain strict conditions and at the same time the way was paved for the accession of Germany and Italy to NATO.

Nevertheless, attempts to create a common foreign policy and a common defence policy alongside the co-operation between the then six members in the EEC had not ceased.<sup>9</sup> The American rejection of De Gaulle's plan for a NATO '*directoire à trois*' in 1958, led the French President to turn towards Europe to again investigate possible forms of political co-operation. Meetings between De Gaulle and the German Chancellor Adenauer in that year resulted in a new plan for political co-operation between the six members. The plan was first mentioned at a meeting in Rome on 25 June 1959 and referred to the creation of a permanent political secretariat.<sup>10</sup> The Dutch in particular rejected the idea of permanent (and probably French-led) form of co-operation that could undermine concepts like the Free Trade Association (which led to the EFTA in 1960). But negotiations continued and at their Strasbourg Meeting on 23 November 1959, the EEC foreign ministers agreed to hold regular meetings every three months 'on matters of international policy', covering both 'the political implications of the activities of the European Communities and other problems'.<sup>11</sup> The outline of a formal

<sup>7</sup> Because of the proposed strong link with the ECSC of which the United Kingdom was not a member.

<sup>8</sup> Signed at Brussels on 17 March 1948. The Protocol Modifying and Completing the Brussels Treaty was signed in Paris on 23 October 1954 (entry into force on 6 May 1955); see A. Bloed & R.A. Wessel (eds.), *The Changing Functions of the Western European Union (WEU): Introduction and Basic Documents* (1994); documents 1 and 2.

<sup>9</sup> A rather extensive article on the Fouchet Process is H. Mayer, 'Germany's Role in the Fouchet Negotiations' (1996) 2 *Journal of European Integration History* 39–59. The analysis in this section is partly based on Mayer's work as well as on R. Boes, *Le 'plan Fouchet' et le problème de l'Europe politique* (1970).

<sup>10</sup> For the documents on the Fouchet Plans see: *Towards Political Union: A Selection of Documents* (1964).

<sup>11</sup> *Ibid.*, 5.

(‘intergovernmental’) political union, which would also be competent to deal with defence issues, was presented by De Gaulle on 5 May 1960:

To help to build Western Europe into a political, economic, cultural and human grouping, organized for action and for defence: this is the aim of the French Government. . . . Of course it is necessary that the nations which become associated do not cease to be themselves, and that the path to be followed should be that of an organized cooperation between states, while waiting to achieve perhaps an imposing confederation.<sup>12</sup>

A new conference was planned for 10 and 11 February 1961 and De Gaulle intended to include the future goal of a ‘confederation’ in the final communiqué, which caused immediate and specific opposition from the Dutch for reasons explained below. Adenauer finally convinced De Gaulle to replace the word ‘confederation’ with ‘organized cooperation’ and to avoid all references to defence matters. The conference finally agreed on the foundation of a committee, the Fouchet Committee, to study further all possible aspects of future political co-operation.

The Fouchet Committee started work in March 1961 and had as its main practical task to keep the Dutch at the negotiating table. One of the main structural problems for the Dutch government was the French domination and the (related) British absence in the negotiations. The latter problem became known as the ‘*préalable anglais*’ and meant that British membership of the economic and political frameworks was perceived as a precondition for progress. The Dutch (and later also Belgian) position did not prevent France from presenting a draft treaty for a ‘Union of States’ which had as its aim to make possible co-operation in cultural and scientific matters and to adopt a common foreign policy and a common defence policy (the ‘first Fouchet Plan’). In the version of 10 November 1961 the French specified that the common defence policy ‘would contribute to the strengthening of the Atlantic Alliance’, that there would be an attempt ‘to associate the European Parliament more closely to the definition and execution of the common policies’ and that the community structures would be respected. An independent secretary-general was to represent the Union. Dutch and Belgian objections were met with a German compromise formula in which Britain would be closely informed about the process and the provision that membership of the union would be automatic for those countries which joined the EEC.

Nevertheless, De Gaulle decided to present a new proposal, known as Fouchet II, in which a reference to co-operation with NATO, supranational goals of the revision clause and the provision for a secretary-general were dropped. Moreover, Fouchet II provided that the accession of new members would be decided unanimously by the Council, the European Parliament would only have advisory powers and ‘economics’ was mentioned as one of the subjects of consultation between the

<sup>12</sup> As quoted by Mayer, *loc. cit.*, 43.

participants (thus encroaching upon the competences of the EEC Commission). With this proposal De Gaulle caused a serious rift between France and the other five states; a rift that motivated the Netherlands and Belgium to block and end the Fouchet process at a meeting on 17 April 1962.

## 2.2 From European Political Co-operation to Common Foreign and Security Policy

The ‘failure of Fouchet’ caused the six members to desist from presenting new proposals on political co-operation for some time. However, after the departure of President De Gaulle in 1969, the meeting of the heads of state and government in The Hague in December of that year decided that their foreign ministers should again investigate the possibilities for closer political co-operation. But they had learned their lesson: defence issues were left out of the proposals. On 20 July 1970 this resulted in the *Davignon Report*, which was adopted by the European Council in Luxembourg on 23 October 1970.<sup>13</sup> This *Luxembourg Report* is usually seen as the constitutive document of the European Political Co-operation (EPC).<sup>14</sup>

Its main purpose was to intensify political co-operation by introducing meetings of the foreign ministers and of a political committee (consisting of the political affairs directors of the national foreign ministries). Moreover, specialized working groups on specific issues of potential common interest were created. The first meeting in the framework of EPC took place in Munich in 1970. These meetings were completely separate from the meetings of the EC Council of Ministers in Brussels. EPC meetings preferably took place in the capital of the state holding the presidency of the EC. After the adoption of the 1970 Luxembourg Report, the EPC developed incrementally and established customs were codified on an *ad hoc* basis in new reports. These reports were adopted by the heads of state and government or the foreign ministers of the EPC states and presented as ‘Communiqués’ or ‘Reports’.<sup>15</sup>

In February 1986, the EPC was at last provided with an official treaty basis in the Single European Act (SEA), but the fundamental differences between opposing camps proved to be insurmountable. The SEA, the result of the Intergovernmental Conference, mirrored the traditional diverging views of the member states on European integration. On the one hand, the EPC was placed with the

<sup>13</sup> The EPC Reports are reproduced in Ph. De Schoutheete, *La coopération politique européenne* (1986); and the *Bulletin EC* in the respective years. See for the Luxembourg Report *Bulletin EC* 11-1970 at 9.

<sup>14</sup> Key publications on EPC include: S. Nutall, *European Political Cooperation* (1992); De Schoutheete, *op.cit.*; A. Pijpers, E. Regelsberger & W. Wessels (eds.), *European Political Cooperation in the 1980s: a Common Foreign Policy for Western Europe?* (1988); R. Rummel & W. Wessels (eds.), *Die Europäische Politische Zusammenarbeit: Leistungsvermögen und Struktur der EPZ* (1978); and Th. Jürgens, *Die gemeinsame Europäische Aussen- und Sicherheitspolitik* (1994). The last-mentioned is one of the very few legal studies on this topic.

<sup>15</sup> An extensive survey of these reports and their legal status is given in Jürgens, *op.cit.*

Community within one *single* document, but on the other hand it remained clearly separated from the Community legal order. The provisions on the EPC in Title III of the SEA reflected the political co-operation as it had developed in the years before. The 'High Contracting Parties' (instead of 'Member States')<sup>16</sup> still dealt with the EPC outside the Community institutional structure. And, even in this situation, defence issues were still left out of the Single European Act, which only provided that the high contracting parties were 'ready to coordinate their positions more closely on the political and economic aspects of security'.<sup>17</sup>

The relation that existed between EPC and the European Communities was maintained in the Treaty on European Union (TEU), signed on 7 February 1992 and which came into force on 1 November 1993. The concept of a Common Foreign and Security Policy (CFSP)<sup>18</sup> as initially formulated by Chancellor Kohl and President Mitterand,<sup>19</sup> was included in the new treaty without any in-depth discussion of its meaning and its implications. The contrast with the debate on the implications of the Economic and Monetary Union was obvious.<sup>20</sup> Despite some attempts by the Dutch government during its presidency in 1991 to realize the opposite, CFSP was not included as part of the Community legal order.<sup>21</sup> As another compromise in the continuous battle between states that favoured a more integrated Europe, and those who tried to hold on to intergovernmental co-operation as much as possible,<sup>22</sup> the structure of the European Union was bound to become the subject of criticism. The architecture of the Greek temple with three pillars has frequently been compared to 'a house which is half-built, a work in progress, suddenly abandoned by its builders'.<sup>23</sup> In realizing that it is increasingly difficult to exclude completely

<sup>16</sup> Title III does however show some inconsistencies in this respect. Article 30, paragraphs 10 (a), (b) and (d) do use the term 'Member States'. See E. Stein, 'European Foreign Affairs System and the Single European Act of 1986', in: W.F. Ebke & J.J. Norton (eds.), *Festschrift in Honor of Sir Joseph Gold*, 403–422, 411.

<sup>17</sup> Single European Act (1986), article 30, paragraph 6(a).

<sup>18</sup> See in general on the legal aspects of CFSP: R.A. Wessel, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective* (1999).

<sup>19</sup> See the letter of Chancellor Kohl and President Mitterand to the Irish Presidency, 19 April 1990 in F. Laursen, F. & S. Vanhoonacker (eds.), *The Intergovernmental Conference on Political Union: Institutional Reforms, New Policies and International Identity of the European Community* (1992) 276.

<sup>20</sup> Ph. De Schoutheete de Tervarent, 'The Creation of the Common Foreign and Security Policy', in: E. Regelsberger, Ph. De Schoutheete de Tervarent & W. Wessels (eds.), *Foreign Policy of the European Union: From EPC to CFSP and Beyond* (1997) 41–66, 61.

<sup>21</sup> See First Dutch Draft Treaty Proposal from the Dutch Presidency, 30 September 1991, in Laursen & Vanhoonacker, *op. cit.*, 407–412. See also for an analysis of the Maastricht negotiations: De Schoutheete de Tervarent, *op. cit.*

<sup>22</sup> See more elaborately on this issue R.A. Wessel, 'Towards a United Europe? A Legal Perspective on European Institutionalization and Integration', in: J. de Wilde & H. Wiberg (eds.), *The Role of States and Intergovernmental Organizations* (1996) 39–64.

<sup>23</sup> Editorial Comments (1992) *CMLRev* 201 *et seq.* But see also D.M. Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) *CML Rev.* 17–69, where she stated that 'the alteration to the existing structure . . . reveals more of a bricoleur's amateurism than a master brick-layer's strive for perfection and attention to detail' (at 24).

decisions on defence issues from the decision-making in the European Union, their transfer to the Western European Union, which was said to form ‘an integral part of the development of the Union’ (article J.4, paragraph 2), seemed to be a workable compromise.<sup>24</sup> A procedure concerning defence issues found its basis in the same article: ‘[t]he Union requests the Western European Union (WEU) . . . to elaborate and implement decisions and actions of the Union which have defence implications’.<sup>25</sup> Thus a compromise was reached between member states pointing to the link between a ‘security policy’ and ‘defence issues’ and those who would not accept the EU itself be involved in defence issues.

The Treaty of Amsterdam of 2 October 1997 (entry into force on 1 May 1999) purported to modify both the Community treaties and the 1992 Treaty on European Union. The CFSP provisions were renumbered from articles J–J.11 to articles 11–28. Article J.4 was replaced by article 17, which almost entirely repeated the original provision, but modified the possibility of a request. The Union would no longer merely request the WEU to implement its defence decisions; instead article 17 provided that ‘[t]he Union *will avail itself of WEU* to elaborate and implement decisions and actions of the Union which have defence implications’.<sup>26</sup> This change was made possible due to a positive reaction by WEU on the provision in the 1992 treaty. The treaty revealed no obligation for the WEU to positively react to a request by the Union,<sup>27</sup> but in a Declaration attached to the TEU, the WEU member states declared: ‘The objective is to build up WEU in stages as the defence component of the European Union. To this end, WEU is prepared, at the request of the European Union, to elaborate and implement decisions and actions of the Union which have defence implications’.<sup>28</sup>

### 2.3 The Breakthrough at the Saint-Malo Summit

Taking this struggle into account, the current developments are truly historic. Indeed, for the development of a European Security and Defence Policy, the past

<sup>24</sup> The complex formula in article J.4, paragraph 1 was proposed by the Belgian delegation in order to reconcile the opinions of those who were in favour of a common defence (France in particular) and those who considered a common defence policy already a step too far (the United Kingdom in particular); see E. Remacle, *La politique étrangère et de sécurité commune de l’Union européenne après Maastricht*, in: M. Telò (ed.), *Vers une nouvelle Europe?* (1992) 239–252, 242.

<sup>25</sup> The Luxembourg Draft Treaty of 18 June 1991 provided in article L of the CFSP provisions that ‘Decisions of the Union on security matters which have defence implications may be wholly or partly implemented in the framework of the Western European Union, insofar as they also fall within that organisation’s sphere of competence’. Although this provision boils down to the same idea, notion, the final choice in the 1992 Union Treaty for a formal ‘request’ to the WEU was certainly more correct from a legal point of view. After all, the decision to implement decisions of the European Union is up to the WEU and not to the EU.

<sup>26</sup> Emphasis added.

<sup>27</sup> See also Jürgens, *op. cit.*, 369.

<sup>28</sup> Bloed & Wessel, *op. cit.*, document no. 28.

few years have meant more than the fifty years that preceded them. In a political sense, the most important development was the change in the traditional British attitude concerning an intensification of European defence cooperation. On 4 December 1998 the British and French Governments meeting in Saint-Malo *inter alia* concluded that “[t]he Union must have the capacity for autonomous action, backed up by credible military forces, the means to decide to use them and a readiness to do so, in order to respond to international crises.”<sup>29</sup> This simple sentence – which according to political commentators *inter alia* finds its basis in Britain’s wish to take the lead in a major European development as well as in the possibility to ‘sell’ Europe back home – triggered a number of subsequent decisions by the European Union. The Saint-Malo declaration was followed by a number of decisions of the European Council in Cologne on 3 and 4 June 1999 concerning the strengthening of the common European policy regarding security and defence.<sup>30</sup> The European Council decided to establish an autonomous operational capacity supported by credible means and decision-making institutions. It was furthermore decided that the Council will be given the competence to use military instruments alongside the already existing political and economic ones. The Declaration further refers to a number of WEU institutions that would be needed in the EU as well (a Military Committee, a Military Staff, a Satellite Centre and an Institute for Security Studies). This declaration set in motion a new development during which the European Union gradually established new institutions at the expense of the WEU, which was stripped of almost its entire institutional infrastructure.<sup>31</sup>

In November 1999 the WEU Council demonstrated that it would accept its fate and decided to ‘prepare the WEU legacy and the inclusion of those functions of the WEU, which will be deemed necessary by the EU to fulfil its new responsibilities in the area of crisis-management tasks.’<sup>32</sup> On 15 November 1999, for the first time in its history, the Council of the European Union met informally in the composition of Ministers for Foreign Affairs and Ministers of Defence.<sup>33</sup> While this may seem a logical step in the current developments, it highlights the revolution that has taken place within the European Union during the past few years. Previously, meetings of defence ministers were unthinkable within the EU framework. During this meeting France and the United Kingdom launched their plan for a rapid

<sup>29</sup> Joint Statement by the British and French Governments, Franco-British Summit, Saint-Malo, France, 4 December 1998. See also the Presidency Conclusions of the Cologne European Council, 3 and 4 June 1999.

<sup>30</sup> European Council, Conclusions of the Presidency, Cologne, 3–4 June 2000, annex.

<sup>31</sup> More extensively: R.A. Wessel, ‘The EU as Black Widow: Devouring the WEU to Give Birth to a European Security and Defence Policy’, in: V. Kronenberger (ed.), *The European Union and the International Legal Order – Discord or Harmony?* (2001) 405–434.

<sup>32</sup> WEU Ministerial Council, Luxembourg Declaration, 23 November 1999, para. 4.

<sup>33</sup> Conclusions of the General Affairs Council of 15 November 1999, Council Press Release No. 12642/99 (*Presse* 344). The first formal meeting of the Defence Ministers took place in May 2002; see Conclusions of the General Affairs Council, 13–14 May 2002.

reaction force, an idea that was adopted by the European Council in Helsinki in December 1999 when it decided to develop an autonomous military capacity.<sup>34</sup> Probably to reassure (the parliaments of) certain member states, the somewhat ambiguous sentence was added that this does not imply the creation of a European army. Nevertheless, all developments pointed in the direction of a sincere attempt on the part of the EU to create a military force. The European Council formulated a 'headline goal' and decided that by the year 2003 member states must be able to develop rapidly and then sustain forces 'capable of the full range of Petersberg tasks, including the most demanding, in operations up to corps level; up to 15 brigades, or 50,000–60,000 persons.' These forces should be self-sustaining with the necessary command and control and intelligence capabilities, logistics, and other combat support services and, additionally, appropriate naval and air elements. The readiness requirement is 60 days, with some units at very high readiness, capable of deployment within days or weeks.<sup>35</sup>

### 3 ESDP AFTER NICE

The results of these developments found their way into the Treaty of Nice, which was adopted in December 2000. On the basis of that treaty, article 17 of the Treaty on European Union was modified as follows: the second subparagraph of paragraph 1 on the relationship with the WEU was deleted; the same holds true for the first three subparagraphs of paragraph 3 on the role of the WEU in the implementation of EU decisions with defence implications. This means that the Union has been given the competence to operate within the full range of the Petersberg tasks: 'humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking' (article 17, paragraph 2). In that respect it is odd that article 17 still refers to the 'progressive framing of a common defence policy' after that same policy has entered into force on the basis of the same article. Provisions like these reveal the fact that, although a final consensus was reached on a European Security and Defence Policy, some member states are more eager to lay everything down in treaty arrangements than others. Nevertheless one cannot overlook the gradual development from the first provision in the Maastricht Treaty ('the *eventual* framing of a common defence policy, which *might in time* lead to a common defence'), to the Amsterdam Treaty ('the *progressive* framing of a common defence policy, which *might* lead to a common defence'), and finally to Nice where all references to the WEU were deleted, thereby making the EU itself responsible for the elaboration and implementation of decisions and actions which have defence implications.

<sup>34</sup> European Council, Conclusions of the Presidency, Helsinki, 10–11 December 1999.

<sup>35</sup> See on the feasibility of this headline objective for instance R. de Wijk, 'Convergence Criteria: Measuring Input or Output' (2000) *European Foreign Affairs Review* 397–417; as well as the NATO Parliamentary Assembly Interim Report entitled 'Building European Defence: NATO's ESDI and the European Union's ESDP', Rapporteur Van Eekelen, 5 October 2000.

### **3.1 New Institutions and Competences Regarding Defence Policy**

Despite the fact that the original Treaty on European Union already included the possible framing of a defence policy, the Union was not yet equipped to deal with this new area of interest. Apart from the decision taken in Helsinki in December 1999 to allow the Ministers of Defence to attend the General Affairs Council meetings each time the Council discusses issues related to the European Security and Defence Policy, the European Council decided to create a number of new organs to deal with ESDP issues: (i) an interim Political and Security Committee (PSC), composed of national representatives at ambassador or equivalent level, dealing with all aspects of CFSP, including ESDP; (ii) an interim EU Military Committee (EUMC), composed of the chiefs of defence, represented by their military delegates, which will give advice and make recommendations to the PSC, as well as providing military direction to the EU military staff; the Chairman of the EUMC would be a four-star officer who would act exclusively in an international capacity and whose authority would stem from the Military Committee; and (iii) an interim EU Military Staff (EUMS), within the Council's secretarial structures, to provide military expertise and support to the ESDP, including the conduct of EU-led military crisis management operations. The interim committees were installed on 1 March 2000, following a Council decision on 14 February 2000. The decision was formally endorsed by the European Council in Feira (Portugal) in June 2000. From a legal point of view it is striking that already in December 2000, the Council decided to make the interim committees permanent in the year 2001, without awaiting the entry into force of the Nice Treaty.<sup>36</sup> The Satellite Centre and the Institute for Security Studies were taken over from the Western European Union by taking over the personnel contracts and the agreements with other organizations.<sup>37</sup> The Satellite Centre (in Torrejón de Ardoz, Spain) supports the ESDP by supplying satellite images; the Institute for Security Issues (in Paris) does academic research on topics relevant to the development of ESDP.

The legal basis of the Political and Security Committee now is article 25 of the EU Treaty.<sup>38</sup> Indeed, the Nice Treaty modified article 25 in the sense that it refers to a Political *and Security* Committee instead of the formerly existing Political Committee. In contrast to the latter, the new PSC is a standing committee, consisting of national representatives at senior/ambassadorial level. Under the responsibility of the council, the PSC shall exercise political control and strategic direction of crisis management operations. It may also be authorized by the Council, for the purpose and for the duration of a crisis management operation, to take the relevant decisions concerning the political control and strategic direction

<sup>36</sup> See the Presidency Report on the European Security and Defence Policy, Brussels, 4 December 2000, Press Release 14056/2/00.

<sup>37</sup> See Joint Actions 2001/554/CFSP and 2001/555/CFSP of the council of 20 July 2001, *Official Journal EC* (25 July 2001). Both institutions formally became EU-organs on 1 January 2002.

<sup>38</sup> Decision 2000/143/CFSP of the council of 14 February 2000, *Official Journal EC* (2000) L 49.

of the operation. In those cases it may be chaired by the High Representative for the CFSP.<sup>39</sup> This is a far-reaching competence, which allows the PSC to play a pivotal role during EU operations. It is striking, however, that article 25 does not contain any reference to *defence* matters. Indeed, the PSC is the Political and Security Committee, and not the Political, Security and Defence Committee. Nevertheless, there can be no doubt that the PSC's tasks cover all aspects of the new European Security and Defence Policy. After all, the reason to turn the original Political Committee into the PSC was to adapt it to the institutional needs emerging out of the development of ESDP.<sup>40</sup>

This conclusion is supported by the fact that one of the tasks of the PSC is to give guidelines to one of the other new committees introduced in the framework of ESDP: the Military Committee (EUMC). This senior military body, consisting of EU member states' chiefs of defence or their representatives, in turn gives military advice to the PSC. The EUMC is chaired by a four-star flag officer, who represents the EUMC before the PSC and the Council. The EUMC is responsible for giving military direction of military activities by offering military advice and recommendations, developing an overall concept of crisis management, assessing risks, and conducting military relations with third states and organizations.<sup>41</sup>

The quite large (130 members when it is fully set up) military staff (EUMS) is shaped in the form of a new directorate-general of the Council, composed of military staff seconded by the member states in an international capacity. It is headed by a director-general (a three-star flag officer) and is to provide early warning, strategic assessment, and strategic planning of Petersberg tasks. It implements policies and decisions of the EUMC and links this committee with military resources. It provides military expertise, contributes to elaboration, assessment and reviews capability goals. In addition, it may monitor, assess, and make recommendations as regards training, exercises, and interoperability. During a crisis it may set up a 'Crisis Action Team'.<sup>42</sup>

In addition to these committees in the field of 'hard security', the Council on 22 May 2000 decided to establish a Committee for the Civilian Aspects of Crisis Management as well.<sup>43</sup> This committee will co-ordinate the civil crisis management of the EU. It functions as a working group of the Council and reports to the Committee of Permanent Representatives (Coreper). In addition, it supplies the PSC and other competent organs with information, recommendations and opinions. The committee had its first meeting on 16 June 2000. Next to this committee a co-ordination mechanism was installed within the Council's Secretariat to co-ordinate a databank on available police capacity. This has led to the creation of a European

<sup>39</sup> But see S. Peers, 'Common Foreign and Security Policy 1999–2000' (2001) *Yearbook of European Law* 531–567 at 556.

<sup>40</sup> See also I. Österdahl, 'The EU and its Member States, Other States, and International Organizations – The Common European Security and Defence Policy after Nice' (2001) *Nordic Journal of International Law* 341–372 at 357.

<sup>41</sup> Presidency Report to the Nice European Council, Annex IV.

<sup>42</sup> *Ibid.*, Annex V.

<sup>43</sup> Decisions 2000/354/CFSP of the council of 22 May 2000, *Official Journal EC* (2000) L 127.

Security and Intelligence Force (ESIF), which is, in time, to consist of 5,000 well-armed police, 1,000 of them to be deployable within 30 days, able to carry out preventive as well as repressive actions in support of global peacekeeping missions. This force will be under the control of the PSC, with effective control being in the hands of the CFSP High Representative, currently Mr Solana.

Finally, it came as no surprise that the Nice Treaty underlined that all ESDP decisions require unanimity.<sup>44</sup> Despite the fact that article 17(2) allows for qualified majority voting in the Council in the case of some CFSP decisions, those with defence or military implications are explicitly excluded from this decision-making regime. The same exception can be found in the newly introduced article 27B on enhanced co-operation.<sup>45</sup> The Council itself has not yet agreed on a new formation as 'Defence Council'. Nevertheless, after a number of informal meetings, the first formal meeting of the defence ministers (replacing the foreign ministers in 'their' Council) in May 2002 was already referred to. If anything, the entry of defence ministers into the formal decision-making structures of the European Union surely reflects the radical change we have been witnessing.

## **3.2 Relations with NATO and the UN**

### **3.2.1 NATO**

All documents leading up to the ESDP have stressed that everything will be done to prevent a duplication of NATO capabilities. This implies, however, that ESDP strongly relies on NATO assets and capabilities for any EU-led operation. Before Nice relations between the EU and NATO were by-passed through the WEU. According to the WEU Declaration attached to the Final Act of the 1991 IGC, the WEU was not only to be developed as the defence component of the European Union, but also as a means to strengthen the European pillar of the Atlantic Alliance. This declaration also stated that an eventual common defence would be compatible with that of NATO. Thus, EU security and defence issues were approached with this institutional triangle in mind and both the EU Treaty and a number of WEU and NATO statements have closely tied the security policies of the three organizations together. The original absence of an EU defence policy itself may explain why the Union has not established formal relations with NATO during the 30 years that they have existed side-by-side. However, since the emergence of the new competencies of the EU the days of splendid isolation are over and intensive policy co-ordination has occurred (ranging from formal consultations in the case of the enlargement policies of both organizations to the weekly breakfast

<sup>44</sup> See more extensively on the decision-making procedure: G. Müller-Brandeck-Bocquet, 'The New CFSP and ESDP Decision-Making System of the European Union' (2002) *EFA Rev.* 257–282; as well as A. Missiroli, 'European Security Policy: The Challenge of Coherence' (2001) *EFA Rev.* 194.

<sup>45</sup> See Th. Jaeger, 'Enhanced Cooperation in the Treaty of Nice and Flexibility in the Common Foreign and Security Policy' (2002) *EFA Rev.* 297–316.

meeting between the two SGs). Nevertheless, the treaty text still limits itself to the provision (not modified by the Nice Treaty) that the policy of the Union: 'shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework' (article 17, paragraph 1).

There is only a remote chance that Union policy could come into conflict with NATO policy, but in that case this provision seems to call for the compatibility of the EU decision with NATO policy, and thus for the precedence of an earlier NATO decision over an EU decision. Theoretically, this provision could in that respect have an influence on the willingness of the EU to engage in a certain operation, but when the overlapping memberships of the two organizations are kept in mind,<sup>46</sup> conflicting policies are indeed hardly conceivable.

After the transfer of the main WEU tasks to the European Union, the NATO–WEU Framework Document that was concluded at the 1996 Berlin Summit,<sup>47</sup> needed to be applied to the NATO–EU relationship. These so-called 'Berlin Plus' arrangements comprise four elements: (i) assured EU access to NATO operational planning; (ii) presumption of availability to the EU of NATO capabilities and common assets; (iii) NATO European command option for EU-led operations, including the European role of Deputy SACEUR; and (iv) adaptation of the NATO defence planning system to incorporate the availability of forces for EU operations.<sup>48</sup> The main problems emerged out of the need of the EU to have access to NATO assets for a military operation and the related fact that the memberships of the two organizations do not coincide. Initially this was solved by arrangements for consultations and co-operation through an exchange of letters in January 2001 on the basis of which NATO and the EU had regular joint meetings. The arrangement envisages at least three meetings at ambassadorial level and one at ministerial level every six months (i.e. during each EU Presidency).<sup>49</sup> Since February 2001, regular meetings of the EU PSC and the North Atlantic Council take place. Joint NATO–EU Ad Hoc Working Groups have also been meeting since mid 2000 to discuss security issues such as procedures for the exchange of classified information and intelligence and modalities for EU access to NATO assets and capabilities. This resulted in an interim security agreement between NATO and the EU Council Secretariat governing the exchange of classified information.

<sup>46</sup> Eleven out of the 19 NATO members are also members of the EU. Ireland is the only EU member that has no relationship at all with NATO; Austria, Finland and Sweden participate in NATO's Partnership for Peace. The other European NATO members are candidate countries of the EU. Apart from the non-European NATO members (the US and Canada), there are six non-EU NATO members (Norway, Iceland, Turkey, Poland, the Czech Republic, and Hungary) and nine EU associated countries (Estonia, Latvia, Lithuania, the Slovak Republic, Slovenia, Romania, Bulgaria, Cyprus, and Malta).

<sup>47</sup> See also NATO Parliamentary Assembly Interim Report, 5 October 2000.

<sup>48</sup> See the 1999 NATO Washington Summit Declaration, para. 10.

<sup>49</sup> The first formal meeting of NATO and EU Foreign Ministers took place in Budapest in May 2001 in the margins of the Ministerial meetings of the North Atlantic Council.

However, a final arrangement proved to be unattainable because of Turkish resistance. It took both organizations until the end of 2002 to reach consensus on a co-operation agreement.<sup>50</sup> Through this agreement the European Union ensures the fullest possible involvement of non-EU European members of NATO within ESDP, whereas NATO supports ESDP by giving the EU, *inter alia* and in particular, assured access to NATO's planning capabilities. As a follow-up to this agreement, on 14 March 2003 NATO Secretary-General, Lord Robertson, and the Minister of Foreign Affairs of Greece, Giorgos Papandreou, on behalf of the EU, settled another problematic issue by signing the NATO–EU Agreement on the Security of Information. This agreement between the two organizations deals with common security standards to be able to share classified information and consult and co-operate on security issues.<sup>51</sup> This opened the door to an activation of ESDP and indeed allowed for the first EU military operation (see below).

### **3.2.2 The United Nations**

Regarding the relationship with the United Nations, the inclusion of the Petersberg tasks in the Treaty on European Union and the competences of the European Council and the Council of Ministers to take decisions on these issues bring about an additional question. The EU Treaty now foresees the possibility for the Union to engage in peace-making operations (article 17, paragraph 2). The Charter of the United Nations, on the other hand, is of course quite clear on the prohibition on using 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, chapter VIII (article 53) allows the Security Council to 'utilize [...] regional arrangements or agencies for enforcement action under its authority.' The question is then whether the EU can be seen as a 'regional arrangement' in this sense.<sup>52</sup> An affirmative answer would also explain the way in which the Union intends to attain the CFSP objective 'to preserve peace and strengthen international security'. However, the TEU at this moment in time

<sup>50</sup> EU–NATO Declaration of ESDP, NATO Press Release (2002) 142, 16 December 2002.

<sup>51</sup> NATO Press Release (2003) 022, 14 March 2003; and EU Council Decision 2003/211/CFSP of 24 February 2003, *Official Journal of the EU* (27 Mar. 2003) L 80, which contains the text of the Agreement.

<sup>52</sup> See more extensively on this issue: M. Fleuß, *Die operationelle Rolle der Westeuropäischen Union in den neunziger Jahren* (1996) 104–276; and V. Kronenberger, 'La dimension institutionnelle de la Politique Européenne Commune de Sécurité et de Défense de l'Union européenne' (2000) *Europe* 3–8.

does not provide any clues for the EU itself to function as a regional arrangement.<sup>53</sup> On the other hand, the concept of ‘regional arrangements’ is not defined by the Charter and it seems to be up to the regional organizations to proclaim themselves as a ‘regional arrangement’ – as was for instance done by the Organization of American States in 1948 and the Arab League in 1945.<sup>54</sup> According to the (former) 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 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.’<sup>55</sup> 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

<sup>53</sup> Fleuß, *op. cit.*, 196: ‘. . . daß die Ausgestaltung der Gemeinsamen Sicherheitspolitik der Europäischen Union im Vertrag von Maastricht zum gegenwärtigen Zeitpunkt noch nicht den Anforderungen des Kapitels VIII der UN-Charta an regionale Einrichtungen genügt’. The same holds true for the WEU. Indeed, the history of the Brussels Treaty makes it clear that the WEU was originally 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 (eds.), *Die westliche Sicherheitsgemeinschaft 1948–1950: gemeinsame Probleme und gegensätzliche Nationalinteressen in der Gründungsphase der Nordatlantischen Allianz* (1988).

<sup>54</sup> Nolte pointed to the fact that in the OAS a multinational force to deal with an internal conflict was only based on the general purposes of the treaty. 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 (from 1990). See G. Nolte, ‘Die “neuen Aufgaben” von NATO und WEU: Völker- und verfassungsrechtliche Fragen’ (1994) *ZaöRv* 1994 95–110, 107.

<sup>55</sup> An Agenda for Peace (1992). See on the concept of regional arrangements and the competences of the Security Council in that respect also E. de Wet, ‘The Relationship between the Security Council and Regional Organizations during Enforcement Action under Chapter VIII of the United Nations Charter’ (2002) *Nordic Journal of International Law* 1–37; as well as Th.J.W. Sneek, ‘The OSCE in the New Europe: From Process to Regional Arrangement’ (1994) 1 *Indiana International & Comparative Law Review* 1–73.

might emerge in Europe.<sup>56</sup> It would thus be too easy to deny the EU a new identity as a regional arrangement solely on the basis of its own constitution. Regardless of the fact that the EU to date has operated much more as a *coordinator* of the actions of its member states than as an organization which was itself involved in international military actions, the implications of the acceptance of a new role for the EU as a 'Chapter VIII organisation' are not to be disposed of too easily. 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.<sup>57</sup> The current EU Treaty does not contain a specific procedure to that end, but further developments in that sense are not at all taboo. After all, the Presidency Report on ESDP of December 2000 clearly states: 'The development of the European Security and Defence Policy strengthens the Union's contribution to international peace and security in accordance with the principles of the UN Charter.' Through the requirement of systematic co-operation between the member states the EU may be in a position to serve as a forum for the pacific settlement of disputes. But even then additional procedural arrangements seem to be required for the Union to fulfil this task effectively.

A second consequence of accepting the identity of the EU as a regional arrangement should always be kept in mind. Article 53 of the UN Charter presents regional arrangements as entities that may be utilized by the Security Council for enforcement action *under its authority*. Even for regional arrangements Security Council authorization to take enforcement action is necessary.<sup>58</sup> However, it may not always be clear whether a particular EU operation is to be seen as enforcement action. The Petersberg tasks in article 17(2) of the EU Treaty range from the softest kind of peace-keeping measures possible all the way up to peace-making, the distinction in practice between the different modalities by no means being clear. As is the case with other crisis management operations round the world, EU operations will most probably include several kinds of Petersberg tasks at once, without a clear distinction being made between the different modalities.<sup>59</sup> This seems to call for a continuous dialogue with the United Nations once the EU engages in any crisis management operation. In fact, article 54 of the UN Charter, indeed provides that the Security Council shall at all times be kept fully informed of activities which are

<sup>56</sup> Report of the Secretary-General on the Work of the Organization. *Secretary Gen. Rep. 21*, 1990, 21.

<sup>57</sup> 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, *loc. cit.*, 52.

<sup>58</sup> Art. 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 was an enemy of any signatory of the present charter). However, the definition of 'enemy state' already points to the outmoded nature of this provision.

<sup>59</sup> See Österdahl, *loc. cit.*, 366.

undertaken or are being contemplated under regional arrangements by regional agencies for the maintenance of international peace and security.

Final conclusions as to the status of the EU as a fully-fledged regional arrangement can thus not yet be drawn.<sup>60</sup> The lack of any procedures to secure internal security is in particular a serious shortcoming in that respect. Nevertheless, practice shows a developing new role of the Union in this respect.

### 3.3 Recent Military and Civil Operations and their Legal Base

On 31 March 2003 the EU formally took over NATO's Operation Allied Harmony in the former Yugoslav Republic of Macedonia, an operation contributing to a stable, secure environment. This decision has been made possible following the agreements reached by the EU and NATO concerning EU-led operations discussed above. Already in March 2002 the EU had given notice of its willingness to take over this operation from NATO, but it made the actual take-over dependent on the existence of a final security agreement with NATO.<sup>61</sup> On the basis of the decision to establish the EU operation, taken on 27 January 2003,<sup>62</sup> the Political and Security Committee is responsible for the political control as well as for the strategic direction of the operation. The PSC reports to the Council at regular intervals. The EU Military Committee monitors the proper execution of the military operation under the responsibility of the operation commander. On 18 March 2003, the Council decided that the launch of operation 'Concordia' (also referred to as EUFOR) was to take place on 31 March 2003.<sup>63</sup> About 300 troops from 27 different countries participate in this operation.

With this decision all paper arrangements can be put to the test. The operation is carried out with recourse to NATO assets and capabilities. The operation commander is NATO's Deputy Supreme Allied Commander for Europe (D-SACEUR) and the EU operation headquarters are the Supreme Headquarters of Allied Powers in Europe (SHAPE). One may get the impression that with the formal hand-over of the operation nothing changed. Nevertheless, this is the first operation in which the EU takes the lead. The NATO infrastructure is used, but the operation takes place under full control of the EU. Article 10(2) of the EU decision of 27 January 2003 provides: 'The entire chain of command will remain under the political control and strategic direction of the EU throughout the operation, after

<sup>60</sup> According to some observers this was not the case in the former situation where the WEU served as an intermediate organization. See L. Vierucci, 'WEU: A Regional Partner of the United Nations?' (1993) *Chaillot Papers*, WEU Institute for Security Studies.

<sup>61</sup> See Joint Action 2002/210/CFSP of the council of 11 March 2002.

<sup>62</sup> Council Joint Action 2003/92/CFSP of 27 January 2003 on the European Union military operation in the Former Yugoslav Republic of Macedonia, *Official Journal of the EU* (11 Feb. 2003) L 34. On 17 January 2003, the authorities of Macedonia had invited the union to assume responsibility for the follow-on to the NATO operation 'Allied Harmony'.

<sup>63</sup> Council Decision 2003/202/CFSP of 18 March 2003, *Official Journal of the EU* (22 Mar. 2003) L 76.

consultation between the two organisations. In that framework the Operation Commander will report on the conduct of the operation to EU bodies only. NATO will be informed of developments in the situation by the appropriate bodies, in particular the PSC and the Chairman of the Military Committee'.

In the area of 'soft security', another 'second hand' operation taken over by the EU is the EU Police Mission (EUPM), which serves as a follow-up to the UN police mission (IPTF) in Bosnia Herzegovina since 1 January 2003. The decision to establish this mission was taken by the Council on 11 March 2002,<sup>64</sup> but could only be implemented after an agreement was concluded between the European Union and Bosnia and Herzegovina.<sup>65</sup> In line with the general objectives of the Paris/Dayton Agreement in the aftermath of the war in the former Yugoslavia, EUPM seeks to establish sustainable policing arrangements under ownership of Bosnia and Herzegovina in accordance with best European and international practice. It does so in particular through monitoring, mentoring and inspection activities. Five hundred police officers from more than thirty countries make up the mission: the fifteen EU Member States as well as eighteen other countries.<sup>66</sup>

With the operations in Macedonia and in Bosnia and Herzegovina the new institutional arrangements regarding the European Security and Defence Policy have been offered a chance to prove their value, before the EU starts to be engaged in larger military operations. At the Copenhagen Summit in December 2002, the European Council confirmed that the EU is willing to take over the tasks of the NATO military operation SFOR in Bosnia and Herzegovina as well.<sup>67</sup> In any case, it seems that in this initial phase the EU is focusing on 'second hand' operations, rather than using the new ESDP arrangements to establish operations that are led by the Union from the outset. Regarding the financing of military operations the Council had already agreed on a solution in June 2002: costs lie where they fall. In other words: contributing member states pay their own expenses, although certain expenses (for instance arising from communication,

<sup>64</sup> Council Joint Action 2002/210/CFSP of 11 March 2002, *Official Journal of the EC* (13 Mar. 2002) L 70.

<sup>65</sup> Decision 2002/845/CFSP of the council of 30 September 2002, *Official Journal of the EC* (29 Oct. 2002) L 293. After the agreement concluded between the EU and Macedonia on 25 April 2001 (*OJ EC*, 5 May 2001, L 125) on the EU Monitoring Mission, this was the second international agreement indicating a treaty-making capacity (and a legal personality) of the EU. See on this issue: R.A. Wessel, 'The International Legal Status of the European Union' (1997) 1 *European Foreign Affairs Review* 109–129; and 'Revisiting the International Legal Status of the EU' (2000) *European Foreign Affairs Review* 507–537.

<sup>66</sup> To that end the EU concludes agreements with third states on their participation to the EUPM. See for instance the *Agreement between the European Union and the Republic of Poland on the participation of the Republic of Poland in the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH)*, concluded on 24 February 2003 and published as an Annex to Council Decision 2003/157/CFSP of 19 December 2002, *Official Journal of the EU* (7 Mar. 2003) L 64.

<sup>67</sup> Presidency Conclusions, Copenhagen European Council, 12–13 December 2002.

medical arrangements and the appointment of local personnel) will be charged in accordance with the GNP scale.<sup>68</sup>

From a legal perspective, however, it is striking that article 17 (on the Unions' competence to engage in military operations) is not used as a legal base for the initial decisions. The Joint Action on the establishment of the military operation in Macedonia refers to article 14 (competence to adopt Joint Actions), article 25, paragraph 3 (currently on the possibility to authorize the PSC to take decisions during the operations), article 26 (on the role of the CFSP High Representative) and article 28, paragraph 3 (on the financing of operations). The decision on the establishment of the EU Police Mission in Bosnia and Herzegovina merely refers to article 14 EU. One obvious reason not to refer to article 17 in these Joint Actions would be that at the time of adoption of the two decisions (January 2003 and March 2002 respectively) the Nice Treaty had not yet entered into force and article 17 still referred to the Western European Union as the organization to deal with this type of operation. At that moment, and anticipating the entry into force of the Nice Treaty, the WEU was already dismantled and any reference to this organization would not have made any sense. During the Nice Intergovernmental Conference a discussion took place on the need to revise the EU Treaty to allow for the ESDP to become operational.<sup>69</sup> Some member states argued that according to the Amsterdam version of article 17, the European Council already had the power to decide on an EU defence policy. At the same time these member states felt that any amendment of this provision would complicate the domestic ratification of the Nice Treaty. The Council Legal Service argued that the decisions taken by the European Council to establish a European security and defence policy did not necessarily require a treaty amendment. Only in the case of decision-making powers of the Council being transferred to a body made up of officials, or in the case of an amendment of the provisions regarding the arrangement with the WEU, article 17 needed to be modified.<sup>70</sup> This view was supported by Italy and the Benelux who drafted amendments to articles 17 and 25, the drift of which was taken over by the Nice Treaty.

At the same time many member states did not want the development of ESDP to become dependent on the entry into force of the Nice Treaty and they succeeded in having a declaration adopted by the IGC stating that the objective was for the EU to become operational quickly, with a decision to be taken as soon as possible in 2001 based on the existing treaty provisions. This decision was taken by the Laeken (Belgium) European Council in December 2001, implying that the entry into force of the Nice Treaty was not seen as a precondition for applying the ESDP. What the IGC seemed to have overlooked – also keeping in mind the report from

<sup>68</sup> Conclusions of the General Affairs Council of 17 June 2002. With regard to the EU Police Mission, however, it was also agreed that certain costs will be financed out of the community budget; see Council Joint Action 2003/141/CFSP of 27 January 2003, *Official Journal of the EU* (28 Feb. 2003) L 53.

<sup>69</sup> Peers, *loc. cit.*, 559–561.

<sup>70</sup> See Report of the Council Legal Service to the Feira European Council, June 2002.

the Council Legal Service – is that any viable ESDP *was* dependent on a modification of the arrangements with the WEU and on the role of the Political and Security Committee and that therefore treaty amendments were required to provide a legal base for any military operation not involving the WEU. The declaration on the operational capability of ESDP adopted by the European Council in Laeken reflects this ambiguity as it refrains from providing a clear picture of what exactly has changed with declaring ESDP ‘operational’: ‘Through the continuing development of the ESDP, the strengthening of its capabilities, both civil and military, and the creation of the appropriate EU structures, the EU is now able to conduct some crisis-management operations. The Union will be in a position to take on progressively more demanding operations, as the assets and capabilities at its disposal continue to develop. Decisions to make use of its ability will be taken in the light of the circumstances of each particular situation, a determining factor being the assets and capabilities available.’<sup>71</sup>

There may be some confusion as to whether the Council made use of this declaration as a basis for ESDP operations prior to the entry into force of the Nice Treaty. Indeed, the reference to article 25(3) in the Macedonia Joint Action indicates that the Council based this decision on the new post-Nice EU Treaty, irrespective of the fact that it was not yet in force. The version of the, at that time, existing article 25 did not know a paragraph 3. And indeed, according to its article 13, the decision was only to enter into force on 1 February 2003, the date of the entry into force of the Nice Treaty. The conclusion that the new treaty formed the basis for this decision on the establishment of a military operation feeds the argument that the modified article 17 should have been used as an (additional) legal basis. After all, the whole purpose of revising article 17 was to make possible these types of EU operations. The Council seems to recognize this point as article 17 is used as the key legal base for the follow-up decision on the actual launch of EUFOR in Macedonia.<sup>72</sup>

In the case of the EU Police Mission one could argue that the non-referral to article 17 does make sense as these kind of operations are not covered by the ‘defence policy’ foreseen by article 17. This would, however, deny the fact that even a police operation could fall under article 17(2) under the heading of humanitarian and rescue tasks. And, indeed, in all documents on the new competencies of the EU leading up to the Nice Treaty ‘security’ and ‘defence’ policy are presented in combination and article 17 is the pre-eminent provision to base these operations on.

<sup>71</sup> Declaration on the Operational Capability of the Common European Security and Defence Policy, Annex II to the Presidency Conclusions of the Laeken European Council, 14–15 December 2001.

<sup>72</sup> Council Decision 2003/202/CFSP of 18 March 2003, *Official Journal of the EU* (22 Mar. 2003) L 76.

### 3.4 Collective Defence

The Nice Intergovernmental Conference did reach an agreement on ‘the progressive framing of a common defence policy’, but article 17 continues to refer to a ‘common defence’ as a future possibility. At the same time all references to the Western European Union as the ‘defence arm’ of the EU were deleted. Is this the end of the Western European Union and hence of a European collective defence arrangement? No, since no consensus could be reached on the transfer of the original core function of the WEU to the EU, the collective assistance agreement laid down in article V of the modified Brussels Treaty is untouched. This provision reads: ‘If one 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.’ The WEU decided to have the WEU residual functions and structures in place by 1 July 2001 so as to enable the member states to fulfil the commitments arising from articles V and IX (on the WEU Assembly). This means that the WEU is essentially returned to the organization that was originally set up to deal with collective defence matters between the Benelux countries and the United Kingdom and France in 1948: the Brussels Treaty Organization. Although the 1948 Brussels Treaty was also intended to intensify the economic, social and cultural collaboration between the member states,<sup>73</sup> the collective self-defence paragraph (at that time article IV) soon proved to be the key provision. The 1954 Paris Protocols modified the original treaty by introducing the WEU as the successor to the Brussels Treaty Organization and allowing Germany to enter the Western European security co-operation through a strict control of its rearmament. After a minimal use of the provisions of the modified Brussels Treaty, the WEU was reactivated in 1984 and allowed to serve as a co-ordination framework for the Western European States in the field of military security co-operation (on the basis of article VIII, paragraph 3).<sup>74</sup> It is in fact this new function which culminated in the creation of the Petersberg tasks that were handed over to the European Union. This explains why no modifications to the WEU Treaty are necessary.

As far as the EU is concerned, the story has not ended. The refusal of the EU member states in Nice to transfer the collective defence obligation in article V of the Brussels Treaty to the EU Treaty means that the EU has not devoured all of the WEU, which results in a somewhat handicapped ESDP. However, procedures to take things further have been set in place. A future transfer of the common (‘collective’) defence provision from the WEU to the EU is made dependent on a

<sup>73</sup> The official name of the WEU Treaty is still: Treaty of Economic, Social and Cultural Collaboration and Collective Defence.

<sup>74</sup> Art. VIII(3) reads: ‘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’.

decision by the European Council only (which may nevertheless need to be adopted by the individual member states in accordance with their respective constitutional requirements – article 17). An inclusion of the collective – or ‘common’ in EU terms – defence clause in the Union treaty would not only be in line with the established defence policy, but also with the goals the EU has set for itself: ‘to organise, in a manner demonstrating consistency and *solidarity*, relations between the member states and between their peoples’ (article 1); ‘to safeguard the common values, fundamental interests, independence and integrity of the Union . . .’; and ‘to strengthen the security of the Union in all ways’ (article 11). While the WEU returns to the dormant position it occupied during the first 30 years of its existence, the European Union may reveal itself as an international organization that not only plays a major economic role in the international legal order, but also a major role where the maintenance of peace and security is concerned.

#### **4 CONCLUSIONS AND OUTLOOK**

On 31 March 2003 the EU took an important step in its development by launching its first military operation. This was made possible due to the new arrangements in the EU Treaty introduced by the Treaty of Nice. These arrangements allow the Union to engage in all possible types of military operations, including peace enforcement actions. While this certainly is a true milestone, history taught us not to draw too far-reaching conclusions on the further development of the EU in this area. After the introduction of the provisions on a Common Foreign and Security Policy in the EU Treaty in 1992, expectations as to their unifying power were high. Indeed, the decision-making procedures on CFSP oblige the EU member states to work together systematically on any issue of foreign and security policy and to discuss these issues within the Council with their fellow members. This has resulted in a ‘European reflex’ at the Political Directorates of the national Foreign Ministries in the sense that decisions on foreign policy have almost ceased to be taken without any consultation with the European partners. At the same time, however, the CFSP arrangements do not force the member states to adopt a common policy or a joint action. The obligation is to consult, not to unite. Once a common viewpoint is out of reach, the member states are free to pursue their own policy. While this was a deliberate choice in the treaty from the outset (any further-reaching arrangement would not have made it to the final treaty text), expectations were somehow higher and over the past ten years the EU has been blamed for not living up to these expectations.

The new European Security and Defence Policy runs the risk of being trapped the same way. ESDP was declared operational when formal institutions were not yet in place and when member states had not lived up to their promise to deliver the troops needed to achieve the headline goal set by the Helsinki European Council in December 1999. Moreover, ESDP is seen as the cream on the CFSP pudding, but when it still proves to be impossible for the member states to agree on key questions of foreign policy (as recently shown in the Iraq case), one

occasionally wonders how any larger scale operation could ever become subject to consensus.

This is not to deny the importance of some recent decisions. Both the Saint-Malo declaration (and the follow-up decisions) and the agreements with NATO are truly historic in nature and potentially allow the EU to develop in the direction of a regional arrangement in the sense of chapter VIII of the UN Charter. This time, however, we should bear in mind that legal arrangements and decision-making procedures do not guarantee an outcome on their own. This spring the EU has carefully started to use the new arrangements for the launching of small-scale operations in the area where the Union has proven to be successful: post-conflict peace-building. Chances that ESDP in the short run will go beyond this are remote. And, the 'finalité' of ESPD is still in the dark as the Laeken Declaration of December 2001 explicitly states that 'the development of military capabilities does not imply the creation of a European army', irrespective of the fact that a European military force is active in Macedonia. Indeed, this conjuring with words characterizes the current ESDP arrangements. Common defence (the term is used instead of the usual term 'collective defence') does not yet form part of ESDP and refers to the mutual obligation (currently) laid down in article V of the WEU Treaty and in article 5 of the NATO Treaty. On the other hand, defence *policy* is included, but has nothing to do with 'defence' in the classical meaning (territorial defence). Instead, it seems to relate to the external policies of the Union involving military operations, including humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking. In addition, *security* policy relates to the non-military external policies of the Union, including the EU positions in the OSCE; the policy of disarmament and arms control; nuclear non-proliferation issues; and the economic aspects of security, in particular armaments co-operation, control of the transfer of military technology to third countries and control of arms exports. The distinction between the different policies is by no means clear, and here we may see an assignment for the Intergovernmental Conference planned for 2004 to come up with more straightforward definitions in order to prevent expectations to rise above capabilities and actual treaty arrangements.