

IN SEARCH OF HARMONY BETWEEN THE LEGAL COMPETENCES OF THE EU AND NATO – FOCUS ON ARTICLE 42(7) TEU, NATO’S ARTICLE 5 AND THE BERLIN PLUS AGREEMENTS AS THRESHOLDS FOR POLICY RECOMMENDATIONS

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ABSTRACT

The aim of this article is to answer the following question: understanding that a significant majority of Member States of the European Union are also members of NATO, how should these two organisations’ inter-institutional relationship be understood in terms of competences in the realm of security and defence? I will also take a normative approach as I suggest policies to further promote coherence in actions between the EU and NATO.

I deduce that the future of European collective security is largely dependent on how the Member States decide to develop their military defence capabilities within the EU. The EU–NATO relationship does not necessarily have to culminate in the question of a potential clash of competences; rather, the most fruitful question becomes how to ensure that competences regarding military defence are exercised in such a way that the Union’s and NATO’s capabilities are deployed in the most effective and cooperative manner.

Furthermore, I argue that a more ambitious approach is needed for the future EU–NATO cooperation. This would require a thorough revision of the Berlin Plus Agreement as well as a transition from its somewhat narrow scope. Hence, I introduce two different pathways forward to revise the existing regulatory framework.

I. INTRODUCTION

Today's geopolitical situation seems to give the European Union (EU) and the North Atlantic Treaty Organization (NATO) many reasons to combine their forces. Following Russia's unlawful attack against Ukraine in February 2022, both clubs of sovereign states have found themselves dealing with the same question; how to ensure security of the European continent against external aggressions? While this development is understandable and necessary, it sparks a need to thoroughly relook at the division of competence of these two organisations. While military defence is traditionally strongly linked with the core functions of NATO, it is evident that the EU has shown a keen interest in operating in this field as well.¹ However, military defence is not the only intersection where the EU's and NATO's interests meet; in the past and present, both organisations have cooperated, for example, in the field of crisis management. As organisations need normative empowerment in their actions, I wish to further disentangle the competences and the relationship between these two legal entities in the field of security as well. What makes the relationship between the two organisations even more interesting is that they share a significant number of member states: the commonly posed question is therefore whether both the EU's and NATO's interests in security result in troublesome duplications between their operations.

This dilemma in the nexus of the European Union and NATO is what inspires me to embark on this research journey. Therefore, my main research question is the following: Understanding that a significant majority of Member States of the European Union are also members of NATO, how should their inter-institutional relationship be understood in terms of competences? What could the possible ways be to further promote clarity between the EU's and NATO's legal competences in the security realm?

In other words, my aim is to draw a comprehensive picture of the regulatory framework of the current and future EU–NATO relationship in the field of security. This end goal also affects the structure of this paper. Firstly, a separate section will focus uniquely on how Russia's unlawful attack against Ukraine has shaped the EU's approach to its common defence and NATO. Secondly, I wish to shed light on to what extent the EU's mutual defence article, that is to say Article 42(7) of the Treaty on European Union (TEU) and NATO's Article 5 overlap with each other and what could possibly promote the cooperation and legal coherence of these two

1 On 21 March 2022, the Council formally approved the Strategic Compass, the EU's plan to strengthen the Union's security and defence policy by 2030. See Council of the EU, 'A Strategic Compass for a stronger EU security and defence in the next decade' (Press release, 21 March 2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/03/21/a-strategic-compass-for-a-stronger-eu-security-and-defence-in-the-next-decade/>> accessed 15 August 2023.

organisations in the field. Thirdly, I will have a closer look at how the EU and NATO have organised their cooperation in crisis management operations; as this field has largely acted as a precedent for regulating today's EU–NATO relations, I will examine to what extent the so-called Berlin Plus agreements have been able to respond to the need for a coherent regulatory relationship between these two organisations.

Finally, I will take a normative approach to the question of EU–NATO relationship. Based on discoveries made along the research journey, I suggest possible ways to further promote the harmony between the EU's and NATO's legal and regulatory competences. In the context of this thesis, this means that I will favour normative conclusions which strive to make the regulatory relationship of the EU and NATO as transparent and legitimate as possible.²

2. POST-WAR IN UKRAINE: WHAT IS THE EU'S ROLE IN SELF-DEFENCE? – SHIFT TO GEOPOLITICAL STRATEGY

It becomes increasingly relevant to examine the factors which currently drive change within the EU's security policy actions. Above all, it seems that an ongoing shift from protection against terrorist attacks to focus on direct threats posed by State actors is about to reshape how the EU understands its role as a security provider.

War returned to Europe's backyard on 24 February 2022 when Russia started its unlawful armed attack against Ukraine.³ As a first response to Russian aggression, the EU clearly chose a path which correlates to the traditional idea of where its power lies; as a mighty economic powerhouse, the EU decided to launch "waves of heavy sanctions against Russia's financial system, its high-tech industries and its corrupt elite".⁴ Since the first reactions to Russian aggression, the Union has introduced several new packages of sanctions, adding to the economic burden against Russia and Belarus.⁵ In addition, other measures such as suspension of visa facilitation clearly make use

2 See e.g. Thomas M. Franck, 'Legitimacy in the International System' (1988) 82 *The American Journal of International Law* 706.

3 Reuters, 'Timeline: The events leading up to Russia's invasion of Ukraine' (Article, 1 March 2022) <<https://www.reuters.com/world/europe/events-leading-up-russias-invasion-ukraine-2022-02-28/>> accessed 15 August 2023.

4 European Commission, 'Speech by President von der Leyen at the European Parliament Plenary on the Russian aggression against Ukraine' (Speech, 1 March 2022) <https://ec.europa.eu/commission/presscorner/detail/en/speech_22_1483> accessed 15 August 2023.

5 Council of the European Union, 'EU response to Russia's invasion of Ukraine' (Official text, 7 August 2023) <<https://www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion/>> accessed 15 August 2023.

of the EU's lucrative status among Russian citizens, not excluding the country's elite with valuable assets in the EU Member States.⁶

However, there are signs that the Union is no longer satisfied with its role being limited exclusively to economic leverage. On 21 March 2022, the European Council approved a plan of action, known as the Strategic Compass, for strengthening the EU's security and defence policy by 2030.⁷ A common plan for security and defence had already been in progress before the Russian attack on Ukraine, yet developments in Ukraine were likely to expedite the consensus on the necessity for a document, the Strategic Compass, which clearly sets out the priorities of the Union regarding common security.⁸

The Strategic Compass relies on four main branches in which the EU Member States, through a Council decision, are committed to work together in order to develop common cooperation within the security and defence policy; these collective headlines include Act, Secure, Invest, and Partner.⁹ As the action plan stretches to a wide array of policies regarding security, it is interesting to examine to what extent it portrays the EU's future as a provider of common territorial defence and military alliance.

In my opinion, a fruitful way to understand the EU's possible future ambitions is how it defines its relation to NATO and whether the Security Compass provides for any novel approaches as to how the EU–NATO relationship could be further coordinated. On the other hand, concrete goals expressed by the EU may reveal the direction in which the EU is heading regarding its common defence capabilities.

According to the Strategic Compass, the EU is still firm to state that its capabilities are “complementary to NATO, which remains the foundation of collective defence for its members”.¹⁰ This remains loyal to the wording of Article 42(7) TEU which stresses that all such commitments

6 Council of the European Union, 'Council adopts full suspension of visa facilitation with Russia' (Press Release, 9 September 2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/09/09/council-adopts-full-suspension-of-visa-facilitation-with-russia/>> accessed 15 August 2023.

7 Council of the European Union, 'A Strategic Compass for Security and Defence - For a European Union that protects its citizens, values and interests and contributes to international peace and security' (Outcome of Proceedings, 21 March 2022) <<https://data.consilium.europa.eu/doc/document/ST-7371-2022-INIT/en/pdf>> accessed 15 August 2023

8 Council of the European Union, 'A Strategic Compass for a stronger EU security and defence in the next decade' (Press release, 21 March 2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/03/21/a-strategic-compass-for-a-stronger-eu-security-and-defence-in-the-next-decade/>> accessed 15 August 2023.

9 See Strategic Compass; European External Action Service, 'A Strategic Compass for Security and Defence for a European Union that Protects its Citizens, Values and Interests and Contributes to International Peace and Security' (Official text, 21 March 2022) <https://www.eeas.europa.eu/sites/default/files/documents/strategic_compass_en3_web.pdf> accessed 15 August 2023 [3] [4].

10 Ibid 2.

remain consistent with commitments under the North Atlantic Treaty Organization. However, the Strategic Compass still acknowledges that Article 42(7) TEU needs to be filled with more content as “the more hostile security environment requires us to make a quantum leap forward and increase our capacity and willingness to act, strengthen our resilience and ensure solidarity and mutual assistance”.¹¹

Judging by the Strategic Compass document, the European Union does not seem very willing to duplicate NATO’s competence when it comes to territorial defence in Europe; unlike tools responding to crisis operations outside Europe¹², the EU did not at this stage propose capabilities which clearly steer the Union’s direction towards a military alliance. However, more recent documents reveal that a process of enhancing the EU’s defence capabilities is on the slow but steady move. The Annual Progress Report on the Implementation of the Strategic Compass for Security and Defence from March 2023 lists a set of programs whose aim is to strengthen existing and build new institutions within the Union’s defence mechanisms. These include financial support for the Union’s defence capabilities development through the European Defence Fund which provided support to research and development projects with almost 1.2 billion euros in 2022.¹³ In addition, the Union’s Member States which are also parties to the Permanent Structured Cooperation mechanism are set to introduce a significant set of new collaborative projects during this year.¹⁴

As the High Representative Josep Borrell noted at his foreword for the Annual Progress Report, the EU’s novel strategy reckons that work for the EU’s own security, the security of its partners as well as international peace and security are “inextricably linked”.¹⁵ While this portrayal of the Union’s actions may be well-motivated in order to highlight the holistic approach of the Union towards security, it does not clearly state whether or not the EU’s ambition is to become a military alliance on the basis of Article 42(7) TEU. This may be a conscious decision, though; as the EU is still at the beginning of the process of determining the degree to which, and whether at all, it should become a military alliance, underlining that certain projects clearly have a self-defence dimension would come across as binding and create needless tension with regards to the Member States’ commitments within the North Atlantic Treaty. Ewers-Peters has illustrated this disagreement between Member States by noting how France has consistently favoured defence initiatives within the EU over NATO capabilities, thus reinforcing the “sceptical and cautious approach” which

11 Ibid 2.

12 E.g., practical modalities for implementing Article 44 and EU Rapid Deployment Capacity.

13 European External Action Service, ‘Annual Progress Report on the Implementation of the Strategic Compass for Security and Defence: Report of the High Representative of the Union for Foreign Affairs and Security Policy to the Council’ (Report, March 2023) <https://www.eeas.europa.eu/sites/default/files/documents/2023/StrategicCompass_1stYear_Report.pdf> accessed 15 August 2023 [16].

14 Ibid 16.

15 Ibid 5.

sometimes may seem to characterise EU–NATO relations.¹⁶ On the other hand, the Baltic States have been driving forces in fostering inter-organisational cooperation; the recognised need for both US security guarantees as well as the EU’s “comprehensive toolbox” together, in their opinion, form a grounded motivation to enhance cooperation between the Union and NATO.¹⁷ Despite a certain degree of ambiguity in written form regarding the EU’s ambition to become a military bloc on the basis of Article 42(7) TEU, it is clear that the Union’s current projects are steering it to a direction where the Union becomes, as it likely wishes, a more credible actor to identify as so.

3. FOCUS ON MILITARY SECURITY AND THE COMPETENCE TO ACT IN THE FIELD OF COLLECTIVE DEFENCE

In this section, I will focus uniquely on the aspects of military self-defence from the point of view of NATO’s Article 5 of the North Atlantic Treaty as well as Article 42(7) of the Treaty on European Union. The scope of my focus is therefore primarily on the aspects of territorial self-defence, that is to say military response and capabilities against external threats directed at Member States of both organisations in Europe.

3.1 Past and Future of Article 5 and 42(7) TEU – What Are the Possible Points of Overlap?

3.1.1 Wording of Article 42(7) TEU and Article 5 of the North Atlantic Treaty

It seems clear that to some extent, the Member States of the European Union have adopted jurisdiction within a field in which NATO, too, already operates. Article 42(7) TEU is rather clear on the matter: if a Member State is a “victim of armed aggression on its own territory”, the other Member States have an “obligation of aid and assistance by all the means in their power”. While the wording does not explicitly mention military capabilities, the broad definition of the obligation indicates that such actions should not be excluded.¹⁸ A respective clause in the North Atlantic Treaty seems to be more powerful in its language; instead of only having an obligation of aid and assistance, an armed attack on a Member State’s territory is considered an attack against all members of the Alliance, creating an obligation to collective response which also includes “the use of armed force” if deemed necessary.

16 Nele Marianne Ewers-Peters, *Understanding EU-NATO Cooperation: How Member-States Matter* (Routledge 2022) 171.

17 *Ibid* 169–170.

18 Päivi Leino-Sandberg and Hanna Ojanen, ‘Time for Military Integration in the EU?’ (Verfassungsblog, 3 March 2022) <<https://verfassungsblog.de/time-for-military-integration-in-the-eu/>> accessed 15 August 2023.

Some differences occur. While Article 42(7) TEU refers to an “armed aggression” on a Member State’s territory, Article 5 of the North Atlantic Treaty is triggered by an “armed attack” against an Alliance member. However, it should be noted that what reinforces the interpretation that these two clauses refer to a similar kind of external action is that all measures of aid or defence in both clauses are rooted in measures recognised by Article 51 of the UN Charter (UNC). This provision recognises every State’s inherent right of “individual or collective self-defence if an armed attack occurs”.

Therefore, the scope of Article 42(7) TEU as well as Article 5 of the North Atlantic Treaty should be dependent on the meaning of an “armed attack”. Brownlie has noted that the drafters of the UN Charter were likely to write the clause with “conventional attacks” in mind, that is to say those witnessed during the Second World War.¹⁹ Later on, the interpretation of the wording has been under further scrutiny; in the case of *Nicaragua v. United States of America* from 1986, the International Court of Justice (ICJ) ruled that an armed attack must be perpetrated by a State as the concept should not include the “assistance to rebels in the form of the provision of weapons or logistical or other support”.²⁰ Orakhelashvili has interpreted this requirement of a State perpetrator by analysing that what is relevant is whether an armed attack occurs “as State action through its own organs” or “by help across border to rebels who do not form organs of that State”.²¹ This is understandable as even the International Law Commission’s (ILC) authoritative yet not legally binding Articles on State Responsibility require that an essential condition for international responsibility of a State is that “the conduct in question is attributable to the State under international law”.²²

3.1.2 Case Study: What Does 9/11 Tell about NATO’s Commitment to the Wording of Article 5?

*“On the basis of this briefing, it has now been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty [...]”*²³

19 James Crawford and Ian Brownlie, *Brownlie’s Principles of Public International Law* (9th edn, Oxford University Press 2019) 977.

20 *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) International Court of Justice 1986, 195.

21 Alexander Orakhelashvili, *Akehurst’s Modern Introduction to International Law* (8th edn, Routledge 2019) 460.

22 International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* [2001] 38.

23 NATO, ‘Statement by NATO Secretary General, Lord Robertson’ (Speech at NATO HQ, 2 October 2001) <<https://www.nato.int/docu/speech/2001/s011002a.htm>> accessed 15 August 2023.

On 2 October 2001, the then NATO Secretary General George Robertson announced in his statement that Article 5 of the North Atlantic Treaty had been invoked for the first time since the adoption of the Treaty, following terrorist attacks directed against the United States on 11 September in the same year.²⁴ It serves as an important way to understand how NATO has decided to interpret its legal obligations under Article 5. It further serves the goal to thoroughly understand NATO's actions within the field of collective self-defence in relation to the EU.

In fact, the response to 9/11 is the only time that NATO has invoked Article 5 of the North Atlantic Treaty and thus serves as an important precedent as to what actions NATO deems to fall under the scope of Article 5. It is noteworthy that the terrorist attacks of September 2001 were committed by a non-State actor Al Qaeda.²⁵ This raises the question whether NATO complied with its founding Treaty in the first place as the wording of Article 5 seems to suggest that the exercise of individual or collective self-defence is connected to actions "recognised by Article 51 of the Charter of the United Nations". Given the established case law under international law, Orakhelashvili has argued that the understanding that the Article 51 UNC would comprise attacks by non-State actors is "flawed for systemic, policy and evidentiary reasons".²⁶

Despite criticism among international law scholarship, NATO seems to have taken a firm position to include protection from attacks by non-State actors under its umbrella of collective self-defence. This is clearly revealed by NATO's Strategic Concepts which state, for example, that "[t]errorism poses a direct threat to the security of the citizens of NATO countries".²⁷ The mere fact that strategic concepts play a significant role in NATO's policies combined with NATO's past decision to invoke Article 5 due to terrorist attacks indicate that attacks by non-State actors need to be understood as a *de facto* "armed attack" in the eyes of NATO, even if this idea has been rejected by the established interpretation of international law which derives from the ICJ's Nicaragua ruling and later scholarship. NATO remains, above all, a political and military alliance; it follows that NATO's legal competences are inherently intertwined with the political-military dimension of its operations. As such, I argue that a purely legal positivist approach to NATO's competences is not sufficient in order to understand the entire sphere of NATO's competence to act.

24 NATO, 'Invocation of Article 5 confirmed' (Archived article, 2 October 2001) <<https://www.nato.int/docu/update/2001/1001/e1002a.htm#FN1>> accessed 15 August 2023.

25 Michael N. Schmitt, 'The North Atlantic Alliance and Collective Defense at 70: Confession and Response Revisited' (2019) 34 *Emory International Law Review* 105.

26 Orakhelashvili n 5.

27 NATO, 'Active Engagement, Modern Defence: Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organisation adopted by Heads of State and Government in Lisbon' (Strategic Concept, 19 November 2010, updated 1 July 2022) <https://www.nato.int/cps/en/natohq/official_texts_68580.htm> accessed 15 August 2023.

3.1.3 Case Study: What Did Paris Attacks in 2015 and EU's Past Policy Reveal About Article 42(7) TEU?

Interestingly enough, also the European Union's Article 42(7) TEU regarding the Union's common actions for defence has been triggered only once.²⁸ It was invoked by France after a set of systematised terrorist attacks in Paris on 13 November 2015, killing 130 people and injuring several more.²⁹ The invocation of Article 42(7) TEU was reported by the then President of France François Hollande in front of the French Senate, stressing that the perpetrators are not only an enemy of France but of Europe as a whole:

*J'ai demandé au ministre de la Défense de saisir dès demain ses homologues européens au titre de l'article 42-7 du traité de l'Union qui prévoit que lorsqu'un Etat est agressé, tous les Etats membres doivent lui apporter solidarité face à cette agression car l'ennemi n'est pas un ennemi de la France, c'est un ennemi de l'Europe.*³⁰

It is interesting to notice that similarly to Article 5 of the North Atlantic Treaty, the Union's mutual assistance clause was invoked by an act of aggression by a non-State actor; the Islamic State, unrecognised by the international community, claimed to be responsible for the attacks.³¹ By unanimously committing to full aid and support for France³², it seems that all EU Member States affirmed that Article 42(7) TEU is indeed applicable to attacks attributed to non-State actors, too. In this regard, the European Union as an entity of common defence clearly took a step toward the position taken by NATO in the aftermath of the 2001 terrorist attacks. Despite the fact that Article 42(7) is closely linked to Article 51 of the United Nations Charter as the article includes a direct reference to it, the EU seems to have deviated from the current position of international customary law which still firmly bases the right to self-defence to aggressions attributable to recognised State actors. NATO and the EU are thus clearly on the same path regarding the interpretation of their respective defence clauses.

28 Eva Kassoti and Narin Idriz, *The Principle of Solidarity: International and EU Law Perspectives* (T.M.C. Asser Press The Hague 2023) 246.

29 EURACTIV France, 'La France "en guerre" invoque la clause de défense mutuelle de l'UE' (Article by Jorge Valero, 17 November 2015) <<https://www.euractiv.fr/section/l-europe-dans-le-monde/news/la-france-en-guerre-invoque-la-clause-de-defense-mutuelle-de-l-ue/>> accessed 15 August 2023.

30 Le Sénat (France), 'Les messages du Président Hollande devant le Parlement réuni en congrès' (Speech, 16 November 2015) <<https://www.senat.fr/connaitre-le-senat/l-histoire-du-senat/dossiers-d-histoire/article-18-de-la-constitution/les-messages-du-president-hollande-au-parlement.html>> accessed 15 August 2023.

31 Europol, 'European Union Terrorism Situation and Trend Report (TE-SAT) 2016' (Publication, 6 December 2021) <<https://www.europol.europa.eu/publications-events/main-reports/european-union-terrorism-situation-and-trend-report-te-sat-2016#downloads>> accessed 15 August 2023 [6].

32 Carmen-Cristina Cîrlig, 'The EU's mutual assistance clause: First ever activation of Article 42(7) TEU' (Briefing by European Parliamentary Research Service, 27 November 2015) <[https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2015\)572799](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2015)572799)> accessed 15 August 2023 [5].

An important observation is that within the tools available within the Union, France decided to invoke specifically Article 42(7) TEU. Another viable option could have been Article 222 of the Treaty on the Functioning of the European Union (TFEU), the so-called solidarity clause which specifically addresses terrorist attacks. According to Article 222(1) TFEU, “[t]he Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack [...]”. More specifically, Section 2 of the same Article stipulates on the procedure if such attack occurs:

“Should a Member State be the object of a terrorist attack [...], the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.”

It is interesting to discover the reasons behind the French motivation to invoke Article 42(7) TEU instead of Article 222 TFEU. Anne Bakker has argued that invoking Article 42(7) clearly served France’s interests as it enabled a much more flexible approach; unlike Article 222, the more general mutual assistance clause did not have any geographical constraints which enabled France to direct its request of assistance to its operations in the Sahel region in order to relieve the French military resources to be deployed elsewhere.³³ A similar flexibility was secured via Article 42(7) as France was able to handle negotiations for aid bilaterally with other Member States, without the coordination of the Council which is integrated within Article 222 TFEU.³⁴ In other words, it seems that France was able to shape a practice as to how the clause would be interpreted not only in that moment but also in the future.

Another consideration is that in theory, France could have decided to invoke Article 5 of the North Atlantic Treaty; previous example from 2001 showed that Article 5 is deemed to be applicable in cases of terrorist attacks. However, similarly to not invoking Article 222 TFEU, France was likely to regard the matter from the perspective of what is most convenient for them; activating NATO would have involved countries like Turkey and the United States, further complicating the process in a situation where France did not look for a collective response but rather approached EU states in a selective manner for help.³⁵ On the other hand, it is likely that France’s political strategy for foreign and security affairs played a role, too; France has advocated for “ambitious defence partnerships [...] with [...] willing and able European nations” as well as “reinforcing Europe’s strategic autonomy”.³⁶

33 Anne Bakker and others, ‘The EU’s mutual assistance clause’ in Anne Bakker and others (ed), ‘Spearheading European Defence. Employing the Lisbon Treaty for a Stronger CSDP’ (Clingendael Institute 2016) 24.

34 Ibid.

35 Ibid.

36 See France’s Strategic Review of Defence and National Security of 2017, Section 203. Ministère de l’Europe et des Affaires étrangères (France), ‘Revue stratégique de défense et de sécurité nationale’ (Report, 2017) <<https://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/securite-desarmement-et-non-proliferation/l-europe-de-la-defense/>> accessed 15 August 2023.

This push for Europe's own defence seems even more understandable as later on, France has heavily criticised NATO and questioned its commitment to common defence.³⁷

Overall, it seems clear that invoking Article 42(7) played a significant role in reviving the question regarding how the EU should activate and shape its legal mandate to promote its Member States' common defence. There are signs that within the Union, there is motivation to utilise the mandate given by Article 42(7) and explore its largely untapped potential – the courage to activate Article 42(7) TEU in a case of non-State actor aggression seems to be a clear example of this.

3.2 Do EU's Current Ambitions regarding Common Defence Conflict with NATO – and Is the Question Relevant? What Is the Way Forward?

War in Ukraine has proved that when it comes to security on the European continent, both the EU and NATO have a significant role to play in military and defence actions. Despite the fact that NATO has not sent any troops to Ukraine, it has put at least 300,000 of them in high readiness in surrounding NATO countries, thus creating a strong message directed at the aggressor.³⁸ In a similar fashion, EU institutions and sovereign states that belong both to the EU's and NATO's member state pools have provided significant amounts of military aid to Ukraine, thus making both organisations firmly present at war-related headlines. This practical observation leads to a couple of essential questions; are the EU's ambitions regarding common defence and security expanding to such an extent that they are about to conflict with those of NATO? And if so, how should their legal and political relationship be harmonised?

In fact, based on previous observations, I argue that these two questions can be merged together. From a purely legal wording standpoint, it seems that Article 42(7) TEU and NATO's Article 5 can indeed be interpreted to mandate functions which overlap with each other.³⁹ Because of this potential overlap, harmonising their functions and ensuring a working relationship becomes essential. According to Szweczyk, there are at least two key reasons which hinder the operational coordination between the Union and NATO: institutional mandate maximisation and treaty overlap.⁴⁰ Firstly, Szweczyk argues that the natural tendency for any intergovernmental

37 BBC News, 'Nato alliance experiencing brain death, says Macron' (Article, 7 November 2019) <<https://www.bbc.com/news/world-europe-50335257>> accessed 15 August 2023.

38 The Guardian, 'Nato to put 300,000 troops on high alert in response to Russia threat' (Article, 27 June 2022) <<https://www.theguardian.com/world/2022/jun/27/nato-300000-troops-high-alert-russia-threat-ukraine>> accessed 15 August 2023.

39 Ramses A. Wessel and Joris Larik, *EU External Relations Law: Text, Cases and Materials* (Bloomsbury Publishing Plc 2020) 316.

40 Bart M. J. Szweczyk, *Europe's Grand Strategy: Navigating a New World Order* (Palgrave Macmillan 2021) 183.

organisation is to try to maximise its mandate as even representatives of member states to respective institutions tend to view its importance through the lenses of their post.⁴¹ On the other hand, Klabbers has also emphasised the need to look beyond the traditional functionalist view of how international organisations law should be understood; instead satisfying oneself with the thought that international organisations reach their final form as a result of conflict resolution between member states, it is important to understand that also other relevant actors such as the organisations' bureaucracies as well as private persons participate in shaping the international organisation and thus contribute to the power struggle which eventually forms the international organisation as it is.⁴² Szewczyk also identifies the scope and respective hierarchy of Article 42(7) TEU and Article 5 of the North Atlantic Treaty as a possible source of friction.⁴³ Understanding the potential impediments to the EU's and NATO's cooperation allows us to draw our attention to potential solutions.

As such, rather than merely identifying conflicting or at least overlapping competences, it may be more fruitful to address the question of legal competences of the EU and NATO in the field of security policy by considering the following normative perspective: How can the mutual cooperation between these two organisations become as coherent and effective as possible? Thus, the question is not necessarily about who is in exclusive charge of what but about freeing their operational coordination from unnecessary legal impediments. I will attempt to answer these normative questions by identifying the most crucial functions for implementing security policy.

3.2.1 How Should Article 42(7) TEU Be Developed?

3.2.1.1 Concrete Contents of the Mutual Assistance Clause

Article 42(7) TEU has its supporters and opponents within the European Union. For supporters, the EU's very own instrument has provided much needed flexibility in matters of self-defence; France was able to receive tangible aid by invoking the Article in November 2015⁴⁴, and at least before joining NATO in April 2023, Finland had been a consistent proponent of Article 42(7)'s

41 Ibid.

42 Jan Klabbers, 'Beyond Functionalism: International Organizations Law in Context', in Jan Klabbers (ed), *The Cambridge Companion to International Organizations Law* (Cambridge University Press 2022) 20.

43 Ibid.

44 Elie Perot, 'France and Article 42(7) TEU: great expectations' in Bob Deen, Dick Zandee, Adája Stoetman (eds), *Uncharted and uncomfortable in European defence: The EU's mutual assistance clause of Article 42(7)* (Clingendael 2022) 39.

flexible interpretation and advocated for a stronger preparedness of the use of the clause.⁴⁵ The opponents have mostly regarded that the EU's defence clause is insufficient and potentially undermines NATO's security guarantees in the region.⁴⁶

Thus, potential ways forward could include those which include a nod towards both camps within the Union. The Third Joint Declaration on EU–NATO Cooperation on 10 January 2023 seems to provide a good starting point, albeit mostly lacking concrete measures at this point; Section 8 of the Declaration concludes that “NATO remains the foundation of collective defence for its Allies and essential for Euro Atlantic security”, yet that the Parties “recognise the value of a stronger and more capable European defence that [...] is complementary to, and interoperable with NATO”.⁴⁷ Thus, a premise for any subsequent plans should be that it is NATO, and ultimately its nuclear deterrent, that forms a sufficient security guarantee against an aggression or threat, such as Russia. This should dilute the strongest fears that an enhanced European security regime is directly off from NATO's security guarantees in Europe.

At the same time, one should bear in mind that a whole array of potential ways to counter threats exist; it is not just a choice of extremes between inaction and using the nuclear card or even whether troops at the frontline should operate under the EU or NATO flags. Therefore, it matters how international organisations decide to exercise their competence in the realm of security. According to Sven Biscop, NATO could benefit if at least some EU Member States decided to integrate their armed forces through the Permanent Structured Cooperation (PESCO) mechanism; these forces could have the potential to serve alongside NATO operations together with US or other forces, while at the same time creating, if need be, a capability to protect European soil on a standalone basis.⁴⁸ On a more general level, projects under PESCO could serve as a potential tool to provide more content to the possible stretch of capabilities under Article 42(7) TEU; the wording of the article does provide the mandate to a wide variety of projects. Furthermore, Deen, Zandee and Stoetman have called for joint exercises under PESCO to create a more complete picture of the possible defence scenarios in which integrated armed forces could be deployed.⁴⁹

45 Teija Tiilikainen, 'Finland's constructive approach to TEU Article 42(7)' in Bob Deen, Dick Zandee, Adája Stoetman (eds), *Uncharted and uncomfortable in European defence: The EU's mutual assistance clause of Article 42(7)* (Clingendael 2022) 45.

46 Bob Deen, Dick Zandee and Adája Stoetman, *Uncharted and uncomfortable in European defence: The EU's mutual assistance clause of Article 42(7)* (Netherlands Institute of International Relations, Clingendael 2022) 27.

47 NATO, 'Joint Declaration on EU–NATO Cooperation' (Official text, 9 January 2023) <https://www.nato.int/cps/en/natohq/official_texts_210549.htm> accessed 15 August 2023.

48 Sven Biscop, 'EU-NATO Relations: A Long-Term Perspective' (2018) 150 *Nação e Defesa* 91.

49 Bob Deen, Dick Zandee and Adája Stoetman, *Uncharted and uncomfortable in European defence: The EU's mutual assistance clause of Article 42(7)* (Netherlands Institute of International Relations, Clingendael 2022) 37.

3.2.1.2 Procedural Aspects of the Article

Apart from its contents, the procedural mechanisms of Article 42(7) TEU play a crucial role in assessing how “user-friendly” for Member States and thus effective the mutual assistance clause can become in the future. A good example can be derived from France’s decision to trigger the Article due to terrorist attacks of Paris in 2015; while an alternative approach, the solidarity clause of Article 222 TFEU would have required the Council’s strategic role in the Union’s response as well as admitting that a Member State was “clearly overwhelmed” by the crisis⁵⁰ which France found quite repulsive. Article 42(7) TEU provided an intergovernmental approach where France was able to assume leadership in the coordination process.⁵¹ France’s invocation of Article 42(7) created a precedent to the use of the Article as even the Council itself affirmed the following:

“No formal decision or conclusion by the Council will be required to implement article 42(7). The High Representative underlined that this is not a CSDP operation, but an activation of bilateral aid and assistance.”⁵²

It should thus be examined whether the firstly created precedent is a step in the right direction; does the flexibility of Article 42(7) TEU constitute one of its strongest assets? Biscop has criticised this position as he views that flexibility comes with vagueness and argues that realising the full potential of Article 42(7) TEU requires a clarification other than the wording of the article itself.⁵³ Firstly, the author identifies it as problematic that a Member State may trigger the mutual assistance article without a Council Decision and thus without a mutual agreement between Member States even though the activation “will have immediate diplomatic and security consequences for its fellow member states”.⁵⁴ The author also points out that the Article handles matters of war and peace and that the decision to trigger the article cannot therefore be taken lightly; as the question of what constitutes an armed aggression under the Article and international law is likely to involve a grey zone, Biscop argues that such invocations cannot happen informally nor automatically.⁵⁵

However, others have argued that sufficient flexibility of Article 42(7) TEU comes with considerable benefits. Deen, Zandee and Stoetman have argued that the fear that unilateral invocation of Article 42(7) TEU would involve reluctant fellow Member States is unlikely to realise: authors

50 *Council Decision of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause* [2014] OJ L192/53, art 4(1) and 5(1).

51 EURACTIV France, ‘La France “en guerre” invoque la clause de défense mutuelle de l’UE’ (Article by Jorge Valero, 17 November 2015) <<https://www.euractiv.fr/section/l-europe-dans-le-monde/news/la-france-en-guerre-invoque-la-clause-de-defense-mutuelle-de-l-ue/>> accessed 15 August 2023.

52 Council of the European Union, ‘Outcome of the Council Meeting’ (3426th Council meeting, 16 and 17 November 2015) <<https://www.consilium.europa.eu/media/23101/st14120en15.pdf>> accessed 15 August 2023 [6].

53 Sven Biscop, ‘The European Union and Mutual Assistance: More than Defence’ (2016) 51:2 *The International Spectator* 120–121.

54 *Ibid* 121.

55 *Ibid* 121.

submit that “political reality within the EU” most often involves extensive political negotiations and even consultations with the Council before formal invocations so that surprises are unlikely to occur.⁵⁶ Consequently, they argue that the possibility to tailor the response according to the existing political and security situation has allowed the Article to develop and create its own purpose in the first place.⁵⁷

An important observation is that Article 42(7) TEU and Article 5 of the North Atlantic Treaty seem to differ in their invocation procedure. Triggering NATO’s Article 5 requires a collective support within the Alliance as it has deep roots in following the “consensus rule”⁵⁸, whereas the Union’s mutual assistance clause is made by the decision of one Member State to activate it.⁵⁹ Understanding this may be a one way forward in disentangling their mutual relationship. While plenty of attention has been dedicated to debating whether Article 5 or the EU’s mutual assistance clause should come first in their respective hierarchy⁶⁰, it may well be that their differences in procedural activation make them distinct enough to avoid such strict confrontation. It is clear that NATO’s more rigid mechanism of Article 5 remains the most relevant safeguard on the European soil against direct external threats caused by great power politics; such scenarios, including Russia’s armed attack, are likely to be menacing enough to trigger the unanimous support for collective defence. However, this does not mean that there would be no room left for situations which require a uniquely European and flexible approach; Article 42(7) TEU should be seen as a rapid tool for action in scenarios such as hybrid or cyber threats or, as in the example of Paris, terrorist attacks. Furthermore, it seems to me that, firstly, understanding these mutual defence articles’ inherent differences in nature and, secondly, cherishing the value of keeping Article 42(7) TEU a flexible and intergovernmental tool, further advance the long-term project of integrating the EU’s and NATO’s operations in the least duplicating way.

3.3 Conclusions

The aim of this section was to examine to what extent the EU’s and NATO’s legal mandates in collective defence can be seen to overlap with each other, and further discover possible ways to enhance the clarity between their competences in the field. From a purely legal standpoint, it seems that the wording of both Article 42(7) TEU and NATO’s Article 5 do provide a similar playing field. Case studies of how these treaty provisions have been invoked in the past reveal that they

56 Bob Deen, Dick Zandee and Adája Stoetman, *Uncharted and uncomfortable in European defence: The EU’s mutual assistance clause of Article 42(7)* (Netherlands Institute of International Relations, Clingendael 2022) 30.

57 Ibid 35.

58 Leo G. Michel, ‘NATO Decision-Making: The ‘Consensus Rule’ Endures Despite Challenges’ in Sebastian Mayer (ed), *NATO’s Post-Cold War Politics* (Palgrave Macmillan 2014) 107.

59 European Council on Foreign Relations, ‘Article 42.7: An explainer’ (Commentary, 19 November 2015) <https://ecfr.eu/article/commentary_article_427_an_explainer5019/> accessed 15 August 2023.

60 Bart M. J. Szewczyk, *Europe’s Grand Strategy: Navigating a New World Order* (Palgrave Macmillan 2021) 183.

have been interpreted in a way which gives rise to a deduction that the provisions' implementation may indeed overlap depending on the context where they are applied.

However, an important note is that the future of European collective security is largely dependent on how Member States decide to develop their military defence capabilities within the EU. If right policies are made, the EU–NATO relationship does not necessarily have to culminate in the question of a potential clash of competences; rather, the right question becomes how to ensure that the Union's and NATO's capabilities are deployed in the most effective and cooperative way.

Firstly, it becomes crucial that EU Member States start to enhance their common capabilities through mechanisms such as PESCO. It is as important to start practicing possible scenarios of deployment in order to gain a better picture of how the evolving capabilities can be harmonised with those of NATO.

Lastly, I argue that differences in invocation of Article 42(7) TEU and NATO's Article 5 provide for an important way to differentiate between the EU's and NATO's legal competences in the future. The EU should further strengthen a precedent where Article 42(7) TEU is regarded as a rapid and flexible tool for European action, leaving the need for collective deliberation for the decision-making process of NATO-led operations.

4. STRATEGIC AND OPERATIONAL COOPERATION – ARE THE BERLIN PLUS AGREEMENTS WORKING?

In the previous section, I examined potential next steps to pave the way for a working relationship between the EU and NATO through their institutional mandates for common defence. By understanding the true meaning of Article 42(7) TEU and NATO's Article 5, it is possible to evaluate these institutions' fundamental purpose of existence in relation to each other.

However, one quickly notices that only evaluating two articles is not necessarily enough to grasp the entire picture of these two organisations' cooperation. The reason behind this is that matters of security and defence are ultimately carried out in the field and therefore, dimensions of strategic planning and operational leadership emerge as issues of particular importance. Thus, it becomes relevant to delve deeper into EU–NATO relations. I am especially interested in understanding what previous efforts EU and NATO have taken in order to establish rules by which they operate in the field. This includes at least the so-called Berlin Plus agreement concluded between the EU and NATO in 2002.⁶¹ Consequently, I am interested in whether existing frameworks conform to the observations made above in relation to their respective articles for common defence and are thus

61 NATO, 'Berlin Plus agreement' (Archived NATO Document, 21 June 2006) <https://web.archive.org/web/20070817094713/http://www.nato.int/shape/news/2003/shape_eu/se030822a.htm> accessed 15 August 2023.

sufficient to address the expanding field of EU–NATO cooperation. Thus, the scope of this section is to further widen the understanding of the contents that a functional EU–NATO relationship includes and should comprise in the future.

4.1 Berlin Plus – Current Raison d’être of the Berlin Plus Agreement

The Berlin Plus agreement is an umbrella term for a set of various agreements concluded between the EU and NATO by an exchange of letters between the then High Representative for Common Foreign and Security Policy of the EU Javier Solana and NATO’s Secretary-General George Robertson on 17 March 2003.⁶² The general scope of the upcoming agreement was announced in NATO’s press release on 16 December 2002: the aim of the agreement package is to create a strategic partnership between the European Union and NATO in crisis management and conflict prevention.⁶³ As a significant outcome of the agreements, the EU gained access to NATO’s planning and operational capabilities to be used in missions led by the Union.⁶⁴

The core idea of the arrangements included in the Berlin Plus Agreement is that the EU is allowed to benefit from NATO’s capabilities in operations in which the Alliance is not militarily involved.⁶⁵ In addition to the Union’s access to NATO’s planning capabilities in EU-led military operations, the two organisations also contribute to each other’s work by exchanging classified information of intelligence.⁶⁶ According to a former Vice-Chief of Staff of SHAPE, the military headquarters of NATO, a central merit of the Berlin Plus Agreement is that it has prevented unnecessary duplication of capabilities between the EU and NATO.⁶⁷ A visible example of this mutual cooperation is the European Union Military Operation in Bosnia and Herzegovina (EUFOR BiH) which promotes and upholds the Dayton Peace Agreement.⁶⁸

62 Ibid.

63 NATO, ‘EU–NATO Declaration on ESDP’ (NATO Press Release, 16 December 2002) <<https://www.nato.int/docu/pr/2002/p02-142e.htm>> accessed 15 August 2023.

64 Ibid.

65 Olivier Rittmann, ‘Operation Althea and the virtues of the Berlin Plus Agreement’ (NATO Defense College, 25 January 2021) <<https://www.ndc.nato.int/news/news.php?icode=1521>> accessed 15 August 2023 [1].

66 Ibid.

67 Ibid.

68 European External Action Service, ‘About EUFOR’ (Article, 25 April 2023) <<https://euforbih.org/index.php/about-eufor/background>> accessed 15 August 2023.

4.2 Is the Berlin Plus on Shaky Grounds? Questions Related to Its Legitimacy

Given the Berlin Plus agreements' position as one of the few formal instruments governing the cooperation between the European Union and NATO as of today, it is important to examine its significance in current debate regarding where the future of EU–NATO cooperation should be heading.

4.2.1 Question of Marginal Visibility

Firstly, it seems that attention given to the agreements is rather small; one could almost describe its current role as marginal compared to the significant amount of positive publicity and support it received at the time of its adoption.⁶⁹ It is noteworthy that the Berlin Plus package has not appeared in any of the three EU–NATO Joint Declarations published since 2016. The only indirect reference to these agreements and preceding negotiations seems to be included in the 2018 Joint Declaration in a rather generic section where the two organisations commit to “building on the substantial cooperation established more than 15 years ago between NATO and the EU”.⁷⁰

Secondly, an eyebrow-raising element of the Berlin Plus agreements is that their exact wording does not seem to be publicly available in the first place; the agreements are formal decisions made by the North Atlantic Council and are therefore kept classified.⁷¹ The closest that the public has been able to get to the content of the agreements is NATO's press release from the time when the content of the Berlin Plus package had been negotiated.⁷²

69 Martin Reichard, 'Some Legal Issues Concerning the EU–NATO Berlin Plus Agreement' (2004) 73 *Nordic Journal of International Law* 38.

70 NATO, 'Joint Declaration on EU–NATO Cooperation by the President of the European Council, the President of the European Commission, and the Secretary General of the North Atlantic Treaty Organization' (NATO Press Release, 10 July 2018) <https://www.nato.int/cps/en/natohq/official_texts_156626.htm> accessed 15 August 2023. For other years, see e.g., NATO, 'Joint declaration by the President of the European Council, the President of the European Commission, and the Secretary General of the North Atlantic Treaty Organization' (NATO Press Release, 8 July 2016) <https://www.nato.int/cps/en/natohq/official_texts_133163.htm> accessed 15 August 2023 and NATO, 'Joint Declaration on EU–NATO Cooperation by the President of the European Council, the President of the European Commission, and the Secretary General of the North Atlantic Treaty Organization' (NATO Press Release, 9 January 2023) <https://www.nato.int/cps/en/natohq/official_texts_210549.htm> accessed 15 August 2023.

71 Martin Reichard, 'Some Legal Issues Concerning the EU–NATO Berlin Plus Agreement' (2004) 73 *Nordic Journal of International Law* 39.

72 NATO, 'EU–NATO Declaration on ESDP' (NATO Press Release, 16 December 2002) <<https://www.nato.int/docu/pr/2002/p02-142e.htm>> accessed 15 August 2023.

4.2.2 Question of Validity under International Law

These are not the only doubts regarding the Berlin Plus agreements' status. It has been questioned whether the Berlin Plus agreements have any validity under international law in the first place. As noted above, the Berlin Plus agreements were concluded by an exchange of letters between the then EU's High Representative for Foreign Affairs and Security Policy Javier Solana as well as NATO's Secretary-General George Robertson on 17 March 2003. While it has become generally agreed that international organisations have acquired a treaty-making power through established customary international law⁷³, it inherently follows that they must comply with their own constituent rules when concluding such treaties. This position is strengthened by Article 6 of the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (VCLTIO) of 1986 which stipulates that "the capacity of an international organization to conclude treaties is governed by the rules of that organization". Even if the Convention has not yet entered into force, the clause can be seen to reflect a prevailing and long-established opinion as the provisions of the founding rules are the ones that establish the organisation's legal personality in the first place.⁷⁴

In the case of the European Union, Article 24(1) TEU stipulates that matters falling under "common foreign and security policy [...] shall be defined and implemented by the European Council and the Council acting unanimously" except where provided otherwise. The same Article continues by stipulating that the High Representative only has executing power regarding such decisions. The respective articles were in force also by the time of the process of adopting Berlin Plus agreements.⁷⁵ The Council's 'Treaties and Agreements' database reveals that the only bilateral agreement between the EU and NATO in which the EU has followed the procedure as defined in the founding treaties is the Agreement between the European Union and the North Atlantic Treaty Organisation on the Security of Information which entered into force on 14 March 2003.⁷⁶ While the afore-mentioned agreement has been concluded only a couple of days before the exchange of letters for the Berlin Plus package, the leaders of the organisations still seem to have

73 Hungdah Chiu, *The Capacity of International Organizations to Conclude Treaties, and the Special Legal Aspects of the Treaties so Concluded* (Martinus Nijhoff Publishers 1966) 34. Klabbers notes a current situation where international organisations constantly de facto conclude numerous treaties; see Jan Klabbers, *An Introduction to International Organizations Law* (4th edn Cambridge University Press 2022) 268.

74 Neri Sybesma-Knol, 'The New Law of Treaties: The Codification of the Law of Treaties Concluded Between States and International Organization or Between Two or More International Organizations' (1985) 15 *Georgia Journal of International and Comparative Law* 427.

75 Martin Reichard, 'Some Legal Issues Concerning the EU-NATO Berlin Plus Agreement' (2004) 73 *Nordic Journal of International Law* 58.

76 Council of the European Union, 'Treaties and Agreements database' (Documents & Publications, 2023) <<https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/>> accessed 15 August 2023.

decided to deviate from the eligible EU treaty-making procedure in the latter agreement package. Reichard has submitted that the leaders of the EU and NATO had clear political motivations to follow a more unofficial procedure: while the EU had never before exercised external relations in the field of military powers, it was the first time for NATO to decide to systematically provide its capabilities to another international actor.⁷⁷ In light of these uncertainties on both sides, it seems understandable that the EU and NATO aspired to retain as much leeway as possible. At the same time however, it seems inevitable that Berlin Plus agreements cannot be seen to have real binding force under international law. Reichard has described that the Berlin Plus package's true nature seems to be closer to a declaration.⁷⁸

These fundamental characteristics of the Berlin Plus agreements are bound to have implications on how their relevance should be understood in today's context. The original importance of the package should not be underestimated; agreeing on the Berlin Plus was an important milestone in the EU–NATO relations in the sense that it confirmed how important it is for the two organisations to make efforts in finding a common playing field. Negotiations which preceded the signing of the agreements largely repeat the essential questions of their mutual relationship today as well.⁷⁹ At the same time however, it seems that the Berlin Plus has a thick layer of secrecy surrounding it. The fact that it cannot be accessed from public sources does not provide a solid foundation for inter-institutional relations, which are evolving constantly. Two organisations with a strong commitment to the principles of democracy and rule of law should be able to base their relations on foundations which can be subject to external scrutiny. Not least is it a vital element in order to understand how their mutual relationship can be developed in the future.

4.3 Case Study: Operation Althea – Is the Berlin Plus Still Working After All?

Even though it seems that the Berlin Plus agreements are based on somewhat shaky grounds when it comes to their legitimacy under international law, the agreements still form the grounds for some practical cooperation between the EU and NATO. In this section, I wish to examine to what extent the Berlin Plus package has been able to provide a beneficial platform for their joint action.

It seems that there is one prominent case example where Berlin Plus agreements are currently being implemented. The European Union's military operation in Bosnia and Herzegovina (EUFOR or Operation Althea) began its operation on 2 December 2004, after the United Nations Security

77 Martin Reichard, 'Some Legal Issues Concerning the EU–NATO Berlin Plus Agreement' (2004) 73 *Nordic Journal of International Law* 60.

78 *Ibid* 67.

79 See e.g., Madeleine K. Albright, 'The Right Balance Will Secure NATO's Future, *Financial Times*, 7 December 1998' in Maartje Rutten (Ed.), *From St-Malo to Nice. European Defence: Core Documents* (European Union Institute for Security Studies 2001) 11.

Council's Resolution 1575 (2004) authorised EUFOR to become the "legal successor" to the prior NATO-led operation SFOR in the region.⁸⁰ The same resolution states that the operation will be carried out with a special EU–NATO cooperation mechanism:

*"Welcomes the decision of NATO to [...] maintain a presence in Bosnia and Herzegovina through the establishment of a NATO Headquarters in order to continue to assist in implementing the Peace Agreement in conjunction with EUFOR [...] in accordance with the arrangements agreed between NATO and the EU [...] which recognize that the EUFOR will have the main peace stabilization role under the military aspects of the Peace Agreement."*⁸¹

This structure which was communicated to and authorised by the UN Security Council follows the ethos of the Berlin Plus agreements. While NATO continues to provide the EU with planning and other capabilities, the Union carries the main responsibility over the leadership of the operation.⁸² Implementing this in practice creates an organisation chart which requires sufficient mastery of abbreviations: NATO's headquarters in Brussels (SHAPE) acts as the operational headquarters (OQ) of the mission as the planning capabilities are located there. At the same time, a liaison to the European Union is created at every level of NATO's chain of command; the European Union Military Staff within the External Action Service of the EU has established an EU Staff Group at SHAPE and an EU Command Element at JFC Naples which is NATO's military command subordinate to SHAPE.⁸³ Besides the military command structure, political decisions of the mission are made by the EU's Political and Security Committee (PSC) under the supervision of the Council.⁸⁴

Has EU–NATO cooperation successfully carried out its mission in Bosnia and Herzegovina and can it reveal something about the success of the Berlin Plus agreements? On 2 November 2022, the Security Council unanimously decided to extend the mandate of EUFOR's mission in the region "for a further period of 12 months".⁸⁵ Judging by statements made by representatives of Member States of the Security Council, the EUFOR mission has been able to deliver satisfying results. As, inter alia, representatives of the United Kingdom and Bosnia and Herzegovina separately welcomed the renewal of EUFOR's mandate, most statements focused on current affairs such as general

80 United Nations Security Council, Resolution 1575 (22 November 2004) UN Document S/RES/1575 (2004) Section 10.

81 United Nations Security Council, Resolution 1575 (22 November 2004) UN Document S/RES/1575 (2004) Section 11.

82 See e.g., NATO, 'EU–NATO Declaration on ESDP' (NATO Press Release, 16 December 2002) <<https://www.nato.int/docu/pr/2002/p02-142e.htm>> accessed 15 August 2023.

83 Olivier Rittmann, 'Operation Althea and the virtues of the Berlin Plus Agreement' (NATO Defense College, 25 January 2021) <<https://www.ndc.nato.int/news/news.php?icode=1521>> accessed 15 August 2023 [1].

84 European External Action Service, 'About EUFOR' (Article, 25 April 2023) <<https://euforbih.org/index.php/about-eufor/background>> accessed 15 August 2023.

85 United Nations, 'Security Council Renews EUFOR–Althea Mandate in Bosnia and Herzegovina, Unanimously Adopting Resolution 2658 (2022)' (United Nations Press Release, 2 November 2022) <<https://press.un.org/en/2022/sc15094.doc.htm>> accessed 15 August 2023, Section 1.

elections of the country, rather than functioning of the mission itself.⁸⁶ Additionally, Boštjančič Pulko, Muherina and Pejič submit that the mission has been able to successfully maintain safe and secure environment, advance human rights and gender equality as well as promote capacity-building of the Armed Forces of Bosnia and Herzegovina.⁸⁷

Despite the success of the mission itself, there have been arguments according to which the premises on which the Berlin Plus agreements were built on are becoming outdated. Biscop has argued that the European Union's aspiration to achieve strategic autonomy is bound to bring changes to the current structures of the Berlin Plus agreement and initiates two different ways forward. Firstly, Biscop proposes that the EU could establish its own operational headquarters and thus make a fairly great detachment from NATO's functions; secondly, another option proposed by Biscop is to give the EU "direct access to the NATO command structure", meaning that the EU could communicate directly with NATO's operational headquarters such as the one in Naples instead of asking for SHAPE to forward its messages.⁸⁸ An early form of the first option took a step forward in 2017 when the EU established the EU Military Planning and Conduct Capacity (MPCC)⁸⁹. While it could indeed be described as the EU's operational headquarters, it is currently small and only capable of conducting non-executive missions such as training, unlike NATO which has the capacity to manage much bigger operations.⁹⁰

However, Olivier Littimann has criticised any initiative to bring the EU's operations further away from NATO. The Commandant of the NATO Defense College has submitted that detaching the Union's Operation Althea from NATO OHQ is "tantamount to killing the Berlin Plus agreement" as it has been a rare example of showing how the EU-NATO co-operation can be a success in the field.⁹¹ He adds that such a move would risk "giving up what we already have for something less certain, stating that the EU's efforts in the field have so far been "largely statements of intent".⁹² Nicholas Williams has also noted that the Berlin Plus agreements remain the only framework for EU-NATO cooperation during a crisis, which further underscores that it should be deemed unnecessary to destabilise institutions or operations which are already working.⁹³

86 Ibid.

87 Ivana Boštjančič Pulko, Meliha Muherina and Nina Pejič, 'Analysing the Effectiveness of EUFOR Althea Operation in Bosnia and Herzegovina' (2016) 8 *Journal on European Perspectives of the Western Balkans* 88.

88 Sven Biscop, 'EU-NATO Relations: A Long-Term Perspective' (2018) 150 *Nação e Defesa* 90.

89 Olivier Rittimann, 'Operation Althea and the virtues of the Berlin Plus Agreement' (NATO Defense College, 25 January 2021) <<https://www.ndc.nato.int/news/news.php?icode=1521>> accessed 15 August 2023 [3].

90 Sven Biscop, 'EU-NATO Relations: A Long-Term Perspective' (2018) 150 *Nação e Defesa* 89.

91 Olivier Rittimann, 'Operation Althea and the virtues of the Berlin Plus Agreement' (NATO Defense College, 25 January 2021) <<https://www.ndc.nato.int/news/news.php?icode=1521>> accessed 15 August 2023 [4].

92 Ibid.

93 Nicholas Williams, 'NATO-EU Cooperation: Don't Forget Berlin Plus!' (European Leadership Network, 26 March 2018) <<https://www.europeanleadershipnetwork.org/commentary/nato-eu-cooperation-dont-forget-berlin-plus/>> accessed 15 August 2023.

4.4 Conclusions – What Is the Way Forward?

What follows is that the Berlin Plus Agreement seems to respond to the question of EU–NATO cooperation on a highly technical level. While this is important to establish functioning working relations, it seems to lack a meaningful definition of the purpose for cooperation between these two organisations. As the *raison d'être* for EU–NATO relations is changing and evolving rapidly due to the imminent threat against European security posed by Russian aggression in Ukraine, it should be deemed desirable to have a deeper discussion of the grounds for cooperation between the organisations. This would further promote the effort to meaningfully define as well as set respective limits to the EU's and NATO's roles in relation to each other.

The elephant in the room therefore seems to be that the Berlin Plus Agreement is limited to crisis management activities in which the EU and NATO co-operate. While this solution has clearly responded to topical security needs in Europe in early 2000s, it can be questioned whether the agreement package concluded in 2003 is any longer capable of governing the inevitably expanding nature of EU–NATO co-operation. Additional doubts to this are raised by the marginal visibility and even disregard for the Berlin Plus Agreement in today's discussions regarding security governance as well as unavoidable doubts regarding its validity under international law.

Therefore, I argue that the current framework for regulation has become increasingly insufficient to respond to transatlantic security challenges of today and near future. Above all, it seems to me that what is needed is a more ambitious approach for the future co-operation between the European Union and NATO. This would require a thorough revision of the Berlin Plus Agreement as well as a transition from its somewhat narrow scope of crisis management operations. I will discuss this in the last chapter as part of the possible ways to better construct the EU–NATO relations as a whole.

5. THE WAY FORWARD – UPDATED BERLIN PLUS 2.0 FOR 2020S AND BEYOND?

In the two previous chapters, I argued that the Berlin Plus agreement package governing the relations between NATO and the EU has some weaknesses ranging from its outdatedness to its relatively narrow scope. Given that the agreement package nevertheless forms quite a large part of today's existing codified regulation for the EU–NATO cooperation, I wish to dedicate the following chapter to discuss how the existing EU–NATO framework for regulation could be further improved to respond to today's security environment.

5.1 Weaknesses and Some Positive in the Current Regulation

As I have noted before, the EU and NATO possess clear competences when it comes to governing their own actions in the field of security. In common defence, Article 5 of the North Atlantic Treaty as well as Article 42(7) TEU provide a clear framework for common action when the organisation itself is considered as the sole key provider of security. As the Berlin Plus package was initially concluded in order to respond to crisis management operations, it has indeed served its purpose quite well; Operation Althea in Bosnia and Herzegovina is a good example of successful EU–NATO cooperation in the field. Still, the problem which arises is that even the Berlin Plus package’s status in current framework seems quite vague given its marginal visibility and questioned validity under international law.

One should question whether this is enough in today’s reality. Understanding that both organisations share a significant majority of Member States and thus naturally operate within the same territory, living in a vacuum of one’s own regulatory framework should not be deemed a viable option in the long run. As significant providers of security to the same member states, the EU and NATO will need to find ways to enhance their collaboration in the ever-changing field of European security.

Of course, it is promising that the EU and NATO have indeed understood that their collaboration is key to many synergies. Starting from 2016 and following Russia’s annexation of Crimea, the EU and NATO have issued joint declarations in which they have announced their commitment to mutual cooperation and emphasised their support against Russia’s “brutal war”.⁹⁴ However, a closer look at the clauses of the latest joint declaration of 2023 reveals that it is primarily meant to be a symbolic expression of transatlantic unity as most of its content is derived from ready-made statements from NATO’s latest Strategic Concept and the Strategic Compass, the EU’s latest strategy document for international security.⁹⁵

However, a more promising development in EU–NATO relations is that the two organisations have regularly tracked their progress in the most common areas for cooperation. On 6 December 2016 and 5 December 2017, the Presidents of the European Council and the European Commission as

94 NATO, ‘Joint Declaration on EU–NATO Cooperation by the President of the European Council, the President of the European Commission, and the Secretary General of the North Atlantic Treaty Organization’ (NATO Press Release, 9 January 2023) <https://www.nato.int/cps/en/natohq/official_texts_210549.htm> accessed 15 August 2023.

95 Sean Monaghan, Colin Wall, Otto Svendsen and Sissy Martinez, ‘Does the New EU–NATO Joint Declaration Matter?’ (Center for Strategic & International Studies, 13 January 2023) <<https://www.csis.org/analysis/does-new-eu-nato-joint-declaration-matter>> accessed 15 August 2023.

well as the Secretary General of NATO issued two different sets of proposals to activate the EU–NATO cooperation on as concrete a level as possible.⁹⁶ Ranging from mutual political dialogue to common exercises in maritime issues and cybersecurity as well as defence industry and research, the two organisations have successfully created a routine in which they regularly assess the quality of their mutual cooperation in these fields.⁹⁷

While these signs of collaboration are certainly promising and much welcomed, it can be questioned if they are enough. It would seem that while political declarations and progress reports are utile in increasing inter-organisational dialogue between the EU and NATO, they are not able to provide a permanent legal basis for their mutual interaction; further acknowledging that the Berlin Plus package from 2003 has been left to become outdated and unable to respond to the security issues of today, the overview of the framework for EU–NATO co-operation is bound to seem shattered. While political declarations may prove to be a flexible way for responding to ad-hoc matters of security, I argue that EU–NATO relations have become permanent enough and too vital for the European security architecture to be left managed by such instruments alone.

5.2 What Form Should the EU–NATO Regulatory Framework Take?

As such, I see that there are two different pathways forward, and both of them include a revision of the existing regulatory framework. The first option would be to expand the specific Berlin Plus -like arrangements between the EU and NATO institutions to cover other dimensions of security; as the Berlin Plus agreements have proved to be working rather well in the field of crisis management, it should be possible to form similar cooperation frameworks in other fields such as cybersecurity and aspects of common defence as well.

96 For the proposals of 2016, see The European Centre of Excellence for Countering Hybrid Threats, 'Common set of proposals for the implementation of the Joint Declaration by the President of the European Council, the President of the European Commission and the Secretary General of the North Atlantic Treaty Organization' (Official text, 2016) <<https://www.hybridcoe.fi/wp-content/uploads/2017/08/Common-set-of-proposals-for-the-implementation-of-the-Joint-Declaration-2.pdf>> accessed 15 August 2023; for 2017, see Council of the European Union, 'Defence cooperation: Council adopts conclusions on EU–NATO cooperation, endorsing common set of new proposals for further joint work' (Press Release, 5 December 2017) <<https://www.consilium.europa.eu/en/press/press-releases/2017/12/05/defence-cooperation-council-adopts-conclusions-on-eu-nato-cooperation-endorsing-common-set-of-new-proposals-for-further-joint-work/>> accessed 15 August 2023.

97 See e.g., the latest progress report from 2022: Council of the European Union, 'Seventh Progress Report on the Implementation of the Common Set of Proposals Endorsed by EU and NATO Councils on 6 December 2016 and 5 December 2017' (Official text, 20 June 2022) <<https://www.consilium.europa.eu/media/57184/eu-nato-progress-report.pdf>> accessed 15 August 2023.

The other and perhaps even more favourable option for future EU–NATO cooperation would be trying to establish functioning relations between the Union and NATO under a single treaty framework. The codification could be set to be rather general, laying out the general principles for cooperation in all fields in which the EU and NATO may engage in. This approach would still allow a more flexible and present-like approach when it comes to settling the details for collaboration in lower-authority instruments such as different political declarations and memorandums of understanding, while still offering a legally durable basis for such actions. This general treaty should indeed follow similar treaty-making procedures mentioned above in order to make it as authoritative document as possible.

However, both approaches include potential pitfalls which should be addressed. I have criticised the original Berlin Plus package for its little visibility. Made only scarcely available publicly, the agreement package does not in its current form fully address the needs of institutional and legal transparency. Understanding that it is not really a question about security as its contents are largely published in other formats such as press releases⁹⁸, the future ‘Berlin Plus 2.0’ agreements should be treated in a consistent manner compared with any agreements or legal instruments such as the North Atlantic Treaty or, say, trade agreements which the EU has concluded with third countries. That is something that should be expected from any organisation committed to the principles of democracy and rule of law.

Of course, one reason for the bashful presentation of the Berlin Plus agreements has been its questionable status under international law. Indeed, in order for the EU and NATO to obtain a functioning bilateral agreement they need to be able to satisfy its requirements. The historical reasons for opting for “declaration-type” Berlin Plus, rather than following the organisations’ treaty-making powers, were political as it was the first time the EU and NATO involved themselves in such inter-institutional division of powers. Yet there should no longer be room for such hesitation as it is becoming increasingly clear that settling the division of work between the EU and NATO is very well motivated by the current pressure directed at European security. While the EU should follow its established treaty-making procedure in external relations, that is to say the provisions of Article 218 TFEU, NATO Member States should be ready to make an unanimous decision to authorise NATO to conclude an agreement for cooperation. Despite hesitation regarding whether or not NATO has treaty-making capacity, it should be clear that the codified expression of willingness to conclude such agreement should be as emphatic as possible.

98 NATO, ‘EU–NATO Declaration on ESDP’ (NATO Press Release, 16 December 2002) <<https://www.nato.int/docu/pr/2002/p02-142e.htm>> accessed 15 August 2023.

6. CONCLUSIONS

The aim of this paper was to answer the following question: understanding that a significant majority of Member States of the European Union are also members of NATO, how should the two organisations' inter-institutional relationship be understood in terms of competences? Furthermore, I wanted to delve into what could be possible ways to further promote the clarity between the EU's and NATO's legal competences in the field.

Firstly, I examined how Russia's unlawful attack against Ukraine has shaped the EU's approach to its common defence and NATO. Despite a certain degree of ambiguity in written form regarding the EU's ambition to become a military bloc on the basis of Article 42(7) TEU, it is clear that the Union's current projects are steering it to a direction where the Union becomes a more credible actor to identify as so.

My second task was to focus uniquely on the territorial defence aspects of the EU's and NATO's mandates; as this field has become especially relevant due to Russia's unlawful attack against Ukraine, I wanted to shed light on to what extent the EU's mutual defence clause, Article 42(7) TEU and NATO's Article 5 overlap with each other and what could be possible ways to promote the cooperation of these two organisations instead of promoting a situation of rivalry and unnecessary duplications.

In the paper, I deduced that the future of European collective security is largely dependent on how the Member States decide to develop their military defence capabilities within the EU. If right policies are made, the EU–NATO relationship does not necessarily have to culminate in the question of a potential clash of competences; rather, the right question becomes how to ensure that the Union's and NATO's capabilities are deployed in the most effective and cooperative way.

Firstly, it becomes crucial that the EU Member States start to enhance their common capabilities through mechanisms such as PESCO. Equally important is to start practicing possible scenarios of deployment in order to gain a better picture of how the evolving capabilities can be harmonised with those of NATO.

On the other hand, I argue that differences in invocation and application of Article 42(7) TEU and NATO's Article 5 provide for an important way to differentiate between the EU's and NATO's legal competences in the future. The EU should further bolster a precedent where Article 42(7) TEU is viewed as a rapid and flexible mechanism for European initiatives, reserving the requirement of collective deliberation for the decision-making process of NATO-led operations.

My third task was to examine the instruments with which the EU and NATO have strived to govern their mutual relations. I was especially interested in understanding the role of the so-called Berlin Plus package; while this set of agreements was originally concluded in order to arrange the two organisations' cooperation in crisis management, it seems to have played an important part in forming a precedent for regulating the EU–NATO relations today as well.

To me, it seems that the Berlin Plus Agreement responds to the question of EU–NATO cooperation on a highly technical level. While this solution has clearly responded to topical security needs in Europe in early 2000s, it can be questioned whether the agreement package concluded in 2003 is any longer capable of governing the inevitably expanding nature of EU–NATO cooperation. Additional doubts about this are raised by the Berlin Plus Agreement’s marginal visibility in today’s discussions regarding security governance and unavoidable uncertainties regarding its validity under international law. On a more positive note, the Berlin Plus Agreement has still been seemingly successful in organising the EU–NATO relations in crisis management operations such as in Bosnia and Herzegovina.

Therefore, I argued that what is needed is a more ambitious approach for the future cooperation between the European Union and NATO. This would require a thorough revision of the Berlin Plus Agreement as well as a transition from its somewhat narrow scope of crisis management operations.

Hence, I introduced two different pathways forward. Both of them include a revision of the existing regulatory framework. The first option would be to expand the specific Berlin Plus -like arrangements between the EU and NATO institutions to cover other dimensions of security; as the Berlin Plus agreements have proved to be working rather well in the field of crisis management, it should be possible to form similar co-operation frameworks in other fields such as cybersecurity and aspects of common defence as well.

The other and perhaps even more favourable option for future EU–NATO cooperation would be trying to establish functioning relations between the Union and NATO under a single treaty framework. The codification could be set to be rather general, laying out the general principles for cooperation in all fields in which the EU and NATO may engage in. This approach would still allow a more flexible and present-like approach when it comes to settling the details for collaboration in lower-authority instruments such as different political declarations and memorandums of understanding, while still offering a legally durable basis for such actions. This general treaty should indeed follow similar treaty-making procedures mentioned above in order to make it as authoritative document as possible.

However, both approaches include potential pitfalls that should be addressed. I criticised the original Berlin Plus package for its little visibility. Made only scarcely available publicly, the agreement package does not in its current form fully address the needs of institutional and legal transparency. Understanding that it is not really a question about security as its contents are largely published in other formats such as press releases, the future ‘Berlin Plus 2.0’ agreement should be treated in a consistent manner compared with any agreements or legal instruments such as the North Atlantic Treaty or, say, trade agreements which the EU has concluded with third countries. That is something that should be expected from any organisation committed to the principles of democracy and the rule of law. Despite the past historical reasons for obtaining for a “declaration-type” Berlin Plus, the future documents should be concluded by following the established treaty-

making procedure; there should no longer be room for hesitation as it is becoming increasingly clear that settling the division of work between the EU and NATO is very well motivated by the current pressure directed at European security.

Ambitious integration between two international organisations is not an easy task politically. However, given that both organisations largely share the same membership pool and that both have capabilities from which they could draw mutual benefit, I believe that it would prove worthy to take ambitious steps forward in order to put their cooperation on a legally solid foundation. As both organisations are committed to defending European security and liberal democracies in today's volatile geopolitical world, they definitely share a common interest to club together ever more firmly.