

An Introduction to European Security Law

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The European security landscape has been rapidly changing recently. In 1991, in Maastricht, the Member States of the European Communities created the Common Foreign and Security Policy (CFSP) as an intergovernmental second pillar of the Treaty on European Union (TEU). Moreover, since 1998 they have been developing the security aspect of this policy into a European Security and Defence Policy (ESDP). This policy now even includes a plan for a European Rapid Reaction Force of 60,000–100,000 troops with army, air force, and navy components. The necessary institutional structures to back up this independent military capability of the European Union (EU) have started to operate. These developments are the most significant innovations towards European security integration since the failure of the European Defence Community (EDC) in the 1950s. Since then the security of the old continent had been dependent largely on the US-dominated North Atlantic Treaty Organisation (NATO), complemented by her largely dormant European sister the Western European Union (WEU).

After two devastating World Wars, the prohibition of the use of force limited the legality of war to the right to self-defence or military action taken under United Nations (UN) authority. Consequently the ministers and departments of war gradually became ministers and departments of defence. Theoretically the sole tasks of the armed forces were to organize the defence of their country, especially against the threat of the other military bloc during the Cold War. However, during the same period new tasks for the armed forces developed. Mainly within the framework of the United Nations, the armed forces of many countries were deployed to keep peace between warring parties, to enforce peace, or more generally for humanitarian tasks. Today missions can take the modern soldier to the other end of the world where he or she is not necessarily expected to fight but to prevent bloodshed. The armed forces serve a broader notion of international or regional security that goes beyond the classical defence of the state. After the end of the Cold War the military threat posed by NATO and the Warsaw Pact vanished. As the extensive defence effort of the past was no longer necessary the armed forces of many countries had to find new reasons for their expensive existence in a time of tight budgets. These security activities, from humanitarian action to peacemaking,

seem to have developed into the new *raison d'être* for the military. Moreover, more recently the fight against terrorism was added to these tasks. Just as the focus shifted from 'war' to 'defence' after World War II, the emphasis has been shifting from 'defence' to 'security'. Moreover, the word 'security' can be understood as a wider term that also includes the classical function of 'defence'. Indeed, the concept of 'security' can take on a specifically regional character that may be created by the EU but also influenced by other European regional actors such as NATO or the Organization for Security and Co-operation in Europe (OSCE), as well as by international institutions. This book considers the political and legal development of European security as understood in its external aspects—security from threats and attacks—rather than what could be called internal security or police matters.

The evolution of the EU into a security actor poses numerous legal problems. Unlike the failed EDC Treaty of 1952, the ESDP is part of the intergovernmental CFSP. The regulation in a separate pillar causes problems with the Community pillar when a policy or measure requires instruments from both pillars, for example in relation to sanctions. This leads to the more general problem of the coherence of the CFSP with the elements of external relations already conducted in the Community framework. The 2004 EU Constitutional Treaty, if it ever comes into force, aims to overcome the multi-pillar structure of the EU. It builds on the peacekeeping *acquis* of the current second pillar, which has already led to several missions. It also includes a mutual defence clause, which raises questions of neutrality concerning some of the Member States. Moreover, the emergence of a new defence and security actor raises questions of compatibility with NATO and other elements of the European and transatlantic security structure, most notably the collective security system of the UN, as well as basic principles of international law governing the use of both forcible and non-forcible measures. The necessity to establish a European defence equipment market through the introduction of a European Defence Agency (EDA) is a third element of the defence dimension of the EU envisaged by the Constitutional Treaty. This edited collection addresses the legal dimension of European security in three parts. Part I deals with the origins and future of European security integration before Part II covers the elements of the current European security policy, followed by a final Part III on the consistency of the European security framework.

Before Parts II and III of this collection look at European security law in its actual and present context, Part I discusses past and future visions of European security and defence integration. Co-editor Martin Trybus covers the origins and future of European defence integration in two chapters. This aims to facilitate the understanding of the discussion of the present system in the following parts and explores alternative models to the current approach at the same time. Both chapters have in common that they deal with major European treaty projects which did not become reality. In Chapter 2, 'The Vision of the European Defence Community and a Common Defence for the European Union', he investigates the relevance of the dawn of European integration for the present and the future. In the early 1950s

the six founding Member States of the European Coal and Steel Community (ECSC) envisaged a supranational EDC in charge of a European defence policy which would even have included a European army. This most ambitious project of European security integration to date failed. The objective of this chapter is to provide an overview of the Community envisaged in the EDC Treaty. The method to achieve an understanding of the scale of security and defence integration planned in the 1950s is to compare the EDC Treaty with defence-related provisions in later European treaties and legislation, most notably those on the CFSP, ESDP, and the Common Security and Defence Policy (CSDP) under the 2004 EU Constitutional Treaty. After a brief introduction to the history of the EDC Treaty, the chapter will discuss the supranational nature of the EDC as reflected in its institutional law, its defensive character, its principle of non-discrimination between Member States, and the connection to NATO. Within the limits set by a book chapter and considering the different historical and strategic contexts, the reader will be able to compare the comprehensive legal framework with the current efforts discussed in other chapters of this collection.

In Chapter 3 Trybus discusses another ambitious and ill-fated project of European security integration, this time set in an uncertain future rather than in the past. 'On the Common Security and Defence Policy of the EU Constitutional Treaty' deals with the innovations regarding security and defence envisaged under the EU Constitutional Treaty mentioned above. The three main policy fields of the CSDP, namely, armaments policy, crisis management, and collective defence, will be addressed. These policy fields will be discussed at length in their current context in Part II of the collection. The analysis in Chapter 3 takes different versions of the Constitutional Treaty into account: from the draft presented by the Convention in July 2003 to the final version published in December 2004. It will be argued that the future of the CSDP does not depend on the entering into force of the Constitutional Treaty. The CSDP armaments policy has been detached from the Constitutional Treaty and implemented through a Joint Action. It is already developing on the basis of the current framework, as will be discussed in Chapter 9. Moreover, the CSDP crisis management policy and the EU's military institutions do not differ substantially from those of the ESDP presently conducted under the Treaty of Nice. They can be developed on the basis of the current framework, which is discussed extensively in Chapters 4 to 6. Finally, the collective defence commitment, and the office of the Union Minister for Foreign Affairs envisaged in the Constitutional Treaty, could also be introduced on the basis of Article 17(1) of the Treaty on European Union. The collective defence commitment is discussed in Chapter 8.

Following the discussion of past and future visions of European security and defence integration, Part II covers the various elements of European security policy, mainly in its current context of the Treaty of Nice. Part II has six chapters. Three chapters cover legal problems of the EU crisis management policy, and one chapter each is dedicated to mutual defence, anti-terrorism policy, and armaments policy.

Peacekeeping has been one of the most important EU activities under the second pillar of the current Treaty of Nice. Therefore three chapters cover the evolving EU crisis management policy. In Chapter 4, 'ESDP in Practice: Increasingly Varied and Ambitious EU Security and Defence Operations', Frederik Naert analyses the main legal aspects of the first eleven of the thirteen ESDP operations launched since 2003, ie, the military operations CONCORDIA (Former Yugoslavian Republic of Macedonia, FYROM), ARTEMIS (Democratic Republic of Congo, DRC) and ALTHEA (Bosnia and Herzegovina), the police operations EUPM (Bosnia and Herzegovina), PROXIMA (FYROM) and EUPOL KINSHASA (DRC), the rule of law mission EUJUST THEMIS (Georgia), the integrated rule of law mission EUJUST LEX for Iraq, the security sector reform mission EUSEC DRC (DRC), the civil-military EU Support to AMIS II (African Union Mission in Darfur, Sudan) and the EU monitoring mission in Aceh (AMM). After an analysis of each operation, focusing on common elements and peculiar aspects, Naert draws some general conclusions regarding the scope of ESDP operations, international mandate, legal status and applicable law, third State participation and some institutional issues.

In Chapter 5, 'EU Peacekeeping Operations: Legal and Theoretical Issues', Nicholas Tsagourias explores the theoretical, political, and legal aspects of EU peacekeeping. The first of the issues examined is the institutional mechanisms and legal framework for peacekeeping contained in the EU constitutive treaties as well as the rationale behind EU peacekeeping. It will be argued in this regard that peacekeeping is a manifestation of the EU's 'civilian' identity. The second of the issues which will be examined is the relationship between the EU, the UN, and NATO in peacekeeping. Notwithstanding the close cooperation and the structured dialogue between these organizations, it is submitted that legally or politically the EU can act more independently. The third of the issues which will be examined, and which has received minimum attention, concerns the application of international humanitarian law and human rights law to peacekeeping operations, as well as the international responsibility of the EU. It will be argued that the operations are those of the EU and that the latter has *de facto* personality. However, because of ambiguities with regards to the international personality of the EU, the above issues will be considered from a number of different perspectives.

In Chapter 6, 'Extraterritorial Collective Security: The European Union and Operation ARTEMIS', Ademola Abass discusses Operation ARTEMIS, undertaken by the EU in the Democratic Republic of Congo in 2003 at the request of the UN. He examines the various legal issues that arise from the operation, which not only became the first time the EU has conducted an enforcement action properly so-called, but also the first time it had done so outside Europe. In particular, the chapter considers why the Security Council authorized the operation under Chapter VII and not Chapter VIII of the UN Charter, especially being, it is argued, the first time the Security Council had utilized a regional organization in the proper understanding of the Chapter VIII framework. The chapter studies

the non-involvement of the African Union (AU) in an operation concerning one of its Member States, and elucidates the wider implications of the operation for the inter-institutional relationship between the EU and the AU.

In Chapter 7 Mirko Sossai explores 'The Anti-Terrorism Dimension of ESDP'. The progressive development of an ESDP coincided with the urgency, perceived also at the EU level, to combat the global threat to peace and security constituted by trans-national terrorist networks. Since the 2002 Seville meeting, the European Council has gradually identified the main characters of the ESDP contribution against terrorism. In this regard, two essential steps are represented by the approval of the Declaration on combating terrorism, soon after the terrorist attacks in Madrid of 11 March 2004, and the adoption of the Conceptual Framework on the ESDP dimension of the fight against terrorism. This chapter seeks to evaluate the changes terrorism has made to the nature of ESDP against the background of the negotiation on the Constitutional Treaty and therefore the possible role of the EU as a regional organization under Chapter VIII of the UN Charter. It is important to understand how the military option can complement the EU's counter-terrorism action in the crucial areas of judicial and police cooperation, civil protection and assistance to third countries.

In Chapter 8 Heike Krieger covers mutual defence in a European context by asking 'Common European Defence: Competition or Compatibility with NATO?'. Since the end of the cold war new security structures have emerged within Europe. The end of the bi-polar security system has enlarged the number of actors with overlapping competences. While NATO broadened its range of permissible activities through the new Strategic Concept of 1999, efforts within the EU aim at closer co-operation on mutual defence including an automatic action commitment. After examining legal limitations for overlapping treaty obligations of NATO and EU Member States the chapter will argue that the EU should not pursue the idea of creating a traditional defence alliance. Rather, because of the changing understanding of defence and security, an alliance based on a clause comparable to the solidarity clause in the envisaged EU Constitutional Treaty could be a more appropriate approach in the future.

In Chapter 9, 'European Armaments Policy: A *Conditio Sine Qua Non* of the European Security and Defence Policy', Aris Georgopoulos describes the landscape of the European armaments market. The existence of a vibrant and competitive European defence and industrial base is widely considered as a necessary condition for an effective and credible ESDP. With this as its starting point the chapter focuses on examination of the emerging institutional framework of a European armaments policy in the light of the recent developments in the field, namely, the establishment of the European Defence Agency and the initiatives of the European Commission. There are various reasons which make this examination necessary. First, the institutional arrangement of European armaments cooperation has immediate consequences for the effectiveness of efforts to create a healthy and competitive European defence technological and industrial base.

As argued in the chapter, the limited effectiveness witnessed so far is to a large extent attributable to what appears to be an environment of unnecessary institutional balkanization of European armaments cooperation. The chapter further submits that the subordination of European armaments cooperation under the EU did not eradicate duplication completely because there are other fora of armaments cooperation outside the EU. More importantly, the initiatives within the Union do not appear to be complementary but inherently antagonistic. Finally, the chapter argues that the new institutional framework, although much more streamlined than in the recent past, develops like a creature with two heads. Until there is a clear allocation of roles the aim of sustaining a vibrant and competitive European defence industrial and technological base would be simply a chimaera with immediate negative repercussions on the credibility of the ESDP as a whole.

After the discussion of the scope of the ESDP and its legal problems in Part II, Part III discusses the coherence of European security law, in five chapters. The discussion refers both to the internal coherence of the security policy of the EU and to its external coherence with policies outside the Union.

Two chapters deal with the internal coherence of the security policies of the Union. In Chapter 10 Ramses A Wessel addresses 'Differentiation in EU Foreign, Security and Defence Policy: Between Coherence and Flexibility'. While the relatively new security and defence policy may contribute to positioning the Union as a cohesive force in international relations, the current legal regime explicitly allows for differentiation in this area. The purpose of this contribution is to analyse the variations in foreign, security, and defence policy as well as the consequences of a possible fragmentation on the positioning of the Union as a united global force. Is it possible for Member States not to participate in the security and defence integration or does the single legal order of the Union prevent this variation? A second question concerns the different possibilities for closer (or 'enhanced') cooperation. While the Treaty on the one hand allows for groups of Member States to work closer together in the area of CFSP, on the other hand the possibilities for an enhanced cooperation in ESDP are less evident. And, finally, the question is to what extent the new European Constitution discussed in Chapter 3 further consolidates the somewhat fragmented legal regime on differentiation in the area of foreign, security, and defence policy.

In Chapter 11 Panos Koutrakos examines 'Security and Defence Policy within the Context of EU External Relations: Issues of Coherence, Consistency, and Effectiveness'. ESDP is devised and carried out in the context of EU external relations. This chapter sheds some light on the various linkages between the conduct of an efficient ESDP and the law and practice of EU external relations and the various ways in which the Union institutions and the Member States seek to ensure the consistency and coherence of EU international actions. It identifies normative, political, and practical mechanisms and examines their interactions in the context of an evolving Union.

The last three chapters of Part III deal with the coherence of the security policy of the EU with other international security frameworks. In Chapter 12 Fabien Terpan explores 'EU-NATO Relations: Interoperability as a Strategic Consideration and a Legal Requirement'. In both NATO and the EU there is a legal basis for the development of a European role in defence and security. Arrangements have been made to fully cooperate in these matters. However, EU-NATO relations face three major challenges: subsidiarity, interoperability, and a more balanced partnership between European members and the United States. Neither the treaties nor the political declarations have given a precise view of the way these challenges are supposed to be faced. A permanent Treaty should help to better shape the future of EU-NATO relations. Before that, however, some political clarifications have to be provided, especially on the idea of European autonomy.

In Chapter 13 Marco Odello examines the relationship between 'The Organization for Security and Co-operation in Europe and European Security Law'. The OSCE defines security and cooperation as one of its main purposes. Security is a wide concept that does not always have well-defined limits. It can expand and include both military and non-military elements. The OSCE was the largest organization in the widened European region well before the end of the Cold War. For this reason, it is not possible to speculate on the idea of European security law without dealing with the pan-European organization par excellence. The content of the concept of security adopted by OSCE documents will be related to other organizations to provide a general framework of the developments concerning the definition(s) of this concept. The chapter focuses on legal aspects of institutional action in the area of security law. Its central idea is to evaluate whether the legal and institutional structure of the organization may undermine its role as the leading European organization in the area of security. It also considers the possible positive aspects of the peculiar legal framework of the OSCE.

In Chapter 14 Nigel White discusses 'The EU as a Regional Security Actor within the International Legal Order'. The UN Charter envisaged the universal organization it constituted working on security matters alongside regional security actors. More widely, the Charter formed part of the post-1945 international legal order, contributing in varying degrees to the principles and rules governing the use of military force, the imposition of non-forcible measures, and the protection of human rights and self-determination. In the period 1956–1992 the impact of these international rules and institutions on the predecessors of the EU was limited. With the EU's entrance as a serious security actor on the international stage in 1992, with the adoption of the Maastricht Treaty, it became more pressing to evaluate the position, powers, and limitations of the EU in the international legal order. The questions to be considered within this chapter concern the rights and duties of the EU and the UN in international law in the related areas of peace and security, human rights, and democracy, as well as the legal relationship between the

two bodies. This will then provide a clearer framework within which better cooperation can be achieved. The process of positioning the organizations within the international legal order should result in enhancing the legitimacy and arguably the effectiveness of the two organizations, whether they act singly or together. It is important to identify the underlying principles governing the organizations and their activities. It will be argued that there are fundamental (legal) principles underlying the function of collective security in the international community that have to be recognized and reinforced if we are to have organizational activity that is not just simply discretionary or arbitrary.

In the final Chapter on 'Conclusions on the Current State of European Security Law' Nigel White and Martin Trybus draw conclusions on the scope and coherence of European security law.