

The Legal Foundations of a European Army

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The Legal Foundations of a European Army

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Abstract: *A European Army featured at the very beginning of the European integration process. In the early 1950s the 'Plan Pléven' proposed to establish a European Defence Community comprising inter alia of an integrated European Defence Force. However, the plan failed and the notion of a European army disappeared from the European agenda for a long time. While the creation of a European army is controversial and not very likely in the short term, the (Common) European Security and Defence Policy developed since the late 1990s might well lead to a permanent European military force in the medium or long term. However, so far EU military missions (in Bosnia, the DRC, Mali, or the Horn of Africa), while based on a permanent intergovernmental framework and EU military bodies, have been conducted by forces made up of national Member State forces formed on an ad hoc basis. The paper will examine the legal and policy arguments for a European army and discuss how the existing legal framework under the Treaty of Lisbon would need to be reformed to permit the establishment of such an entity.*

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1. Introduction

Many readers will find the title and topic of this article quite provocative as the subject matter of a European army is controversial. First, it is controversial for many who are opposed to war and the military: they are not only against a European army, but against armies in general. This is understandable. However, it is hoped that what a European Army would be used for, that is for peacekeeping and State building rather than for invasions, can put some of those critical about the military at ease. Moreover, it needs to be remembered that European integration is always first of all about peace. Second, a European Army is of course controversial for those opposed to transferring any further powers to the European Union (EU). Moreover, the creation of common European military structures would entail the transfer to powers in the area of security

and defence policy which are perceived to be at the very heart of national sovereignty. If the competence for defence is handed over to Brussels, they might say, the EU finally becomes a State and the United Kingdom and the other Member States would lose their independence.¹ However, it is submitted that such fears are exaggerated and hopefully the financial, military, and political arguments for common structures outlined below will be carefully considered.

This article aims to address three basic questions: (1) what is to be understood under the term “European Army”?, (2) why should a European Army be established?, and finally (3) how could a European Army be established? The article will therefore have the following structure: it will begin by laying the foundations for the understanding of the main thesis of the paper. First, the significance of defence in the European integration process will be outlined. Second, three models of a European Army as reflected in existing legal and policy documents will be discussed. It will then move on to the main part of the argument. This will explain first ‘the why?’ and second ‘the how?’ of a European army based on legal concepts. In other words, it will discuss a legal argument for the establishment of a European army, an argument based on the principle of subsidiarity, and the legal concept or technique through which a European army could be established, the concept of flexibility, also called differentiation.

2. European integration and defence

Defence - and even a European army - featured prominently at the very beginning of the European integration process. As early as 1950, in the Assembly of the Council of Europe, Sir Winston Churchill called for:

“[...] the immediate creation of a unified European army [...] under a unified command, and which we should all bear a worthy and honourable part [...]”²

While this probably makes Winston Churchill the “father” of the modern idea of a European army, the concrete proposal was a French idea.

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¹ See for example Mr Geoffrey Van Orden MEP, the Conservative European defence spokesman on the plan to establish “Synchronized Armed Forces Europe: “[British ministers] are sleepwalking towards a European army and seem to have little awareness of what is going on”, 18 February 2009, [telegraph.co.uk](http://www.telegraph.co.uk); Conservative defence spokesman Liam Fox MP: “The idea of a standing European military force under EU command or the creation of an EU defence budget is wishful but dangerous thinking. [...] This is another example of the EU getting involved in an area in which it has no business”, 7 June 2008, <http://www.dailymail.co.uk/news/article-1024630/France-plotting-create-Euro-Army.html#ixzz0gdAxFdU7>; and “But the development of a European Army would undermine Nato, creating two parallel military bureaucracies that would not only cost a fortune - much of it, as usual, from the UK taxpayer - but compete directly with each other. <http://www.dailymail.co.uk/news/article-1024803/Folly-wreck-Nato.html#ixzz0gdBmhPgp>

² Council of Europe, Consultative Assembly, Ordinary Session 1950, Documents.

2.1 The European Defence Community

In 1952, following the establishment of the very first European Community, the European Community for Coal and Steel, the Plan Pléven envisaged a European Defence Community between six Member States: France, Italy, Germany, Belgium, the Netherlands, and Luxembourg. The European Defence Community Treaty³ envisaged nothing less than the merger of the armed forces of the Member States into a single European army called the “European Defence Forces”.⁴ These forces were to be organised and supervised by a supranational (meaning independent) administration answerable to a European Assembly and reviewed by a Court of Justice.⁵ Units from the Member States were to be made available to the Community “with a view of their fusion” into the European Defence Forces. These were to be made up of conscripts and regular volunteers wearing a common (blue) uniform.⁶ No Member State could have recruited or maintained national armed forces.⁷ Hence the European Defence Force was to replace the armed forces of the Member States. Having been signed by all six Member States and ratified by four, in the end the French Parliament voted against ratification in 1954.⁸ After the failure of the European Defence Community, defence dropped completely off the European agenda for decades. The defence of Europe became the exclusive task of the Northern Atlantic Treaty Organisation (NATO). In their 2003 book *Toward a European Army* the political scientists Trevor Salmon and Alistair Shepherd therefore rightly called the second half of the 20th century “fifty years of failure”.⁹

2.2 The Common Foreign and Security Policy

38 years later, in 1992, in the first Maastricht version of the Treaty on European Union, the new Common Foreign and Security Policy (CFSP) was created. This put security, but not yet defence, back on the European agenda, as an intergovernmental

³ *La Traité Instituant la Communauté Européenne de Défense – La Documentation Française* was originally published by the *Ministère des Affaires Etrangères* in Paris [undated 1952?]. There are two English translations. One was presented to the United Kingdom Parliament in April 1954 as *The European Defence Community Treaty Paris, May 27, 1952 (together with related documents)*, Cmd 9127 (London: HMSO, 1954). The Office of the United States Special Representative in Europe published a separate and slightly different unofficial translation of the EDC Treaty on 26 January 1953 based on the United States Senate publication 94118 (82nd Congress 2nd session), a NATO version published on 12 July 1952 and on translation of one of the agreements by the Allied High Commission’s Secretariat. Article 1 EDC Treaty:

“The High Contracting Parties, by the present Treaty, set up among themselves a European Defence Community, supra-national in character, comprising common institutions, common Armed Forces, and a common budget.”

⁴ European Defence Community Treaty 1952 Part III: Military Provisions; Chapter I: Organisation and Administration of the European Defence Forces (Articles 68-79), Chapter II: Status of the European Defence Forces.

⁵ European Defence Community Treaty 1952 Part II: The Institutions of the Community, Chapter I: The Board of Commissioners (Articles 19-32); Chapter II: The Assembly (Articles 33-38), Chapter III: The Council (Articles 39-50), Chapter IV: The Court (Articles 51-67).

⁶ Article 15 EDC Treaty, According to Article 12 of the Military Protocol to the EDC conscription would last at least 18 months.

⁷ Except in clearly defined circumstances: Article 9 subparagraph 2 EDC.

⁸ For more detailed accounts of this failure including the reasons: Edward Fursdon, *The European Defence Community: A History* (Macmillan: London, 1980), chapter 7: “Prelude to failure”, at 227-265 and chapter 8: “La ronde est complète”, at 266-299 and Daniel Lerner and Raymond Aron, *France Defeats EDC* (Frederick A. Praeger: New York, 1957).

⁹ Trevor C. Salmon and Alistair J. K. Sheperd, *Toward a European Army: A Military Power in the Making?* (Lynne Rienner Publishers: Boulder and London, 2003), chapter 2 at 15.

framework, meaning that it was controlled by the Member States who retained a veto right on all decisions.¹⁰ On defence the new Treaty said in its Article 17 (1):

“The common foreign and security policy shall include all questions relating to the security of the Union, including the progressive framing of a common defence policy, which might lead to a common defence, should the European Council so decide.”

This means that a common defence – which could and it is submitted would entail a common European army – is recognised as a possible future step.¹¹ The Treaty of Lisbon contains a very similar provision in Article 42 (2).¹² However, a common defence was of course not established with the Maastricht Treaty. That common defence is, as the author wrote in his book *European Union Law and Defence Integration* “vague, uncertain and set in the future”.¹³

2.3 The European Security and Defence Policy

It was not before the Treaty of Nice in 2000 that more flesh was put to the bone, with a new European Security and Defence Policy (ESDP) as part of the CFSP just mentioned.¹⁴ At the same time the so called ‘Petersberg Tasks’, essentially outlining the objectives for a common European Security and Defence Policy were inserted into the Treaty. They were listed in Article 17 (2) TEU: “humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking”. The Treaty of Lisbon contains a very similar provision in Article 43 (1).¹⁵ This defines what Marc Leonard, in his book *Why Europe will run the 21st Century* calls “the European way of war”.¹⁶ Essentially for the EU the military is only

¹⁰ On the differences between the envisaged supranational European Defence Community and the intergovernmental Common Foreign and Security Policy see: M. Trybus, “The Vision of the European Defence Community and a Common Defence for the European Union” in M. Trybus and N. D. White (eds.), *European Security Law* (OUP, 2007), chapter 2 at 13.

¹¹ Martin Trybus, *European Union Law and Defence Integration* (Hart: Oxford, 2005) at 64 - 65.

¹² Article 42 (2) Treaty on European Union (Lisbon) reads:

“The [CFSP] shall include the progressive framing of a common defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.

The policy of the Union in accordance with this Article shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in [NATO], under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.”

¹³ Trybus, *European Union Law and Defence Integration*, *supra* note 11, at 61.

¹⁴ See in general on the ESDP: R. A. Wessel, “The State of Affairs in European Security and Defence Policy: The Breakthrough in the Treaty of Nice” (2003) 8 *Journal of Conflict & Security Law* 265-288.

¹⁵ Article 43 (1) TEU (Lisbon) reads:

“The tasks referred to in Article 42 (1), in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation.

All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories.”

¹⁶ Marc Leonard, *Why Europe will run the 21st Century* (Fourth Estate: London and New York, 2005), chapter 5 and 57.

part of a whole framework of instruments – together with police, lawyers, consultants, teachers, doctors, etc. – of peacekeeping (and when necessary peacemaking), crisis management, State building, and rescue. In contrast, the “American way of war” is more based on the military, a contrast which the US American Robert Kagan in his book *Of Paradise and Power* described as Americans being from Mars and Europeans being from Venus.¹⁷ Interestingly, however, the new US administration is about to add the “EU’s Venus approach” to the “American way of war” by creating a 4,000 strong civil crisis reaction force by the end of 2010.¹⁸

The ESDP had been a British initiative. During the Franco-British summit of Saint-Malo in December 1998 the President of France and the Prime Minister of the United Kingdom agreed on a Joint Declaration on European Defence.¹⁹ The declaration referred directly to the CFSP. In order for the EU “to be in a position to play its full role on the international stage”, so Chirac and Blair:

“[...] the 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”.²⁰

Why did the United Kingdom change its traditionally reserved position on a common defence? Ultimately this was triggered by the results of a Ministry of 1998 Defence Strategic Review ordered by the Prime Minister. As summarised by Sandholtz and Sweet, the review concluded what is still the case today:

“ [...] in an emergency situation the EU Member States could only mobilise a very limited force, heavily dependent on the support of the USA regarding transportation, logistics, and communications. Europe simply lacks the skills and equipment for independent military action: although the EU Member States spend about two-thirds of what the USA spend on defence, they can only deploy about 10 per cent of what the USA can deploy.”²¹

Therefore the perceived necessity of the modernisation of the armed forces to equip them for new tasks is an important motive of the initiative. This modernisation will be expensive, too expensive for a purely national effort. The British Prime Minister understood that the relevant modern armed forces of the future, capable and equipped to be deployed worldwide without the help of the USA, are too expensive for any single Member State of the EU. The only alternative to a national military dependent on the USA is a European force.²²

¹⁷ Robert Kagan, *Of Paradise and Power: America and Europe in the New World Order* (Alfred A. Knopf: New York, 2003), at 3.

¹⁸ John Herbst, Coordinator for Reconstruction and Stabilisation, S Department of State during a conference “Building a Strategic US-EU Partnership on Defence and Security Aspects” organised by the Atlantic Council in partnership with the Center for Transatlantic Relations and the Centre for Strategic and International Studies as part of the Project on Forging a Strategic US-EU Partnership, Washington DC, 21 October 2009.

¹⁹ Franco-British Summit, “Joint Declaration on European Defence: Saint-Malo”, 3-4 December 1998, in: *From St-Malo to Nice, European Defence: core documents*, compiled by Maartje Rutten, Chaillot Paper 47, Institute of Security Studies of the Western European Union, Paris, 2001, at 8.

²⁰ Ibid.

²¹ Wayne Sandholtz and Alex Stone Sweet (eds.), *European Integration and National Governance* (OUP 1998), at 259.

²² Reference to Anglo-French Treaty.

Saint-Malo “triggered” a number of corresponding decisions of the EU. The Cologne European Councils of June 1999²³ and Helsinki of December 1999 ‘Europeanised’ the Franco-British Saint-Malo initiative. Helsinki stipulated the more tangible ‘Helsinki Headline Goal’. This entails the current vision of common military structures. First, the EU was to be able, by 2003, to deploy within 60 days and to sustain for at least one year, military forces of up to 50,000-60,000 persons or up to 15 brigades, capable of the full range of the ‘Petersberg tasks’ – “the European way of war”. The forces were to be militarily self-sustaining with the necessary command, control and intelligence capabilities, logistics and other combat support services and additionally, as appropriate air and naval elements. The French Presidency Report at the European Council at Nice speaks of a “pool of 100,000 persons, [...] 400 combat aircraft and 100 vessels.” The Helsinki Presidency Conclusions also stated:

“The European Council underlines its determination to develop an autonomous capacity to take decisions and, where NATO as a whole is not engaged, to launch and conduct EU-led military operations in response to international crises. This process will avoid unnecessary duplication and does not imply the creation of a European army.”²⁴

It is necessary to point this out in the second part of the last sentence of this citation, because what is proposed appears to be exactly that: a European army.

The European Rapid Reaction Force envisaged in St-Malo and Helsinki was not established by 2003 as planned and was never been established as such. In 2005 the ‘battle group concept’ was developed and established in subsequent European Councils. It means that Member States earmark ‘on call’ battle groups of 1,500 men and women with the respective equipment. 15 of these groups have been established so far. They have never been called to action.

Another important development occurred since the beginning of the century. The ESDP was increasingly put into action. This started with a small police force in Bosnia and Herzegovina, continued with a first military peacekeeping force in the Former Yugoslav Republic of Macedonia, another force in the Democratic Republic of the Congo and culminated in the at times 7,000 strong EUFOR peacekeeping force in Bosnia and Herzegovina to replace the UN force in place before that. Since then the EU carried out over 20 missions, using the military, police, and other law enforcement units for peacekeeping and law enforcement in various parts of Europe, Africa, and the Middle East.²⁵ What needs to be said is that the EU missions so far have been

²³ Declaration of the European Council on Strengthening the Common European Policy on Security and Defence, European Council Meeting in Cologne, 3-4 June 1999, Rutten, *From Saint Malo to Nice*, *supra* note 00, at 42-43.

²⁴ European Council, Presidency Conclusions: European Council Meeting in Helsinki, 10-11 December 1999.

²⁵ A good overview of the missions up to 2007 is provided by F. Naert, “The EU’s ESDP Operations” in Trybus and White (eds.), *European Security Law*, *supra* note 10. There had been 11 operations until then: the military operations CONCORDIA in the Former Yugoslav Republic of Macedonia (FYROM), ARTEMIS in the Democratic Republic of Congo and ALTHEA in Bosnia and Herzegovina, the police operations EUPM in Bosnia and Herzegovina, PROXIMA in Macedonia and EUPOL KINSHASA in the Democratic Republic of Congo, the rule of law mission EUJUST THEMIS in Georgia, the integrated rule of law mission EUJUST LEX for Iraq, the security sector reform mission EUSEC DRC in the Democratic Republic of Congo, the mixed civilian-military EU *Support to AMIS II* (African Union (AU) Mission in the Darfur region of Sudan) and the EU AMM monitoring mission in Aceh (Indonesia). Naert also mentions EC/EU missions launched before 1999 which would probably be qualified as crisis management operations today, in particular the EU’s administration of

mostly small (exception EUFOR Althea in Bosnia), second hand (taking over from NATO or the UN), and at the low end of security (when hostilities were mostly over and with an emphasis on non-military tasks).²⁶ An intensive and large military conflict would be too much for the EU at this stage²⁷ and perhaps it will never get there. However, the last decade has seen major moves towards the transformation of the EU from not much more than an internal market to also a security actor. While this development remains incomplete and many questions remain unanswered, the ESDP is taking shape. One of the questions that remain unanswered is what shape an EU military force would take. The question is if such a military force will be established has already been answered in the affirmative. Whether this force deserves the name “European army” remains yet to be seen.

3. Models for a ‘European Army’

Based on the explanations made so far, three models for a ‘European army’ emerge. The first model is that of the ‘European Defence Force’ envisaged in the European Defence Community of old, a true ‘European army’ to replace the national armed forces of the Member States. This model is currently the least likely in the short or medium term as it would involve a major restructuring of all aspects of defence policy and would represent a significant transfer of Member State sovereignty to the EU. However, it does offer considerable advantages which will be outlined below. Hence the ‘European Defence Force model’ should not be entirely dismissed.

The second model is that of the ‘European Rapid Reaction Force’ envisaged in St-Malo and Helsinki, a limited yet sizable common force made up of voluntary contributions of the Member States, with common command structures and budgetary arrangements. This European Rapid Reaction Force would, however, co-exist with the national armed forces of the Member States, gradually making peacekeeping exclusive to the European Rapid Reaction Force leaving homeland defence to the armed forces of the Member States and NATO. This model is a possibility in the medium term but not the short term.

The third model is that of the ‘EU Battle Group Force’ whereby Member States voluntarily earmark specifically prepared battle groups of 1,500 men and women and put them at the disposal of the EU. This model is more or less already put in place. Member States already agreed on the establishment and could agree on the further development and use of this model. However, many of the considerable benefits outlined in the main part of the argument put forward in this paper have not and will not be realised if this model will continue to be used in the future.

Hence, depending on what in the understanding of the reader constitutes a ‘European army’, such an army is either a distant possibility or already becoming a reality. It is not impossible that the EU Battle Group concept – which will be established in the short term - will develop into a more integrated and permanent

the city of Mostar (Bosnia and Herzegovina) and the EC/EU Monitoring Mission (ECMM/EUMM) in the former Yugoslavia. In addition, Mr. Solana, the EU High Representative for the Common Foreign and Security Policy and Secretary-General of the Council of the EU (SG/HR), recently mentioned plans to transform the EU Coordinating Office for Palestinian Police Support (COPPS, a core unit of EU police/security advisors in the Palestinian territories) into an ESDP mission. See also A. Missiroli, “The European Union: Just a Regional Peacekeeper?” (2003) 8 *European Foreign Affairs Review* 493, at 493 (hereinafter ‘Regional Peacekeeper’). [...]

²⁶ Wessel, “State of affairs”, *supra* note 14, at 283.

²⁷ This assessment of S. Duke, “Nice’s Overtrumped Success” (2001) 6 *European Foreign Affairs Review* 155, at 160 still holds true today.

European Rapid Reaction Force in the medium term (15 years) and will be further developed to a European Defence Force in the long term (25 years?). All this will depend on the political will of the Member States, also determined by the financial position and the military strategic situation, not least in response to US American demands.

4. Why a European Army?

The main argument of this article is that the principle of subsidiarity supports the allocation of defence policy to the EU level, including the establishment of European military structures.

What is subsidiarity? Governance, to use a term coined by the political scientist Frits Scharf, can occur on different levels. In the context of the United Kingdom, it can occur at the level of the central government and parliament in Westminster, the devolved governments in Edinburgh, Cardiff, and Belfast, or local governments in Birmingham, Stafford, or Lichfield. In the context of the EU it can occur at the EU level in Brussels or the national Member State level in Paris, Rome, or Westminster. The decision to which level the competence for a policy and decision making should be attributed, in a system of multi-level governance, is, as Joseph Weiler wrote in his seminal article *The Transformation of Europe* “the most explosive of “federal” battlegrounds”.²⁸ In another article he called the principle of subsidiarity “deliciously vague”.²⁹

However, the essence of the principle of subsidiarity ultimately requires that the allocation of a particular competence is to be determined: if in doubt at the lowest possible level, but otherwise, at the level at which the policy will be the most effective.³⁰ This notion of ‘effectiveness’ of a level should be determined by an

²⁸ J. H. H. Weiler, “The Transformation of Europe” originally published in (1991) 100 *Yale Law Journal* 403, here citing from J. H. H. Weiler, *The Constitution of Europe: “Do the New Clothes have an Emperor?” And Other Essays on European Integration* (CUP, 1999) chapter 2, 10, at 39 .

²⁹ J. H. H. Weiler and U. Haltern, “The Autonomy of the Community Legal Order Through the Looking Glas” originally published in (1996) 37 *Harvard International Law Journal* 411, here citing from J. H. H. Weiler, *The Constitution of Europe*, *ibid.*, chapter 9, 286, at 318.

³⁰ Article 5 (3) TEU (Lisbon):

“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action *cannot be sufficiently achieved by the Member States*, either at central level or at regional and local level, but rather, *by reason of the scale or effects of the proposed action, be better achieved at Union level.*[emphasis added]”

This provision replaces, in substance, Article 5 EC Treaty (Nice). As pointed out in Paul P. Craig and Gráinne de Búrca, *EU Law* (OUP, 4th ed., 2008) at 103, with reference to the then Article 5 EC Treaty, the principle of subsidiarity contains three interrelated elements: “[1] the [then] Community is to take action only if the objectives of that action cannot be sufficiently achieved by the Member States; [2] the [then] Community can better achieve the action because of its scale and effects; [3] if the [then] Community does take action then this should not go beyond what is necessary to achieve the Treaty objectives.” The argument of this article is based on the second element. The European Commission as initiator of new legislation calls the first two elements outlined above a ‘test of comparative efficiency’, see: Commission Communication to the Council and the European Parliament, Bull. EC 10-1992, 116. It should be emphasised, however, that the subsidiarity-based argument made in this article, is only loosely based on this test of comparative efficiency. The principle of subsidiarity applies only in a (not very clearly) defined context, in policy field conferred to the EU but not subject to exclusive EU competence. Article 5 TEU does not apply to defence since this is clearly not in any way conferred to the EU (yet). Nevertheless, the argument made below is, if the ‘test of comparative efficiency’ of subsidiarity was applied to defence and the armed forces, the EU rather than the Member States should take action in this area.

evaluation. First, at what level do we get the best results? In the context of defence and the armed forces this has to be determined by financial considerations, but of course also by military-strategic and political considerations. Currently, the competence for defence and the armed forces lies firmly with the Member States. As a consequence Europe's 2 million soldiers,³¹ the USA has only 1.4 million,³² are divided between 28 armies, and Europe's £400 billion a year defence spending, the USA spends about £600 million, is divided into 27 separate national budgets. What are the financial, military-strategic, and political implications of this attribution of competence for defence to the Member States? Second, what would be the implications if this competence was conferred to the EU?

4.1 Financial considerations

There is, perhaps not surprisingly, no published data on the costs of a divided defence as compared to a common defence. However, the leading British defence economist Keith Hartley provides us with two crucial figures. The first is a 17 per cent figure. This is a conservative estimate of the cost savings if a single EU armaments agency provided a single EU army, navy and air force.³³ Hartley writes that:

“This scenario is the most attractive economically but politically the most difficult to achieve.”³⁴

The background is the massive duplication of all aspects of the national defence efforts (ministries, armies, arms production) simply making them too small and failing to achieve the necessary economies of scale.

This 17 per cent figure only relates to the costs of armaments equipment. There is no published data on cost savings in other areas of defence spending, for example on

³¹ 2,013,990 according to the EU Institute of Security Studies paper *Strength in numbers? Comparing EU military capabilities in 2009 with 1999* at: <http://www.iss.europa.eu/uploads/media/PolicyBrief-05.pdf> (accessed in September 2010). This figure is taken from the paper *The Military Balance 2009* published by the International Institute of Strategic Studies (IISS). The (EU) European Defence Agency (2009) estimates this figure at 1,800,707: <http://www.eda.europa.eu/defencefacts/showvalues.aspx?CountryID=EU&Year=2008> (accessed in September 2010). Larger armed forces are sustained by France with 250,000: <http://www.webcitation.org/5kwpV2ULI> (accessed in September 2010); Germany with 247,000: <http://www.bundeswehr.de> (accessed in September 2010); the United Kingdom with 240,000: http://en.wikipedia.org/wiki/Military_of_the_European_Union#cite_note-15 (accessed in September 2010); Italy 187,000: http://www.difesa.it/NR/rdonlyres/5EF11493-59DD-4FB7-8485-F4258D9F5891/0/Nota_Aggiuntiva_2009.pdf (accessed in September 2010); Greece with 177,000: <http://www.nationsencyclopedia.com/Europe/Greece-ARMED-FORCES.html> (accessed in 09/2010); and Spain with 143,000: http://en.wikipedia.org/wiki/Military_of_the_European_Union#cite_note-15 (accessed in September 2010). Smaller armed forces are sustained for example by Latvia with 5,500: <http://www.nationsencyclopedia.com/Europe/Latvia-ARMED-FORCES.html> (accessed in September 2010); Malta with 2,140: <http://www.nationsencyclopedia.com/Europe/Malta.html> (accessed in 09/2010) and Luxembourg with 900: <http://www.nationsencyclopedia.com/Europe/Luxembourg-ARMED-FORCES.html> (accessed in September 2010).

³² 1,385,122 in 2008 according to the US Library of Congress and the Central Intelligence Agency at: http://www.globalfirepower.com/country-military-strength-detail.asp?country_id=United-States-of-America (accessed in September 2010).

³³ T. Sandler and K. Hartley, K. (1999). *Political Economy of NATO* (CUP, 1999) 159-160. See also refers in this book to T Callaghan. K. Hartley, “Defence industrial policy in a military alliance”, (2006) 43 *Journal of Peace Research* 483-484.

³⁴ Ibid.

the troops, which covers almost 90 per cent of EU Member States' defence spending. However, it does not require reliable data to assume that the savings on the combined national defence budgets would be considerable, well exceeding 17 per cent, especially if the overall troop size would be brought down from over 2 million to at least US American levels, if possible below that.

The second is a 10 per cent figure. This is a conservative estimate of by what percentage the costs for the main pieces of armaments equipment grow each year. In other words the costs double about every 7 years. Considering the current costs of a fighter aircraft of about £100 million the reader might get a feel for the dimensions we are talking about. Several Member States cannot afford this equipment any more and buy smaller and smaller quantities to make up for the increased costs. The question is how much longer EU Member States will be able to afford 27 meaningful and separate armies.

Therefore the financial subsidiarity argument for a European army is, that it would be cheaper in an environment of tight budgets, especially in times of financial crisis, and in a few years, a European army might well be the only meaningful army that all Member States pooling their resources, can afford at all. This argument also emanates from the United Kingdom 1998 *Defence Strategic Review*³⁵ and the *St-Malo Declaration*: the necessary restructuring can only be financed on a common basis. We currently have very expensive and outdated 28 national Cold War armies we do not need. We need different forces, easily deployable and well equipped. These forces or force, as Anand Menon put it, "will not be cheap".³⁶ There are compelling financial arguments for a common force.

4.2 The military considerations

The small size of the European national armed forces makes them unsuited for large scale military operations. With regards to peacekeeping operations, even larger Member States such as the United Kingdom may still be able to intervene on a small scale in Sierra Leone, but need to cooperate with other countries in any mission on a medium or large scale, such as Bosnia and Herzegovina, Congo, or Macedonia. Larger operations such as Kosovo or Afghanistan cannot be conducted without the support of the USA at all.

Moreover, the troops for joint peacekeeping operations are always put together on an *ad hoc* basis, often have to work together in that composition for the first time, do not know each other, use different equipment and procedures, can be withdrawn at any time, and generally lack cohesion: they are not one force but a combination of forces. Moreover, as the recent dispute over the EU peacekeeping mission in Chad has shown, Member States are often happy to support a mission with their vote in the Council, but are often slow to contribute troops, equipment and money to the implementation of the mission. The bottom line is that EU peacekeeping forces are militarily less effective than a permanent force would be. This principle learned from peacekeeping operations at the EU but also United Nations and NATO levels can be transferred to the territorial defence of the Member States. A permanent single European force would be more effective through greater cohesion.

³⁵ Reference to the recent review.

³⁶ Anand Menon, "Why ESDP is Misguided and Dangerous for the Alliance" in Jolyon Howorth and John T. S. Keeler (eds.), *Defending Europe: The EU, NATO and the Quest for European Autonomy* (Palgrave Macmillan: New York and Basingstoke, 2003) 203-217, at 204.

Moreover, the financial and military subsidiarity arguments can be combined: national armies will soon be too small to provide effective defence and security.

4.3 The political implications

There is and there always has been a clear connection between military power and the efficiency of a foreign policy. As former UN Secretary General Kofi Anan put it:

“You can do a lot more with diplomacy backed by firmness and force.”

The British *Defence Strategic Review* 1998 puts in the following terms:

“Strong defence is the essential underpinning of a successful foreign policy.”

A diplomat who is known to have a large army behind him or her will be listened to more than one without such a background. The diplomat representing the EU is known to have no army; he or she has a large economy, funds, and soft power behind him or her, but no army. Hence in the most security intensive situations his or her voice is often ignored. A cohesive, easily deployable, and well equipped EU military force would enhance the weight of the EU as an international actor considerably – through its existence alone.

4.4 Conclusion on subsidiarity

Hence the defence policies of the Member States are considerably more expensive than a common defence would be, the only way forward – accelerated by the current economic crisis and mounting public debt – is to downsize the armed forces even further. The separate 28 armies are mostly so small that they can only be effectively used in concert with others. However, in this context there are insufficient common structures, procedures, and experiences to work together effectively. As a result of the small size of these national armed forces, the Member States are not fully taken seriously by their partners, most noticeably the United States, or potential or actual adversaries. There are still a few exceptions, most noticeably the United Kingdom, but in the changing international power structure this exceptional status, if it even still exists, is likely to get lost. Hence the only way forward is either an even fuller reliance on the United States, which might lose interest in Europe, or a common defence policy including common military structures. The more comprehensive the integration of defence, in other words the closer to Model 1 “the European Defence Force”, the larger the financial, military-strategic, and political benefits.

5. How to establish a European Army: flexibility

When it comes to how a “European Army” could be established in legal terms, a significant obstacle needs to be addressed. Some Member States would be ready to establish a common military structure. These are France, Germany, Belgium, Spain, Portugal, Hungary, Slovakia, Estonia, and possibly the Netherlands and even the United Kingdom.³⁷ However, some other Member States are not ready to transfer their sovereignty over their armed forces to the EU. They do not want to participate in

³⁷ Depending on the government of the day

a European army. Some Member States think they are not legally able to participate in a European army because of their status of neutrality. These are Finland, Sweden, Ireland, Austria, Cyprus, and Malta. Some Member States are not financially and militarily able to make a significant contribution to a European army. These could be mainly the small Member States. Some Member States, perhaps the United Kingdom being one of them, do not wish to participate, because they think they can go it alone or because they want to built their defence on a strong relationship with the United States only. The basic problem is that not all Member States would be participating in common European military structures.

The classical principle of European integration has been the principle of uniformity. This means that all Member States reach a certain level of integration at the same time: the European Coal and Steel Community Treaty, the EEC Treaty, the Treaties of Maastricht, Amsterdam, and Nice all entered into force and bound the Member States at the same time. The same happened with the Treaty of Lisbon which entered into force on the 1 December 2009. The principle of uniformity can be the principle of integration when the number of participating Member States is reasonably small and their policies comparable, as with the founding six Member States. It becomes increasingly unattainable in a Union of 27 or more Member States which we have today. Therefore EU law mechanisms were developed which essentially allow an avant-garde group of Member States - which is less than all Member States - to integrate a new policy area within the framework of the EU, including the institutional framework, without committing the other Member States that wish to stay outside the new policy. This integration happens with the blessing of the Member States staying outside who have the option to join the new policy later. These mechanisms are referred to as “flexibility”, “differentiation”, or “two speed Europe”, sometimes also as “Europe à la carte”.

Examples for these mechanisms are European Monetary Policy, “the Euro” in which currently 19 Member States participate, and 9 Member States retain their own policies and currencies because there are not willing or not economically able to join. Another example is the “Schengen Acquis” of a European without border controls, which excludes the United Kingdom and Ireland. The current CSDP also has its distinct form of flexibility since Denmark does not participate in any policies involving military matters.

Hence the thesis on the question of how a “European Army” could be introduced: it could be introduced as a flexible framework, allowing it to be established by an avant-garde group of Member States, without those Member States, who are unwilling, neutral, or economically unable to participate. Member States outside the policy could join later or stay outside on the permanent basis.

The Treaty of Nice did not allow the existing flexibility framework called “enhanced cooperation” to be used for military matters, including common military structures. This was due to a specific exclusion in the Treaty, put there in 2000 on a British initiative,³⁸ probably to prevent any structures without the participation of the United Kingdom. The Treaty of Lisbon no longer contains this military exemption and provides the military specific flexibility instrument of “permanent structured cooperation”. Article 42 (6) of the Lisbon version of the Treaty on European Union provides:

³⁸ Craig and de Búrca, *EU Law* (OUP, 3rd ed. 2003), at 46.

“Those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework.”

Article 1 (b) Protocol on Permanent Structured Cooperation (to the Treaty of Lisbon) provides:

“The permanent structured cooperation [...] shall be open to any Member State which undertakes, from the day of entry into force of the Treaty of Lisbon, to:

Have the capacity to supply by 2010 at the latest, either at national level or as a component of multinational force groups, targeted combat units for the missions planned, structured at a tactical level as a battle group, with support elements including transport and logistics, capable of carrying out the tasks referred to in [the TEU], within a period of 5 to 30 days, in particular in response to requests from the United Nations Organisation, and which can be sustained for an initial period of 30 days and be extended up to at least 120 days.”

This clearly subjects the future common military structures of the EU to flexibility in the form of permanent structured cooperation. It is submitted that this is the most significant innovation of the Treaty of Lisbon in the field of the European Security and Defence Policy, which under Lisbon will be called the Common Security and Defence Policy.³⁹

A possible if not likely scenario is that over the next decade several Member States, hopefully including the United Kingdom, will form battle groups until an overall size of 60,000-100,000 is reached. Moreover, once formed they will also be deployed. This will create the experience and tradition to move towards an even more permanent force in the future. A further development to a more permanent European Rapid Reaction Force or would not require a Treaty revision as the Treaty of Lisbon already contains the necessary flexible framework of permanent structured cooperation.

6. Conclusions

In an environment of changing security challenges, now including terrorism, regional conflicts at the periphery, and natural and man made disasters, in an environment of significant budget cuts which will not spare the armed forces the indefinite preservation of Europe's redundant Cold War armies represents a frivolous luxury and puts our security at risk. The armed forces have to be subjected to a fundamental

³⁹ The Inaugural Lecture contained the following sentence: “In case you did not have the chance to listen to the news today. This morning the Czech Constitutional Court decided that the Treaty of Lisbon does not violate the Czech Constitution. The President of the Czech Republic had announced that in case of such a decision he will sign the Lisbon Treaty. Thus the last hurdle for the entering into force of the Treaty, probably on 1 December, has been removed. From today it is certain that the Treaty of Lisbon will enter into force.”

reform, yes in parts have to be completely rebuilt. The legal, financial, military-strategic, and political argument to conduct this reform on an EU basis was the core element of this article. Moreover, a possible and likely legal framework on how this could be done from an EU law perspective was also presented. Without a well equipped, cohesive, and deployable force, Europe will remain as powerless as it was during the massacre of Srebrenica, or when the killings began in Kosovo. The words of former Belgian Prime Minister Mark Eyskens, that “Europe is an economic giant, a political dwarf, and, even worse, a military worm until it concerns itself with elaborating a defence capability” will remain true. The political will to create these structures is not yet there- it is also for the general public to question the lack of reform in this area. The Common Security and Defence Policy and the development of a European force, is still uncertain and many questions remain unanswered. However, unanswered questions are a fertile ground for research - and the author intends to use the next decades to make a contribution in this respect.