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**DO NATO OBLIGATIONS TRUMP
EUROPEAN BUDGETARY CONSTRAINTS?**

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ABSTRACT

The article examines from an international law and policy perspective the relation between North Atlantic Treaty Organization (NATO) obligations and European Union (EU) budgetary constraints. Its aim is to understand whether the binding target to spend 2% of annual gdp on defense that NATO members have undertaken can trump EU rules adopted in the aftermath of the euro-crisis that instead strictly limit governments' deficits. The topic of this article has acquired particular relevance since the election of US President Trump, who has repeatedly complained about underspending on defense by European countries and threatened to disregard the NATO mutual defense pledge (that an attack on one is an attack on all) vis-à-vis those NATO members who fail to pay their fair share to the organization. By combining in an innovative way conflict-of-laws analysis with public policy research on trade-offs in budget-making, the article claims that EU rules do not legally prevent EU member states from fulfilling their NATO obligations – but make it politically difficult for them to do so. In order to address this state of affairs, the article thus considers how greater integration in the field of defense by EU member states could overcome the problem and revive the transatlantic alliance. In this regard, the article examines extremely recent EU legal and policy developments, including the milestone EU Council decision to establish for the first time a permanent structured cooperation (PESCO) in the field of defense between 25 EU member states in December 2017, and suggests that ultimately defense union stands at the core of the future of Europe – regardless of whether NATO obligations trump EU rules or not.

Keywords: NATO, European Union, PESCO, European Defense Union

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1. Introduction

Since the end of World War II (WWII) European security has been ensured by the North Atlantic Treaty Organization (NATO). Established by the North Atlantic Treaty, signed in Washington DC in April 1949,¹ NATO pledges its members – originally the United States (US), Canada, and ten countries of Western Europe: the United Kingdom (UK), France, Belgium, the Netherlands, Luxembourg, Italy, Portugal, Denmark, Norway and Iceland – to mutually protect each other in case of enemy attack. Pursuant to Article V of the NATO Treaty, “the Parties agree that an armed attack against one or more of them in Europe or North America shall be considered against them all”. For almost three quarters of a century the mutual defense pledge has been a cornerstone of the transatlantic alliance. NATO successfully contained the Soviet Union, and was flexibly turned against the threats of global terrorism following 9/11.² In fact, NATO itself expanded, and through several rounds of enlargement it came to englobe almost all countries of Europe, including states which were originally part of the Soviet-led Warsaw Pact: with 29 members, today NATO arguably represents the most successful military alliance in the world.³

Nevertheless, the viability of NATO has increasingly been called into question since the election of US President Donald Trump in November 2016. In his first interview since taking office, President Trump – repeating statements he had made during the campaign⁴ – questioned the utility of NATO and complained that the US was shouldering too much of a burden in guaranteeing Europeans’ security.⁵ After meeting German Chancellor Angela Merkel President Trump then affirmed that Germany owed the US large sums of money for its failure to live up to its obligation to spend an adequate share of its budget on defense.⁶ And at an official NATO meeting in Brussels in May 2017, then, President Trump lectured the heads of state and government of the other NATO members on what he called “their chronic underpayment to the NATO alliance” and failed to reaffirm the US pledge to the mutual defense clause of the NATO Treaty.⁷ In fact, although later President Trump explicitly mentioned approvingly Article V NATO Treaty during the

¹ See *North Atlantic Treaty*, 34 UNTS 243.

² See generally A HISTORY OF NATO (G. Schmidt ed. 2001).

³ The success of NATO can be compared with the failure of the South East Asian Treaty Organization (SEATO) another military alliance set up by the US in the wake of the Cold War with southern-east Asian nations and colonial powers of the region. SEATO, established in 1955 was dissolved in 1977 due to lack of interest in cooperation among member nations, and disputes between them.

⁴ See Philip Rucker and Robert Costa, *Trump Questions Need for NATO, Outlines Non-Interventionist Foreign Policy*, THE WASHINGTON POST, March 21, 2016.

⁵ See *Trump Exklusiv im Bild Interview, “Ich Mag Starke, Ich Macg Ordnung”*, BUILD ZEITUNG, January 20, 2017 at <http://www.bild.de/video/clip/donald-trump/das-grosse-bild-interview-49795050.bild.html>

⁶ See Jim Puzzanghera, *Trump Says Merkel Meeting was ‘Great’, then Blasts Germany for NATO Bills’*, THE LOS ANGELES TIMES, March 18, 2017.

⁷ See Michael Shear, Mark Lander and James Kanter, *In NATO Speech, Trump is Vague about Mutual Defense Pledge*, THE NEW YORK TIMES, May 25, 2017.

course of a state in visit in Poland in July 2017,⁸ European policy-makers seem to remain in the dark on what position would the US adopt in case the security of a NATO member were at risk.⁹ Since the US effectively represents the flesh and bones of the NATO, any American disengagement would make the transatlantic military alliance practically moot.

Yet, for all the fuss raised by the Trump presidency’s position on NATO, the reality is that for several years now US administrations – both Republicans and Democratic – had asked European partners to increase their contributions to the military alliance. While during the George W. Bush presidency Secretary of State James Baker had demanded greater collaboration from Europe on matters of security,¹⁰ President Barack Obama himself had requested that Europe surge its security spending to ensure a fairer burden sharing.¹¹ In fact, governments of the NATO members meeting in the North Atlantic Council – the main decision-making body of NATO – had decided at the Wales summit in September 2014 that all states of the military alliance had to spend at least 2% of their gross domestic product (gdp) per year on defense.¹² This commitment was regarded as crucial to preserve the alliance in a post-unipolar world.¹³ However, in 2017, besides the US, only four members of NATO – the UK, Greece, Estonia and Poland – are meeting this spending target.¹⁴ In fact, during the Great Recession,¹⁵ a number of NATO members have even decreased the percentage of their spending on defense, and because of the tight budgetary constraints that the European Union (EU) has set up in response to the Euro-crisis, it is uncertain to what extent European countries may be able at all to meet their financial obligations toward NATO.¹⁶

The purpose of this article is to examine from an international law and politics perspective the interaction between NATO obligations and European budgetary constraints. In particular, the article inquires whether the obligations that EU member states have undertaken as members of

⁸ See Abby Phillip, John Wagner and Michael Birnbaum, *Western Values Increasingly Endangered by Terrorism and Extremism, Trump Warns Europe*, THE WASHINGTON POST, July 6, 2017.

⁹ See *Donald Trump Fails to Endorse NATO’s Mutual Defense Pledge*, THE ECONOMIST, May 26, 2017.

¹⁰ See *Bush to Press Allies for More Defense Spending at NATO Summit*, ASSOCIATED PRESS, November 27, 2006.

¹¹ See Ewen MacAskill, *US Presses NATO Members to Increase Defense Spending*, THE GUARDIAN, June 23, 2014.

¹² See Summit Declaration issued by the Heads of State and Government participating in the Meeting of the North Atlantic Council in Wales from 4 to 5 September 2014.

¹³ See ROBERT O. KEOHANE, *AFTER HEGEMONY* (2005).

¹⁴ See NATO, *Defense Expenditures of NATO Countries (2009-2016)*, available at http://www.nato.int/cps/en/natohq/news_132934.htm, reporting the following data for the year 2016:

Country	% GDP on defense	Country (continued)	% GDP on defense (cont.)
Albania	1.21	Lithuania	1.49
Belgium	0.85	Luxembourg	0.44
Bulgaria	1.35	Montenegro	n.a.
Canada	0.99	Netherlands	1.17
Croatia	1.23	Norway	1.54
Czech Republic	1.04	Poland	2.00
Denmark	1.17	Portugal	1.38
Estonia	2.16	Romania	1.48
France	1.78	Slovakia	1.16
Germany	1.19	Slovenia	0.94
Greece	2.38	Spain	0.91
Hungary	1.01	Turkey	1.56
Italy	1.11	UK	2.21
Latvia	1.45	US	3.61

¹⁵ See CARMEN REINHART AND KENNETH ROGOFF, *THIS TIME IS DIFFERENT* (2009).

¹⁶ See *THE CONSTITUTIONALIZATION OF EUROPEAN BUDGETARY CONSTRAINTS* (Federico Fabbrini et al eds., 2014).

NATO trump the budgetary constraints which EU law imposes on them to cap their spending. To this end, the article first examines the legal nature of the NATO obligation set in the 2014 Wales Summit Declaration to spend at least 2% gdp on defense, dwelling on the constitutional authority of the North Atlantic Council to adopt legally binding norms under the NATO Treaty. Subsequently, the article considers the effect that NATO obligations have in the EU legal order, also in light of the provision of the EU treaty regulating conflict between EU laws and prior international obligations that EU member states have undertaken vis-à-vis third parties. Finally, the article evaluates to what extent EU rules adopted in the aftermath of the Euro-crisis to limit states' deficit effectively restrict the ability of EU member states to meet their NATO obligations, and by analyzing the political incentives that drive decision-making on budgeting in EU member states, discusses the interplay between law and politics in the field of defense spending.

The article argues that legally it is questionable whether NATO obligations may prevail over conflicting European budgetary constraints. At the same time, the article explains that the failure by most EU nations to reach the defense spending target set by NATO derives more from rational public policy choices than from law: Electoral incentives and the need to fund an expensive welfare state push European policy makers to underfund defense. However, because the duty for NATO members to spend at least 2% of gdp on defense is a binding obligation under international law, the article warns that repeated failure by EU member states to reach this target could lead to retaliation by the US, which would ultimately undermine the mutual defense pledge that lay at the foundation of the transatlantic alliance. As this would represent a major threat for the security of Europe, the article therefore concludes by suggesting that EU member states should pool more effectively their resources, so as to meet *jointly* the NATO spending target within the EU. Instruments already exist under EU law to allow member states to engage in deeper integration in the field of Common Foreign and Security Policy (CFSP): in particular, on the basis of Article 42(6) Treaty on EU, member states whose military capabilities fulfil higher criteria can establish a so-called "permanent structured cooperation" (PESCO) developing common defense projects and potentially pooling military forces. Under French leadership, in June 2017 the European Council has eventually endorsed greater EU integration in defense,¹⁷ and in December 2017 the Council has recently authorized the activation of PESCO among 25 EU member states¹⁸ – marking a major step forward for the EU in this arena.¹⁹ Yet further action would be needed, particularly following Brexit²⁰ (the withdrawal of the UK from the EU),²¹ to allow the EU to grow its defense capacities so as to ensure its autonomous security in an ever more unsafe world.

¹⁷ See European Council Conclusions, 23 June 2017, EUCO 8/17.

¹⁸ See Council Decision (CFSP) of 8 December 2017 establishing Permanent Structured Cooperation (PESCO) and determining the list of Participating Member States, Doc. 14866/17.

¹⁹ See Steven Erlanger, *E.U. Moves Closer to a Joint Military Force*, THE NEW YORK TIMES, 13 November 2017 and *EU Countries Sign Key Defense Pact*, THE GUARDIAN, 13 November 2017.

²⁰ On June 23, 2016 UK citizens voted in a national referendum to leave the EU. See The Electoral Commission, *EU referendum results*, <http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information>. On March 29, 2017 the UK Government notified the European Council of its intention to withdraw from the EU pursuant to Article 50 TEU. See Letter of Prime Minister Theresa May to European Council President Donald Tusk. On April 29, 2017 the European Council approved guidelines for the negotiations of the withdrawal of the UK from the EU. See European Council Guidelines, 29 April 2017, EUCO XT 20004/17. Since June 2017, the European Commission is conducting negotiations with the UK Government to settle the divorce and set the framework of a possible new relation between the UK and the EU. By default, the UK will be out from the EU by March 2019. See *generally* THE LAW & POLITICS OF BREXIT (Federico Fabbrini ed., 2017).

The article is structured as follows. Section 2 provides a first analysis of the institutional architecture of NATO as an international treaty organization, and clarifies what is the legal authority of the North Atlantic Council to adopt rules implementing the NATO Treaty – notably with regard to the definition of specific spending targets on defense. Section 3 then considers the interplay between NATO obligations and EU budgetary constraints, examining the EU treaty rules regulating conflict of norms between EU law and previously ratified international treaties, as well as the relevant case law of the European Court of Justice (ECJ) adjudicating cases of conflict between international obligations and foundational constitutional principles of the EU legal order. Section 4 instead considers how NATO obligations interplay with national budgetary policies, exploring the political incentives and economic rationales why EU member states underspend on defense, and emphasizing that this state of affairs may produce dire consequences if the US retaliates, as it legally could – and as President Trump has indicated he would.²² In light of this, Section 5 submits that EU member states should strengthen their cooperation in the field of defense, reaching together the NATO spending target, thus preserving the viability of the transatlantic alliance and simultaneously endowing the EU with sufficient, autonomous military means to preserve their freedom and independence. Section 6 concludes claiming that defense union stands at the core of the future of Europe – regardless of whether NATO obligations trump EU rules or not.

2. The North Atlantic Treaty Organization

The NATO Treaty is an international agreement concluded in 1949 with the aim to “promote stability and well-being in the North Atlantic Area” by uniting in a military alliance the North American and Western European nations.²³ It is a multilateral treaty that – together with the Bretton Woods agreements establishing the International Monetary Fund (IMF),²⁴ and the General Agreement on Tariffs and Trade (GATT)²⁵ liberalizing commerce among capitalist nations – constitutes an essential component of the world order established by the US and its allies in the aftermath of WWII, and in the wake of the Cold War.²⁶ In fact, while the Preamble of the NATO Treaty reaffirms the faith of the contracting parties “in the purposes and principles of the Charter of the United Nations and their desire to live in peace with all peoples and all governments,” it also clarified that the aim of the military alliance is to defend Western values – in competition with the Soviet bloc:²⁷ NATO members, in fact, resolve to unite their efforts for collective defense “to

²¹ The UK is (with France) the only European country with a nuclear deterrent. See 1968 Treaty on the Non-Proliferation of Nuclear Weapons, 729 *UNTS* 161. Moreover, it is one of the few European countries spending at least 2% of its budget on defense. See *supra* note 16.

²² See Ben Jacobs, *Donald Trump Reiterates he will Only Help NATO Countries that Pay 'Fair Share'*, *THE GUARDIAN*, July 28, 2016.

²³ See Preamble, NATO Treaty.

²⁴ See Articles of Agreement of the International Monetary Fund, 2 *UNTS* 39.

²⁵ See General Agreement on Trade and Tariffs, 55 *UNTS* 194.

²⁶ See ANN-MARIE SLAUGHTER, *THE NEW WORLD ORDER* (2004).

²⁷ The quick transformation of NATO from a post-WWII alliance into an instrument of the Cold War is reflected by the position of Germany. In 1949, West Germany was not included among the members of NATO, which in this respect expanded to the North American partners the Treaty of Brussels of March 1948 concluded between France, the UK and the Benelux countries in anti-German mode. See Treaty of Economic, Social and Cultural Cooperation and Collective Self-Defense, 19 *UNTS* 51. However, following the geo-political changes produced by the Korean War, in 1955 West Germany

safeguard the freedom, common heritage and civilisation of their peoples, founded on the principles of democracy, individual liberty and the rule of law.”²⁸ While admittedly not all NATO founding members fulfilled these criteria,²⁹ NATO has arguably succeeded in creating a framework of international cooperation which secured liberty and peace in the European continent.³⁰

In legal terms, the NATO Treaty is a relatively short document, composed of just 14 articles. Several of these provisions are designed to bridge the NATO Treaty with the Charter of the United Nations (UN).³¹ Hence, Article I reaffirms the commitment of the NATO members to refrain in their international relations from the threat or the use of force in any manner inconsistent with the purposes of the UN.³² Article II commits contracting parties to contribute to the peaceful and friendly international relations, including by encouraging economic cooperation. And Article VII affirms that “[t]his Treaty does not affect, and shall not be interpreted as affecting in any way the rights and obligations under the Charter of the Parties which are members of the United Nations, or the primary responsibility of the Security Council for the maintenance of international peace and security.” The centerpiece of the NATO Treaty is, as already mentioned, Article V, which enshrines a mutual defense pledge that an attack on one is an attack on all.³³ Connected to this, Article VI clarifies what is the geographical coverage and substantive meaning of the notion of armed attack. Article III requires NATO members to “maintain and develop their individual and collective capacity to resist armed attack.” And Article IV sets a duty on contracting parties to consult together whenever the security or independence of a member may be threatened.

Just like any international agreement,³⁴ then, also the NATO Treaty includes general and final provisions. Hence, Article XI states that “This Treaty shall be ratified and its provisions carried out by the Parties in accordance with their respective constitutional processes” and clarifies that, to enter into force, the Treaty requires ratification by at least the US, the UK, France, Canada, and the Benelux countries. Article XII sets a rendez-vous clause, which allows revisions of the Treaty to be made after 10 years of operation. Article XIII allows any contracting party to denounce the Treaty after 20 years of operation. And Article XIV clarifies that English and French will be the official languages of the Treaty, both having authentic values. Moreover, Article X allows the contracting parties, by unanimous agreement, to “invite any other European State in a position to further the principles of this Treaty and to contribute to the security of the North Atlantic area to accede to this Treaty” – a possibility that occurred several times since 1949, through subsequent enlargements of the alliance to Greece and Turkey (1952)³⁵, West Germany (1955),³⁶ Spain (1982),³⁷

was quickly included into the NATO alliance with the purpose of consolidating the Eastern flank of the military alliance vis-à-vis the Soviet Union. See generally JOHN REED, *GERMANY AND NATO* (1987).

²⁸ See Preamble, NATO Treaty.

²⁹ In particular, Portugal was in 1949 still ruled by an authoritarian regime led by Antonio Salazar but its geographical position made it a strategic partner in the military alliance. The country would transition to democracy only in 1974 after the so-called Carnation Revolution. See generally JUAN LINZ AND ALFRED STEPAN, *PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA AND POST-COMMUNIST EUROPE* (1996).

³⁰ See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

³¹ See Charter of the United Nations, 1 UNTS XVI

³² See also Bardo Fassbender, *The UN Charter as the Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529 (1998) (arguing that the UN Charter serves as the constitution of international law).

³³ See also Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999).

³⁴ See generally JAMES CROWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (2012, 8th ed).

³⁵ Protocol of the North Atlantic Treaty on the Accession of Greece and Turkey.

the Czech Republic, Hungary, Poland (1999),³⁸ Slovakia, Bulgaria, Romania, Estonia, Latvia, Lithuania, Slovenia (2004),³⁹ Croatia, Albania (2009),⁴⁰ and now Montenegro (2017).⁴¹ Moreover, Article VIII states that “Each Party declares that none of the international engagements now in force between it and any other of the Parties or any third State is in conflict with the provisions of this Treaty, and undertakes not to enter into any international engagement in conflict with this Treaty.”

At the same time, as a treaty establishing an international organization, the NATO Treaty does not limit itself to introducing obligations for the contracting parties: it also creates common institutions.⁴² According to Article IX NATO Treaty, “The Parties hereby establish a Council, on which each of them shall be represented, to consider matters concerning the implementation of this Treaty.” Admittedly, the common institutions of NATO are more simplified than the governing structures of other international organizations, like the UN or the IMF.⁴³ Consistent with the nature of a military alliance, Article IX limits itself to saying that “The Council shall be so organised as to be able to meet promptly at any time. The Council shall set up such subsidiary bodies as may be necessary; in particular it shall establish immediately a defence committee which shall recommend measures for the implementation of Articles III and V.” Nevertheless, NATO has practically developed a sizable architecture, housed in the organization’s headquarter in Brussels,⁴⁴ with a civilian Secretary General – a position which by custom is always held by a European policy-maker – and a military Central Command – which is conventionally led by a US armed officer.⁴⁵

The main governing body of NATO is however the Council – also known as the North Atlantic Council – which groups the heads of state and government of the NATO members. The Council only meets periodically: on average it has assembled every 2.5 years.⁴⁶ However, because of its composition, it is the institution that provides NATO with the necessary impetus for its development and defines the general political direction and priorities thereof. In fact, as

³⁶ Protocol of the North Atlantic Treaty on the Accession of the Federal Republic of Germany.

³⁷ Protocol of the North Atlantic Treaty on the Accession of Spain.

³⁸ Protocol of the North Atlantic Treaty on the Accession of the Czech Republic, Protocol of the North Atlantic Treaty on the Accession of Hungary, Protocol of the North Atlantic Treaty on the Accession of Poland.

³⁹ Protocol of the North Atlantic Treaty on the Accession of Bulgaria, Protocol of the North Atlantic Treaty on the Accession of Estonia, Protocol of the North Atlantic Treaty on the Accession of Latvia, Protocol of the North Atlantic Treaty on the Accession of Lithuania, Protocol of the North Atlantic Treaty on the Accession of Romania, Protocol of the North Atlantic Treaty on the Accession of the Slovak Republic, Protocol of the North Atlantic Treaty on the Accession of Slovenia.

⁴⁰ Protocol of the North Atlantic Treaty on the Accession of Albania, Protocol of the North Atlantic Treaty on the Accession of Croatia.

⁴¹ Protocol of the North Atlantic Treaty on the Accession of Montenegro.

⁴² See generally JAN KLABBERS, *AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW* (2012, 2nd ed.).

⁴³ See Julian Arato, *Constitutionality and Constitutionalism Beyond the State: Two Perspectives on the Material Constitution of the United Nations*, 10 INT’L J. CONST. L. 627 (2012) (discussing institutional separation of powers within the UN system).

⁴⁴ See NATO, *Organization*, available at: <http://www.nato.int/cps/en/natohq/structure.htm>

⁴⁵ All NATO members today participate both in the political and military structures of NATO. However, historically France embraced a peculiar stand. In 1967 French President Charles de Gaulle decided to withdraw France from the integrated military command, to express his disapproval of US domination of the military alliance. Nevertheless in 2009, French President Nicolas Sarkozy reintegrated France in all NATO structures.

⁴⁶ See NATO, *Events*, available at:

http://www.nato.int/cps/en/natolive/events.htm?query=&date_from=&date_to=&event_types=Summit&sort=date:D:R:d1&start=0 reporting that Heads of State and Government of the NATO members have met 29 times since the establishment of NATO: specifically in 1957, 1974, 1975, 1977, 1978, 1982, 1985, 1988, 1989 (twice), 1990, 1991, 1994, 1997 (twice), 1999, 2001, 2002 (twice), 2004, 2005, 2006, 2008, 2009, 2010, 2012, 2014, 2016, 2017.

mentioned, Article IX NATO Treaty gives to the Council the power to take decisions on the implementation of the treaty – a responsibility that, absent provisions to the contrary, has to be exercised by unanimous agreement between all contracting parties. The broad language of this clause suggests that the North Atlantic Council acts as the executive branch of the organization.⁴⁷ Yet, because the NATO Treaty does not create an internal system of separation of powers among different institutions, the Council as the only constituted treaty-body is also inevitably vested with quasi-legislative powers, since it is for it to adopt any implementing rule which may be necessary to achieve the objectives of the organization. For instance, since Article III provides that NATO members “will maintain and develop their individual and collective capacity to resist armed attacks” it is for the Council to specify the precise action that contracting parties have to take in order to fulfil this goal.

In the Wales Summit of 2014, the Council seems to have engaged precisely in this exercise. After reaffirming their commitment to the mutual defense pledge of Article V, the heads of state and government of NATO members meeting in the North Atlantic Council “agree[d] to reverse the trend of declining defence budgets, to make the most effective use of our funds and to further a more balanced sharing of costs and responsibilities.”⁴⁸ To this end, NATO members decided that:

- Allies currently meeting the NATO guideline to spend a minimum of 2% of their [gdp] on defence will aim to continue to do so. Likewise, Allies spending more than 20% of their defence budgets on major equipment, including related Research & Development, will continue to do so.
- Allies whose current proportion of GDP spent on defence is below this level will:
 - halt any decline in defence expenditure;
 - aim to increase defence expenditure in real terms as GDP grows;
 - aim to move towards the 2% guideline within a decade with a view to meeting their NATO Capability Targets and filling NATO’s capability shortfalls.⁴⁹

NATO members also reaffirmed the importance of increasing “defense budgets [...] towards the goals we pledged in Wales” in the Declaration concluding the July 2016 North Atlantic Council in Warsaw,⁵⁰ and the commitment to spend at least 2% of gdp on defense was at the heart of discussions during the NATO meeting of heads of state and government in Brussels in May 2017.⁵¹ The precise spending targets originally agreed in Wales are set in what is formally known as a “declaration” concluding the NATO Summit. Nevertheless, contrary to the final communiqués other intergovernmental summits such as for example G20 meetings – which have a purely political nature – this declaration is binding in international law, since it can be regarded as adopted by the North Atlantic Council in pursuance of its functions under the NATO Treaty. As a result, NATO members have an obligation to respect these spending targets on common defense as parties to an international organization.

⁴⁷ See JEAN-CLAUDE GAUTRON, *DROIT EUROPEEN* 17 (2006, 12th ed).

⁴⁸ See NATO Wales Declaration, *supra* note 12, §14.

⁴⁹ *Ibid.*

⁵⁰ See The Warsaw Declaration on Transatlantic Security issued by the Heads of State and Government participating in the Meeting of the North Atlantic Council in Warsaw, 9 July 2016, §3.

⁵¹ See NATO Secretary General Jens Stoltenberg press conference following the meeting of NATO Heads of State and/or Government in Brussels on 25 May 2017, available at: http://www.nato.int/cps/en/natohq/opinions_144098.htm

3. Conflict of laws: the interaction between NATO obligations and EU rules

While NATO obligations compel member states to increase spending, EU rules oblige member states to do the exact opposite.⁵² In particular, since the enactment of the Maastricht Treaty in 1992, the Stability and Growth Pact (SGP) has prohibited all EU member states that adopt the euro as their currency to run a yearly budget with a deficit higher than 3% of gdp (and simultaneously required them to keep their public debt below 60% of gdp).⁵³ Moreover, since the explosion of the Euro-crisis, EU budgetary rules have been remarkably strengthened to prevent governments' spending.⁵⁴ Two new packages of EU laws – the so-called 'six-pack' of 2011,⁵⁵ and 'two-pack' of 2013⁵⁶ have tightened the rules of the SGP and increased the ability of the European Commission to police national budgetary policies. At the same time, the Fiscal Compact of 2012⁵⁷ – a intergovernmental treaty concluded by 25 out of the then 27 EU member states outside the framework of EU law – required contracting party to constitutionalize the "golden rule" of the balance budget amendment in their basic law, setting an even more restrictive fiscal target:⁵⁸ based on Article 3 of the Fiscal Compact, contracting parties are prevented from running an yearly budget with a deficit higher than 0.5% of gdp, effectively foreclosing any margin for deficit spending.

If it is true that the constitutional architecture of EU economic governance emerging from the Euro-crisis reflects a German-dominated policy-preference for budgetary consolidation,⁵⁹ and austerity, the question is to what extent EU budgetary constraints have to give way to the spending obligations that EU member states have undertaken as members of NATO. Admittedly the question does not apply equally to all 28 EU member states. Currently, in fact, 6 EU member states – Austria, Sweden, Finland, Ireland, Malta and Cyprus – are not members of NATO, pursuant to a tradition of neutrality that dates to independence (Ireland),⁶⁰ the Cold War (Austria,

⁵² See further FEDERICO FABBRINI, *ECONOMIC GOVERNANCE IN EUROPE* (2016)

⁵³ See Protocol No. 12 on the Excessive Debt Procedure, 2008 O.J. (C 115) 279.

⁵⁴ See Kenneth Armstrong, *The New Governance of EU Fiscal Discipline*, 38 EUR. L.REV. 601 (2013) and MARTIN HEIPERTZ AND AMY VERDUN, *RULING EUROPE: THE POLITICS OF THE STABILITY AND GROWTH PACT* (2011).

⁵⁵ See Regulation 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the Effective Enforcement of Budgetary Surveillance in the Euro Area, 2011 O.J. (L 306) 1; Regulation 1174/2011, of the European Parliament and of the Council of 16 November 2011 on Enforcement Measures to Correct Excessive Macroeconomic Imbalances in the Euro Area, 2011 O.J. (L 306) 8; Regulation 1175/2011, of the European Parliament and of the Council of 16 November 2011 Amending Council Regulation (EC) No 1466/97 on the Strengthening of the Surveillance of Budgetary Positions and the Surveillance and Coordination of Economic Policies, 2011 O.J. (L 306) 12; Regulation 1176/2011, of the European Parliament and of the Council of 16 November 2011 on the Prevention and Correction of Macroeconomic Imbalances, 2011 O.J. (L 306) 25; Council Regulation 1177/2011, of 8 November 2011 amending Regulation (EC) No 1467/97 on Speeding Up and Clarifying the Implementation of the Excessive Deficit Procedure, 2011 O.J. (L 306) 33; Council Directive 2011/85/EU of 8 November 2011 on Requirements for Budgetary Frameworks of the Member States, 2011 O.J. (L 306) 41.

⁵⁶ See Regulation 473/2013 of the European Parliament and the Council of 21 May 2013 on monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficits in euro-area Member States, 2013 O.J. (L 140) 11; Regulation 472/2013 of the European Parliament and the Council of 21 May 2013 on enhanced surveillance of euro-area Member States experiencing or threatened with serious difficulties with respect to their financial stability, 2013 O. J. (L 140) 1.

⁵⁷ See Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, 2 March 2012, available at http://www.eurozone.europa.eu/media/304649/st00tscg26_en12.pdf

⁵⁸ See further Federico Fabbrini, *The Fiscal Compact, the Golden Rule and the Paradox of European Federalism*, 36 B. C. INT'L & COMP. L. REV. 1 (2013).

⁵⁹ See Leonard Besselink & Jan Herman Reestman, Editorial: *The Fiscal Compact and the European Constitutions: 'Europe Speaking German'*, 8 EUR. CONST. L.REV. 1 (2012).

⁶⁰ See ROISIN DOHERTY, *IRELAND, NEUTRALITY AND EUROPEAN SECURITY INTEGRATION* (2002).

Sweden and Finland),⁶¹ or their complex relation with the UK (Malta, Cyprus).⁶² Nevertheless, with the exception of Cyprus (whose borders are contested),⁶³ these states closely cooperate with NATO through the Partnership for Peace program.⁶⁴ Moreover, all other EU member states – three-fifths of them, including the largest one – are members of NATO. In fact, all the EU member states who are also members of NATO were members of NATO *before* being members of the EU – either because the EU (or its predecessor: the European Communities established by the Treaties of Rome of 1957) did not exist yet, or because accession to NATO preceded accession to the EU.⁶⁵

This point is of major legal significance because of Article 351 TFEU. This clause, which has existed in the EU legal order since the Treaties of Rome, is designed to preserve the obligations that EU member states have undertaken with third parties prior to the creation of the EU, or their accession to it. According to Article 351(1) TFEU: “The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.” As Robert Schütze has explained, “Article 351 [TFEU] codified the ‘precedence’ or prior international obligations of the Member States over conflicting European law.”⁶⁶ In technical terms, Article 351 TFEU is a conflict-of-law rule, which – consistent with the foundational principle of international law that *pacta sunt servanda*⁶⁷ – empowers EU member states to give prevalence to obligations they have assumed vis-à-vis third parties before creating/joining the EU when these clash with provisions of EU law. Such conflict-of-law rule is only partially mitigated by the provision of Article 351(2) TFEU, which states that “To the extent that such [prior] agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.” While Article 351 TFEU requires EU member states to seek to overcome possible conflicts between EU law and international law, it ultimately allows them to disregard EU law if this is necessary to comply with prior international treaties.⁶⁸

The rule of Article 351 TFEU is clearly relevant in the context of a discussion of the NATO obligations of EU member states. Because, as explained in the previous section, the defense

⁶¹ See Federal Constitutional Law on the *Neutrality of Austria*, 26 October 1955 StF: BGBl. Nr. 211/1955 (Austr.), and 1948 Agreement of Friendship, Cooperation, and Mutual Assistance between Finland and the Soviet Union, 48 *UNTS* 156. But see also JOHANNA RAINIO-NIEMI, *THE IDEOLOGICAL COLD WAR: THE POLITICS OF NEUTRALITY IN AUSTRIA AND FINLAND* (2014) (explaining that neutrality coexisted with an ideological leaning toward the West).

⁶² Both Malta and Cyprus are members of the UK-led Commonwealth. In fact, the UK owns a Sovereign Base area on the Republic of Cyprus which is part of British Overseas Territory.

⁶³ Following its independence from the UK in 1960, Cyprus experienced intercommunity violence between the Greek and Cypriot populations, which led to UN Security Council resolution 186 of 1964 establishing a UN Peacekeeping force in Cyprus. A military coup d'état in Greece in 1974 led to the Turkish invasion of Northern Cyprus, which created a puppet state – the Republic of Northern Cyprus – internationally recognized only by Turkey itself. The UN Peacekeeping mission was subsequently expanded but efforts to re-unite the island have thus far failed to achieve any results. When Cyprus joined the EU in 2004 special arrangements were taken to account for the fact that the island remains divided. See also Treaty of Accession of Cyprus to the EU, Protocol 10, 2003, OJ (L 236) 955.

⁶⁴ See NATO, *Partnership for Peace program*, available at: http://www.nato.int/cps/en/natolive/topics_50349.htm

⁶⁵ See WADE JACOBY, *THE ENLARGEMENT OF THE EUROPEAN UNION AND NATO* (2004).

⁶⁶ ROBERT SCHÜTZE, *FOREIGN AFFAIRS AND THE EU CONSTITUTION* 125 (2014).

⁶⁷ See also Article 26, Vienna Convention on the Law of the Treaties (VCLS), 1155 *UNTS* 331.

⁶⁸ See also GEERT DE BEARE, *CONSTITUTIONAL PRINCIPLES OF EU EXTERNAL RELATIONS* (2008).

spending target set in the 2014 Wales Summit has to be interpreted as the exercise of the regulatory powers constitutionally assigned to the North Atlantic Council by the NATO Treaty – a treaty concluded by EU member states with third countries before the creation of the EU, or the accession to it – it could be argued that whatever EU rule prevents the fulfilment of this obligation has to be discarded in the name of Article 351 TFEU. If the NATO Treaty as interpreted by the North Atlantic Council imposes a duty on NATO members to increase their defense spending to maintain the ability of the alliance to protect each of its members, should this not imply ex Article 351 TFEU that EU fiscal rules which interfere with this objective have to give way? In fact, in other contexts, the ECJ has accepted that an EU member state may disregard an EU norm if this is “necessary in order to ensure the performance by the Member State concerned of obligations arising under an agreement concluded with non-member countries prior to the entry into force of the [EU] Treaty.”⁶⁹

Nevertheless, in the awareness that the conflict-of law rule of Article 351 TFEU represents a significant interference in the autonomy and supremacy of the EU legal order, the ECJ has construed the clause restrictively and over-time introduced limitations on the ability of international legal obligation to prevail over EU fundamental constitutional norms.⁷⁰ In the *Kadi & Al Barakaat* case,⁷¹ in particular, the ECJ was faced with the question whether an EU regulation implementing a resolution of the UN Security Council listing an individual as a terrorist suspect could be applied in the EU legal order, even though it conflicted with EU principles of due process rights.⁷² On the EU side, Article 351 TFEU was clearly relevant, since all EU member states are members of the UN, and were UN members well before becoming EU members.⁷³ Moreover, special UN provisions were at stake. On the one hand, Article 25 UN Charter states that “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” On the other hand, Article 103 UN Charter even entrench a hierarchical rule among international treaties,⁷⁴ proclaiming that: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

Yet, in what has been regarded as one of its most important judgment ever,⁷⁵ the ECJ ruled in *Kadi & Al Barakaat* that UN obligations could not undermine the constitutional protection of human rights guaranteed by EU law. Addressing specifically the effect of Article 351 TFEU (at that time Article 307 EC) the ECJ ruled that that clause cannot “be understood to authorise any derogation

⁶⁹ Case C-158/91, *Criminal Proceedings against Jean-Claude Levy* [1993] ECR I-4287, §22.

⁷⁰ See Schütze, *supra* note 66, 105.

⁷¹ See Joined Cases C-402/05 P and C-415/05 P *Yassin A. Kadi and Al Barakaat International Foundation v. EU Council and Commission* [2008] ECR I-6351.

⁷² In response to the threat of global terrorism, UN Security Council resolution 1267 of 1999 had established a Sanctions Committee empowered to blacklist individuals and organizations suspected of financing terrorism. See Peter Fitzgerald, *Responding to Rogue Regimes: from Smart Bombs to Smart Sanctions. Managing ‘Smart Sanctions’ Against Terrorism Wisely*, 36 NEW ENG. L.REV. 957 (2002). The Sanctions Committee, subsequently expanded and reformed by several UN Security Council resolutions, operated however as a diplomatic body, falling short of due process rules. See Clemens Feinaugle, *The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of the Individuals?*, 9 GERMAN L.J. 1513 (2008).

⁷³ See CHRISTINA ECKES, *EU COUNTER-TERRORIST POLICIES AND FUNDAMENTAL RIGHTS: THE CASE OF INDIVIDUAL SANCTIONS* (2009).

⁷⁴ See Fassbender, *supra* note 32.

⁷⁵ See KADI ON TRIAL: A MULTIFACETED ANALYSIS OF THE KADI TRIAL (Matej Avbelj et al eds., 2014).

from the principles of liberty, democracy and respect for human rights and fundamental freedoms [which are at the] foundation of the Union.”⁷⁶ In fact, the ECJ added that Article 351 TFEU “may in no circumstances permit any challenge to the principles that form part of the very foundations of the [EU] legal order, one of which is the protection of fundamental rights, including the review by the [EU] judicature of the lawfulness of [EU] measures as regards their consistency with those fundamental rights.”⁷⁷ By embracing a dualist approach, and separating the review of the EU regulation from the analysis of the UN resolutions which lied underneath, the ECJ was able to effectively ensure the prevalence of EU constitutional law over international treaty law.⁷⁸ In fact, while *Kadi & Al Barakaat* has been hailed by EU and human rights lawyer as the appropriate response to the flawed UN global anti-terror regime,⁷⁹ international lawyers have criticized the ECJ ruling for disregarding international law and weakening the obligations deriving from the UN.⁸⁰

The interpretation of the ECJ judgment in *Kadi & Al Barakaat* is thus crucial in the resolution of a possible conflict between NATO obligations and EU rules. While Article 351 TFEU allows EU member states to disregard EU rules which conflict with international obligations previously assumed vis-à-vis third parties, the ECJ has excluded that international law can trump the constitutional foundations of the EU legal order.⁸¹ Certainly, in *Kadi & Al Barakaat* the ECJ discarded UN anti-terrorism rules which undermined the protection of core fundamental rights.⁸² NATO spending rules, on the contrary, would likely not affect this feature of the EU legal order. And while budgetary rules are entrenched in the EU treaties and a dense web of EU legislation, it is not self-evident that they represent the deep core of the EU constitutional order that would authorize disregarding international obligations.⁸³ Nevertheless, as Grainne de Búrca has recently explained, the ECJ has increasingly embraced a defensive attitude of the autonomy of the EU legal order, and much like the US Supreme Courts, it has found ways to shield domestic law from the external influence of international law.⁸⁴ If the approach of the ECJ, which reflects a reading of the EU treaties as the constitutional charter of the EU,⁸⁵ were to hold, it remains possible therefore that a conflict between NATO obligations and EU constitutional rules constraining deficit spending would be solved in favor of the latter – not of the former.

⁷⁶ *Kadi*, supra note 75, §303.

⁷⁷ *Ibid.* §304.

⁷⁸ See Federico Fabbrini, *The role of the judiciaries in times of emergency: Judicial review of counter-terrorism measures in the US Supreme Court and the European Court of Justice*, 28 YBK EUR. L. 664 (2009).

⁷⁹ See e.g. Takis Tridimas and Jose Gutierrez-Fons, *EU Law, International Law and Economic Sanctions against Terrorism: the Judiciary in Distress?* 32 FORDHAM INT’L L.J. 660 (2008), and Martin Scheinin, *Is the ECJ Ruling in Kadi Incompatible with International Law?* 28 YBK EUR. L. 637 (2009).

⁸⁰ See e.g. Gráinne de Búrca, *The European Court of Justice and the International Legal Order after Kadi*, 51 HARV. J. INT’L L. 1, 37 (2010).

⁸¹ See Daniel Halberstam and Eric Stein, *The United Nations, the European Union and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, 46 COMM. MKT. L.REV. 13 (2009).

⁸² See FEDERICO FABBRINI, *FUNDAMENTAL RIGHTS IN EUROPE* (2014).

⁸³ *But see* Christian Joerges, *The European Economic Constitution and its Transformation during the Financial Crisis*, ZenTra Working Paper in Transnational Studies No. 47/2015 (explaining the centrality of Economic and Monetary Union in the constitutional system of the EU).

⁸⁴ See Grainne de Búrca, *International Law before the Courts: The European Union and the United States Compared*, 55 VA. J. INT’L L. 685 (2015).

⁸⁵ See also Case 294/83 *Les Verts v. Parliament* [1986] ECR 1339 (ECJ affirming for the first time that the EU Treaty is the Constitutional Charter of the EU).

4. Trade-offs: fiscal constraints and Defense spending

With all that said about law and theory, however, the political and empirical question is to what extent EU fiscal rules effectively constrain member states' ability to spend on defense as required by NATO. The question is meaningful considering that EU budgetary constraints, and notably the SGP, have been blamed even by leaders of some EU member states and EU institutions as an obstacle toward fulfilling their responsibility to guarantee the security of citizens in the face of terrorist threats. In particular, following a series of deadly terrorist attacks in Paris, in November 2015 then French President Francois Hollande declared in front of the two houses of French Parliament that “le pacte de sécurité l’emporte sur le pacte de stabilité”⁸⁶ and pledged to increase spending on security in disregard of European budgetary constraints. At the same time, European Commission President Jean-Claude Juncker recognized that the military role played by France – one of the only 2 European countries with the nuclear deterrent and a sizable engagement in peace-keeping missions around the world⁸⁷ – justified particular leniency when assessing its compliance with the rules of the SGP.⁸⁸ In fact, even if France is the only EU member states which has never met the SGP target of running a yearly budget with a deficit below 3% of gdp,⁸⁹ it has never been fined under EU fiscal rules – arguably also because of its responsibilities in foreign affairs.

Yet it is questionable whether compliance with NATO obligations would necessarily entail a violation of EU budgetary constraints. Indeed, while France is currently falling short of its NATO obligations (spending only 1.7% of gdp in 2016)⁹⁰ and simultaneously failing to comply with the SGP⁹¹ – with the effect that an increase in military spending would most likely complicate its objective to reduce its deficit – a member state like Estonia is actually meeting both: in 2016, Estonia matched its duty to spend 2% on defense,⁹² while predicting a budget surplus of 0.5%,⁹³ in perfect compliance with the rules of the SGP and the Fiscal Compact. In fact, while EU budgetary constraints limit the ability of EU member states to embrace a policy of deficit spending, they do not predetermine the composition of national expenditures. It is up to the EU member states to decide through their national budgetary process how to allocate their fiscal resources to alternative programs, including defense. In principle, therefore, member states could meet their defense spending targets while cutting the budget on all other public programs – something that, for example, Greece has done even in the aftermath of the euro-crisis,⁹⁴ to sustain its military capacity in the invisible conflict it still has with Turkey.⁹⁵

⁸⁶ See François Hollande, Discours du Président de la République devant le Parlement réuni en Congrès, 16 November 2015 (stating that « the security pact prevails over the stability pact »).

⁸⁷ France is (with the UK) the only country having a permanent seat within the UN Security Council. See Article 23 UN Charter. See also supra note 31.

⁸⁸ See *Terrorism Spending Outside Stability Pact – Juncker*, ANSA, November 16, 2015.

⁸⁹ See European Commission Opinion of 16 November 2016 on the Draft Budgetary Plan of France, C(2016) 8007 final (reporting that France has consistently been running budgets with a deficit higher of 3% of gdp).

⁹⁰ See supra note 14.

⁹¹ See supra note 14.

⁹² See supra note 14.

⁹³ See European Commission Opinion of 16 November 2016 on the Draft Budgetary Plan of Estonia C(2016) 8004 final (reporting that Estonia will run a budget surplus of 0.5% of gdp in 2016).

⁹⁴ Greece has been the EU member state most severely hit by the euro-crisis and since 2010 it has had to request for three times a bailout from to its European partners and international creditors. Each financial assistance program implied the imposition of significant austerity measures. See Greece – Memorandum of Understanding on Specific Economic Policy

Nevertheless, as students of public finances know, budgeting is a matter of trade-offs.⁹⁶ National governments have limited resources when drawing their budgets – since tax raises can produce capital outflows or a recession, and increased borrowing may diminish the creditworthiness of state bonds. Limited resources otherwise have to be allocated among possible competing programs. In this context, therefore, political incentives become the main drivers behind budget-making:⁹⁷ this explains why European politicians have traditionally underspent on defense. On the one hand, in many EU member states, including Germany and Italy, the tragic experience of the first half of the 20th century has (thankfully!) rendered the citizenry wary of militarism⁹⁸ – with the result that there would be no electoral return for any politician to run on a program of greater spending on the armed forces. On the other hand, however, in all EU member states it not would be economically feasible to increase defense spending while keeping the budget expenditures put. To do so, of course, national government would have to curb spending in other sectors. And since EU member states are directly engaged in the provision of essential public services like healthcare, education and pensions, this would imply significantly reducing the financing of the welfare state.⁹⁹ Unsurprisingly, this is a path no rational politician interested in his or her re-election is willing to take. Particularly after the deep cuts that were forced in many EU member states by the recent financial crisis, it would politically suicide for any national government to slash spending on the welfare state in order to increase spending in defense.¹⁰⁰

Hence, it is certainly true, as Daniel Kelemen has argued, that the adoption of the Fiscal Compact reflected the reality that Europe lacks a meaningful defense capacity – for it is difficult to run a balanced budget while maintaining a standing army.¹⁰¹ In fact, in the US any proposal to amend

Conditionality, May 3, 2010, available at : http://crisisobs.gr/wp-content/uploads/2013/03/Mou_03_05_20101.pdf; Second Economic Adjustment Program for Greece: Memorandum of Understanding between the European Commission and the Hellenic Republic, March 1, 2012, available at: http://ec.europa.eu/economy_finance/eu_borrower/mou/2012-03-01-greece-mou_en.pdf; and Memorandum of Understanding between the European Commission and the Hellenic Republic and the Bank of Greece, August 19, 2015, available at: https://ec.europa.eu/info/files/memorandum-understanding-greece-august-2015_en. See generally, Lina Papadopoulou, *Can Constitutional Rules, even if 'Golden', Tame Greek Public Debt?*, in THE CONSTITUTIONALIZATION OF EUROPEAN BUDGETARY CONSTRAINTS 223 (Federico Fabbrini et al eds., 2014).

⁹⁵ Although both Turkey and Greece are members of NATO, having joined together the alliance in 1952, tensions between the two have remained strong. See generally HARALAMBOS ATHANASOPOULOS, GREECE, TURKEY AND THE AEGEAN SEA: A CASE STUDY IN INTERNATIONAL LAW (2001). A factor in the geopolitical tensions between the two countries is Cyprus. See supra note 63. For these geostrategic reasons, Greece has kept a high spending on defense notwithstanding the budget cuts imposed since the bailouts. See supra note 16.

⁹⁶ See JAMES BUCHANAN AND R WAGNER, DEMOCRACY IN DEFICIT (1977) and DANIEL A. FARBER AND PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991).

⁹⁷ See Min Shi and Jakob Svensson, *Political Budget Cycles: Do they Differ Across Countries and Why?*, 90 J. PUB. ECON. 1367 (2006) (explaining how electoral incentives shape budget-making).

⁹⁸ See also Article 11 CONST. IT. (saying that Italy rejects war as an instrument to offend the liberty of other peoples and to resolve international disputes) and Article 26(1) BASIC L. GERM. (prohibiting war).

⁹⁹ See Fritz Scharpf, *Economic Integration, Democracy and the Financing of the Welfare State*, 4 J. EUR. PUB POL. 18 (1997) (discussing implications of EU integration on the national welfare state).

¹⁰⁰ In fact, budgetary cuts to welfare benefits imposed in several EU member states since the euro-crisis have been increasingly challenged in courts as a violation of social rights protected in national constitutions and European human rights documents. See Olivier De Schutter and Paul Dermine, *The Two Constitutions of Europe: Integrating Social Right on the New Economic Architecture of the Union*, EUR. J. HUM. RGTS. 108 (2017). So far, most legal challenges have been unsuccessful. See e.g. ECtHR, *Da Silva Carvalho Rico v Portugal*, judgment of 24 September 2015, para. 44 (European Court of Human Rights holding that “budgetary constraints on the implementation of social rights can be accepted”). But see Const. Ct. Portugal, *Acórdão N° 187/2013*, judgment of 5 April 2013 (Pt.) (Portuguese Constitutional Court striking down a budget law reducing salaries for public employees as a violation of the principle of equality). See generally Federico Fabbrini, *The Euro-Crisis and the Courts*, 32 BERK. J. INT’L L. 64 (2014).

¹⁰¹ Daniel Kelemen, *Law, Fiscal Federalism and Austerity*, 22 INDIANA J. GLOB. LEG. ST. 379 (2015).

the US Constitution to introduce a balanced budget amendment has been rejected precisely on argument that this would undermine the ability to finance the largest military apparatus in the world.¹⁰² Nevertheless, the decision by most EU member states not to invest adequate resources on defense finds its explanation in politics, more than in law. Indeed, politics is the art of allocating scarce resources¹⁰³ – and political incentives have traditionally pushed European decision-makers to underspend on defense with the aim to achieve other public policy objectives, and to cut on defense budget whenever they were forced to make savings. As it is well known, this state of affairs has fueled the conventional American critique that European states free ride on US tax payers for their defense, using their domestic revenues to maintain a welfare state that the US lacks.¹⁰⁴ In reality, as explained by the US Congressional Budget Office, also in the US the most expensive federal program is Social Security.¹⁰⁵ Yet, in 2016 the US spent on national defense more than twice as much as all the EU member states combined¹⁰⁶ – notwithstanding the fact that the European population is almost double that of the US.¹⁰⁷

Because the decision of European countries to spend less than what they should on common defense is more the result of political choices – as opposed to legal constraints – it seems possible to maintain that no direct conflict exists between NATO obligations and EU fiscal rules. Be that as it may, from the point of view of NATO these nations are simply failing to abide by commonly agreed international commitments.¹⁰⁸ In this situation, however, it cannot be excluded that other NATO members may decide to take counter-measures. The NATO Treaty does not provide for a dispute resolution mechanism by which a contracting party can start proceedings in front of an independent adjudicatory body to complain of the failure by another contracting party to fulfil its obligations under the treaty.¹⁰⁹ Nevertheless, in the field of public international law, general remedies exist, and states can retaliate against other contracting parties to a treaty which fail to abide by it.¹¹⁰ In the worse-case scenario, a state may even declare itself to be no longer bound by the treaty – or selectively disapply it.¹¹¹ In fact, this seems to be what US President Trump has suggested when he stated – in response to a question whether the US would maintain its commitment to Article V of the NATO Treaty – that the US would only come in support of those NATO countries which were paying their fair share to the organization.¹¹²

¹⁰² See James Saturno and Suzanne Lynch, *A Balanced Budget Constitutional Amendment: Background and Congressional Options*, Congressional Research Service, 8 July 2011, R41907.

¹⁰³ See David Easton (1965)

¹⁰⁴ See ROBERT KAGAN, *OF PARADISE AND POWER: AMERICAN AND EUROPE IN THE NEW WORLD ORDER* (2003).

¹⁰⁵ US Congressional Budget Office, *Social Security*, available at <https://www.cbo.gov/topics/social-security>

¹⁰⁶ See Stockholm International Peace Research Institute, *SIPRI Military Expenditure Database*, available at <https://www.sipri.org/databases/milex> (reporting that in 2016 the US spent 548bn€ while the 28 member states of the EU combined spent 227bn€).

¹⁰⁷ See World Bank, *Development Indicators: Population (total)*, available at <http://databank.worldbank.org/data/views/reports/tableview.aspx#> (reporting that the EU had a population of 510 million inhabitants, and the US of 316 million).

¹⁰⁸ See supra text accompanying note 49.

¹⁰⁹ See generally DUNCAN FRENCH ET AL, *INTERNATIONAL LAW AND DISPUTE SETTLEMENT* (2010).

¹¹⁰ See TULLIO TREVES, *DIRITTO INTERNAZIONALE* 507 (2005) (discussing retaliation and counter-measures). Retaliation is instead prohibited when an international treaty creates specific mechanisms of dispute resolution and collective enforcement. See WILLIAM PHELAN, *IN PLACE OF INTER-STATE RETALIATION: THE EUROPEAN UNION'S REJECTION OF WTO-STYLE TRADE SANCTIONS AND TRADE REMEDIES* (2015).

¹¹¹ See Article 60 VCLT.

¹¹² See supra note 8.

Needless to say, a decision of the US to suspend the mutual defense pledge would effectively bury NATO.¹¹³ Although the only time when Article V was invoked in the history of NATO is by the US, after 9/11,¹¹⁴ because only the US enjoys the full military capacity to intervene in support of an ally facing an enemy attack, disengagement by the US would sound the death knell of the alliance. Even a remote possibility that this may happen should be cause of major concern for EU member states.¹¹⁵ The EU faces important geo-political threats around all its borders.¹¹⁶ Civil war in Iraq and Syria has operated as a playground to train foreign fighters, who return to EU member states to commit terrorist attacks.¹¹⁷ Climate change in Sub-Saharan Africa, combined with instability on the Mediterranean coast, has led to an interrupted flux of migration, challenging Europe's reception capacity.¹¹⁸ And, while authoritarian developments in Turkey have complicated relations within NATO,¹¹⁹ a resurgent Russia has shattered any expectation of a possible partnership between NATO and the successor of the Soviet Union. In fact, Russian invasion of Crimea in 2014 – the first ever redefinition of European maps by force since the end of WWII¹²⁰ – has raised worries that the security of Central and Eastern European nations may be seriously at stake. In this situation, the strategic interest of the EU should be to take greater ownership of their defense by sharing a higher burden of their security costs than what is currently the case.¹²¹

5. A European Defense Union?

Yet, what should European states practically do? The proposal of this article is that EU member state should increase their cooperation in the field of defense, meeting the spending targets set by NATO jointly.¹²² While it is not legally impossible for European states to spend on defense, it is

¹¹³ See Editorial, *President Trump Fails NATO*, THE NEW YORK TIMES, May 26, 2017.

¹¹⁴ See NATO press release, *Invocation of Article 5 confirmed*, October 2, 2011, available at <http://www.nato.int/docu/update/2001/1001/e1002a.htm>

¹¹⁵ See also Joseph H.H. Weiler, Editorial: *Sleepwalking Again: The End of Pax Americana*, 25 EUR. J. INT'L L. 635 (2014) (stressing erosion of US leadership in Europe).

¹¹⁶ See Letter by the President of the European Council Donald Tusk to the Heads of State and Government of the EU Member States on the Future of the EU before the Malta Summit, 31 January 2017, PRESS35/17.

¹¹⁷ See Piotr Bakwski and Laura Puccio, *Foreign Fighters – Member States Responses and EU Action*, European Parliament Research Service briefing March 2016, PE 579.080.

¹¹⁸ See European Commission, *European Agenda on Migration*, October 2015.

¹¹⁹ While Turkey is a member of NATO, and has one of the most powerful forces of the military alliance, its recent constitutional involution has raised concerns about the ability for European countries – and the US – to continue cooperating with Turkey within NATO. See further the former NATO Supreme Allied Commander US Admiral James Stavridis, *Turkey and NATO: What Comes Next is Messy*, FOREIGN POLICY, July 18, 2016.

¹²⁰ See Parliamentary Assembly of the Council of Europe, resolution 1990 of 11 April 2014 (suspending the Russian delegation in the Parliamentary Assembly of the Council of Europe to regret the illegal annexation of Crimea by the Russian Federation).

¹²¹ See also Government of Denmark, *Foreign Policy and Security Strategy: Security in Denmark and the Surrounding Region*, June 14, 2017 (explaining that the Danish government will allocate more funding to defense in its next budget). But see also Paolo Mastrolilli, *La proposta di Renzi all'ONU: "Per ogni euro investito in sicurezza uno per la cultura"*, LA STAMPA, September 21, 2016 (reporting the opinion of then Italian Prime Minister Matteo Renzi that for every euro spent on defense governments should spend a euro in culture) and *German Foreign Minister Gabriel Questions NATO Defense Spending Target*, DEUTSCHE WELLE, March 1, 2017 (reporting opinion of the German Minister of Foreign Affairs Sigmar Gabriel, who suggested that spending on other goals, like integrations of migrant, is more relevant than spending on security).

¹²² The proposals articulated here would have peculiar ramifications for those EU member states which are not part of NATO. See *supra* text accompanying note 60-66. The EU currently respects the decision by several EU member states to maintain a policy of neutrality. See e.g. Presidency Conclusions, European Council, 11-12 December 2008, EU Doc. 17271/08 (reassuring the Irish people after they voted against the Treaty of Lisbon that nothing in that Treaty among others undermined the policy

politically difficult to do so – *severally*. Yet, if EU member states were to combine their efforts through the framework of the CFSP – the EU foreign security and defense policy¹²³ – they may be able to surge the overall spending on security through synergies and economies of scale. Coordinated action by the EU member states would increase the ability to devote a total overall percentage of gdp on defense, while simultaneously expanding the effective capacity of action of European military forces. As several analyses have highlighted, the lack of a common European defense policy has major opportunity costs, as it produces duplications, diverts resources to the staff expenditures (as opposed to hardware expenditures), and reduces the ability to invest in research & development.¹²⁴ By acting together, instead, EU member states would not only rationalize their expenditures, but they could also increase their operational capacity – hence rebalancing the transatlantic alliance as asked by the US.¹²⁵

The European Council – the body grouping the heads of state and government of the EU member states, with the President of the European Commission, under the guidance of a semi-permanent president¹²⁶ – has recently indicated this direction. Under the leadership of the new French President Emmanuel Macron, who during the election campaign had called for a “Europe which better protects,”¹²⁷ in June 2017 the European Council has outlined a plan for further development of CFSP.¹²⁸ After re-affirming that “[t]he transatlantic relationship and EU-NATO cooperation remain key to [the] overall security” of the EU member states,¹²⁹ the European Council has identified as a strategic objective the “joint development of capability projects agreed by Member States to fill the existing major shortfalls and develop the technologies of the future.”¹³⁰ To this end, the European Council has invited member states to work on options for the joint procurement of capabilities and encouraged investment on enterprises involved in the area of security and defense.¹³¹ Specifically, the European Council has called for the rapid establishment of a European Defense Industrial Development Programme and invited the European Investment Bank – an international public investment bank owned jointly by all EU member states and funding infrastructural investments – to increase its financial support for private companies active in the field of security and defense.¹³²

Moreover, the European Council has – for the first time ever – agreed on “the need to launch an inclusive and ambitious Permanent Structured Cooperation.”¹³³ The PESCO is a form of enhanced cooperation in the field of defense, originally introduced in the EU by the defunct constitutional

of neutrality of Ireland, thus paving the way to a second referendum). Clearly, developments toward greater integration by a group of EU member states in the field of defense would pose particular challenges for the hold-out countries.

¹²³ See PANOS KOUTRAKOS, *THE EU COMMON SECURITY AND DEFENSE POLICY* (2013).

¹²⁴ See Blanca Ballester, *The Costs of Non-Europe in Common Security and Defense Policy*, European Parliament Research Service Study, 2013, PE 494.466 and Valerio Brani, *I costi della non-Europa della difesa*, Centro studi sul Federalism and Istituto Affari Internazionali paper, April 2013.

¹²⁵ See also the former EU High Representative for CFSP Javier Solana, Op-Ed, *European Defense Integration Now*, PROJECT SYNDACATE, September 20, 2016.

¹²⁶ See Article 15 TEU (establishing the European Council).

¹²⁷ See EMMANUEL MACRON, *REVOLUTION* (2017).

¹²⁸ See European Council conclusions, *supra* note 17.

¹²⁹ *Ibid* para 6.

¹³⁰ *Ibid* para 7.

¹³¹ *Ibid* para 7.

¹³² See also European Commission Communication to the European Parliament and the Council “Launching the European Defense Fund”, 7 June 2016, COM(2017) 295 final.

¹³³ See European Council conclusions, *supra* note 17, §8.

Treaty of 2005, and later resumed by the Treaty of Lisbon of 2009.¹³⁴ According to Article 42(6) TEU the PESCO allows “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” to unite their forces, developing greater operational capabilities. As clarified by Article 1, Protocol No. 10 attached to the EU treaties, PESCO is open to any member state which undertakes to “proceed more intensively to develop its defense capacities through the development of national contributions and the participation, where appropriate in multinational forces.” In fact, as indicated in Article 2 of the same Protocol, member states participating in PESCO undertake to cooperate “with a view to achieve approved objectives concerning the level of investment expenditure on defense equipment [...] in light of the security environment and of the Union’s international responsibilities.” Hence, while the PESCO is mostly aimed at developing mixed battle groups,¹³⁵ the European Council has also clarified that this “has to be consistent with Member States’ national defense planning and commitments agreed within NATO”¹³⁶ – which suggests that the mechanism could be used to address spending gaps too.

Duly following up on the endorsement of the European Council, France, Germany, Italy and Spain drafted a formal request to set up an ambitious and inclusive PESCO.¹³⁷ The proposal to activate the mechanism was joined by 21 other member states¹³⁸ – and the UK, on its way out of the EU, refrained from stopping the initiative.¹³⁹ Hence, on 13 November 2017 a large group of EU member states¹⁴⁰ notified to the EU High Representative for Foreign Policy (the EU Chief Diplomat)¹⁴¹ and to the Council (the body grouping the governments of the member states)¹⁴² their intention to establish PESCO;¹⁴³ and on 8 December 2017 the Council formally approved the creation of the military cooperation between 25 EU member states.¹⁴⁴ As indicated in the decision establishing PESCO, “participating Member States shall make contributions which fulfil the more binding

¹³⁴ See Hervé Bribosia, *Les nouvelles formes de flexibilité en matière de défense*, in GENESIS AND DESTINY OF THE EUROPEAN CONSTITUTION 835 (Giuliano Amato et al eds. 2007).

¹³⁵ The antecedent of the permanent structured cooperation is the Joint Declaration Issued at the British-French Summit, Saint Malo, France, 3-4 December 1998 (establishing the principle that the EU should be in a position to play its role in the international stage through the creation of rapid response forces made available by the member states willing and able to carry out military operations).

¹³⁶ European Council conclusions, supra note 17, §8.

¹³⁷ See Andrea Shalal & Robin Emmot, *EU to Sign Joint Defense Pact in Show of Post-Brexit Unity*, REUTERS, 8 November 2017.

¹³⁸ The other member states joining the letter notifying the request to establish PESCO include Austria, Belgium, Bulgaria, the Czech Republic, Croatia, Cyprus, Estonia, Finland, Greece, Hungary, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Rumania, Slovakia, Slovenia, and Sweden. Ireland and Portugal did not initially join the letter of notification to activate PESCO as they had to obtain special parliamentary consent for that, but they expressed their intention to join PESCO a few days afterwards. See e.g. Marie O’Halloran, *Dail Approves Ireland Joining EU’s PESCO Military Framework*, THE IRISH TIMES, 7 December 2017 (reporting vote by the Irish Parliament to authorize Ireland participation in PESCO).

¹³⁹ Traditionally the UK had opposed EU military integration perceiving this as competitive with its NATO commitments. See Sven Biscop, *The UK and European Defense: Leading or Leaving?* 88 INT’L AFFAIRS 1297 (2012). The decision of the UK to withdraw from the UK?, see further supra note 20, obviously deprived the UK of any leverage in stopping the other EU member states from moving forward with PESCO.

¹⁴⁰ Only the Denmark, Malta and the UK are not participating to PESCO. Denmark decision not to participate to PESCO is consistent with its optout: see Protocol No 22 attached to the EU Treaties, Article 5 (exempting Denmark from participating to EU decisions and actions with implications on the field of defense). Malta decision instead is political: see *Malta Among Three Countries Opting Out of EU’s New Defense Agreement*, TIMES MALTA, 11 December 2017.

¹⁴¹ See Article 18 TEU (defining the position of the High Representative of the Union for Foreign Affairs and Security Policy).

¹⁴² See Article 16 TEU (regulating the Council of the EU and its relation with the European Council).

¹⁴³ See Notification on Permanent Structured Cooperation (PESCO) to the Council and to the High Representative, 13 November 2017.

¹⁴⁴ Council decision, supra note 18.

commitments which they have made to one another”¹⁴⁵ and to this end they must participate to individual projects detailed in an Annex to the decision. In fact, the Council decision creates a governance structure for PESCO,¹⁴⁶ with regular assessments of states performances, and foresees that states failing to fulfil their obligations may be expelled from the military cooperation.¹⁴⁷ Specifically, on the question of defense expenditures, PESCO commits participating member states to “regularly increase defense budgets in real terms,”¹⁴⁸ increase “defense investment expenditure to 20% of total defense spending,”¹⁴⁹ and increase “the share of expenditures allocate to defense research and technology with a view to nearing the 2% of total defense spending”¹⁵⁰ – indicating this as a collective benchmark.

The activation of PESCO climaxes the growing attention that defense cooperation has received among the EU institutions and member states.¹⁵¹ In fact, while the High Representative of the EU for Foreign and Security Policy had called for developments of greater military capacity to back the EU foreign policy in its June 2016 global strategy,¹⁵² the election of US President Trump has accelerated debates on the creation of a true EU defense Union. In November 2016 the European Parliament (EP) approved a resolution calling for the creation of a real European defense Union, offering guarantees and capabilities to member states beyond their individual ones.¹⁵³ In March 2017 the Council of the EU, approved an operational planning and conduct capability designed to oversee common security and defense policy missions and operations.¹⁵⁴ And in June 2017, the European Commission published a reflection paper on the “Future of European Defense,”¹⁵⁵ in which the scenario of the development of a full fledged “common” EU defense policy was clearly indicated as the most appropriate response to the challenges facing the EU – including an evolving transatlantic relations and the need for greater financial solidarity.¹⁵⁶

These latest developments suggest that awareness is growing in the EU for the need to strengthen the ability to act in the field of CFSP. Nevertheless, as several scholars have pointed out, a recurrent problem in EU foreign and security policy is the disconnect between, on the one hand, the ambitions and the proclamations, and on the other, the acts and the deeds.¹⁵⁷ In particular, with specific regard to the object of this article – defense spending – it is clear that

¹⁴⁵ Ibid, Article 3(1).

¹⁴⁶ Ibid, Article 4.

¹⁴⁷ Ibid, Article 6(3).

¹⁴⁸ Ibid, Annex, a) 1.

¹⁴⁹ Ibid, Annex, a) 2.

¹⁵⁰ Ibid, Annex, a) 4.

¹⁵¹ See also Government of the Netherlands, press release, *L’Allemagne et les Pays-Bas donnent une impulsion à leur coopération militaire*, 4 February 2016 (reporting greater military cooperation between the Netherlands and Germany) and recently Conseil des Ministres Franco-Allemand de Défense et de Sécurité, Paris, 13 July 2017 (indicating the joint pledge by France and Germany to strengthen European defense and proposing the development of specific research programs e.g. on drone technology).

¹⁵² See High Representative of the EU for Foreign Affairs and Security Policy, *A Global Strategy for the EU Foreign & Security Policy*, June 2016.

¹⁵³ See European Parliament resolution of 22 November 2016 on the European Defense Union, P8_TA(2016)0435.

¹⁵⁴ See Foreign Affairs Council Conclusions, 6 March 2017, Doc. 110/17, Annex – Concept Note: Operational Planning and Conduct Capabilities for CSDP Missions and Operations.

¹⁵⁵ See European Commission reflection paper on the “Future of European Defense”, 7 June 2017, COM(2017)315.

¹⁵⁶ See also the interview with the Executive Director of the European Defense Agency Jorge Somecq, *Nous sommes devant un moment crucial de la défense européenne*, FONDATION ROBERT SCHUMAN, ENTRETIEN D’EUROPE n°95, June 19, 2017 (arguing that European defense is at a crucial turning point).

¹⁵⁷ See JORIS LARIK, *FOREIGN POLICY OBJECTIVES IN THE EUROPEAN CONSTITUTION* (2016).

additional action would be required for the EU to achieve, even in the framework of PESCO, the targets set by NATO. In fact, the Council decision establishing PESCO indicated that “operating expenditures arising from projects undertaken within the framework of PESCO shall be supported primarily by the participating Member States.”¹⁵⁸ However, particularly after Brexit (the withdrawal of the UK), only an increase of the EU budget would expand the resources available for EU security and defense purposes.¹⁵⁹ From this point of view, therefore the strengthening of EU defense depends on a reform of the EU architecture of economic governance,¹⁶⁰ and the creation of a fiscal capacity – that is an EU budget, financed by real own resources (rather than member states’ transfers), and designed to support action by the EU.¹⁶¹ As the EP – one of the strongest supporter of a EU fiscal capacity¹⁶² – has pointed out in its latest annual report on the implementation of CFSP, within the next multi-annual financial framework of the EU “a fully-fledged EU defense budget should be established” and “this new defense budget will have to be financed through new resources.”¹⁶³

In conclusion, while the EU imposes budgetary constraints on the EU member states, it also offers a framework in which European nations can enhance their collective security – including increasing their joint investment in common defense.¹⁶⁴ Recent institutional attention for the need to strengthen CFSP – and the establishment for the first time of PESCO – signals that EU member states are increasing their ability and willingness to work together in the field of defense. In fact, in its resolution of November 2016 on European Defense Union the EP renewed the call “on the Member States to aim for the target of 2 % of GDP for defence spending”¹⁶⁵ but pointed

¹⁵⁸ Council decision, *supra* note 18, Article 6(2)

¹⁵⁹ See European Parliament Resolution of 16 February 2017 on improving the functioning of the European Union building on the potential of the Lisbon Treaty, P8_TA(2017)0049, §39 (stating that only an increase of “the resources earmarked for the Common Foreign and Security Policy [can] ensure that the cost of military operations carried out in the framework of the Common Security and Defence Policy or the European Defence Union is shared more fairly.”) and also European Commission proposal for a regulation of the European Parliament and the Council establishing the European Defense Industrial Development Programme aiming at supporting the competitiveness and innovative capacity of the EU defense industry, COM(2017)294final (investing 25 million € on defense research until the end of 2019, and 500 million € per year after 2020; and simultaneously offering co-financing of 500 million € per year in 2019 and 2020 to the member states for defence hardware developments and acquisitions).

¹⁶⁰ A number of proposals to reform the architecture of EMU have been advanced at the highest institutional level since the beginning of the euro-crisis. See *in particular* the final report of the President of the European Council, “Towards a Genuine EMU”, 5 December 2012; the report of the President of the European Commission, “Completing Europe’s EMU”, 22 June 2015; and the final report with recommendations of the High Level Group on Own Resources chaired by Mario Monti, “Future Financing of the EU”, December 2016.

¹⁶¹ See Federico Fabbrini, *From Fiscal Constraints to Fiscal Capacity: The Future of EMU and its Challenges*, in *THE CONSTITUTIONALIZATION OF EUROPEAN BUDGETARY CONSTRAINTS* 399 (Federico Fabbrini et al eds., 2014).

¹⁶² See European Parliament Resolution of 23 May 2013 on future legislative proposals for EMU, P7_TA(2013)0222; European Parliament Resolution of 24 June 2015 on the review of economic governance framework: stock-tacking and challenges, P8_TA(2015)0238; and European Parliament resolution of 16 February 2017 on budgetary capacity for the Eurozone, P8_TA(2017)0050.

¹⁶³ See European Parliament Resolution of 13 December 2017 on the Annual Report on the implementation of the Common Security and Defense Policy, P8_TA(2017)0492 §§27-28.

¹⁶⁴ A connected question that this article does not address it to what extent greater integration in the field of defense can be achieved in a situation where at least two EU member states – Poland and Hungary – are increasingly abandoning common principles of democracy, human rights and the rule of law. See *in general* *CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA* (Armin von Bogdandy & Pal Sonnevend eds., 2015). In July 2017 Poland approved a law infringing on the independence of the judiciary. In December 2017, the European Commission activated for the first time ever the procedure foreseen in Article 7 TEU against Poland, which may ultimately lead to the suspension of the states’ voting rights within the EU institutions. See European Commission Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the Rule of Law, 20 December 2017, COM(2017)835 final.

¹⁶⁵ European Parliament resolution, *supra* note 153, §40.

out that the only way for member states to do so in the face of European budgetary constraints would be through greater EU military integration: As the EP clarified, “the challenges which financial constraints represent to national budgets are at the same time accompanied by opportunities for progress arising from the evident need for closer cooperation between Member States in defence matters.”¹⁶⁶ While almost all EU member states still fall short of meeting their NATO spending target, developments in the EU – including through the creation of a fiscal capacity – could create the conditions for European countries to take charge of a greater share of their defense costs, boosting their contribution to the transatlantic security alliance.

6. Conclusion

This article has sought to answer a provocative question: do NATO obligations trump European budgetary constraints? While the North Atlantic Council has decided in the 2014 Wales Summit, in execution of the constitutional mandate it pursues under the NATO Treaty, that NATO members must spend at least 2% of their annual GDP on defense, hardly any EU member state – with the exception of Poland, Estonia, Greece and the UK¹⁶⁷ (which is on its way out of the EU)¹⁶⁸ – is currently meeting this target. At the same time, EU rules adopted in the aftermath of the euro-crisis have limited the ability of EU member states to run large deficits, introducing tight budgetary constraints at both the national and international level.¹⁶⁹ The failure by European countries to meet their binding international NATO obligations, however, has recently triggered intense transatlantic quarreling: particularly since the election of US President Donald Trump, recriminations that EU member states are not spending sufficiently on defense has led to questions whether the US would still back up the mutual defense pledge underpinning NATO.¹⁷⁰ This has raised major worries on the very survival of the transatlantic alliance.¹⁷¹ Since NATO constitutes the backbone of European security, it seems pressing to understand how NATO rules interact with the law and politics of budget-making in the EU.

As the article has explained, from a conflict-of-laws perspective, EU treaties empower EU member states to disregard EU norms if they conflict with prior international obligations. Nevertheless, the ECJ has interpreted strictly this rule, and introduced limitations on the ability of prior international obligations to undermine basic constitutional principle of the EU legal order. This raises several doubts on whether NATO spending rules could legally allow member states to set aside EU budgetary constraints. At the same time, the article has suggested that political trade-

¹⁶⁶ *Ibid*, §41.

¹⁶⁷ See *supra* note 14.

¹⁶⁸ See *supra* note 20.

¹⁶⁹ See *supra* text accompanying notes 55.

¹⁷⁰ But see the US Ambassador to NATO Kay Bailey Hutchison, Op-Ed, *Washington Remains United Behind NATO*, THE NEW YORK TIMES, August 30, 2017.

¹⁷¹ Another area of transatlantic tensions in the field of security has recently been created by the conflicting approaches of the EU and the US institutions on questions of privacy and surveillance. See in particular Case C-362/14 *Schrems*, ECLI:EU:C:2015:650 (ECJ striking down the EU-US Safe Harbor Agreement allowing the free flow of data between the EU and the US on the argument that privacy and data protection standards in the US failed short of EU constitutional requirements). The ruling of the ECJ prompted the adoption of a new transatlantic agreement. See European Commission press release, *EU Commission and United States Agree on New Framework for Transatlantic Data Flows: EU-US Privacy Shield*, 2 February 2016, IP/16/216. See generally, SURVEILLANCE, PRIVACY AND TRANSATLANTIC RELATIONS (Federico Fabbrini et al eds., 2017).

offs, more than legal constraints, explain European nations' underspending on defense: since budget-making implies the allocation of scarce resources, political incentives have driven EU policy-makers to reduce spending on the military in order to support other public policy objectives like welfare. Yet, because failure by European parties of NATO to reach their spending target may lead to retaliation by the US, the article has suggested that EU member states should strategically seek to strengthen their cooperation in the field of defense, so as to achieve jointly what they cannot do individually. By pooling forces through a real European defense union, EU member states can create economies of scale and increase their operational capabilities. Moreover, if cooperation in the field of CFSP through the mechanism of PESCO were supported by the development of new budgetary instruments at the EU level, member states could collectively fill the gaps in defense spending and endow the EU with a real security capacity.¹⁷²

Ironically, shortly after WWII, six European nations had engaged in the attempt to establish a European Defense Community:¹⁷³ that project failed in 1954,¹⁷⁴ leading instead the six (France, Italy, West Germany, and the Benelux countries) to create the EU, while European security was outsourced to NATO.¹⁷⁵ In 2017, however, the need for the EU member states to take on a greater responsibility in their defense has returned more pressing than ever. While geostrategic challenges around Europe have increased, American complaints that NATO unfairly relies on the US money and manpower have raised concerns on the continuing validity of Article V NATO Treaty – the mutual defense pledge that an attack on one is an attack on all. In this scenario, increasing defense integration seems to be the only rational choice forward for EU member states. For countries acting under tight EU legal constraints, and powerful national political incentives, cooperation in the field of CFSP is the way to achieve jointly what they cannot do separately. NATO obligations call member nations to spend at least 2% of their annual gdp on defense. By reaching that target as a Union, European states could reaffirm their commitment to the transatlantic defense alliance and simultaneously take greater ownership of their freedom and security: regardless of whether NATO obligations trump European budgetary constraints or not, it seems time for the EU to establish a Defense Union.

¹⁷² The debate on the future of European defense hence connects closely with that about the future of Europe more generally. See European Commission, whitepaper on “The Future of Europe”, 1 March 2017 (outlining alternative scenarios for the EU future) and Rome Declaration of the leaders of 27 Member States and of the European Council, the European Parliament and the European Commission, 25 March 2017 (calling for further steps in EU integration on the occasion of the 60th anniversary of the Treaties of Rome). See generally also Federico Fabbrini, *Constitutional Crises, Institutional Reforms: the European Union at the Crossroads*, 32 CONN J. INT’L L. 50 (2017).

¹⁷³ See draft Treaty Establishing the European Defense Community, 27 May 1952. This treaty was meant to complement the 1951 Treaty of Paris Establishing the European Carbon and Steel Community, 261 UNTS 140.

¹⁷⁴ See Assemblée Nationale, resolution of 30 August 1954 (Fr.) (voting down the Treaty by a vote of 319 to 264). See generally DESMOND DINAN, *EUROPE RECAST: A HISTORY OF THE EUROPEAN UNION* (2014).

¹⁷⁵ See also FRANK SCHIMMELFENNING, *THE EU, NATO AND THE INTEGRATION OF EUROPE* (2003).

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