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Jeff P.H. Cazeau

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European Security and Defense Policy Under the Gun

Jeff P. H. Cazeau*

I. Introduction

In the wake of a growing awareness of their dependency on the United States during the NATO campaign in Kosovo, leaders in Europe vowed to create a European arm within NATO. In May 1999, Tony Blair, the British Prime Minister announced, "We Europeans should not expect the United States to play a role in every disorder in our back yard."¹ Meeting in Bremen, Northern Germany, defense and foreign ministers of the long dormant Western European Union (WEU) announced that they were committed to developing "an effective European defense and security policy."²

The European Security and Defense Policy (ESDP) refers to the process of building that effective European defense and security policy. It sprang from an idea to develop "a rapid-reaction corps which would act at the EU's behest in crises that were too big to ignore but not big enough to demand the involvement of America, and therefore of NATO."³ Proponents of the process claim that the goal of ESDP is to streamline and coordinate European military policies that now duplicate one another, and to strengthen the European "pillar" within NATO.⁴ Some critics, such as former British Prime Minister Margaret Thatcher, say that the move towards a European defense force is part of a "utopian venture" to create a single super state to rival the United States.⁵

Lady Thatcher claims that the venture had long been a French aspiration.⁶ She argues that the idea of Europe being more active in its defense superficially sounded "splendid" but the impulse toward developing a new European defense and separate armed forces has little

* (J.D.) University of Miami School of Law, 2002.

¹ Roger Cohen, *Europeans Commit to a Common Defense Policy*, DESERT NEWS, May 12, 1999, at A5.

² *Id.*

³ *The EU Turns its Attention From Ploughshares to Swords*, THE ECONOMIST, Nov. 18, 1999.

⁴ *Id.*

⁵ Chris Gray, *Thatcher Dismisses Utopian 'Euro Army'*, BIRMINGHAM REPORT, Dec. 8, 1999, at 8.

⁶ *Id.*

to do with reality, when Europe was cutting its defense budget and America was increasing theirs.⁷

As Britain's Prime Minister for three terms, Lady Thatcher bitterly opposed Britain integration into Europe.⁸ She saw a British role in the European Economic Community (EEC), the precursor to the EU, as having the potential to threaten the unique relationship that Britain had cultivated with its Anglophone ally across the Atlantic.⁹ Due to the chilly relationship that existed between Lady Thatcher and French President Mitterand, it is wise to take her criticisms of the French with a grain of salt.¹⁰

It is important to note, however, that the French (along with the Germans) have for a long time been the standard-bearer for a Europe-only defense.¹¹ It was after all French Foreign Minister Claude Cheysson, at President Mitterand's suggestion, who recommended the reactivation of the long dormant Western European Union (WEU) in 1984 that under the original formulation for a European Defense was to be the European arm of NATO.¹² Lady Thatcher and others saw France's championing of the WEU as one of France's perennial attempts to counter what they believed was increasing American hegemony.¹³ Many today see ESDP as continuing that tradition.

At the EU's Nice summit in December 2000, French President Jacques Chirac, stated that Europe was creating an "independent" defense.¹⁴ Most recently, while discussing ESDP, the German Defense

⁷ *Id.*

⁸ See PETER RIDDELL, *THE THATCHER DECADE 192* (Basil Blackwell 1989).

⁹ See *id.* at 186-92.

¹⁰ See P.M.H. BELL, *FRANCE AND BRITAIN 1940-1994: THE LONG SEPARATION* 246-47 (Longman 1997).

¹¹ See *THE ECONOMIST*, *supra* note 3.

¹² See Cheryl Swack, *Building a Bridge for Defense: The European Union's Common Foreign and Security Policy*, 6 U. MIAMI Y.B. INT'L. L., 1, 20 (1997/1998).

¹³ "Jacques Chirac, recently summed up the U.S.-French relationship in this way: 'Franco American relations have been, and always be, both conflictual and excellent. The U.S. finds France unbearable with its pretensions; we find the U.S. unbearable with its hegemonism. But deep down, we remember that the "boys" came to help us two times, just as the Americans remember that the French helped them with their independence. So there will be sparks but no fire, because a real bond exists.'" Olin Robison, *Francois Mitterand* (Vermont Public Radio Broadcast, Jan. 12, 1995).

¹⁴ See John Vinocur, *EU Defense Autonomy Lacks a Unifying Voice*, INT'L HERALD TRIB., Apr. 9, 2001, available at 2001 WL 4853624.

Minister Rudolf Scharping, told the defense commission of the French National Assembly that, "we don't want an unnecessary duplication of capabilities and no competition between NATO and the EU that is damaging to Euro-Atlantic relations."¹⁵ Paul Quiles, The French defense commission's president asked, "But why not useful duplication?" In a preemptive response to German concerns about transatlantic decoupling, he said: "There's such a thing as a danger of over coupling. That's in the American's missile defense idea. In every respect, it just isn't reasonable to let the Americans confiscate all responsibility, military and political."¹⁶

It is clear that, at least for some, there may be validity to the fears that ESDP will ultimately be the lever that Europe uses to get from under the perceived thumb of the U.S. Despite the indications as to the ultimate purpose of a greater European defense posture, the U.S. has, at least officially, adopted the view that it does not object to the ESDP concept. In fact, after years of arguing that Europe was not shouldering its fair share of maintaining the Atlantic alliance, Washington welcomes the prospect of increased defense spending by its allies. Recently, President Bush affirmed that, in general, the U.S. views ESDP favorably. "The United States", he said, "welcomes the European Union's European Security and Defense Policy, intended to make Europe a stronger, more capable partner in deterring and managing crises affecting the security of the transatlantic community."¹⁷ Despite such positive comments, it is clear that at least some in the administration have their reservations.

Colin Powell, the U.S. Secretary of State has said:

We welcome a more integrated, robust and stronger Europe. . . Our allies are in the midst of important efforts to improve their defense capabilities. We will support any such efforts as long as it strengthens NATO, not weakens it . . . We do not say that there are no differences between the plethora of people who have thought it right to express a view.¹⁸

One of the "views" hinted at by Secretary Powell is that ESDP will duplicate or degrade NATO's ability to carry out its mission.

With the demise of the Soviet Union and the end of the Warsaw Pact the probability of an armed attack by a belligerent nation, on the

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ CFSP, *Getting EU Citizens out of Danger*, EUR. REP., May 9, 2001.

¹⁸ *Id.*

scale envisioned by NATO during the cold war, is very unlikely. Regardless, the NATO Treaty still governs how the allies will react when confronted with an attack on one or some of its members. Article V of the Washington Treaty that created NATO, makes it clear that the Alliance's primary purpose is collective defense and that an "armed attack against one or more [of NATO members] shall be considered an attack against them all."¹⁹ ESDP should not and cannot duplicate or degrade NATO's ability to carry out this mission.

Unfortunately, all indications are that ESDP will in fact degrade and duplicate NATO functions. Despite the growing impetus behind ESDP, and the modest increases in defense spending that some members have undertaken, it still remains to be seen whether the European allies will carry out the long-term increases in defense spending that would be needed to duplicate the intelligence and logistical support that the U.S. currently provides NATO.²⁰ Secondly, if ESDP will be, as the Europeans have said Europe's arm within NATO, and if ESDP will not or cannot act in the NATO area without violating or coming to a head with the NATO treaty, then Europe's troops tied to ESDP will only be able to operate outside of the NATO area. Events in recent years have shown that in the future regional organizations will be increasingly called on to take part in the resolution of crises that have arisen in places like Kosovo, Somalia, Haiti, Liberia and elsewhere. The out of area missions that ESDP will most likely undertake are, therefore, likely to be humanitarian interventions. Despite the many opinions to the contrary it is still not clear even after Kosovo, that the U.N. Charter authorizes unilateral humanitarian interventions. And as long as the question is unsettled it is possible that the most likely mission for ESDP will be illegal under international law and the U.N. Charter.

Part II of this note will examine the United States' first difficulty

¹⁹Article V reads: The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of aimed force, to restore and maintain the security of the North Atlantic area.

North Atlantic Treaty, Apr. 4, 1949, art. 5, Stat. 2241, 2244 34 U.N.T.S. 243, 246.

²⁰ See generally John C. Hulsman, *A Grand Bargain with Europe: Preserving NATO for the 21st Century*, 6 GEO. PUB. POL'Y REV. 71 (2000).

with ESDP: that in the short term ESDP will degrade NATO and its ability to defend Europe and that it will duplicate and degrade NATO capabilities. This argument is based on the fact that Europe's spending on defense has never been up to par, and that the modest increases in defense spending announced by some of the European allies will not close the gap between the U.S.' defense spending and Europe's. I will argue that at least one of the allies, Germany, currently lacks both the fiscal ability and the political will to increase its defense expenditures, and that without more money and more assets, the ESDP will have to draw its strength and assets from those already dedicated to NATO, thereby, effectively duplicating and degrading NATO's capabilities precisely in the way that the U.S. objects.

In Part III, I argue that before the final shape of ESDP can be finalized the question of the legality of unilateral humanitarian intervention in the absence of Security Council approval must be answered. I will argue that under current international law and the U.N. Charter, humanitarian intervention, absent Security Council, approval is illegal. Therefore, the primary mission that ESDP contemplates, namely humanitarian interventions outside the NATO area, are illegal.

II. ESDP Will Degrade NATO's Ability to Complete Its Primary Mission.

The United States does not object to the building of a European Security and Defense Policy (ESDP). To do so would be disingenuous and would ignore the years of rhetoric that has come out of Washington, urging the Europeans to increase or improve their defense forces.²¹

When it comes to the ESDP the primary concern of the U.S. is that it does not become a replacement for NATO. That ESDP should not duplicate NATO's function. Nor should it draw on NATO capabilities or, most importantly, be used over NATO's objection or withdraw forces from NATO without NATO's authority.²² Unfortunately, it is very likely that absent some drastic measures, Europe will not likely increase its

²¹ In a speech to a gathering of Germany's top brass last December, William Cohen, the American Defense secretary, called for a "complete reorientation" of the country's armed forces, including "a radical reduction and restructuring of an outmoded and oversized main defense force." *Guns or Butter?*, THE ECONOMIST, May 13, 2000, at 50.

²² See THE ECONOMIST, Nov. 18, 1999, *supra* note 3.

spending on defense, nor will it increase its manpower to the point where a defense force, separate from NATO will be possible.²³

The three big countries that would lead the European rapid reaction force of 60,000 men, now contemplated under ESDP are France, Britain and Germany. Altogether, EU members spend roughly 60% of the American total but have barely 10% of America's ability to deploy and maintain military over long distances.²⁴ Two of the wealthiest European Allies, France and Britain, together spend approximately 80 billion dollars on defense spending or 2.8% of their GDP's each, in contrast to the United States' 3.2%.²⁵ Both France and Britain appear to have the political willpower and the fiscal resolve to meet the cost requirements that a militarily stronger Europe through ESDP would entail. The same cannot be said about Germany, however.

France is determined to "reform the alliance structure in order to make for greater balance between its American leadership and European participants."²⁶ "Under the French defense plan, it hopes to have at least 30,000 troops able to be rapidly deployed, as well as 100 deployable combat aircraft, two time France's Persian Gulf levels."²⁷

Britain has also made significant progress towards reforming its armed forces and making modest increases to defense spending. After Kosovo, Prime Minister Blair became increasingly convinced that Europe's diplomatic weakness was linked to its inadequate military capabilities.²⁸ Prime Minister Blair broke with British tradition in advocating much closer ties between the countries comprising the European pillar of NATO.²⁹ Along with President Chirac, he has argued that Europe should be more involved in its own defense. "As Peter Mendelson, Blair's closest political confidant, put it, 'Should US taxpayers and U.S. troops always have to resolve any problems that exist on Europe's doorstep?'"³⁰ To back up its talk, the UK moved to an all volunteer professional military. To increase their lift capabilities, the British are planning to lease four C-17s from the U.S.³¹ Furthermore,

²³ See Vinocur, *supra* note 14.

²⁴ See *Defending the Union*, THE ECONOMIST, June 5, 2001, at 17.

²⁵ See Hulsman, *supra* note 20, at 73.

²⁶ *Id.* at 79.

²⁷ *Id.*

²⁸ *Id.* at 78.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 79.

“[t]o enhance strategic sea lift for the deployment of forces, the British government plans to acquire six roll-on-roll off ships.”³²

In Germany, there has been much talk in favor of European integration on the widest possible scale but it does not appear that the country is prepared either politically or otherwise to accept the fiscal burden of ESDP. As Major J.D. Godwin points out in his article examining NATO’s role after the Bosnia and Kosovo conflicts³³ it is unclear that Germany will permit its armed forces to participate in NATO operations other than for collective self defense. It is even more unclear whether Germany will have the political willpower to participate in those activities as part of a European Defense initiative in areas where there is still lingering hostility over Germany’s occupation during WWII.³⁴

While President Chirac of France and Prime Minister Blair of the UK aspire to a significant improvement in Europe’s defense standing, recent trends indicate that German defense spending will continue to decrease in the coming years.³⁵ Germany is the biggest and richest West European country, but spends only 1.5% of its GDP on defense.³⁶ In May 2000 Chancellor Gerhard Schroder admitted that Germany’s armed forces were “no longer completely NATO-ready” nor could they meet the challenges that participation in a new European force would require.³⁷ Still, Shroder refused to set aside any more funds for defense. In fact, as Shroder was making these comments in May 2000, the German government had already cut defense spending by 3.6% and was planning further cuts.³⁸

Without increased spending by the Europeans they will be incapable of operating alone under ESDP. The idea of ESDP developed in the aftermath of NATO’s foray into Kosovo. The European Allies were reportedly “shamed by their modest contribution to [the] war over Kosovo and by the time it took most of them to get their troops there to keep the subsequent peace.”³⁹ Kosovo revealed a huge disparity between U.S. military and European military capabilities, and put the alliance on

³² *Id.*

³³ See generally Major J.D. Goodwin, *NATO’s Role in Peace Operations: Reexamining the Treaty After Bosnia and Kosovo*, 160 MIL. L. REV. 1 (1999).

³⁴ *Id.* at 13.

³⁵ See Hulsman, *supra* note 20, at 80.

³⁶ See THE ECONOMIST, *supra* note 21, at 51.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *In Defense of Europe*, THE ECONOMIST, Feb. 26, 2000, at 25.

notice it was in urgent need of reform. During the conflict, "U.S. intelligence assets identified almost all the bombing targets in Serbia and Kosovo, US aircraft flew two-thirds of the strike missions, and nearly every precision—guided missile was launched from an American aircraft."⁴⁰ The Europeans simply lacked the computerized weapons, night-vision equipment, and advanced communications that the American's possessed.⁴¹ Most importantly the Europeans discovered that they lacked "lift:" capabilities or the ability to transport an army at will.⁴² The U.S.' monopoly on lift capability is what accounts for the U.S.' current military dominance.⁴³ Europeans found that they, "are not only very limited in the amount of force they can project beyond Europe, but they must also depend heavily on the US in more nearby places like the Balkans."⁴⁴

As American General John Sheehan, former Supreme Allied Commander, Atlantic (SACLANT) put it, "The technological gap is increasing between the U.S. and Europe. Soon the other members of NATO will be little more than constabulary forces, with the US possessing the only genuine modern army."⁴⁵ German General Klaus Naumann, retired Chairman of NATO's military committee put it another way when he expressed the view that the day is fast approaching when the U.S. and its European allies, "will not even be able to fight on the same battlefield."⁴⁶

German Defense Minister Rudolf Scharping has said that, "We don't want an unnecessary duplication of capabilities and no competition between NATO and the EU that is damaging to Euro-Atlantic relations."⁴⁷ Both the French and the British have recently echoed those sentiments. But, given all the capabilities that the U.S. provides to NATO, surely as the Europeans embark on the creation of their separate defense mechanism, duplication and degradation of NATO's capabilities will occur.

The United States wishes to maintain, strengthen and expand NATO so that it continues to be a strong and viable multinational security alliance, whose consultative machinery, provided, for in Art. 5

⁴⁰ Hulsman, *supra* note 20, at 71.

⁴¹ *Id.*

⁴² *Id.* at 73.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Hulsman, *supra* note 20, at 71.

⁴⁷ Vinocur, *supra* note 14.

of the Treaty, fosters cooperation among member states, creating a necessary forum for solving international security issues as they arise.⁴⁸

As long as the U.S. continues to contribute more than its fair share to NATO it will continue to have the greatest say in the Alliance. Europe must act cautiously and fairly towards the U.S. It will be many years before Europe achieves the autonomy it desires and as the Economist cautioned in 1999, "Get all these details right early on and Europe's emerging defense identity and military capability will strengthen NATO to the benefit of security all round. Get them wrong, and the damage will be just as far-reaching."⁴⁹

III. The Most Likely Mission for ESDP, Humanitarian Intervention, is Illegal Under International Law and the U.N. Charter.

Even if the European allies are able to create a force separate from NATO that is in fact the European pillar in the NATO structure, any action by that force in the NATO area will violate the NATO Treaty. Arguably, any action outside the area by European forces utilizing NATO assets will require the full approval of all NATO members leaving ESDP only able to act in situations that meet two requirements: 1) NATO is unable or unwilling to act 2) the U.S. and Canada approve of the mission, but simply do not wish to participate.

Presumably, any such a scenario is also almost inevitably a matter on which the U.N. Security Council is unable or willing to act under Chapter VII of the U.N. Charter which governs "Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression".⁵⁰ Over the last few decades the instances where military actions have met one or more of the above criteria have been in the area of humanitarian interventions.

Such prominent international law authorities as Professors Louis Henkin and Oscar Schachter have argued that humanitarian interventions are illegal under the U.N. Charter and customary international law.⁵¹

As Professor Henkin points out, "before the Second World War,

⁴⁸ See Swack, *supra* note 12, at 8.

⁴⁹ THE ECONOMIST, *supra* note 39, at 26.

⁵⁰ U.N. CHARTER ch. VII.

⁵¹ See Louis Henkin, *Editorial Comments: NATO's Kosovo Intervention: Kosovo and the Law of Humanitarian Intervention*, 93 A.M. J. INT'L. L. 824 (1999). See also Oscar Schachter, *The Right of States to Use Armed Forces*, 82 MICH. L. REV. 1620 (1984).

international law prohibited 'intervention' by any state within the territory of another without that state's consent: international law prohibited unilateral intervention in internal wars; international law prohibited intervention ever for agreed, urgent humanitarian purposes."⁵²

The U.N. Charter's general prohibition against all forms of armed aggression is a reaffirmation of this idea.⁵³ Article 2, paragraph 4, of the Charter reads: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."⁵⁴

Some have argued that humanitarian interventions are a broad exception to this provision.⁵⁵ In Henkin's view, "unilateral intervention, even for what the intervening state deems to be important humanitarian ends, is and should remain unlawful."⁵⁶ Henkin's chief argument is that the nations most likely to engage in humanitarian intervention are also the richest, and often have other political motives behind their actions making humanitarian intervention very susceptible to abuse.

Those who believe in humanitarian intervention often argue that there are safeguards against abuse. The first being the U.N. Charter, which requires Security Council authorization for any intervention. The second is that actions by NATO or other regional organizations, being a collection of states, are less likely to be subject to abuse.

NATO did not seek explicit authorization from the Security Council during the Kosovo campaign because even after the Cold War, unanimity by the permanent members of the Security Council is not assured. NATO apparently decided that it would be better not to risk having its military action vetoed. After all, there was serious conflict, a threat to international peace and security in its own backyard involving claims of atrocities and genocide.

Morality aside, NATO's actions were still arguably illegal under the U.N. Charter. The Charter prohibition against intervention, even for humanitarian purposes, applies to individual states as well as groups of states that act unilaterally.⁵⁷ The Security Council's ratification of NATO's action through Resolution 1244 was contrary to the procedure set out by the U.N. Charter whereby states are prohibited from

⁵² Henkin, *supra* note 51, at 824.

⁵³ *Id.*

⁵⁴ U.N. CHARTER art. 2, para. 4.

⁵⁵ See Henkin, *supra* note 51, at 825.

⁵⁶ *Id.* at 824.

⁵⁷ See Henkin, *supra* note 51, at 826.

intervention of any kind including humanitarian, unless first authorized by the Security Council.

By ratifying NATO's actions after the fact, the Security Council may have created a questionable precedent whereby a state or group of states can engage in a "humanitarian" intervention, confident that the Security Council will later acquiesce and ratify their military action. This precedence is clearly in conflict with Article 2(4) of the Charter prohibiting "the threat or use of force against the territorial integrity or political independence of any state" (subject only to the right of self-defense, Article 51).⁵⁸

In 1991, Professor Oscar Schacter argued against the legitimacy of NATO's actions:

Even in the absence of such prior approval, a State or group of States using force to put an end to atrocities when the necessity is evident and the humanitarian intention is clear is likely to have its action pardoned. But, I believe it is highly undesirable to have a new rule allowing humanitarian intervention, for that could provide a pretext for abusive intervention. It would be better to acquiesce in a violation that is considered necessary and desirable in the particular circumstances than to adopt a principle that would open a wide gap in the barrier against the unilateral use of force.⁵⁹

Supporters of NATO action during the Kosovo campaign argue that NATO's intervention in Kosovo was different from the interstate aggression contemplated by the U.N. Charter and exemplified by actions such as Iraq's invasion of Kuwait. Those supporters could argue that, "NATO['s] intervention was not 'unilateral'; it was 'collective' pursuant to a decision by a responsible body, including three of the five permanent members entrusted by the U.N. Charter with special responsibility to respond to threats to international peace and security"⁶⁰ and that, "the collective character of the organization provided safeguards against abuse by single powerful states pursuing egoistic national interests."⁶¹

But the assurance that humanitarian interventions by a European rapid reaction force would be legitimate because of the "collective" nature of the decision to act belies the very definition of the ESDP that the Europeans have proposed. As ties within the EU strengthen, its

⁵⁸ *Id.* at 824.

⁵⁹ *Id.* at 826.

⁶⁰ *Id.*

⁶¹ *Id.*

proposed military arm will behave more as a federation than as a collection of countries. Forces operating under the ESDP will effectively be the military arm of the super state that the French and Germans have all but proposed. The actions of that military will be seen as the action of Europe as a whole. The safeguard of collective action will not be much of a safeguard under that scenario.

IV. Conclusion

The basic premise that Europe must contribute more to NATO both economically and materially so that it may become a true partner in the transatlantic partnership is a sound one. The EU and NATO should work towards a fair and equitable division of labor. But, fairness and true equality cannot be achieved through rhetoric alone. First, the European allies, most importantly Germany, must increase their defense spending. Improvements must be made in European mobility, logistics and communications. It is too soon to speak so strongly of a separate European "defense identity". Such talk only serves to alienate the ever isolationist Americans before Europe actually has the firepower to go it alone.

Second, unilateral intervention for humanitarian purpose is and remains unlawful under the U.N. Charter. NATO, a collective body of some of the most wealthy and powerful nations on earth, has the obligation not to set a precedent that could be used by other nations as a pretext for abusive intervention.