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# The Madrid terrorist attacks: a midwife for EU mutual defence?

– Note –

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## Abstract

Defence had until recently been considered out of bounds for the European Union. Since the Union has recently begun to engage in peacekeeping, that dogma is no more. The European Convention in 2002-2003 saw lively debates on whether self-defence should form part of the future Constitution for Europe. The Madrid terrorist attacks helped spur the recognition that European solidarity against

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threats of all kind cannot stop before military measures as part of the package of instruments which must be considered to counter them – a recognition duly crystallised in the EU's Declaration on Solidarity against terrorism of 25 March 2004. This article analyses the background, content and legal value of this Declaration. The Declaration does not contain a mutual defence clause, and it is not legally binding. However, this does not exclude a possible future role in being an influential precedent for further developments, particularly with regard to the Inter-governmental Conference 2004.

The terrorist bombing attacks which took place in Madrid on the morning of March 11<sup>th</sup> 2004 shocked the world. They left close to 200 people dead and many more wounded. For Europeans, they dispelled the comforting illusion that the phenomenon of international terrorism, having wreaked havoc in New York and Washington on September 11<sup>th</sup>, would somehow skip the old continent in pursuit of its ends. An immediate and strong sense of solidarity with the Spanish people swept through Europe, expressed by a day of mourning declared throughout the EU on March 15<sup>th</sup>. The international community responded in manifold ways. On the same day, the Spanish conservative *Aznar* government was able to push through a resolution in the UN Security Council which condemned ETA for the attacks,<sup>1</sup> before anyone had a realistic chance to ascertain whether the Basque separatists had truly been behind the incident, as the Spanish government initially believed. NATO expressed its strongest solidarity with Spain<sup>2</sup> and extended its Operation Active Endeavour – a naval operation carried out in the eastern Mediterranean Sea since autumn 2001 after the invocation of Art. 5 of the North Atlantic Treaty (NAT) – to cover the whole Mediterranean.<sup>3</sup>

After the Madrid attacks, the EU perceived an enhanced necessity to establish protective measures against terrorism of the kind which could cause a repetition of the Madrid carnage – possibly with an even graver outcome – somewhere else in Europe. The possibility of further such attacks being imminent was seen as real in the days following the event.

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<sup>1</sup> This effort by the Spanish government had a historical parallel in the diplomatic initiative previously taken by the US government in the Security Council immediately after the Sept. 11<sup>th</sup> 2001 attacks, by tabling a resolution (which became Resolution 1368) condemning the attacks in the strongest terms and allowing wide help and powers to respond to the government of the country affected. This parallel was certainly not lost on the international community.

<sup>2</sup> NATO Press Release (2004)040 of 17 March 2004.

<sup>3</sup> NATO Press Release (2004)039 of 16 March 2004; cf. also Declaration on Terrorism issued by the North Atlantic Council on 2 April 2004, NATO Press Release (2004)057 of 2 April 2004. Interestingly, only the day before the attacks on Madrid, NATO had concluded its Crisis Management Exercise CMX 04 which was based on just such a terrorist contingency (CMX 04 Terrorists attack NATO, ISIS NATO Notes, Vol. 6, No. 2, April 2004). NATO has been conducting civil emergency planning exercises for some years now (cf. ISIS, NATO responds to a “dirty bomb”, NATO Notes Vol. 5, No. 7, Oct. 2003).

One year previously, as part of its preparatory work on a future European Constitution, the European Convention had drafted a Solidarity clause (Article 42). The pertinent part read as follows<sup>4</sup>:

#### Solidarity clause

The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the victim of [a]<sup>4a</sup> terrorist attack [...]. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States to

- (a) – prevent the terrorist threat in the territory of the Member States;
  - protect democratic institutions and the civilian population from any terrorist attack;
  - assist a Member State in its territory at the request of its political authorities in the event of a terrorist attack;
- (b) – assist a Member State in its territory at the request of its political authorities in the event of a disaster.

However, a European Constitution looked only likely to be adopted by the EU Intergovernmental Conference (IGC) later in the year, with its entry into force being further yet in the future. Full implementation of the clause by the Council would further require a formal procedure according to its Art. III-231, i.e. a European decision on a joint proposal from the Commission and the European Foreign Minister, taken with assistance of the Political and Security Committee (PSC).

Given the urgency of the new situation, the EU decided on a fast-track and isolated implementation of the draft Article 42. The Brussels European Council on 25-26<sup>th</sup> March 2004<sup>5</sup> issued a ‘Declaration on Solidarity Against Terrorism’ which restated Art. 42 in wording, with some minor changes.

#### Declaration on Solidarity against Terrorism

We, the Heads of State or Government of the Member States of the European Union, and of the States acceding to the Union on 1 May, have declared our firm intention as follows:

In the spirit of the solidarity clause laid down in Article 42 of the draft Treaty establishing a Constitution for Europe, the Member States and the acceding States shall accordingly act jointly in a spirit of solidarity if one of them is

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<sup>4</sup> Draft Treaty Establishing a Constitution for Europe, OJ C 169/1-105 of 18 July 2003, at p. 19.

<sup>4a</sup> A typing mistake seems to have occurred in the English translation. The French version reads “*si un État membre est l’objet d’une attaque terroriste*”.

<sup>5</sup> Brussels European Council 25/26 March 2004, Presidency Conclusions, available at <http://ue.eu.int> (visited 26/03/2004).

the victim of a terrorist attack. They shall mobilise all the instruments at their disposal, including military resources to:

- prevent the terrorist threat in the territory of one of them;
- protect democratic institutions and the civilian population from any terrorist attack;
- assist a Member State or an acceding State in its territory at the request of its political authorities in the event of a terrorist attack.

It shall be for each Member State or acceding State to the Union to choose the most appropriate means to comply with this solidarity commitment towards the affected State.

It was annexed to a 'Declaration on Combating Terrorism' which contained a multi-pronged package of measures to counter the terrorist threat on the territory of the member states, mostly in the area of police and judicial co-operation in criminal matters, including the appointment of a Counter-Terrorism Co-ordinator for the EU.<sup>6</sup> The Irish EU Presidency has since begun work on the implementation of the Declaration.<sup>7</sup>

This note will try to establish the legal import of the Declaration on Solidarity against Terrorism of 25<sup>th</sup> March 2004 [hereinafter: Declaration], both with regard to its content, and as to the question whether the member states are bound to it as a matter of international law. Looked at in isolation, the latter might seem a trite question, were it not raised in the security-political context of an increasingly discussed mutual defence clause in the framework of the EU (I.). The Declaration is expressly based on Art. 42 of the draft European Constitution. I will compare the two provisions and conclude that the Declaration, although roughly equal in content, is more intergovernmental than Article 42. It also leaves more freedom of action to the member states than would a full mutual defence clause like Art. V of the WEU's Modified Brussels Treaty (II.). In addition, could this Declaration be the long-awaited (or dreaded) 'decision' by the European Council provided in Art. 17 of the Treaty on European Union, to provide for a mutual defence among the member states, albeit restricted to terrorist threats on their territories? This will be among the legal questions concerning possible binding force for the Declaration (III.). The Declaration permits an outlook on the future possibility of a mutual defence clause in the EU (IV.).

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<sup>6</sup> Brussels European Council 25/26 March 2004, Declaration on Combating Terrorism – Bxl, 25 March 2004, available at <http://ue.eu.int> (visited 26/03/2004). *Gijs de Vries* was a few days later appointed to the post of Counter-Terrorism Co-ordinator, see Council Press Release S0087/04, 29 March 2004.

<sup>7</sup> Irish Presidency Press Release, 6 April 2004, Minister Smith expresses satisfaction with outcome of Informal Meeting of EU Defence Ministers, available at <http://www.eu2004.ie> (visited 11/05/2004).

## I. Background: the European Security and Defence Policy (ESDP)

Measures like the ones contained in the Declaration, taken by the Union in solidarity against the threat of terrorism, are a relatively new component of its Common European Security and Defence Policy (ESDP).<sup>8</sup> Given its nature, moreover, the issue of terrorism prevention cuts across the first and third pillars,<sup>9</sup> encompassing, *inter alia*, economic, financial and criminal prosecution fields,<sup>10</sup> in a “multidisciplinary response” to the problem.<sup>11</sup> ESDP provides only one component in the overall EU approach to the fight against international terrorism.<sup>12</sup> ESDP has so far only been developed in the sphere of the Union’s crisis management, both on the institutional<sup>13</sup>, and on the operational level, with a number of EU civil and military peacekeeping operations on the ground<sup>14</sup>. However, it can-

<sup>8</sup> There is already now vast literature on all aspects of the European Union’s Common Security and Defence Policy which to list would exceed the scope of this note. For an overview on ESDP, see European Union Institute of Security Studies (ISS), ESDP, available at <http://www.iss-eu.org> (visited 28/03/2004).

<sup>9</sup> Under the European Union’s ‘three pillar structure’, dating from the Maastricht Treaty, the first pillar contains the European Community (EC), covering mostly economic co-operation between the member states, the second pillar (Title V of the TEU) contains the Union’s Common Foreign and Security Policy (CFSP), and the third pillar (Title VI of the TEU) contains Police and Judicial Co-operation in Criminal Matters (PJCC). Cf. *Craig/de Búrca*, EU Law (3<sup>rd</sup> ed. 2003), pp. 22.

<sup>10</sup> Cf. Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, OJ L 164/3 (2002); Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant, OJ L 190/1 (2002).

<sup>11</sup> *Koutrakos*, Constitutional Idiosyncrasies and Political Realities: The Emerging Security and Defense Policy of the European Union, 10 Col. J.Eur.L., p. 69, at 92.

<sup>12</sup> Cf. European Council, Seville, 21-22 June 2002, Presidency Conclusions, Annex V: Draft Declaration of the European Council on the contribution of CFSP, including ESDP, in the fight against terrorism (reprinted in: *Haine* (compil.), From Laeken to Copenhagen - European defence: core documents, Volume III (2003), Chaillot Paper 57, Institute for Security Studies European Union, Paris [hereinafter: CP 57], pp. 272-274).

<sup>13</sup> The Treaty of Amsterdam created the office of the High Representative for the Common Foreign and Security Policy (CFSP-HR), a post which, together with that of General Secretary of the Council, is held by Javier Solana since 1999. That treaty also provided the High Representative with a Policy Planning and Early Warning Unit (PPEWU), consisting of more than a dozen experts drawn from the diplomatic services of the member states. In 2000, three more bodies were added (first on an interim basis) by the European Council: the Political and Security Committee (PSC), the Military Committee (EUMC), and the Military Staff (EUMS). For an overview see Council of the European Union, EU Military Structures, available at <http://ue.eu.int/pesc/military/en/homeen.htm> (visited 10/06/2004).

<sup>14</sup> The peacekeeping operations carried out or under operation by the EU so far are: the European Union Police Mission (EUPM) in Bosnia (from 1 January 2003); ‘Operation Concordia’ in the former Yugoslav Republic of Macedonia (1 April - 15 Dec. 2003), followed by a police mission ‘Proxima’ (from 15 Dec. 2003); and ‘Operation Artemis’ in the Democratic Republic of Congo (12 June - 5 Sept. 2004). For more information on these missions, see Council of the European Union, ESDP Operations, available at <http://ue.eu.int/pesc/pesd.asp> (visited 28/03/2004).

not be ignored that, from its inception at the Maastricht Summit, the option of turning the EU into a fully-fledged mutual defence<sup>15</sup> community – beyond a mere defence *policy*<sup>16</sup> – was included in the Treaty on European Union (TEU) from the very beginning<sup>17</sup>, an option which subsequently has been rephrased in more and more concrete terms. The development has seen a gradual change from a vague option to increasing expectations in successive IGCs amending the TEU over the years (see Table 1 below).

| Table 1   |  |  |                              |  |
|---|--|--|------------------------------|--|
| Treaty  | Maastricht<br>(1992) <sup>18</sup>   | Amsterdam<br>(1996) <sup>19</sup>  | Nice<br>(2000) <sup>20</sup> | draft European<br>Constitution<br>(July 2003) <sup>21</sup>  |
| Article   | J.4 (para. 1)  | 17 (para. 1)   | 17 (para. 1)                 | I-40 (para. 2) <sup>22</sup>   |
| Wording <sup>23</sup> :<br>“The common<br>foreign and<br>security policy<br>shall include ... “ | “ ... the <i>eventual</i><br>framing of a common<br>defence policy which<br><i>might in time</i> lead to a<br>common defence.“ | “ ... the <i>progressive</i><br>framing of a common<br>defence policy [...] which<br><i>might</i> lead to a common<br>defence, <i>should the</i><br><i>European Council so</i><br><i>decide.</i> “ | (unchanged)                  | “ ... the progressive<br>framing of a common<br>defence policy. This <i>will</i><br>lead to a common<br>defence, <i>when</i> the<br>European Council,<br>acting unanimously, so<br>decides.“ |

<sup>15</sup> The TEU uses the term ‘common defence’. However, as this term rings very close to the TEU’s ‘common defence *policy*’, for clarity reasons *mutual* defence will be used throughout here. The two terms are synonymous.

<sup>16</sup> A common defence policy includes both functions of crisis management (defined for the EU in the list of the Petersberg tasks, Art. 17/2 TEU) as well as collective self-defence, cf. *Bartelt*, *Der rechtliche Rahmen für die neue operative Kapazität der Europäischen Union* (2003), p. 29-30.

<sup>17</sup> Cf. *Ojanen*, *Theories at a loss? EU-NATO fusion and the ‘low-politicisation’ of security and defence in European integration*, Finnish Institute of International Affairs, Working Paper 35 (2002), p. 6, who detects a “compelling presence” of the common security and defence policy in the treaties.

<sup>18</sup> Treaty on European Union, OJ C 191, of 29 July 1992.

<sup>19</sup> Treaty of Amsterdam, OJ C 340 of 10 November 1997.

<sup>20</sup> Treaty of Nice, OJ C 80 of 10 March 2001. Declaration No. 1 to the Nice Treaty (*ibid.*, p. 77) called for ESDP to “become operational quickly”, but only in accordance with the Nice Presidency Report and Annexes. Those Annexes state clearly that “NATO remains the basis of the collective defence of its members” thus also according NATO a primacy in the area of mutual defence. See European Council, Nice, 7-9 Dec. 2000, Presidency Conclusions, Annex VI, Introduction (reprinted in: *Rutten* (compil.), *From St-Malo to Nice - European defence: core documents* (2001), Chaillot Paper 47, Institute for Security Studies of Western European Union [hereinafter: CP 47], p. 169).

<sup>21</sup> See above at note 4.

<sup>22</sup> Art. I-40, para. 2 differs from Art. I-15 (Union competences in CFSP) which retains the old wording.

<sup>23</sup> Emphases added.

These changes, taken in isolation, could be described as semantic.<sup>24</sup> But such semantics matter<sup>25</sup>, and with hindsight they constitute a distinctive pattern of intention.

Beyond these incremental steps, however, a mutual defence clause in the TEU has not been an objective supported by a majority, let alone all, EU member states. Most of those opposing it, led by the United Kingdom and including most of the new member states which have joined the Union on 1 May 2004, see collective self-defence (and, initially, all military aspects of European security) as a matter which should remain firmly within NATO. Even after the Cold War receded into history, in their view the substantial benefit of a collective defence guarantee underpinned by the military might of the United States should not be jeopardised. Respective clauses ensuring a NATO primacy in this area were therefore included into the TEU from the beginning<sup>26</sup>. In addition to NATO, another European organisation, the Western European Union (WEU) continues, at least on paper, to provide an ever stronger mutual defence guarantee than NATO's Art. 5, in its Art. V (see Table 2 below). Nevertheless, the European Convention managed to agree (though this was not supported by all the members of the relevant drafting Working Group VIII) on a mutual defence clause on an *interim* basis in the draft European Constitution, as an option for those of the member states willing to subscribe to it, in the framework of 'enhanced co-operation' (until such time when the European Council would decide to fully establish it for the Union as a whole).<sup>27</sup> This optional obligation closely matches that enshrined in the constituent treaty of the WEU (see the Table 2 below).<sup>28</sup>

<sup>24</sup> *Neuhold*, The Provisions of the Amsterdam Treaty on the CFSP: Cosmetic Operation or Genuine Progress?, in: Hafner/Loibl/Rest/Sucharipa-Behrmann/Zemanek (eds.), *Liber Amicorum for Professor I. Seidl-Hohenveldern*, in honour of his 80<sup>th</sup> birthday (1998), p. 495 at 501; *Id.*, The European Union: A Major Actor in the Field of Security Policy?, in: Benedek/Isak/Kicker (eds.), *Development and Developing International and European Law - Essays in Honour of Konrad Ginther on the Occasion of his 65<sup>th</sup> Birthday*, p. 451 at 468.

<sup>25</sup> *Koutrakos*, note 11 above, p. 81.

<sup>26</sup> Art. J.4. Treaty on European Union (1992), note 18 above.

<sup>27</sup> The 'flexibility' approach to mutual defence was already advocated by the European Parliament in its proposals for the 2000 IGC, when it commented on options of including Art. V of the WEU's Modified Brussels Treaty in an EU framework (Report on the European Parliament's proposals for the Intergovernmental Conference, A5-0086/2000, at para. 34.3). Cf. also *Debousse/Caler*, *De Saint-Malo à Feira: Les Enjeux de la Renaissance du Projet de Défense Européenne*, 52 *Studia diplomatica* (1999), p. 1 at 103-4; *Heisbourg*, *L'Europe de la défense dans l'Alliance Atlantique*, 64 *Politique étrangère* (1999), p. 219 at 228; *Teunissen*, *Strengthening the defence dimension of the EU*, 4 *Eur.For.Aff.Rev.* (1999), p. 327 at 335.

<sup>28</sup> The suggestion to include a mutual defence clause seems to have been made first by *Dini* in September 2002 (Contribution on 'European Defence', Brussels, 26 September 2002, para. 1, CP 57, p. 203 at 204). At the IGC in December 2003, various amendment proposals to Art. 40, para. 7 were forwarded by the member state delegations. They included, among other things, a dropping of the optional nature of the Article, and a safety clause concerning "the specific character of the security and defence policy of certain member States" (a repetition of the traditional 'Irish formula' (dating from

| NATO<br>Washington Treaty (1949) <sup>29</sup>   | WEU<br>Modified Brussels<br>Treaty (1954) <sup>30</sup>   | draft European<br>Constitution<br>(July 2003) <sup>31</sup>  |
|--|---|--|
| Article 5  | Article V   | Article 40 (para. 7)   |
| “The Parties agree that an armed attack against one or more of them [...] 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-defence recognised 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, <i>such action as it deems necessary, including the use of armed force</i> , to restore and maintain the security of the North Atlantic area.” | “If any of the High Contracting Parties should be the object of an armed attack [...], the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked <i>all the military and other aid and assistance in their power</i> .” | “... if any one of the Member States participating [...] is the victim of armed aggression on its territory, the other participating States shall give it aid and assistance by <i>all the means in their power, military or other</i> , in accordance with Article 51 of the United Nations Charter.” |

As the European Council has to date not taken any decision to create such a mutual defence clause, and as the European Constitution does not exist yet as a legal instrument, collective self-defence is still absent from the EU to this day.<sup>32</sup> Nevertheless, a small but growing body of academics and practitioners have regarded it as a logical culmination and a necessary ingredient of a Common European Foreign and Security Policy, and, indeed, of European integration as a whole in the long term, to respond to common vital interests of the Union.<sup>33</sup> Reference is often

Maastricht), already retained in draft para. 2 of the same article), and deletion of the passage “military or other”. The exact wording of para. 7 is still controversial at the time of writing. Some countries, such as the UK, remain opposed to the entire paragraph. For a summary of the proposals forwarded at the IGC, see *Missiroli* (compil.), *From Copenhagen to Brussels - European defence: core documents Volume IV* (2003), Chaillot Paper 67 [hereinafter: CP 67], Institute for Security Studies European Union, Paris, pp. 432-453.

<sup>29</sup> 34 UNTS 243 (emphasis added).

<sup>30</sup> See above at note 4 (emphasis added).

<sup>31</sup> 19 UNTS 51 (emphasis added).

<sup>32</sup> Cf. European Council, Seville, 21-22 June 2002, Presidency Conclusions, Annex IV: Declaration of the European Council, para. 4: “the Treaty on European Union does not impose any binding mutual defence commitments” (CP 57, p. 75).

<sup>33</sup> *Teunissen*, note 27, at p. 338; *Collet*, *Le Traité de Maastricht de la Défense*, 29 Rev.T.Dr.Eur. (1993), p. 225 at 232; *Nerlich*, *The relationship between a European common defence and NATO, the OSCE and the United Nations*, in: Martin/Roper (eds.), *Towards a common defence policy* (1995), p. 69 at 82; *Grant*, *Can Britain lead in Europe?*, Centre for European Policy Reform, 1998, p. 47; *Ojanen*, *The EU and the Prospect of Common Defence*, Finnish Institute of International Affairs, Working Paper 18 (1999), pp. 16-23; *Kremer/Schmalz*, *Nach Nizza - Perspektiven der Gemeinsamen Europäischen Sicherheits- und Verteidigungspolitik*, 24 *Integration* (2001), p. 167 at 175; *Layne*, *Death Knell for NATO? The Bush Administration Confronts the European Security and Defense Policy*, *Cato Institute, Policy Analysis*, No. 394 (2001), p. 4; *Cooper*, *The Breaking of Nations - Order and Chaos in the Twenty-First Century* (2003), p. 171; *Wessel*, *The State of Affairs in EU Security and Defence Policy: The Breakthrough in the Treaty of Nice*, *J'l Confl. & Sec. L.* (2003), p. 265 at 287. Cf. also

made in this regard to the underlying security rationale of European integration in its founding days.<sup>34</sup> Since French President *Mitterrand's* suggestion in 1992<sup>35</sup>, there have even been proposals in French military circles to extend a nuclear deterrent umbrella over the whole of the EU – at a much reduced level, suitable for post-Cold War scenarios.<sup>36</sup> In political reality, the sense of solidarity and common identity among the EU member states has developed today so far that it seems hard to think of a situation in which an EU member state under attack could not count on the other member states to come to its aid, even if that State was not a member of NATO<sup>37</sup>. Some cite September 11<sup>th</sup> as a factor enhancing this development.<sup>38</sup>

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*Debousse/Caler*, note 27, at p. 112. *Blockmans*, A New Crisis Manager at the Horizon – The Case of the European Union, 13 LJIL (2000), p. 255 at 257 and 262 seems to mean the same by a “military union”. See also already *Bull*, Civilian Power Europe; A Contradiction in Terms?, in: Tsoukalis (ed.), The European Community – past, present and future (1983).

34 *Marauhn*, Building a European Security and Defence Identity (1996), pp. 64 and 128; The Development of a Common European Security and Defence Policy - The Integration Project of the Next Decade, Speech by *J. Solana* 17 Dec. 1999 (last sentence), available at <http://www.fas.org/news/europe/991217-eu-fp.htm> (visited 11/05/2004).

35 *J. Klein*, Europäische Sicherheitsinteressen aus der Sicht Frankreichs, in: Meimeth (ed.), Die Europäische Union auf dem Weg zu einer Gemeinsamen Sicherheits- und Verteidigungspolitik (1997), p. 37 at 42.

36 *F. Mitterrand*, “To imagine European security without a nuclear force is illusory”, joint press conference with *J. Major* and *E. Balladur* following the France-British summit at Chartres, 18 Nov. 1994 (source: Franco-British Air Support; London Delays Role in Transport Plane, Associated Press Worldstream, 18 Nov. 1994); cf. *de Nooy*, Capabilities, in: Martin/Roper, note 33, pp. 37-50; *Marauhn*, note 34, pp. 76-80; *Mallard*, Défense Nationale et Défense Européenne: Deux Notions Compatibles?, in: Vinçon et al., Défense: quels projets après 2002?, 57 Défense nationale (2001), p. 82 at 95.

37 Cf. European Commission President *R. Prodi's* remarks in Riga on 10 Feb. 2000: “Any attack or aggression against an EU member nation would be an attack or aggression against the whole EU, this is the highest guarantee” (cited in: Prodi reassures EU hopefuls on security, cultures, AFP, 10 Feb. 2000; Ireland may already be committed to European military strategy, The Irish Times, 4 March 2000, p. 10); *Stainier*, Common Interests, values and criteria for action, in: Martin/Roper, note. 33, p. 13 at 20-1; *Hill*, The EU's Capacity for Conflict Prevention, 6 Eur.F.Aff.Rev. (2001), p. 315 at 321; *Gerteiser*, Die Sicherheits- und Verteidigungspolitik der Europäischen Union (2002), p. 175. See also the letter by the foreign ministers of the four neutral and non-aligned EU member states of 5 Dec. 2003 at the IGC (CIG 62/03), commenting on the solidarity clause: “we are prepared to underline the principle of EU solidarity more widely in the field of security, including in situations referred to in Article 51 of the UN Charter”.

38 *van Ham*, Politics as Usual: NATO and the EU after 9-11, in: van Ham et al., Terrorism and Counterterrorism – Insights and Perspectives after September 11, The Hague, Clingendael Institute, December 2001, p. 52.

## II. The Content of the declaration

### 1. Preventive action against terrorism by military means?

The Declaration of Solidarity, although closely following Article 42, features two main changes.<sup>39</sup> Firstly, whereas Article 42 refers to the “Union and its Member States”, the Declaration of Solidarity only mentions the “Member States and the acceding States”<sup>40</sup>. Furthermore, the drafting history of Article 42 in the European Convention reveals that, initially, reference was made only to “the Union”<sup>41</sup>. In contrast, the word “the Union” was deleted in the Declaration.<sup>42</sup> The sovereignty of the member states as ‘masters of the treaties’ (*Herren der Verträge*)<sup>43</sup> thus seems to have prevailed over acknowledging any Union competence, the subject matter of terrorism being regarded as an area of highest priority to the member states. Secondly, the Declaration on Solidarity adds a new sentence at the end which weakens the main obligation of the Declaration to come to the aid of the affected fellow member state because it leaves the choice of means at the discretion of the aiding state who may “choose the most appropriate means to comply with this solidarity commitment”<sup>44</sup>. The strength of the obligation thus goes no further than NATO’s renowned Art. 5 which requires a party to assist another party under attack by taking “such action as it deems necessary”<sup>45</sup>.

Two more characteristic points should be highlighted. The first is that, unlike most mutual defence clauses existing in the international system,<sup>46</sup> the Declara-

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<sup>39</sup> Apart from the dropping of para. 1 (b) of Article 42 which concerned assistance in the event of a disaster.

<sup>40</sup> The use of the word “acceding” rather than “candidate” may be taken to mean that the Declaration covered only those states which later joined the EU on 1 May 2004, not the remaining states which currently hold candidate status. This would make sense in light of the short time gap between the Declaration on 25 March and their accession date.

<sup>41</sup> Proposed Amendments to the text of the Articles of the Treaty Establishing a Constitution for Europe, Part I of the Constitution, Article: 40, available at <http://european-convention.eu.int/Docs/Treaty/pdf/30/global30.pdf> (visited 10/06/2004).

<sup>42</sup> A suggestion to that effect was already raised in the negotiations on Article 42, see Proposed Amendments (note 41), Suggestion by *Heathcoat-Amory*, MEP, who argued for an intergovernmental approach.

<sup>43</sup> Cf. German Federal Constitutional Court Decision, 8 April 1987, BVerfGE 75, 223 (242), (English summary in: *Giegerich* et al., Decisions of German courts relating to public international law and European Community law 1986-1993 (1997), p. 577. This reference is only an approximating analogy. The decision referred to a European Community context, rather than to the European Union which did not exist at the time.

<sup>44</sup> This sentence surfaced first in a Declaration by the IGC to the Presidency proposals of 9 December 2003 concerning the draft European Constitution (Dec. CIG 60/03 ADD 1, at p. 57). It may be taken to indicate that even at the time of that IGC, the member states were somewhat hesitant about adopting an Article 42 in as ‘strong’ a form as in the July 2003 draft.

<sup>45</sup> See note at p. 318 above. The commenting press was quick to point out this similarity, cf. *Winter*, EU will Terror mit Soldaten bekämpfen, Frankfurter Rundschau, 26 March 2004, p. 1.

tion on Solidarity provides that the obligation for assisting an attacked state is only triggered by an express request of that state. However, this controlling requirement only concerns measures taken in actual “assistance” (third bullet), not those taken in “prevention” (first bullet) of the terrorist threat. These prevention measures, like all the measures listed by the Declaration, may be effected by mobilising all instruments at the disposal of member states, “including military resources”. The effect of this structure of provisions would be that, according to the Declaration, a state may come to the aid of the other in preventing a perceived terrorist threat with military force, even absent an express call for help from the affected State, contrary to the strict limitations set by general international law – Articles 2, para. 4 and 51 of the United Nations Charter and relevant customary international law – in this respect.<sup>47</sup> The Declaration thus arguably moves some way towards the U.S.-declared right of *pre-emptive* self-defence against international terrorism than any other provision found so far in the EU system, even though it is still far from endorsing any such right.<sup>48</sup> Particular attention should be accorded to the circumstance that, contrary to most mutual defence provisions drafted after 1945,<sup>49</sup> the Declaration does not contain any reference to Article 51 of the United Nations Charter<sup>50</sup>. Politically, the Declaration also carries a strong deterrent for prospective terrorist organisations. The danger of abuse of this clause was already pointed out in the European Convention’s Working Group VIII, and suggestions were made to move up the provision on required consent by the affected state, so as to make it cover all the measures listed.<sup>51</sup> However, the eventual Article 42 (as well as the Declaration on Solidarity) retained the consent clause

<sup>46</sup> E.g. Art. 5 Washington Treaty (note 29 above); Art. V Modified Brussels Treaty (note 30 above); Art. 3 Inter-American Treaty of Reciprocal Assistance, 2 Sept. 1947 21 UNTS 77; Art. 4 Treaty on Collective Security (Commonwealth of Independent States), *Diplomaticeskij vestnik*, 30 June 1992, No. 12, pp. 9-11 (English translation in: 1894 UNTS 313 [1995]).

<sup>47</sup> Cf. *Military and Paramilitary Activities in and against Nicaragua*, 1986 ICJ Rep., p. 14 at 104; *Randelzhofer*, Article 51, in: Simma (ed.), *The Charter of the United Nations, a commentary* (2<sup>nd</sup> ed. 2002), p. 788 at 803; *Dinstein*, *War, aggression and self-defence* (3<sup>rd</sup> ed. 2001), p. 238; *Mrázek*, *Prohibition of the Use and Threat of Force: Self-Defence and Self-Help in International Law*, 27 *CYIL* (1989), p. 81 at 93; see already *K. Ipsen*, *Rechtsgrundlagen und Institutionalisierung der Atlantisch-Westeuropäischen Verteidigung* (1967), p. 60; contra: *Nicaragua Case*, *Diss.Op. Jennings*, *ibid.*, p. 528 at 544-5.

<sup>48</sup> The oft-cited dichotomy between the words ‘pre-emptive’ (as the US National Security Strategy uses it) and ‘preventive’ (as the European Union Security Strategy now does) is of importance in drawing the legal limits to that right of self-defence. The Declaration does not seem to cross that line (‘prevent’). However, the argument here presented refers to a general tendency along a continuum, rather than trying to define a clear limit. (The National Security Strategy of the United States of America, Sept. 2002, available at <http://www.whitehouse.gov/nsc/nss.pdf> (visited 11/06/2004), p.15; A Secure European in a Better World – European Security Strategy, Council Doc. 15895/03, 8 Dec. 2003).

<sup>49</sup> Cf. *Dinstein*, note 47, p. 237.

<sup>50</sup> This does not, however, diminish the legal primacy of the limits set by the Charter (Art. 103 UN Charter), as all 25 EU member states are UN members.

<sup>51</sup> Proposed Amendments (note 41), Suggestions by *Hjelm-Wallén* et al., *Farnleitner*, *Tiilikainen* et al., *Santer* et al. and *Kaufmann*. In this sense also the suggestion by *de Villepin*.

with its limitation to actual responses taken “in the event” of a terrorist attack. The only way in which such a result could be avoided would be by reading the requirement for member states to “act jointly” as a limit to unilateral action under the Declaration. However, such a reading may not necessarily be compelling, in addition to the fact that this provision is set apart by one sentence from the “military measures” clause.

The second point is that preventive measures, including by military means, are restricted to those countering terrorist attacks on the territory of the member state. But this would not exclude the possibility, for example, of a member state engaging in a military intervention in a third non-EU state, for preventing a terrorist attack on the territory of another member state which it believes is being hatched in that third state, again notwithstanding general international law and in particular the prohibition (although it is under debate) of preventive self-defence. According to the Declaration, the intervening state can theoretically do so even without asking for a request of the state in whose name it purports to act.<sup>52</sup> Taken together, the overall impression of the text of the Declaration on Solidarity seems to be one of a more weak mutual defence clause, specifically for terrorist attacks. Admittedly, the text is not too clear on this question.

## 2. A mutual defence clause?

Practical use might arise out of a mutual defence clause, be it binding under international law or not.<sup>53</sup> Political declarations, especially where they are very precise, may work as ‘soft law’ and thus still influence the behaviour of international actors. In the present case, the actors concerned would be firstly the EU member states, but also international terrorist organisations trying to assess the deterrent presented by the Declaration, i.e. the possible retaliation they could expect in response to an new attack. Thirdly, as the Declaration does not rule out preventive action on the territory of third states, such states are also in part affected. Neo-realist theory in international relations claims that historically alliances are born out of the perception of a common threat.<sup>54</sup> Against this background, the Declaration of Solidarity, as a soft law document expressing political consensus to act to counter a threat, could serve to prepare the ground for more binding com-

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<sup>52</sup> Cf. *Military and Paramilitary Activities*, p. 104, at para. 195 and p. 105 at para. 199.

<sup>53</sup> Uncertainty about the binding force of a document equally does not prohibit interpretation according to the general law of treaties (Arts. 31, 32 VCLT). Cf. *Reichard*, *Some Legal Issues Concerning the EU-NATO Berlin Plus Agreement*, 73 *Nordic J. Int'l L.* (2004), p. 37 at 62.

<sup>54</sup> *Walt*, *The Origins of Alliances* (1987), pp. 32-3; *Gärtner*, *Security Concepts*, 8 *Rom. J. Int'l Aff.* (2002), pp.19-31 (with many further references); *Cornish*, *Partnership in Crisis - The US, Europe and the Fall and Rise of NATO* (1997), p. 10; *Medcalf*, *Going Global? The North Atlantic Treaty Organisation and the Extra-European Challenge*, Ph.D. Dissertation, University of Bath, 2002 (unpublished; on file with the author), pp. 17-21.

mitments in the future, if indeed its provisions are able to be read as a mutual defence clause.

As said above, overall the textual provisions, could perhaps seem to support a mutual defence clause (even if it would be a weak one). Turning, in search of further enlightenment, to the object and purpose of the Declaration, it is clearly solidarity in face of a terrorist attack. Solidarity responses to such an attack may be very varied, commensurate with the unpredictable nature of the attack and the damage it might cause. They may include armed force, but in other cases non-military measures (such as intelligence and police co-operation, enhanced border control, and preventive infrastructural measures to minimise the extent of the damage) will be more adequate. The overall broad term ‘Solidarity’ reflects the general uncertainty of where, when and how terrorists might strike, and seeks to cover the maximum range of answers on a collective level. Even if this does not run directly counter to what a mutual defence clause generally seeks to do, its spirit and emphasis is already somewhat removed from the latter.

The systematic separation (by two article numbers) of Article 42 from the classical mutual defence clause of Art. 40, para. 7 of the draft Constitution (indeed, the very existence of that other clause) seems to further support the preliminary assumption that something else than a classical mutual defence clause was intended by the ‘Solidarity clause’. Rather, Article 42 seems to have looked for a solution of how to multilaterally respond to attacks by international terrorists with all possible means (including military and preventive, should this be necessary), without creating an outright new mutual defence guarantee. Its results, however, could come fairly close to being the same, if not ‘more’ in terms of freedom of action it allows in responding to such occurrences.

There are unfortunately no *travaux préparatoires* to the Declaration available (such as verbatim records of the European Council proceedings) which might help to confirm or qualify the above assumption. The next best relevant material is the negotiating history of Article 42, on which the Declaration is based. The initial proposal for a solidarity clause seems to have been made in a joint French-German proposal on 21 November 2002.<sup>55</sup> Some members of Working Group VIII expressly wanted to include an explicit mutual defence clause against terrorism,<sup>56</sup> and one of them even seemed to imply a pre-emptive self-defence clause<sup>57</sup>. Others wanted to go only some way towards this position, by adding the element of “indivisible

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<sup>55</sup> *de Villepin/Fischer*, Joint Proposals to the European Convention, Prague 21 Nov. 2002, CP 57, pp. 214-5; *Ruge*, Europäische Sicherheits- und Verteidigungspolitik, speech at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, 20 Sept. 2003 (reprinted in: Weidemann/Simon (eds.), *The Future of ESDP - A Conference Report: “The (not so) Common European Security and Defence Policy”* (2003), p. 33 at 37-38.

<sup>56</sup> Proposed Amendments (note 41), Suggestion by *Michel* et al.

<sup>57</sup> *Ibid.*, Suggestion by *MacLellan*.

security” (which is typical NATO language<sup>58</sup>) to “solidarity” in the text.<sup>59</sup> The French and German governments are reported to have later deemed Article 42 as too narrow.<sup>60</sup> Yet others held that another Article in the draft Constitution, the optional full mutual defence clause contained in Art. 40, para. 7 (see above, p. 318) already covered such cases, implying that a mutual defence clause specifically against terrorist threats was welcome in principle, but not really needed.<sup>61</sup> Such voices were countered by other members of the Working Group who abhorred both the notion of a mutual defence clause against terrorism<sup>62</sup> – moreover allowing pre-emptive self-defence<sup>63</sup> – as well as the concept in general of using soldiers to combat a phenomenon with as complex origins as international terrorism<sup>64</sup>. Suggestions were made to include an explicit reference to the limits of international law with regard to the right of self-defence.<sup>65</sup> Some even argued for the deletion of the whole article from the Convention draft.<sup>66</sup> In the Final Report of the Working Group of 16 December 2002, although many ‘hawkish’ elements were later to be retained in the final Article, with regard to a formalised mutual defence provision the latter opinion seems to have prevailed. The Report states that:

Such a clause would *not* be a clause on collective defence entailing an obligation to provide military assistance, but would apply to threats from non-State entities.<sup>67</sup>

The first part of this sentence in the Final Report stands in contradiction to the wording of Article 42, and equally the later Declaration, both of which expressly include “military resources” among the instruments possible to be used to help another member state in facing a terrorist attack (or threat). However, the spirit of the second part of the sentence would seem to imply (especially if one considers

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58 See e.g. The Alliance’s Strategic Concept, Approved by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington D.C. on 23<sup>rd</sup> and 24<sup>th</sup> April 1999, para. 27 (CP 47, pp. 29).

59 Proposed amendments, (note 41), Suggestions by *de Villepin* and *Hain*. This was justified by *de Villepin* with an agreement between the French and British positions.

60 *Jopp*, GASP und ESVP im Verfassungsvertrag – eine neue Angebotsvielfalt mit Chancen und Mängeln, 26 Integration (2003), p. 550 at 551.

61 Suggestion by *de Vries* and *de Bruijn*. *De Vries* was later appointed Counter-Terrorism Co-ordinator under the ‘Declaration on Combating Terrorism’, see note 6 above.

62 *Ibid.*, Suggestion by *Hjelm-Wallén* et al.

63 *Ibid.*, Suggestions by *Heatcoat-Amory*, *Seppänen* and *Queiró*. In weaker and implicit terms: suggestions by *Hain*, *Giannakou* and *Santer*.

64 *Ibid.*, Suggestion by *Kaufmann*.

65 *Ibid.*, Suggestions by *Roche*, *Hjelm-Wallén* et al.

66 *Ibid.*, Suggestions by *Kaufmann*, *Voggenhuber* et al. and *Gormley*.

67 The European Convention, Final Report of the Working Group VIII – Defence (‘Barnier Report’), WG VIII 22, CONV 461/02, 16 December 2002, para. 58 (emphasis added).

the preceding obviously controversial debates) that the members of the Working Group wanted to steer clear of a classical mutual defence clause styled after NATO's Art. 5 when they drafted the 'Solidarity Clause'. Terrorism of the Sept. 11<sup>th</sup> and Madrid kind does mostly not emanate from states, it is an 'asymmetric' threat and much harder in practice to predict than the scenarios which Art. 5 NAT and Art. 51 of the UN Charter have primarily in mind. The close state-relatedness of such 'classical' cases of mutual defence seems to remain even in cases of defending against international terrorist attacks<sup>68</sup>: before striking at Afghanistan as a state proper after Sept. 11<sup>th</sup> in autumn 2001, the United States had to impute Al-Quaida's actions to that state to a credible degree.<sup>69</sup> Thus, the conclusions one can draw from the negotiating history further support the view that it was not intended to enshrine a classical mutual defence clause in the Declaration.<sup>70</sup>

### III. Legal questions concerning the Declaration on Solidarity against Terrorism

#### 1. An isolated prior enactment of Article 42?

The adoption of the Declaration clearly stems from the need to enact measures such as listed under Article 42 of the draft European Constitution without having to wait for its entry into force. Would this work, however, from a legal point of view? As the content of Article 42 goes beyond what is covered by the TEU currently in force, it would amount to an amendment of that treaty. Under the general international law of treaties as codified in the Vienna Convention on the Law of Treaties (VCLT), states are free to amend treaties in force between them by a variety of means, ratification, acceptance, approval or accession, or any other means which they agree to.<sup>71</sup> However, this applies only where the treaty to be amended does not itself define the means to be used.<sup>72</sup> The TEU's Art. 48 states clearly that amendments may only take place according to the procedure described therein, which includes ratification by the member states. In order to enter into

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<sup>68</sup> Both Art. 5 NAT and Article 51 UN Charter were applied to terrorist attacks directed from abroad after Sept. 11<sup>th</sup>. See the invocation of Art. 5 by NATO (NATO Press Release (2001)124 of 12 Sept. 2001) and SC-Res. 1368 of 12 Sept. 2001 respectively.

<sup>69</sup> *Stahn*, International Law at a Crossroads? - The Impact of September 11, 62 HJIL (2002), p. 183 at pp. 226.

<sup>70</sup> In this sense also *Gourlay*, The Convention: Conclusion without closure, ISIS European Security Review, No. 17, May 2003, p. 4, who deems that the solidarity clause "falls short of a collective defence commitment".

<sup>71</sup> Arts. 39 and 11, Vienna Convention on the Law of Treaties (1969), Part IV, 1155 UNTS 331.

<sup>72</sup> *Ibid.*, Art. 39.

force, the European Constitution would need to be first adopted and then ratified by all the EU's member states, according to their respective constitutional requirements, like any other amendment to the TEU. This strict requirement for amendment procedure, moreover, flows also directly from the plane of international law, by virtue of Art. 39 VCLT.<sup>73</sup> What is true for the whole draft Constitution must also be true for any of its parts. Any 'isolated prior enactment' by the member states, wishing to create the same binding force at law but circumventing the procedural requirements under international and European law, is thus excluded.

## 2. Provisional application of Article 42?

Adopting and ratifying an international treaty can be a lengthy process. Sometimes, however, situations of crisis call for faster action.<sup>74</sup> The international law of treaties provides for such cases, stating that parties to treaties which have not yet entered into force may choose to apply all or some of its provisions on an interim basis. This rule is codified in Article 25 VCLT:

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

- (a) the treaty itself so provides; or
- (b) the negotiating States have in some other manner so agreed

[...]

Most of the 25 EU member states have ratified the VCLT. As regards those who have not<sup>75</sup>, its content is held, to a large degree, to reflect existing customary international law<sup>76</sup>.

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<sup>73</sup> Thus, the fact that the EU - in contrast to the EC - is not a 'self-contained regime' does nothing to change this conclusion. Moreover, the treaty amendment rules of Art. 48 TEU cover also the EC (Art. 300, para. 5 TEC). On the EU and 'self-contained regimes', see: *Simma*, Self-contained regimes, 16 NYIL (1995), pp. 111; *de Witte*, Rules of Change in International Law: How Special is the European Community?, in: *Barnhoorn/Wellens* (eds.), Diversity in Secondary Rules and the Unity of International Law (1995), pp. 299; *Marschik*, Subsysteme im Völkerrecht - Ist die Europäische Union ein „Self-Contained Regime“? (1997); *Koskonniemi*, International Law Aspects of the Common Foreign and Security Policy, in: Id., International Law Aspects of the European Union (1998), p. 27 at 30 (with further references); *Gavouneli*, International Law Aspects of the European Union, 147 Tulane J. Int'l & Comp.L. 2000, p. 147 at 150.

<sup>74</sup> Cf. *Lefeber*, The Provisional Application of Treaties, in: *Klabbers/Lefeber* (eds.), Essays on the Law of Treaties (1998), p. 81.

<sup>75</sup> The member states not having ratified yet are: France, Ireland and Malta (Multilateral treaties deposited with the Secretary-General, CD-ROM, status: 31 Dec. 2002).

<sup>76</sup> *Sinclair*, Vienna Conference on the Law of Treaties, 19 ICLQ (1970), p. 47 at 49-50; *Briggs*, United States Ratification of the Vienna Treaty Convention, 73 AJIL (1979), p. 470-3; *Jennings/Watts*, *Oppenheim's International Law* (9<sup>th</sup> ed. 1992), p. 1199.

The question of whether a provisional application according to Art. 25 VCLT is legally binding or not (which would arguably dilute the value of proper ratification<sup>77</sup>) seems to have been subject to much debate in the long history of negotiations of the Vienna Convention<sup>78</sup>, and is disputed in international legal scholarship to this day<sup>79</sup>. Some authors appear to evade the question altogether.<sup>80</sup> However, the ILC's commentary to the final draft articles on the law of treaties in 1966 stated that "there can be no doubt that such clauses have legal effect and bring the treaty into force on a provisional basis"<sup>81</sup>, a verdict which *Lefebvre* calls "firm and authoritative"<sup>82</sup>.

There are numerous cases of multilateral treaties where express provision (Art. 25, para. 1 (a) VCLT) was made for such a provisional application prior to entry into force.<sup>83</sup> However, the draft European Constitution does not seem to contain any such clause. The question if the Declaration is a provisional application according to the VCLT therefore hinges on whether the 'Declaration on Solidarity' constitutes a provisional application by the EU member states of Article 42 by "some other manner" (Art. 25, para. 1 (b) VCLT).

One difficulty with such an assertion consists of the fact that the texts of Article 42 and the Declaration are not exactly the same (see above). The first difference in the Declaration – namely the absence of the Union as a 'party' – is not too significant for deciding on the question of its legal force *per se* (although it could become important later in deciding whether the Union is bound to it independently of its member states). The second difference, however, seems graver: the dilution of the duty of a member state to come to the aid of another in case of a terrorist attack. How can a declaration "provisionally apply" an article of a draft treaty if it spells out a different, namely a weaker, obligation for the parties than the former? This question could be answered by interpreting the object and purpose of the phrase "part of a treaty" in Art. 25 VCLT in a *qualitative* rather than a quantitative sense. Put bluntly, if the parties may provisionally apply a whole

<sup>77</sup> Cf. *Verdross/Simma*, *Universelles Völkerrecht* (1984), p. 460.

<sup>78</sup> A earlier draft had read "provisional *entry into force*" (*Sinclair*, *The Law of Treaties* (1984), p. 247, emphasis added).

<sup>79</sup> Cf. *Sinclair* (1984), *ibid.*, p. 247; *Aust*, *Modern Treaty Law and Practice* (2000).

<sup>80</sup> *de la Guardia*, *Derecho de los tratados internacionales* (1997), p. 198-9; *Reuter*, *Introduction au Droit des Traités* (1985), pp. 62-3.

<sup>81</sup> YBILC 1966, Vol. II, p. 210.

<sup>82</sup> *Lefebvre*, note 74, p. 90; cf. *D'Estefano Pisani*, *Derecho de Tratados* (1986), p. 24.

<sup>83</sup> A recent example in the area of international security is the ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping And Security, 10 Dec. 1999, available at [http://www.iss.co.za/AF/RegOrg/unity\\_to\\_union/pdfs/ecowas/ConflictMecha.pdf](http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/ecowas/ConflictMecha.pdf) (visited 10/06/2004), Art. 57.  
Cf. also *Blix*, *The treaty maker's handbook* (1973), pp. 84-5; *Aust*, note 79 above, pp. 139-141.

provision, could they not choose to apply half the provision for the time being? The above-mentioned need for greatest possible normative flexibility in urgent and unexpected situations – which Art. 25 VCLT specifically addresses – should not be forgotten in this respect.<sup>84</sup>

Nevertheless, Art. 25 VCLT contains a last hurdle: the parties need to “agree” to apply the provision in question with the effect just described (i.e. with legal force). From the point of view of European law this requirement seems to pose no problem. The European Council, being an intergovernmental forum for the member States, decides by consensus. There is no indication that this was different in the case of the Declaration.

The Declaration on Solidarity is, however, part of the ‘Declaration on Combating Terrorism’ (see above). It is introduced in the latter’s Part 2 as a “*political commitment* [...] to act jointly against terrorist acts, in the *spirit* of the Solidarity Clause contained in Article 42 of the draft Constitution for Europe”<sup>85</sup>. This terminology clearly evidences the intention of the member states, expressing their will through the European Council, not to be bound at law. Hence, in effect, even though the European Council *could* have “provisionally applied” Article 42 of the draft Constitution, it seems to have chosen not to do so, by keeping the obligations in the Declaration “political” in nature.

### 3. A “decision” according to Art. 17 TEU?

The currently binding version of Art. 17 TEU (dating from the Nice European Summit of 2000) allows the European Council, in principle, to “decide” on the creation of a mutual defence between the member states. However, the condition is added that “it shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional practices”<sup>86</sup>. This sentence is commonly interpreted to mean that creation of a mutual defence requires a full treaty revision of the TEU as a *sine qua non*<sup>87</sup>, including ratification

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<sup>84</sup> Cf. *Schürr*, Der Aufbau einer europäischen Sicherheits- und Verteidigungsidentität im Beziehungsgeflecht von EU, WEU, OSZE und NATO (2003), pp. 284-5, who points out the present absence of fast decision-making mechanisms under the ESDP to react to an unforeseen event like Sept. 11<sup>th</sup>; cf. *Keohane/Townsend*, A Joined EU Security Policy, CER Bulletin Dec./Jan. 2004, Issue 33; *Heisbourg*, US-European relations: from lapes alliance to new partnership?, 41 International Politics (2004), p. 119, at 125: “we cannot afford to wait for a ‘9/11’”. The conclusions of the GAERC in Brussels, 8-9 Dec. 2003, however, hint that an integrated approach on “protection of civilian populations against the effects of terrorist attacks” (including a military database with the EUMS) is presently being developed (CP 67, p. 287 at 290).

<sup>85</sup> Emphases added.

<sup>86</sup> Art. 17, para.1 TEU (consolidated Nice version), OJ C 325/5-32, at p. 16.

<sup>87</sup> *Frowein*, Auf dem Wege zu einer gemeinsamen Sicherheits- und Verteidigungspolitik, in: Tomuschat (ed.), Rechtsprobleme einer europäischen Sicherheits- und Verteidigungspolitik (1997), p. 11 at 12;

by all the member states<sup>88</sup> (although with slightly lowered formal requirements compared to the standard procedure under Art. 48 TEU<sup>89</sup>).

This constitutional barrier for mutual defence stands in contrast, for example, to the more flexible powers accorded to the European Council to “progressively frame” a common defence policy, this being an activity which does not require any formal revision of the TEU.<sup>90</sup> The results of this progressive activity on the part of the European Council have increasingly become visible in the EU’s building of an institutional capacity for crisis management and peacekeeping, and lately also in its taking on some first small operations in the field.<sup>91</sup>

If the nature of the Declaration on Solidarity as a “decision” according to Art. 17 TEU could be open to question, fulfilment of the second requirement – a treaty revision – certainly is not: There was no move on the part of the European Council on 25<sup>th</sup> March 2004 to initiate such a treaty revision, and moreover the member states have not ratified any. Thus, no binding force of the Declaration arises out of the TEU.<sup>92</sup>

#### 4. A new treaty outside the TEU?

The practice by EU member states of having and concluding other international treaties with each other is nothing new. To name just two examples: the Schengen regime, now incorporated into the *acquis communautaire*, started in this way; furthermore, there is of old remaining the Modified Brussels Treaty of the WEU.<sup>93</sup>

Article 11 VCLT states that international treaties may be concluded, apart from signature, exchange of instruments, ratification, acceptance, approval or accession,

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*Dashwood*, The Common Foreign and Security Policy, in: Usher, The State of the European Union (2000), p. 42 at 55; *Krück*, Gemeinsame Außen- und Sicherheitspolitik, in: Schwarze (ed.), EU-Kommentar (2000), p. 108 at 112; *Bartelt*, note 16, p. 37-8.

<sup>88</sup> *Griller et al.*, The Treaty of Amsterdam – Facts, Analysis, Prospects (2000), p. 419; *de Zwaan*, Community Dimensions of the Second Pillar, in: *Heukels/Blokker/Brus*, The European Union after Amsterdam – A Legal Analysis (1998), p. 179 at 183; *Cremer*, Commentary to Art. 17 TEU, in: *Calliess/Ruffert* (eds.), Kommentar zu EU-Vertrag und EG-Vertrag (2<sup>nd</sup> ed. 2002), p. 186 at 188.

<sup>89</sup> *Cremer*, *ibid.*, p. 188; *Warnken*, Der Handlungsrahmen der Europäischen Union im Bereich der Sicherheits- und Verteidigungspolitik (2002), p. 146-7 (with further references). Art. 48 TEU requires, in addition, the convocation of an IGC and the consultation of the European Parliament, the Commission and in some cases the European Central Bank.

<sup>90</sup> *Frowein*, note 87, p. 12.

<sup>91</sup> See above at note 14.

<sup>92</sup> The possibility of interpreting the Declaration as a “general guideline with defence implications” by the European Council (Art. 13/1 TEU) should also be ruled out because of the very fundamental character that the introduction of a mutual defence clause in the EU would represent, cf. *Gerteiser*, note 37, p. 221.

<sup>93</sup> See note 30 above.

by “any other means if so agreed”. However, all of these forms of conclusion only serve to show the consent of a state to be bound (Art. 11 VCLT) without which no treaty is binding.<sup>94</sup>

Already *prima facie*, the mere titles as ‘Declarations’ hint at lack of the parties’ will to be bound by either document.<sup>95</sup> Arguably, some of the language employed to frame the member states’ obligations could also be found in an international treaty (“shall” is used throughout).<sup>96</sup> But, on closer inspection, the obligations thus phrased are, in their entirety, preceded by the words “have declared our firm intention”<sup>97</sup>. In the first publicly available draft of the Declaration of 19<sup>th</sup> March 2004 the words “declared our firm intention” are even marked in bold letters.<sup>98</sup> This ultimately rules out any will to be bound, however “firm” the said intention may be described, a conclusion which is further substantiated by the characterisation of the Declaration as a “political commitment” by the European Council.<sup>99</sup>

In conclusion, the Declaration on Solidarity spells out a clear commitment of political nature, no more, no less.<sup>100</sup>

## 5. “Subsequent practice” to the TEU?

Even if one tried, by very creative reading, to see the Declaration as “subsequent practice” (Art. 31, para.3 (b) VCLT) to Title V and in particular Art. 17 of the TEU,

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<sup>94</sup> Reichard, note 53, p. 54 (with further references).

<sup>95</sup> Cf. Reichard, note 53, p. 52 and 55.

<sup>96</sup> Ibid., p. 62-3.

<sup>97</sup> Emphasis added.

<sup>98</sup> Draft Declaration on combating terrorism, Brussels 19 March 2004, Council Doc. 7486/04, p. 17.

<sup>99</sup> See above at p. 328. Since, after consideration of the aforementioned elements it has become clear that the Declaration is not binding, testing for other commonly used criteria for international treaties can be dispensed with for the sake of this argument. Cf. Reichard, note 53, pp. 48; Bernhardt, *Treaties: in: Bernhardt (ed.), Encyclopedia of Public International Law, Volume IV (2000)*, p. 927; Shaw, *International Law (4<sup>th</sup> ed. 1997)*, p. 73-4; Cassese, *International Law (2001)*, p. 126; Verdross/Simma, *Universelles Völkerrecht (1984)*, § 534, p. 337; Doebring, *Völkerrecht (1999)*, § 334, pp. 143-4; U.S. Department of State, *Coordination and Reporting of International Agreements*, § 181.2 Criteria, 27 April 1981, 22 Code of Federal Regulations, Part 181, see 46 Federal Register 35917 of 13 July 1981; Decision of the German Federal Constitutional Court (*Bundesverfassungsgericht*) of 22 November 2001, BverfGE 104, p. 151 at 119-206, English summary available at [http://www.bverfg.de/entscheidungen/frames/es20011122\\_2bve000699en](http://www.bverfg.de/entscheidungen/frames/es20011122_2bve000699en) (visited 10/06/2004), at paras. 23-29; Rau, *NATO’s Strategic Concept and the German Federal Government’s Authority in the Sphere of Foreign Affairs: The Decision of the German Federal Constitutional Court of 22 November 2001*, 44 *GYIL (2001)*, p. 545 at 558-562.

<sup>100</sup> The commenting press seems to have appreciated it exactly in this way, cf. Minder, *EU gives half-hearted endorsement to anti-terror solidarity clause*, *Financial Times*, 26 March 2004, p. 3.

this would seem impermissible because the text of the TEU is clear on the question of mutual self-defence: it does not contain it. There is no room for interpretation in that respect.

## IV. Conclusion

The considerations above cannot be more than a first-hand assessment of the 'Declaration on Solidarity' issued by the European Council at Brussels on 25-26<sup>th</sup> March 2004. More importance should be accorded to subsequent practice in its application by the EU member states, and to the eventual outcome of the IGC later in 2004 which will likely adopt the final European Constitution. In this regard, considering also the respective debates in the European Convention, it is interesting that the part of opinion calling for a mutual defence clause in an EU context is yet far from a majority<sup>101</sup>, but it is growing. Some member states such as France<sup>102</sup> and Belgium<sup>103</sup> officially support the creation of a common European army. So does the European Parliament.<sup>104</sup> Discussion inside other states like Germany, is also moving in that direction.<sup>105</sup>

In conclusion, the horrible terrorist attacks of Madrid did not give birth to a mutual defence clause against terrorism in the EU – in the same way that European frustration at the operational incapacity of the EU laid open in the Balkan

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<sup>101</sup> See European Council, Helsinki, 10-11 December 1999, Presidency Conclusions, II. Common European Policy on Security and Defence, para. 27, CP 47, p. 82; European Council, Seville, note 32 above, pp. 74-5; *J. Solana* has also remarked that "The EU is not in the business of collective defence. Nor is it in the business of creating a European army" (Forschungsgesellschaft der Deutschen Gesellschaft für Auswärtige Politik, Berlin, 14 November 2000, CP 47, p. 151 at 154).

<sup>102</sup> "[A] European army is a 'goal' towards which the Union should move", speech by *M. Balladur* to the French National Assembly, 7 Dec. 1994, quoted in *Le Monde*, *Le Conseil Europeen D'Essen et le debat sur l'elargissement de l'Union*, 9 Dec. 1994.

<sup>103</sup> Letter from *Guy Verhofstadt*, PM of Belgium, to *Tony Blair* and *Jacques Chirac*, Brussels, 18 July 2002 (CP 57, p. 114). *Verhofstadt* argued both for a "convergence of Europe's armies" and for a "mutual security guarantee" between EU members.

<sup>104</sup> European Parliament, Resolution on the gradual establishment of a common defence policy for the European Union, A4-171/98, OJ C 167/190 of 1 June 1998, at p. 192, para. 5. The EP also, in October 2003, "regretted" that the mutual assistance clause in the draft European Constitution (see note. 4 above) fell short of the wording used in Article V of the WEU Modified Brussels Treaty (European Parliament resolution on the annual report from the Council to the European Parliament on the main aspects and basic choices of CFSP, 23 Oct. 2003, para. 16, CP 67, p. 235 at 240).

<sup>105</sup> *Mey*, Europäische Sicherheitsinteressen aus der Sicht Deutschlands, in: *Meimeth*, note 35, p. 21 at 23; *Varwick*, EU-Streitkräftestruktur – Auf dem Weg zur europäischen Verteidigung, Bundeswehr, IFDT – Information für die Truppe, 4/2003; cf. *Douglas-Scott*, The Common Foreign and Security Policy of the EU: Reinforcing the European Identity?, in: *Ibid.*, *Europe's other* (1998), p. 131 at 146.

Wars in the 1990s lead to the ESDP.<sup>106</sup> However, they may have come closer to that than any development before. Whichever way EU member states play it, mutual defence is now more than ever in the cards.

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<sup>106</sup> *Grant*, European defence post-Kosovo?, Centre for European Reform (London), Working Paper, June 1999; *Moens*, Developing a European intervention force, 55 *International Journal*, (1999/2000), p. 248; *Blockmans*, note 33 above, p. 255; *Bradford*, The Western European Union, Yugoslavia, and the (dis)integration of the EU, the new sick man of Europe, 24 *Boston College Int'l & Comp. L. R.* (2000), pp.13-84; *Pradetto*, Funktionen militärischer Konfliktregelung durch die NATO bei der Neuordnung Europas, in *Timmermann/Pradetto* (eds.), *Die NATO auf dem Weg ins 21. Jahrhundert* (2002), p. 191 at 203; *Treacher*, From Civilian Power to Military Actor; The EU's Resistible Transformation, 9 *Eur.For.Aff.Rev.* (2004), p. 49 at pp. 57.