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The Challenges of European Union Foreign and Security Policy: Retrospective and Prospective

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Since 1993, there has been an EU foreign policy, confirmed in constitutional form in the Maastricht Treaty on European Union and Final Act (EU Treaty).¹ The first decade, most commentators agree, has proven to be difficult, “painful and problematic,” according to one.² As the twenty-first century progresses, replete with an array of new challenges, the need for a reassessment, and perhaps reinvigoration, of EU foreign and security policy is widely argued. The purpose of this Article is to provide a retrospective of the evolution of the European

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1. TREATY ON EUROPEAN UNION AND FINAL ACT, Feb. 7, 1992, 31 I.L.M. 247 [hereinafter MAASTRICHT TREATY].

2. Roy H. Ginsberg, *Conceptualizing the European Union as an International Actor: Narrowing the Theoretical Capability-Expectations Gap*, 37 J. COMMON MKT. STUD. 429, 431 (1999).

Union's foreign policy so far and a prospective of the challenges which it presently faces.

These challenges are in part constitutional, related to the structure of the European Union itself, and in part practical, related to the European Union's capacity to address the various challenges which it has faced and will continue to face in the near future. Paramount among the ongoing challenges is the European Union's responsibility to aid in the stabilisation of the Balkans—a responsibility that introduces wider questions regarding enlargement and migration. But whilst the settlement of the Balkans and the question of “enlargement” remains a preoccupation, in recent years deeper questions regarding the European Union's defence “capabilities,” its relation with the United States and the countries of North Atlantic Treaty Organization (NATO), and its ability to engage the challenges posed by terrorism and global security have become ever more pressing. More than ever, in terms of its international presence, as Commission President Romano Prodi contends, the new Europe needs “to make our voice heard, to make our actions count.”³

This Article is divided into three Parts. The first Part will be retrospective, examining the first decade of the European Union's Common Foreign and Security Policy (CFSP). It will focus on (1) the establishment of the CFSP in the original EU Treaty of 1992, (2) the immediate political context for its establishment, and (3) the need to address the limitations evidenced by the European Union's inability to respond to successive crises in the Balkans. The second Part will discuss a prospective—a distinctively “European” prospective—concerning the ongoing reforms to the CFSP within the EU Treaty, as well as continuing attempts to resolve the Balkan question. The final Part will then present a global prospective, discussing the kind of challenges which presently face EU foreign and security policy. Such challenges revolve around the related questions of the European Union's relationship with the United States and NATO, as well as the need to respond to the pervasive security concerns which all Europeans face in the wake of 9/11 and Europe's own “epiphany of fear,” the Madrid bombings of March 11, 2004.⁴

3. ROBERT KAGAN, *PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* 65 (2003).

4. The phrase “epiphany of fear” is Timothy Garton Ash's. See TIMOTHY GARTON ASH, *FREE WORLD: WHY A CRISIS OF THE WEST REVEALS THE OPPORTUNITY OF OUR TIME*, at xii (Allen Lane ed., 2004).

I. RETROSPECTIVE

EU foreign policy since 1993 has been defined first by its constitutional status within the Treaty framework, and second by its more prosaic responsibility to engage the various challenges it has faced, most importantly in Southeast Europe.⁵ Both aspects provide the historical context for the first decade of the European Union's foreign and security policy. As we shall see in the next Part, they also describe the immediate European context for its prospective history.

A. *Constitutionalising European Union Foreign Policy*

There have been attempts to establish some kind of common EU foreign or security capability since the 1950s—most notably, in the early days, the European Defence Community and the Western European Union (WEU).⁶ Of more recent significance was the inauguration of a system of European Political Cooperation (EPC) in 1970, later confirmed in the Single European Act (SEA) in 1985.⁷ Its broad aim was to encourage Member State foreign ministers to hold periodic meetings, at which common policies might be drawn up in response to particular events.⁸ However, the innately reactive nature of the EPC was much criticised.⁹ And, above all, no one could furnish a convincing reply to Henry Kissinger's notorious question, "When I want to speak to Europe, whom do I call?"¹⁰

The need to furnish an answer to Kissinger's question lay behind the establishment of an identifiable "Common Foreign and Security Policy" in the 1992 Maastricht Treaty on European Union (EU Treaty), which came into force in 1993,¹¹ and was later revised in the Treaty of

5. See generally Donato F. Navarrete & Rosa María F. Egea, *The Common Foreign and Security Policy of the European EU: A Historical Perspective*, 7 COLUM. J. EUR. L. 41-52 (2001) (discussing the historical evolution of the CFSP).

6. See *id.* at 42; see also Jan Wouters & Frederik Naert, *How Effective Is the European Security Architecture? Lessons from Bosnia and Kosovo*, 50 INT'L & COMP. L.Q. 540, 544-45 (2001) (describing the organisations in the European security state).

7. See Navarrete & Egea, *supra* note 5, at 51 n.68.

8. For a thorough discussion, see Gianni Bonvicini, *Making European Foreign Policy Work*, in THE EUROPEAN UNION BEYOND AMSTERDAM: NEW CONCEPTS OF EUROPEAN INTEGRATION 61, 62-69 (Martin Westlake ed., 1998); Kenneth Glarbo, *Wide-Awake Diplomacy: Reconstructing the Common Foreign and Security Policy of the European Union*, 6 J. EUR. PUB. POL'Y 634, 638-45 (1999); and Michael E. Smith, *Diplomacy by Decree: The Legalization of EU Foreign Policy*, 39 J. COMMON MKT. STUD. 79, 86-89 (2001).

9. See Ramses A. Wessel, *The State of Affairs in EU Security and Defence Policy: The Breakthrough in the Treaty of Nice*, 8 J. CONFLICT & SECURITY L. 265, 270-71 (2003).

10. William Echikson, *Europe's 15-Headed Diplomat Tries to Face the World as One*, CHRISTIAN SCI. MONITOR, Apr. 1, 1997, at 6.

11. MAASTRICHT TREATY, *supra* note 1.

Amsterdam in 1997 and the Treaty of Nice in 2000.¹² Yet, there was a further and more immediate context. As Stanley Hoffmann observed, the experience of the Balkan wars, set alongside the European Union's rather lame response to the Iraqi invasion of Kuwait and its singularly incoherent attempt to respond to genocidal war in Rwanda, rendered the need for a more coherent foreign policy instrument "not only tempting, but necessary."¹³

In prosaic terms, the CFSP replaced the EPC. The Preamble to the new EU Treaty stated that the European Union "[r]esolved to implement a common foreign and security policy" that would reinforce the "European identity and its independence in order to promote peace, security and progress in Europe and in the world."¹⁴ Article 2 EU fleshed out this aspiration, listing amongst the European Union's wider aims, a desire

to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence.¹⁵

The distant aspiration "to a common defence" was to emerge as a matter of particular anxiety.

The provisions of the CFSP are then fleshed out in Title V of the Treaty, which encapsulates articles 11 EU to 28 EU. Article 11 EU presents the mission statement of the Title, stating that, amongst various "objectives," the CFSP is designed to "safeguard the common values" of the Union, "in conformity with the principles of the United Nations Charter," to "strengthen the security of the Union in all ways," to "preserve peace and strengthen international security," and to "promote international cooperation."¹⁶ Member States are urged to "support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity."¹⁷ This sentiment is revisited in article

12. TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C 340) 1 (1997); TREATY OF NICE AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Feb. 26, 2001, O.J. (C 80) 1 (2001) [hereinafter TREATY OF NICE].

13. Stanley Hoffmann, *Towards a Common European Foreign and Security Policy?*, 38 J. COMMON MKT. STUD. 189, 191-92 (2000).

14. CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION, Dec. 24, 2002, O.J. (C 325) 5, pmb1. (2002), available at http://www.europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_325/c_32520021224en00010184.pdf [hereinafter CONSOLIDATED EU TREATY].

15. *Id.* art. 2.

16. *Id.* art. 11(1).

17. *Id.* art. 11(2).

16 EU, which states that Member States “shall inform and consult one another within the Council on any matter of foreign and security policy of general interest.”¹⁸ The presence of the term “shall,” it has been suggested, represents a binding commitment on Member States to act in the spirit of the *acquis communautaire* of the European Union.¹⁹

The role of the Council is paramount. Foreign and security policy is its plaything, and so, in turn, the plaything of the Member States. The entire Title is couched in an unambiguously intergovernmental tone. Article 11 EU concludes with the comment that “[t]he Council shall ensure that these principles are complied with.”²⁰ This tone is reaffirmed in article 13 EU, which states, “The European Council shall define the principles of and general guidelines for the common foreign and security policy, including for matters with defence implications.”²¹ The authority of the Council is again reinforced by article 18 EU, which states, “The Presidency shall represent the Union in matters coming within the common foreign and security policy.”²² In fact, the President is one of what has become known as a “troika” of external representation.²³ Alongside the President, article 18 EU also establishes an office of High Representative.²⁴ The latter has become known, at least colloquially, as “Mr. CFSP.”²⁵ The third representative is the designated Commissioner for External Affairs.²⁶ If Kissinger’s successors wish to speak to Europe today, any one of three might pick up the phone; unfortunately, it is never entirely certain who will.

EU foreign and security policy is thus a matter of intergovernmental “cooperation.” Whilst article 21 EU gestures to the need of the Presidency to “consult” Parliament as appropriate, the competence of the Community’s primary policy-driving body, the Commission, is specifically excluded from the article, and significantly, so is the

18. *Id.* art. 16.

19. *Euro-Glossary: Acquis Communautaire*, BBC NEWS, at http://news.bbc.co.uk/1/hi/in_depth/europe/euro-glossary/1216329.stm (Apr. 30, 2001); Ginsberg, *supra* note 2, at 436 n.3.

20. CONSOLIDATED EU TREATY, *supra* note 14, art. 11(2).

21. *Id.* art. 13(1).

22. *Id.* art. 18(1).

23. *Frequently Asked Questions About the EU: What Is the EU Troika?*, THE EUROPEAN COMMISSION’S DELEGATION TO THE KINGDOM OF CAMBODIA, at <http://www.delkhm.cec.eu.int/en/faq> (last visited Feb. 4, 2005) [hereinafter *What Is the EU Troika?*].

24. CONSOLIDATED EU TREATY, *supra* note 14, art. 18(3).

25. *The European Union: A Guide for Americans: Chapter 7: Europe in the World: Asserting the EU’s Role in the World—CFSP*, European Union in the U.S., at <http://www.eurunion.org/infores/euguide/Chapter7.htm> (last visited Feb. 4, 2005).

26. *What Is the EU Troika?*, *supra* note 23; Pascal Gauttier, *Horizontal Coherence and the External Competences of the European Union*, 10 EUR. L.J. 23, 38 (2004).

jurisdiction of the European Court of Justice (ECJ).²⁷ Moreover, as article 23 EU confirms, not only is the Council the governing institution when it comes to initiating and pursuing EU foreign policy, but the interests of the Member States are further entrenched by the requirement that any decision must be reached unanimously.²⁸ In effect, each Member State can exercise a veto if it invokes “important and stated reasons of national policy.”²⁹ However, since the Nice Treaty, the terms of article 23 EU have been changed so that a Member State that chooses to abstain can “qualify” its abstention so that it does not act as a veto.³⁰

Article 12 EU lists the means by which these objectives might be promoted, including the adoption of “common strategies,” “joint actions,” and “common positions.”³¹ The distinction between these categories, outlined in articles 13 EU, 14 EU, and 15 EU, is not always clear. According to article 13(2) EU, the purpose of “common strategies,” introduced as an alternative instrument in the Amsterdam Treaty in 1997, is to permit the Council to address matters of foreign policy that do not necessarily relate to particular instances or current crises.³² According to article 14 EU, “joint actions,” as the title suggests, tend to be more specific and more proactive,³³ and have included the passage of humanitarian aid to Bosnia³⁴ and the implementation of the Bosnian peace plan,³⁵ as well as various measures to provide economic and political support outside of the European Union in South Africa,³⁶ Palestine,³⁷ and Nigeria.³⁸ Finally, article 15 EU describes “common

27. CONSOLIDATED EU TREATY, *supra* note 14, art. 21.

28. *Id.* art. 23(1).

29. *Id.* art. 23(2).

30. *See generally* Daniel Thym, *Reforming Europe's Common Foreign and Security Policy*, 10 EUR. L.J. 5 (2004) (analysing the agenda of the European Convention); *see also* CONSOLIDATED EU TREATY, *supra* note 14, art. 23(1).

31. CONSOLIDATED EU TREATY, *supra* note 14, art. 12.

32. *See id.* art. 13(2).

33. *See id.* art. 14(1).

34. Council Decision 93/603/CFSP: Concerning the Joint Action Decided on by the Council on the Basis of Article J.3 of the Treaty on European Union on Support for the Convoying of Humanitarian Aid in Bosnia and Herzegovina, 1993 O.J. (L 286) 2.

35. Council Joint Action 95/545/CFSP: Action of 11 December 1995 Adopted by the Council on the Basis of Article J.3 of the Treaty on European Union with Regard to the Participation of the Union in the Implementing Structures of the Peace Plan for Bosnia-Herzegovina, 1995 O.J. (L 309) 2.

36. Council Decision 93/678/CFSP: On a Joint Action Adopted by the Council on the Basis of Article J.3 of the Treaty on European Union Concerning Support for the Transition Towards a Democratic and Multi-Racial South Africa, 1993 O.J. (L 316) 45-47.

37. Council Decision 1997 O.J. (L 187) 3.

38. Council Joint Action 98/735/CFSP: Joint Action of 22 December 1998 Adopted by the Council on the Basis of Article J.3 of the Treaty on European Union in Support of the Democratic Process in Nigeria, 1998 O.J. (L 354) 1.

positions” in terms of matters of “a geographical or thematic nature,” and requires Member States to ensure that their “national policies” conform with the EU common position.³⁹ In practice, the European Union’s positions have tended to be more reactive, and they have included embargos on arms sales to Sudan,⁴⁰ the restriction of trade with Haiti,⁴¹ and a raft of sanctions against the areas of Bosnia-Herzegovina controlled by Bosnian Serb forces.⁴²

Of course, the creation of a common foreign and security policy is one thing. Its structural and operational credibility is quite another. The intervening decade since the inception of the CFSP has proved to be anything but easy. More stringent critics have argued that the CFSP is the “weakest” link in the architecture of the new European Union,⁴³ its aspirations undercut by a “painful” disparity between “promise and delivery.”⁴⁴ We shall examine the question of operational credibility shortly. First, however, it is important to address some of the more pressing structural, constitutional, and jurisprudential concerns.

One of the most strident criticisms of the three-pillar structure of the EU Treaty is that of incoherence.⁴⁵ Article 13 EU confirms that the Council is expressly entrusted with the responsibility to ensure the “unity, consistency and effectiveness of action” of the European Union.⁴⁶ A degree of overlap between the pillars is inevitable, and, as External Relations Commissioner Chris Patten has averred, competences can never be confined to “neatly separated boxes.”⁴⁷ The kind of overlap between the two intergovernmental pillars with regard to issues such as enlargement and immigration will be considered in due course.

39. CONSOLIDATED EU TREATY, *supra* note 14, art. 15.

40. Council Common Position 2004/31/CFSP of 9 January 2004 Concerning the Imposition of an Embargo on Arms, Munitions and Military Equipment in Sudan, 2004 O.J. (L 6) 55.

41. Council Decision 94/315/CFSP: Concerning the Common Position Defined on the Basis of Article 2 of the Treaty on European Union Regarding the Reduction of Economic Relations with Haiti, 1994 O.J. (L 139) 10.

42. Council Regulation 2471/94 of 10 October 1994 Introducing a Further Discontinuation of the Economic and Financial Relations Between the European Community and the Areas of Bosnia-Herzegovina Under the Control of Bosnian Serb Forces, 2001 O.J. (L 266) 1-7.

43. Navarrete & Egea, *supra* note 5, at 41.

44. See Ginsberg, *supra* note 2, at 431.

45. For an overview, see Gauttier, *supra* note 26, at 26-28 (“Taking the Principle of Coherence into Account in the Treaty on European Union”).

46. CONSOLIDATED EU TREATY, *supra* note 14, art. 13(3).

47. Jolyon Howorth, *European Defence and the Changing Politics of the European Union: Hanging Together or Hanging Separately?*, 39 J. COMMON MKT. STUD. 765, 777 (2001).

It is, however, the overlap between the CFSP and the Community that has created the greatest degree of constitutional incoherence.⁴⁸ As Stanley Hoffmann has suggested, the attempt to delineate between the Community's external competences regarding international trade and the European Union's competences regarding international order and security is "anomalous and clumsy."⁴⁹ Both supranational bodies in the Community pillar have found themselves necessarily engaged in foreign and security matters from time to time. Indeed, the Commission has long cherished a role in foreign policy formation. The EU Treaty, however, carefully curtails its potential involvement. Article 27 EU asserts that the Commission "shall be fully associated with the work carried out in the common foreign and security policy field,"⁵⁰ whilst article 14 EU authorizes the Council to ask the Commission to submit proposals for implementing joint actions.⁵¹ Furthermore, article 23(2) EU invests both the Council and the Commission with a shared responsibility regarding the formation of common strategies.⁵² However, in reality, only a handful of such strategies have been adopted to date.⁵³ Interestingly, an enhanced role for the Commission has been outlined in the new Draft Treaty Establishing a Constitution for Europe (Draft Constitution).⁵⁴

Whilst it may not advertise any particular comparable ambition, the ECJ has, of necessity, found itself repeatedly assuming competence to review foreign and security policy in order to protect the interests of the Community pillar.⁵⁵ Although its competence was specifically excluded in article 46 EU,⁵⁶ matters such as security, sanctions overseas, and developmental aid are of common concern to both the European Union and the Community.⁵⁷ Perhaps the most famous examples of the ECJ's assumption of competence were provided by the cases of *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transportation, Energy & Communications* in 1996 and *Centro-Com Srl v. H.M. Treasury &*

48. See Ramses A. Wessel, *The Inside Looking Out: Consistency and Delimitation in EU External Relations*, 37 COMMON MKT. L. REV. 1135, 1152-57 (2000) (discussing overlapping competence).

49. Hoffmann, *supra* note 13, at 190.

50. CONSOLIDATED EU TREATY, *supra* note 14, art. 27.

51. *Id.* art. 14(4).

52. *Id.* art. 23(2).

53. See Gauthier, *supra* note 26, at 37 ("[O]nly three common strategies have been adopted.").

54. DRAFT TREATY ESTABLISHING A CONSTITUTION FOR EUROPE, July 18, 2003, O.J. (C 169) 1 (2003) [hereinafter DRAFT TREATY].

55. See Gauthier, *supra* note 26, at 40.

56. CONSOLIDATED EU TREATY, *supra* note 14, art. 46.

57. Gauthier, *supra* note 26, at 40.

Bank of England in 1998.⁵⁸ In both instances, whilst making relatively uncontroversial judgements regarding the legality of Council regulations adopting UN sanctions, it was striking that the Court was prepared to assume a competence to review the legality in the first place.⁵⁹ The same kind of issue, regarding the legality of sanctions, on this occasion in what was alleged to be an “illegal” war in Kosovo in 1999, was raised in *Royal Olympic Cruises Ltd. v. Council*.⁶⁰

Aside from the jurisdictional incoherence that these cases suggest, there is the wider criticism that the European Union should not be seeking to remove the competence of the ECJ in the first place. Article 6 EU states that all Member States of the European Union adhere to the principle of the rule of law.⁶¹ In this matter at least, the European Union, it seems, does not.⁶² The narrow constitutionalist might observe that, in the Anglo-American tradition, foreign policy has always tended to be a matter of executive fiat; such justification is often trundled out for the extrajudicial detention of those deemed to be a security threat in Guantanamo Bay or London’s Belmarsh prison. But necessity, as the adage goes, makes bad law. In this case, it is an excuse for having no law at all, and it is to be regretted.

B. *The Balkan Crises and the Question of Competences*

The evolution of the European Union’s CFSP during the 1990s has an obvious and tragic context. In 1991, the Prime Minister of Luxembourg and aspiring President of the European Commission, Jacques Poos, visited the Balkans.⁶³ Amidst the spiralling chaos, he merrily proclaimed that “the hour of Europe has dawned.”⁶⁴ It was a statement borne of the exuberance that accompanied the tearing down of the Berlin Wall, the “bewilderment,” as Phillip Bobbit terms it, that

58. Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transp., Energy & Communications*, 1996 E.C.R. I-3953; Case C-124/95, *The Queen, ex parte Centro-Com Srl v. H.M. Treasury & Bank of Eng.*, 1997 E.C.R. I-81.

59. See *Bosphorus*, 1996 E.C.R. I-3953; *Centro-Com*, 1997 E.C.R. I-81.

60. Case T-201/99, *Royal Olympic Cruises Ltd. v. Council*, 2000 E.C.R. II-4005.

61. CONSOLIDATED EU TREATY, *supra* note 14, art. 6.

62. See Peter Mair, *Popular Democracy and EU Enlargement*, 17 E. EUR. POL. & SOCIETIES 58, 62-63 (2003); see also Michael Zürn, *Democratic Governance Beyond the Nation-State: The EU and Other International Institutions*, 6 E.J. INT’L REL. 183 (2000).

63. ASH, *supra* note 4, at xii.

64. *Id.* at 211. Poos was unsuccessful in his candidacy for the Presidency of the Commission in 1992. He has repeatedly tried, and failed, to secure the Presidency, most recently in Spring 2004.

accompanied the end of the “Long War” of the twentieth century.⁶⁵ As a hostage to fortune, Poos went on to declare that “if one problem can be solved by the Europeans it is the Yugoslav problem. It is not up to the Americans or anyone else.”⁶⁶

It was a hideous misjudgement. Much of the Balkans were about to descend into a decade of bloodshed and anarchy, whilst the rest of Europe, as William Wallace dryly observed, was left to watch in horror whilst its favourite beach resorts along the Dalmatian coast were bombed into a seeming oblivion.⁶⁷ The optimism projected in Francis Fukuyama’s “end of history” thesis suddenly seemed to be rather misplaced.⁶⁸ Instead, commentators returned to the kind of forebodings articulated by John Mearsheimer, who had more soberly suggested that the end of the Cold War was “likely to increase markedly” the “prospects for major crises and war” along Europe’s eastern marches.⁶⁹

The end of the Cold War vested in Western Europe a particular responsibility for ensuring the peaceful transition to democracy and prosperity in the East.⁷⁰ Sadly, in the Balkans the performance of the European Union and its Member States was variously hesitant, incoherent, humiliating, and provocative—“a defeat for civilization,” in the words of the late Pope John Paul II.⁷¹ The Community dithered. And whilst it dithered, the Member States, all too predictably, set about doing their own thing.⁷² Germany led the way, aligning with the German Slovenes and Croats, doing some tidy business selling the latter some aging fighter aircraft.⁷³ It was Germany which, critically, finally persuaded the European Union to recognise the sovereign integrity of

65. PHILLIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 24, 62 (2002).

66. ASH, *supra* note 4, at 107.

67. William Wallace, *From the Atlantic to the Bug, From the Arctic to the Tigris? The Transformation of the EU and NATO*, 76 INT’L AFF. 475, 480 (2000).

68. BOBBITT, *supra* note 65, at 61. See generally FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

69. John J. Mearsheimer, *Back to the Future: Instability in Europe After the Cold War*, 15 INT’L SECURITY 5, 6 (1990).

70. Ginsberg, *supra* note 2, at 436.

71. BOBBITT, *supra* note 65, at 436-37. The same Pope was conspicuous, if not notorious, in repeatedly urging the European Union to recognise and support Croatia as the rampart of Christianity, *id.*, an observation that echoed the equally notorious assertion by German Chancellor Kohl that the European Union is an exclusively “Christian club.” See also Martin Walker, *Variable Geography: America’s Mental Maps of a Greater Europe*, 76 INT’L AFF. 459, 462 (2000).

72. See Susan L. Woodward, *War: Building States from Nations*, in MASTERS OF THE UNIVERSE? NATO’S BALKAN CRUSADE 227, 249-50 (2000).

73. See MISHA GLENNY, *THE FALL OF YUGOSLAVIA: THE THIRD BALKAN WAR*, 111-12 (1992).

Slovenia and Croatia,⁷⁴ a gesture that made the dismemberment of the Federal Republic of Yugoslavia not only inevitable, but inevitably disordered.⁷⁵

Nothing the European Union or its Member States did seemed to help, and when, belatedly, it got involved, it seemed to make matters worse. Whilst pontificating endlessly about the evils of “ethnic cleansing,” the European Union repeatedly dispatched delegations with the primary purpose of persuading former Yugoslavians to accept the partition of their disintegrating republic into ethnically distinct Serbian, Croatian, and Bosnian statelets.⁷⁶ Worse still perhaps, the declaration of “safe areas,” loudly approved by the European Union, proved to be a tragic pomposity.⁷⁷ Neither the European Union nor the United Nations could ensure anyone’s safety anywhere, as the various atrocities of Tuzla, Bihac, and Srebrenica confirmed.⁷⁸ Timothy Garton Ash put it succinctly: The European Union “fiddled at Maastricht, whilst Sarajevo began to burn.”⁷⁹

And it seemed to be fiddling still when, in late 1998 and 1999, hostilities began to erupt once more, this time in Kosovo.⁸⁰ It has been suggested that at least here the “European Union had a very good war.”⁸¹ But this is true only in the sense that it was prepared to escalate sanctions and freeze the assets of leading Serbian politicians.⁸² It was NATO that did the bombing that finally brought the Kosovo war to an end, as it had the Bosnian war before it.⁸³ It might have been a “European problem,” as President Clinton repeatedly urged and as Jacques Poos had proudly assumed nearly a decade earlier, but Europe was singularly unable to resolve it.⁸⁴ It is often remarked that one of the most notable aspects of the Dayton Accord, which brought an end to the Bosnian war, was its

74. *Id.* at 112.

75. Woodward, *supra* note 72, at 249-50.

76. BOBBITT, *supra* note 65, at 446-47, 455.

77. *Id.* at 459.

78. Hannah R. Garry, *Harmonisation of Asylum Law and Policy Within the European Union: A Human Rights Perspective*, 2 NETH. Q. HUM. RTS. 163, 178 (2002); *see also* Wouters & Naert, *supra* note 6, at 548-49.

79. TIMOTHY GARTON ASH, *HISTORY OF THE PRESENT: ESSAYS, SKETCHES, AND DISPATCHES FROM EUROPE IN THE 1990S*, at 3-27 (1999).

80. Wouters & Naert, *supra* note 6, at 558-59.

81. Steve Peers, *Common Foreign and Security Policy 1999-2000*, 20 Y.B. EUR. L. 531 (2001).

82. *Id.* at 562.

83. *Id.*

84. BOBBITT, *supra* note 65, at 455-59.

geography.⁸⁵ It was America which forced peace in this war, just as it was America, in the guise of NATO, which forced peace in the Kosovo war.⁸⁶

It was in the wake of the Kosovo war that two European Union Member States—the United Kingdom and France—decided that the time had finally come to address the European Union's serial and embarrassing ineptitude. At the hastily convened St. Malo Summit in late 1998, it was agreed that they, as the two Member States who sat as permanent representatives on the United Nations Security Council, should set about establishing the conditions necessary for an "autonomous" EU "defence capability."⁸⁷ The sentiment was carried forward through successive European Union Councils, culminating in the treaty amendments agreed to at the Nice Council in 2000.⁸⁸ At the heart of the various amendments of the Nice Treaty was the pressing question of "capabilities."⁸⁹ If the 1990s had revealed one thing above all others, it was that the possession of a foreign policy and the possession of an effective foreign policy were very different matters.⁹⁰ Although the European Union's NATO Member States had one million troops in uniform, they could not, when pressed, find a mere 40,000 to send to Kosovo.⁹¹

The following year, the 1999 Cologne Council Declaration affirmed that "the Union must have the capacity for autonomous action, backed up by credible military forces, the means to decide to use them, and a readiness to do so, in order to respond to international crises without prejudice to actions by NATO."⁹² It represented, the Declaration concluded, "a new step in the construction of the European Union."⁹³ Whilst affirming that the European Union's primary objective should be

85. See, e.g., Paola Gaeta, *The Dayton Agreements and International Law*, 7 EUR. J. INT'L L. 147, Part V (1996).

86. See Peers, *supra* note 81, at 554-55; BOBBITT, *supra* note 65, at 455-56; Philipp Borinski, *NATO Towards Double Enlargement: The Case of the Balkans*, 24 EUR. INTEGRATION 113, 116 (2002).

87. John Roper, *Keynote Article: Two Cheers for Mr. Blair? The Political Realities of European Defence Co-operations*, 38 J. COMMON MKT. STUD. 7, 11-12 (2000).

88. Howorth, *supra* note 47, at 772-74.

89. *Id.* at 774-77.

90. *Id.* at 773.

91. Philip H. Gordon, *Their Own Army? Making European Defense Work*, 79 FOREIGN AFF. 12, 15-16 (2000).

92. Roper, *supra* note 87, at 12 (quoting European Council Declaration on Strengthening the Common European Policy on Security and Defence, Cologne, 3-4 June, 1999, para. 1).

93. Presidency Conclusions, Cologne European Council, 3 and 4 June 1999, Ann. III: European Council Declaration on Strengthening the Common European Policy on Security and Defence, THE COUNCIL OF THE EUROPEAN UNION, available at http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/ec/kolnen.htm (last visited Feb. 4, 2005).

to implement effectively the various Petersburg “tasks,” already prescribed in article 17 EU, the Declaration further concluded that the time had come for the European Union to establish its own “capacity for autonomous action,” one that was “backed up by credible military forces.”⁹⁴ To this end, the Council also agreed to develop a Common European Policy on Security and Defence (CEPSD) as a complement to the existing CFSP.⁹⁵

At the following Helsinki Council, it was announced that the Member States had agreed to a “Headline Goal,” which required the deployment of between 50,000 and 60,000 troops by 2003.⁹⁶ Such troops, moreover, were to be capable of full deployment with necessary technical support within sixty days and to be operational for one year.⁹⁷ The Goal represented a commitment to make something of the CEPSD, and, as we shall see in due course, it has been revitalised in the form of a new 2010 “Headline Goal,” declared at the Brussels Council in May 2004.⁹⁸ At the Brussels Council in November 2001, it was stressed that the Goal represented a commitment to forging a “true strategic partnership between the EU and NATO.”⁹⁹ The ensuing Feira Council addressed the need to establish a similar competence for policing responsibilities, including the deployment of up to 5000 police officers for crisis management within thirty days.¹⁰⁰ The Helsinki and Feira Councils clearly represented an acknowledgement that existing defence organisations, most obviously the WEU, were no longer effective in dealing with real foreign policy crises.

This process reached its culmination at the Nice Council and Intergovernmental Conference in 2000, at which the entire Treaty was amended, the CFSP included.¹⁰¹ Perhaps most significant was the emergence of an amended article 17 EU, which addresses the potential

94. Roper, *supra* note 87, at 12.

95. See Asteris Pliakos, *The Common European Policy on Security and Defense: Some Considerations Relating to Its Constitutional Identity*, 6 COLUM. J. EUR. L. 275, 276-77 (2000); see also Howorth, *supra* note 47, at 765-89.

96. Presidency Conclusions, Helsinki European Council, 10 and 11 December 1999, para. 27, THE COUNCIL OF THE EUROPEAN UNION, available at http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/ec/ACFA4C.htm (last visited Feb. 4, 2005) [hereinafter Presidency Conclusions, Helsinki European Council].

97. *Id.*

98. Note from Secretariat, Council of the European Union, to Permanent Representative Committee (May 12, 2004) (9231/1/04 REV 1).

99. Excerpt from the Press Release, Council of the European Union, Statement on Improving European Military Capabilities (Nov. 19-20, 2001) (13802/01) (Presse 414-G).

100. Press Release, Council of the European Union, Presidency Conclusions Santa Maria da Feira European Council (June 19-20, 2000) (CONSEIL/00/2000).

101. TREATY OF NICE, *supra* note 12.

for a “common defence policy” and states that the CFSP now includes “all questions relating to the security of the Union, including the progressive framing of a common defence policy, which might lead to a common defence, should the European Council so decide.”¹⁰² It goes on at some length to reaffirm the European Union’s “respect” for existing obligations of Member States to NATO, as well as the “integral” role of the WEU in the “development of the EU.”¹⁰³ The second part of article 17 EU then addresses the kind of defence activities with which the European Union might engage. These activities, described as “humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking,” comprise what are generally known as the Petersburg “tasks.”¹⁰⁴ A European Union Rapid Reaction Force (RRF) was established in order to ensure that these “tasks” could be effected properly.¹⁰⁵ The RRF is also given the rather vague remit of securing the “defence” of the European Union.¹⁰⁶ Of course, the existence of a capacity to “react” does not guarantee any concomitant will to do so.¹⁰⁷

The existence of the RRF necessarily reopens concerns regarding the relationship between any “autonomous” EU capability and NATO,¹⁰⁸ as is evidenced by the Cologne Declaration stressing the European Union’s desire not to “prejudice” the “actions” of NATO.¹⁰⁹ The ensuing Helsinki Council Declaration did likewise, rather tortuously confirming that the desire to establish such a force did not “imply the creation of a European army.”¹¹⁰ The 1990s had readily confirmed the extent to which the security of Europe was effectively dependent on NATO.¹¹¹ Whilst certain European Union Member States, most notably France, might crave greater autonomous military capability, few really believed that

102. CONSOLIDATED EU TREATY, *supra* note 14, art. 17.

103. *Id.*

104. *Id.* For a commentary on the precise meaning of these “tasks,” see Wouters & Naert, *supra* note 6, at 542-43.

105. Argyris G. Passas & Dionyssis G. Dimitrakopoulos, *The Treaty of Nice, the Presumed End of Incrementalism and the Future of the European Union*, in PERSPECTIVES OF THE NICE TREATY AND THE INTERGOVERNMENTAL CONFERENCE IN 2004 30, 38 (Dimitris Mellissas & Ingolf Pernice eds., 2002).

106. See Howorth, *supra* note 47, at 768 n.9.

107. *Id.* at 768-69, 779-82.

108. *Id.* at 780.

109. Roper, *supra* note 87, at 8.

110. Presidency Conclusions, Helsinki European Council, *supra* note 96.

111. Roper, *supra* note 87, at 8.

Europe could somehow dispense with NATO.¹¹² As we shall see, the shape of an EU military capability is yet to be resolved. At present, it is described by a critical tension between the desire for greater autonomy and the countervailing realisation that NATO remains indispensable.¹¹³

Along with article 17 EU and the RRF, amendments to articles 23 EU and 27 EU were also intended to address the problem of political “capabilities.” Article 23 EU was recast so as to allow for “constructive abstentions,” meaning that a Member State could abstain from supporting a Council initiative, whilst declaring that it did not wish the abstention to constitute a veto.¹¹⁴ In similar spirit, article 27a-e EU introduced the principle of “enhanced cooperation,” whereby certain groups of Member States could act together, under certain circumstances, in the CFSP field.¹¹⁵ Whilst such a concession detracts from the very notion of the action being “common,” article 27a-e EU is testimony to a genuine sense of urgency and frustration amongst some Member States at the apparent timidity of others.¹¹⁶ Finally, and perhaps most importantly, article 25 EU established a Political and Security Committee (PSC) to “monitor the international situation in areas covered” by the CFSP and also “the implementation of agreed policies.”¹¹⁷

In practice, after Nice as before, the European Union’s effective “capability” remains limited to the Petersburg “tasks” enunciated in article 17 EU. It is in pursuit of these tasks that the European Union conducts its current policing role in the Balkans.¹¹⁸ In effect, the European Union goes “on the beat,” but only once NATO has made the streets safe enough to venture outside in the first place. The order of priority is plain, both in Treaty text and in practice: Europe’s CEPSD,

112. Borinski, *supra* note 86, at 122. This conclusion is confirmed by Philip Gordon, who comments, “For all their new enthusiasm about an EU defense role, Europeans are not ready, willing, or able to replace the United States.” Gordon, *supra* note 91, at 13.

113. See Mark Webber et al., *The Governance of European Security*, 30 REV. INT’L STUD. 3, 9-11 (2004).

114. CONSOLIDATED EU TREATY, *supra* note 14, art. 23. The possibility of “constructive abstention” has not yet been invoked by any Member State.

115. *Id.* arts. 27a-e.

116. A similar principle, “flexibility,” has been introduced into the Community pillar in the Treaty of Amsterdam in 1997. See Peers, *supra* note 81, at 547-54 (“CFSP Flexibility”).

117. CONSOLIDATED EU TREATY, *supra* note 14, art. 25.

118. See Wessel, *supra* note 9, at 277-79 (“Thus, EU security and defence issues were approached with this institutional triangle in mind and both the EU Treaty and a number of WEU and NATO statements have closely tied the security policies of the three organizations together.”); Panos Koutrakos, *Constitutional Idiosyncrasies and Political Realities: The Emerging Security and Defense Policy of the European Union*, 10 COLUM. J. EUR. L. 69, 87-89 (2003) (“[T]he emerging policy is confined to the Petersburg tasks.”); Alphonse F. LaPorta, *Rationalization of NATO Forces in the Balkans*, 27 FLETCHER F. WORLD AFF. 271, 272 (2003) (“NATO has worked in close concert with . . . the EU, the EU Monitoring Mission . . . Council of Europe.”).

and in turn its satellite policing missions, will only come into effect if NATO is satisfied that it is not, or no longer, needed.¹¹⁹ America “makes the dinner,” as the popular metaphor goes, and Europe “does the dishes.”¹²⁰

II. THE EUROPEAN PROSPECTIVE

Of course, it is never easy to distinguish retrospective from prospective, past and present from future. As intimated earlier, the challenges which have faced EU foreign and security policy thus far are pretty much those that face it in the future. In his recent policy document, *A Secure Europe in a Better World*, the European Union’s High Representative Javier Solana admits that there still remains much to do.¹²¹ The European Union must, he urges, “be more active, more coherent and more capable.”¹²² Such a declaration has both a European and a global dimension. In Part III of this Article, we will address this latter dimension, particularly the prospective state of EU-U.S. relations, as well as the immediate security challenges post 9/11. In this Part, however, we will concentrate on the more obviously European challenges: the putative reconstitutionalising of the CFSP, and the continuing agony that is the Balkans.

A. *The Balkans Again: Enlarging the Context*

The history of EU foreign and security policy can be written, as we have already noted, largely in terms of dealing with apparent threats along its eastern border, what Garton Ash terms the “near abroad.”¹²³ Its immediate future can, with a reasonable degree of confidence, be charted in much the same way. The European Union’s policy in Eastern Europe, and more particularly the Balkans, remains an effective litmus test, and will remain so for the next decade or so. As Solana admits, the entire “credibility of our foreign policy depends on the consolidation of our

119. This conclusion is widely accepted. See Brian Crowe, *A Common European Foreign Policy After Iraq*, 79 INT’L AFF. 533, 540 (2003).

120. Susan Penksa & Warren L. Mason, *EU Security Cooperation and the Transatlantic Relationship*, 38 COOPERATION & CONFLICT: J. NORDIC INT’L STUD. ASS’N 255, 256 (2003).

121. Javier Solana, *A Secure Europe in a Better World: European Security Strategy*, (Dec. 12, 2003) 2, 12, THE COUNCIL OF THE EUROPEAN UNION, at http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/reports/78367.pdf [hereinafter *European Security Strategy*].

122. *Id.* at 12.

123. ASH, *supra* note 4, at 217. For the same conclusion, see Penksa & Mason, *supra* note 120, at 257-60.

achievements” in the Balkans.¹²⁴ The stakes are similarly recognised by Commission President Prodi. The European Union, he admits, faces a “credibility” problem in Southeast Europe, and it will be the resolution of this problem that will define the future of EU foreign and security policy.¹²⁵ It is a problem, as he further admits, born of a decade or more of incoherence and humiliation, a singular failure, in prosaic terms, to prevent the slaughter of a quarter of a million Europeans.¹²⁶

There is a further, intimately related, context here—that of enlargement. As the current wave of enlargement is completed—a process that includes the admission of a number of former Warsaw Pact states—the foundations for the next anticipated stage of enlargement, projected for around 2010-2012, are being put in place.¹²⁷ This stage, it is generally thought, will include Bulgaria and Romania and, with varying degrees of speculation, Croatia, Macedonia, Bosnia, and Serbia.¹²⁸ In a recent speech, European Union High Representative Javier Solana acknowledged that the accession of states such as Bosnia to the European Union will represent the next stage in the evolution of the “European era.”¹²⁹

Faced with fresh challenges, the European Union, as Robert Cooper observes, has always “enlarged the context.”¹³⁰ The observation is acute and very obviously pertinent with regard to the geographical enlargement of the European Union itself. Enlargement, as Solana urges, is itself a

124. *European Security Strategy*, *supra* note 121, at 8. A similar conclusion is posited by Robert Cooper. See ROBERT COOPER, *THE BREAKING OF NATIONS: ORDER AND CHAOS IN THE TWENTY-FIRST CENTURY* 147 (2003).

125. Romano Prodi, President of the European Commission 2000-2005, *Shaping the New Europe*, Address to the European Parliament, Strasbourg (Feb. 15, 2000), *available at* http://europa.eu.int/comm/external_relations/news/2000/02_00/speech_00_41.htm.

126. See *id.* For a similar conclusion, see also Morton Abramowitz & Heather Hurlbert, *Can the EU Hack the Balkans?: A Proving Ground for Brussels*, 81 *FOREIGN AFF.* 2, 5, 6 (2002) (suggesting that “the EU suffers from a generalized lack of respect across the region”).

127. Press Release, Statement of President Prodi on Enlargement and Institutional Changes, (Mar. 16, 2004) IP/04/576, *available at* http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/04/61&format=HTML+aged=0+language=en+guiLanguage=en; ENLARGEMENT WKLY. NEWSL., Dec. 21, 2004, at http://europa.eu.int/comm/enlargement/docs/newsletter/weekly_211204.htm [hereinafter ENLARGEMENT WKLY. NEWSL.]; see also Antonio Missiroli, *EU Enlargement and CFSP/ESDP*, 25 *EUR. INTEGRATION* 1, 9-11 (2003).

128. ENLARGEMENT WKLY. NEWSL., *supra* note 127. Croatia is the furthest advanced in terms of satisfying the Copenhagen criteria for accession. *Id.* The Macedonian case will encounter historical opposition from Greece, and both Bosnian and Serbian hopes seem to be some distance away. See Carl Bildt, *A Second Chance in the Balkans*, 80 *FOREIGN AFF.* 148, 156-58 (2001).

129. Javier Solana, EU High Representative for the Common Foreign and Security Policy, *A European Era* (July 2, 2004), THE COUNCIL OF THE EUROPEAN UNION, *at* <http://ue.eu.int/ueDocs/cms.Data/docs/pressdata/EN/articles/79030.pdf>.

130. COOPER, *supra* note 124, at 138-51.

policy process designed to reinforce European security.¹³¹ “Successive enlargements,” he proclaims, “are making a reality of the vision of a united and peaceful continent.”¹³² Cooper vouches the same conclusion, opining that it is “only in the context of a wider vision” that “a permanent peace can be assured.”¹³³ This may well be so. But at the same time security can become a paranoia, and popular anxieties regarding the threat of the “other” describe the darker context of enlargement.¹³⁴

Of course, it is not merely a question of EU enlargement. Enlargement of NATO is just as striking, and just as important. Many of the countries that have sought admission to the European Union, and those that continue to do so, are the same as those who have sought admission to NATO. This process of “double-hatted” enlargement has itself been welcomed as an example of a complementary strategy for providing political, economic, and military security.¹³⁵ But it is the European Union that sets the more stringent political and legal conditions for entry. It is for this reason that the ability of the European Union to promote the principles of democracy and the rule of law in the aspirant Member States, in accordance with the “conditionality” criteria established at the Copenhagen Summit in 1993, will be so important.¹³⁶ The criteria, which later found constitutional authority in articles 6 EU and 7 EU, require these aspirant states to provide evidence of the “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for minorities.”¹³⁷

Membership in NATO might lend Eastern European states a greater measure of security, but it is membership in the European Union that will make them stable in terms of governance, democratic, and prosperous—or at least a little more so. As the Polish philosopher Marek Cichocki has said of his own country’s experience, whilst accession may not resolve deep-rooted political “pathologies,” particularly those that attach to the idea of executive governance, it does “strengthen the stability of the state” as well as reinforce the priority of democratic forms of

131. Solana, *supra* note 129.

132. *European Security Strategy*, *supra* note 121, at 1.

133. COOPER, *supra* note 124, at 146.

134. See Penksa & Mason, *supra* note 120, at 259.

135. See Missiroli, *supra* note 127, at 6; see also Webber et al., *supra* note 113, at 22.

136. Presidency Conclusions, Copenhagen European Council, 21 and 22 June 1993 (SN 190/93), available at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf.

137. *Id.*

governance.¹³⁸ Rightly or wrongly, as Wojciech Sadurski has commented, whilst people who lived in the Soviet shadow might have developed a deep distrust of their “own state” they appear to retain a “quasi-mythical trust in ‘Brussels.’”¹³⁹ In this context, Brussels’s role in the Balkans assumes even greater import. As Prodi acknowledges, it will ultimately describe the “acid test” of the CFSP’s credibility as a tool, not just for countering security threats, but for promoting liberal values of “good governance.”¹⁴⁰

According to Prodi, the “noble task of reuniting Europe” is carried along with the “tide of history.”¹⁴¹ The purely humanitarian case is unarguable. In simple terms, whilst Western Europe is vastly wealthy, Eastern Europe is generally impoverished, a fact which caused no small concern in the decade prior to the present “fourth wave” of enlargement in 2004 to 2005.¹⁴² For this reason prominent intellectuals such as Jürgen Habermas and Jacques Derrida have been quick to recast the “credibility” challenge.¹⁴³ The need to fully integrate the various “peoples” of Europe, Habermas recognises, is the primary duty of the new Europe.¹⁴⁴ The European Union was not designed so that the wealthier Western European Member States could draw their wagons around themselves and their chauvinism of prosperity.¹⁴⁵ The way in which the European Union treats those who aspire to be part of it will indeed be a weather-vane of its sense of “humanity.”¹⁴⁶ Derrida has taken the same line to a still more radical conclusion. The European Union’s treatment of those who seek entry and succour will be a true test of whether it has really attained those principles of “cosmopolitan virtue” that Immanuel Kant originally and famously held were definitive of an “enlightened” Europe.¹⁴⁷

138. Wojciech Sadurski, *Accession’s Democracy Divided: The Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe*, 10. EUR. L.J. 371, 372 (2004).

139. *Id.* at 374.

140. Prodi, *supra* note 125.

141. Stephen White et al., *Enlargement and the New Outsiders*, 40 J. COMMON MKT. STUD. 135, 136 (2002).

142. See generally Eneko Landaburu, *The Fifth Enlargement of the European Union: The Power of Example*, 26 FORDHAM INT’L L.J. 1 (2002).

143. Jürgen Habermas, *Citizenship and National Identity Reminder*, in THE CONDITION OF CITIZENSHIP 20 (Bart van Steenburgen ed., 1994); see JACQUES DERRIDA, SPECTERS OF MARX 4-5, 45-46, 59-61, 135-37, 147-58 (1994).

144. Habermas, *supra* note 143, at 28-32.

145. *Id.*

146. *Id.*

147. Giovanna Borradori, *Deconstructing Terrorism*, in, PHILOSOPHY IN A TIME OF TERROR: DIALOGUES WITH JÜRGEN HABERMAS AND JACQUES DERRIDA 123-26 (2003).

Along with the “credibility” of the enlargement project comes the seemingly inevitable anxiety regarding refugees and immigration. This is, as noted above, the darker context of enlargement. The logic of expansion and inclusion is always compromised by a countervailing “logic of exclusion.”¹⁴⁸ The free movement of persons has, of course, always represented something of a semiotic for the “new” Europe. But it is the free movement of some persons that is favoured, not all. Significantly, alongside the aspiration to “assert an identity on the international scene” found in article 2 EU and the intention to implement “a common foreign and security policy,” can be found a second distinctive aspiration: “to maintain and develop the European Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.”¹⁴⁹ This collateral aspiration reinforced the sense that internal and external “security” could not, in practice at least, be conveniently distinguished. The treatment of those without and the security of those within are part of the same overarching question. As John Roper concludes, “much of current European foreign policy is driven less by humanitarian motives than by an aversion to refugees.”¹⁵⁰

For this reason the European Union is inordinately concerned about who can enter and who cannot. In practice, the pillar on “Justice and Home Affairs,” as it was originally termed in 1992, was devoted to controlling the movement of internal migrants, particularly those who originated from “third countries.”¹⁵¹ Whilst a number of asylum and immigration provisions were transferred under article 61 of the Amsterdam Treaty into the Community pillar, primarily in order to render them compatible with the provisions of the European Convention on Human Rights, the sense of anxiety regarding immigration and immigration policy remains tangible.

If the European Union has proved to be ever more wary of permitting unrestricted movement within its boundaries, it has become positively paranoid about movement across them. In 1980, sixty-five

148. Theodora Kostakopoulou, *The ‘Protective Union’: Change and Continuity in Migration Law and Policy in Post-Amsterdam Europe*, 38 J. COMMON MKT. STUD. 497, 510 (2000). For a similar conclusion, see Carole Lyons, *The Politics of Alterity and Exclusion in the European Union*, in *EUROPE’S OTHER: EUROPEAN LAW BETWEEN MODERNITY AND POSTMODERNITY* 171 (Peter Fitzpatrick & James Henry Bergeron eds., 1998).

149. CONSOLIDATED EU TREATY, *supra* note 14, art. 2.

150. Roper, *supra* note 87, at 22.

151. MAASTRICHT TREATY, *supra* note 1, art. K.1 (articles K to K.9 of the Treaty on European Union have been replaced by articles 29 EU to 42 EU).

percent of asylum applications to Member States were successful.¹⁵² At present, the ratio has reduced to less than five percent.¹⁵³ The figures are stark; the reality of exclusion is starker still. Back in the early 1990s, at the time of the first Balkan war, the Italian government was encouraged to deport thousands of Albanian refugees in the dead of night, presumably in the hope that no one else would notice.¹⁵⁴ A decade later, when the Kosovo crisis was at its height, the United Nations High Commissioner for Refugees pleaded with the European Union to keep its borders open for fleeing refugees. The borders stayed firmly shut.¹⁵⁵

There is no better example than the refugee problem of the European Union's schizophrenic attitude to matters of foreign policy and internal security. As John Roper has observed, whilst it might display a genuine anxiety to promote "humanitarian motives," the European Union's visceral "aversion to refugees" always militates against its better intentions.¹⁵⁶ The Commission might promote the need to alleviate Third World poverty, but that does not stop it from issuing reports warning that the European Union is threatened by a potential "flood" of immigrants—a claim of dubious veracity, but undoubted recklessness.¹⁵⁷ The European Union, as Timothy Garton Ash put it, is "doing" immigration and cultural integration in the broader sense—"badly."¹⁵⁸ It should do better.

The policy of enlargement is defined by this same schizophrenia, driven in part by idealism, but driven also by a particular paranoia regarding security.¹⁵⁹ The idea of Europe as an "open society," as an essentially inclusive polity, militates against the idea of Europe as a fortress.¹⁶⁰ The fear, certainly amongst some Member States, is that an enlarged Europe will be a less "secure" one, at least in terms of effectively monitoring movement within, as well as movement through,

152. M. Baldwin-Edwards, *Immigration After 1992*, in POLICY AND POLITICS 200 (1991).

153. Garry, *supra* note 78, at 164.

154. Bruno Nascimbene, *The Albanians in Italy: The Right of Asylum Under Attack?*, 3 INT'L J. REFUGEE L. 714, 719-20 (1991).

155. Barbara Marshall, *Closer Integration or Re-nationalization? Recent Trends in EU Migration and Asylum Policies: The Case of Germany*, 22 J. EUR. INTEGRATION 409, 421-24 (2000).

156. Roper, *supra* note 87, at 22.

157. See MICHAEL SPENCER, STATES OF INJUSTICE: A GUIDE TO HUMAN RIGHTS AND CIVIL LIBERTIES IN THE EUROPEAN UNION 109, 110 (1995); see also Jef Huysmans, *The European Union and the Securitization of Migration*, 38 J. COMMON MKT. STUD. 751, 769 (2000).

158. ASH, *supra* note 4, at 251.

159. For a general discussion on European Union enlargement, see Missiroli, *supra* note 127.

160. Catherine Phuong, *Enlarging 'Fortress Europe': EU Accession Asylum, and Immigration in Candidate Countries*, 52 INT'L & COMP. L.Q. 641, 663 (2003).

its porous eastern boundaries.¹⁶¹ The 2010 “Headline Goal” emphasises that the European Union has a particular “commitment” to secure a “ring of well governed countries around Europe.”¹⁶² To this end, the European Union and its Member States have poured hundreds of millions of European Currency Units into strengthening the borders of Poland, the Czech Republic, and Slovakia, creating in reality a new “Iron Curtain.”¹⁶³ The fact that it continues to do so suggests that anxieties have not been assuaged.¹⁶⁴ Back in 1992, the United Nations High Commissioner for Refugees openly questioned whether “Europe will turn its back on those” who seek its succour.¹⁶⁵ Its response, the Commissioner concluded, will determine the “kind of world we bestow on future generations.”¹⁶⁶ The gauntlet was thrown down. It has yet to be taken up.

The Balkans remains a critical, if necessarily weak, link in the “ring” of security around the European Union’s eastern border. For this reason, the European Union has retained a keen interest in its putative stability, maintaining a presence both in the form of a wider Monitoring Mission,¹⁶⁷ which has been ongoing since the outbreak of hostilities a decade ago, as well as the narrower policing missions in Bosnia and Macedonia.¹⁶⁸ These responsibilities were placed at the centre of the Ohrid Framework Agreement, which set particular conditions not just for securing stability in the region, but also possible future accession to the European Union.¹⁶⁹ The European Union’s policing mission in Bosnia (EUPM) remains a matter of considerable controversy and no small friction, with the present European Union Special Representative, Lord Ashdown, most recently issuing stern warnings to Bosnian Serb police and administrators to take more seriously the need to ensure the rule of law

161. See Hoffmann, *supra* note 13, at 191, 196.

162. Presidency Conclusions, Brussels European Council, 25 and 26 March 2004 (rev. version dated May 19, 2004), THE COUNCIL OF THE EUROPEAN UNION, *available at* http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/79696.pdf [hereinafter Presidency Conclusions, Brussels European Council].

163. Phuong, *supra* note 160, at 662-63.

164. Marshall, *supra* note 155, at 416-17.

165. SPENCER, *supra* note 157, at 98.

166. *Id.* at 99.

167. EU Monitoring Mission in Former Yugoslavia (EUMM), THE COUNCIL OF THE EUROPEAN UNION, *available at* http://ue.eu.int/cms3_fo/showPage.asp?id=622+lang=en (last visited Feb. 4, 2005).

168. *EU Launches Crisis Police Force*, BBC NEWS, Sept. 17, 2004, *available at* <http://news.bbc.uk/1/hi/world/europe/3665172.stm>.

169. Ohrid Framework Agreement, Aug. 13, 2001, *available at* http://faq.macedonia.org/politics/framework_agreement.pdf.

in their region.¹⁷⁰ Operation Concordia, the European Union's assumption of military responsibilities in Macedonia, was completed at the end of 2003,¹⁷¹ and immediately replaced by a concomitant policing operation, Operation Proxima.¹⁷²

At one level EU policing has the more immediately prosaic role of trying to maintain peace and security, while at another it is intended to aid the various Balkan "states" in the wider reform of their civic institutions. As Javier Solana and Franco Frattini put it in an article published in a Serbian journal, the European Union's overarching "aim" is to "strengthen rule of law" in the region.¹⁷³ They can, Solana has advised, strengthen the "rule of law" and thus enter the "European family" or "return to the stagnation and isolation of the 1990s."¹⁷⁴ Alongside its ongoing policing responsibilities, the European Union also continues to dangle its carrot, offering the prospect of accession to the European Union, however distant that might be, to those Balkan states that fulfil the Copenhagen criteria for membership.¹⁷⁵ The Serbs have been subjected to the same mantra. As Solana goes on to confirm in a Bosnian publication, the establishment of a genuinely effective rule of law is "one of the preconditions for the development of closer relations with the EU."¹⁷⁶

The European Union's policing missions are complemented by the much vaunted "Stability Pact for Eastern Europe," concluded in 1999 and designed to allow the European Union, under the wider auspices of the Organisation for Security and Co-operation in Europe (OSCE), to assume a responsibility for promoting "economic prosperity" in the region,¹⁷⁷ as well as to provide a mechanism for resolving any future

170. *New Bosnia Envoy Targets Crime*, BBC NEWS, May 27, 2002, available at <http://news.bbc.co.uk/1/hi/world/europe/2010289.stm>. A warning was accompanied by the removal from office of sixty of the most senior Bosnian Serb police officers. The EUPM was established by Joint Action in March 2002. See Council Joint Action 2002/210/CFSP on the European Union Police Mission, 2002 O.J. (L 70) 45.

171. *EU's First Military Mission Ends*, BBC NEWS, Dec. 15, 2003, at <http://news.bbc.co.uk/1/hi/world/europe/3321637.stm>.

172. *EU Approves Macedonia Mission*, BBC NEWS, Sept. 29, 2003, available at <http://news.bbc.co.uk/1/hi/world/europe/3144932.stm>. Proxima was established by Joint Action in September 2003. See Council Joint Action 2003/681/CFSP, 2003 O.J. (L 249) 66.

173. Franco Frattini & Javier Solana, *Choosing Europe*, POLITIKA, Dec. 15, 2003, 1, available at <http://ue.eu.int/uedocs/cmsUpload/78425.pdf>. Frattini is the Italian Minister for Foreign Affairs. *Id.*

174. Javier Solana, *Tackling the European Agenda*, POLITIKA, Dec. 2, 2003, at 1.

175. Interview with Javier Solana, EU High Representative for the Common Foreign and Security Policy, by Sead Numanovic, DNEVNI AVAZ, Mar. 5, 2002.

176. Javier Solana, *The EU After the United Nations' International Police Task Force IPTF: A Good Day for European Integration*, DNEVNI AVAZ, Mar. 1, 2002, at 1.

177. Wouters & Naert, *supra* note 6, at 566.

transborder disputes, together with a measure of protection for the rights of ethnic minorities.¹⁷⁸ The two represent hopefully complementary means by which “stability” in the Balkans can be secured.¹⁷⁹

The importance of securing peace, stability, and political and economic growth in the Balkans cannot be overstated. As we have already noted, the entire “future of a serious European foreign policy” depends upon it. The fate of the Balkans still hangs in the balance.¹⁸⁰ As the United Nations’ special envoy to the Balkans, Carl Bildt, notes, it is the European Union’s particular responsibility to ensure that the causes of “despair and desperation” in the Balkans are overcome by the establishment of democratic institutions of governance, alongside “fundamental economic and social reforms.”¹⁸¹ NATO might have ended the war, but the European Union must secure the peace. This truth is all the more compelling since the events of 9/11, because the United States is now less likely to focus its attention or its resources on events in Southeastern Europe.¹⁸²

It is for this reason that, whilst not denigrating the importance of policing, the overriding need is to make the various peoples of the Balkans feel, not just more settled and more prosperous, but more European too. The European Union, as Bildt maintains, “must assist in establishing not only a firm political framework that would end internal instability, but also a framework for eventual regional and European integration, without which the political conflicts will continue forever.”¹⁸³ As the Member States acknowledged at the Thessaloniki Council in 2003, securing peace in the Balkans must remain the focal point of EU foreign policy for the foreseeable future,¹⁸⁴ and, in the final analysis, membership in “Europe,” no matter how distant an aspiration, is the only likely means of preventing an incessant cycle of ethnic fragmentation.¹⁸⁵ It is sobering to note the conclusions of the Brussels Council in March

178. The Pact provides for three working tables: democratisation, economic reconstruction, and security. *See id.*; *see also* Toby King, *Human Rights in European Foreign Policy: Success or Failure for Post-modern Democracy?*, 10 EUR. J. INT’L L. 313, 326 (1999).

179. Notably the Pact acknowledges that NATO will play an “important role.” Wouters & Naert, *supra* note 6, at 568.

180. Abramowitz & Hulbert, *supra* note 126, at 2.

181. Bildt, *supra* note 128, at 153.

182. Borinski, *supra* note 86, at 133.

183. Bildt, *supra* note 128, at 153. For similar sentiments, *see* Abramowitz & Hulbert, *supra* note 126, at 3-5.

184. Presidency Conclusions, Thessaloniki European Council, 19 and 20 June 2003 (rev. version dated Oct. 1, 2003), THE COUNCIL OF THE EUROPEAN UNION, *available at* http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/76279.pdf [hereinafter Presidency Conclusions, Thessaloniki European Council].

185. *See* Bildt, *supra* note 128, at 155-58.

2004. Recent events in Kosovo during the last twelve months, it reported, represent a “serious setback” for peace in the region.¹⁸⁶

B. Reconstitutionalisation: Foreign and Security Policy in the Draft Constitution

It was at the Thessaloniki Council that the European Union was also presented with a new Draft Constitution.¹⁸⁷ Originally drafted by a convention of constitutional and political experts under the guidance of former French President Giscard d’Estaing,¹⁸⁸ and then the subject of furious politicking at the ensuing Brussels Council, it includes a significant, or at least potentially significant, recasting of present constitutional provisions for the CFSP. It also includes in its Preamble, a desire “to strive for peace, justice, and solidarity throughout the world.”¹⁸⁹ The new Europe has never been short of good intentions.

It is in this vein that the proposed article I-3(4) further declares, “[I]n its relations with the wider world, the Union shall uphold and promote its values and interests,” as well as “contribute to peace, security, the sustainable development of the earth, solidarity and mutual respect among people,”¹⁹⁰ and so on, listing various other desirables, such as the eradication of poverty and the protection of universal human rights.¹⁹¹ Pretty much the same kind of rhetoric is revisited in article III-193(1), in which the European Union undertakes to “develop relations and build partnerships” across the globe in order to promote “the principles which have inspired its own creation.”¹⁹² Intriguingly, article III-193(2) closes with the pointed observation that the European Union will seek to “promote an international system based on stronger multilateral cooperation and good global governance.”¹⁹³ As we shall see in the next Part, this message carries a particular poignancy in the context of apparent transatlantic tensions today.

Proposed reform to the CFSP must, of course, first be set within the broader context of reform of the European Union itself. The immediate context is, of course, that described by enlargement and the need to devise a system of governance that can better serve an ever more disparate, as well as more integrated, Europe. At a more opaque

186. Presidency Conclusions, Brussels European Council, *supra* note 162, at 14.

187. Presidency Conclusions, Thessaloniki European Council, *supra* note 184, at 1.

188. *Id.*

189. DRAFT TREATY, *supra* note 54, pmb1.

190. *Id.* art. I-3.4.

191. *Id.*

192. *Id.* art. III-193.1.

193. *Id.* art. III-193.2.

intellectual level, this context nourishes arguments regarding that “state” of a post-modern Europe. For some, this kind of “state” raises all the “spectres” of Derridean post-modernism, the spectres originally invoked by all the previous attempts to provide Europe with some kind of intellectual and political identity.¹⁹⁴ A less opaque version simply suggests that the new Europe is somehow “beyond” the classical determinants of the Westphalian nation-state.¹⁹⁵ Neil MacCormick has famously termed this a Europe that is “beyond the nation-state.”¹⁹⁶ According to Neil Walker, speaking in the same vein, the new Europe is an essentially “plural” Europe.¹⁹⁷

The Draft Constitution, at least in the eyes of its drafters, is supposed to bring together all the strands of post-modern Europe, and to prescribe a structure of effective governance that can provide a measure of political unity whilst also accommodating an essential plurality. It is supposed to bring to reality the vision prescribed in President Prodi’s famous “Decade of Europe” speech in 2001, in which he declared, “Let us enrich Europe through its great diversity.”¹⁹⁸ “After all, Europe has always been about diverse peoples with varied cultures and religions learning to live together because they share a common destiny.”¹⁹⁹ “In doing so,” he concluded, “we discover shared values, a shared sense of identity and European citizenship.”²⁰⁰

It is not, of course, the first time that Europe’s leaders have articulated such aspirations. But in the context of the putative redrafting of a European “constitution,” Prodi’s speech and his observations carried a particular resonance, one that can be readily perceived in the Draft Constitution presented by the Convention. Article I.1 alludes to the peculiarity of the “Community way,” an allusion that carries the clear implication that the European Union, in pursuing this tradition, intends to establish a constitution and a practice of governance distinctive from that

194. See generally DERRIDA, *supra* note 143. It is this kind of agonistic, indeterminable notion that lies behind the invocation of an “essentially contested” Europe. Zenon Bańkowski & Emiliios Christodoulidis, *The European Union as an Essentially Contested Project*, in *THE EUROPEAN AND ITS ORDER: THE LEGAL THEORY OF EUROPEAN INTEGRATION* 18, 24 (2000).

195. See, e.g., COOPER, *supra* note 124, at 4-6; King, *supra* note 178, at 313-37; Jo Shaw, *Process and Constitutional Discourse in the European Union*, 27 *J.L. Soc’y* 4, 19-24 (2000).

196. Neil MacCormick, *Beyond the Sovereign State*, 56 *MOD. L. REV.* 1, 7, 8 (1993).

197. See generally Neil Walker, *The Idea of Constitutional Pluralism*, 65 *MOD. L. REV.* 317 (2002).

198. Romano Prodi, President of the European Commission, *Poland and Europe: Building on the Past, Shaping the Future*, Speech at Catholic University of Lublin (Poland) (Mar. 9, 2001), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/01/115&format=HTML&aged=0&language=EN&guiLanguage=en>.

199. *Id.*

200. *Id.*

of its Member States.²⁰¹ In fact, and perhaps paradoxically, whilst the dust is still to settle, early prognosis suggests that the proposed Constitution will strengthen the EU “way” at least as much as any Community “way,” reaffirming the power of the Member States in all areas of policy that fall outside the strict remit of the Community, or “market” pillar.²⁰²

With regard to the CFSP itself, the arguments for reform have been pressed ever more strongly since the Amsterdam and Nice Treaties.²⁰³ Whilst commentators have bemoaned the incoherence of the pillar structure and the various collateral problems which afflict the CFSP, there is, as Daniel Thym has suggested, a broader popular perception amongst the European Union’s citizens that it should be playing “a more proactive role in foreign policy.”²⁰⁴ Certainly, the Draft Constitution establishes ambitious goals for EU foreign policy. Article III-193(2) declares that it shall contribute to “safeguard the common values, fundamental interests, security, independence and integrity of the Union.”²⁰⁵ But such grand sentiments do not necessarily translate into any greater measure of democratic or governmental accountability.

And the rest of the Draft Constitution does little to suggest that foreign and security policy, in particular, will remain anything other than the preserve of the Member States. Article I-11(4) put this in its baldest terms: “The Union shall have competence to define and implement a common foreign and security policy, including the framing of a common defence policy.”²⁰⁶ The competence of the European Union, in this instance, is meant to infer the competence of the Member States acting together in the Council. As we shall see shortly, there is a marginally enhanced role for the Commission and an even more marginally enhanced role for the Parliament. But, for all intents and purposes, foreign and security policy remains the preserve of Europe’s nation-states, the epitome of intergovernmental rather than supranational governance.

The distinction between the ordinary “common foreign and security” policy, and the specific “common security and defence” policy (CSDP), outlined in article I-40, is striking.²⁰⁷ It represents both a constitutionalisation of the CEPSD as well an acknowledgement that the

201. DRAFT TREATY, *supra* note 54, art. I.1.

202. See ASH, *supra* note 4, at 213.

203. See Bonvicini, *supra* note 8, at 73.

204. Thym, *supra* note 30, at 6.

205. DRAFT TREATY, *supra* note 54, art. III-193.2.

206. *Id.* art. I-11.4.

207. *Id.* art. I-40.

immediate policy concerns are very much focused on the security aspect of the CFSP. The CSDP “shall be an integral part” of the CFSP, and will facilitate “the progressive framing of a common EU defence policy.”²⁰⁸ Article III-210(1) confirms that the CSDP has a particular responsibility to “contribute to the fight against terrorism,”²⁰⁹ something to which we will return in due course. As ever, of course, article I-40(2) includes the usual caveat that such a defence policy will “respect” existing Member State obligations within NATO.²¹⁰ Notably, article I-40(6) further confirms that Member States “whose military capabilities fulfil higher criteria” and which have already “made more binding commitments” to one another, may operate within a more specific and “structured” system of “cooperation.”²¹¹

With regard to institutional reform and the reform of decision-making procedures, the Draft Constitution makes various proposals. First, with regard to the Council, article I-23(2) suggests that the “General Affairs and External Relations Council,” established in an essentially ad hoc form at the Seville Council in 2002, will be formally enacted and will have an existence that is distinct from the Council itself.²¹² The second proposed reform relates to the practice of unanimity and “qualified” abstention in Council. The idea that the Council might move to some form of qualified majority voting (QMV) in both CFSP and CSDP matters clearly remains too hot a potato, even though the British, the French, and the German governments did, for a brief moment at the beginning of 2003, intimate a preparedness to countenance such a possibility.²¹³ Nothing, however, will now change. The “new” articles I-39(7), III-194(1), and more particularly III-201(1), which preserves the system of constructive abstention, bear a striking resemblance to existing article 23.²¹⁴

Article III-201(1) reaffirms the practice of qualified abstentions, whilst article III-201(3) simply allows for the Council to “decide unanimously” to “act by qualified majority” in specific “cases.”²¹⁵ Article III-201(4) confirms that only decisions “having military and defence implications” will continue to be exempted from any form of

208. *Id.*

209. *Id.* art. III-210.1.

210. *Id.* art. I-40.2.

211. *Id.* art. I-40.6.

212. *Id.* art. I-23.2.

213. See generally Daniel T. Murphy, *Closer or Enhanced Cooperation: Amsterdam or Nice*, 31 GA. J. INT'L & COMP. L. 265 (2003).

214. DRAFT TREATY, *supra* note 54, arts. I-39(7), III-194(1), III-201(1).

215. *Id.* art. III-201.1, III-201.3.

qualified majority voting.²¹⁶ Whilst it is clear that the drafters are reluctant to admit any formal notion of “flexibility” into the sphere of foreign and security policy, the potential for “enhanced cooperation,” as described under article III-325, thus remains.²¹⁷ Of course, as article III-201(2) confirms, the Council must approve such cooperation unanimously.²¹⁸ If just one Member State, say Malta or Slovenia, decides to exercise its veto, then the entire European Union will be prevented from acting on any putative foreign or security policy or initiative. It is not a recipe for a more vigorous or coherent foreign policy capability.

The role of the European Parliament remains obviously subservient. Article III-205(1) provides a right of consultation and a right to “ask questions” of the Council of Ministers. But that is it.²¹⁹ It is not inconceivable that matters such as expenditure and accounting might have been presented for Parliamentary consent, as might the adoption of common strategies. Whilst most Member States adhere to the classical idea that foreign affairs should be a matter of executive, rather than legislative, competence, few totally exclude all related matters of finance and military deployment from the very cognizance of their legislative assemblies.²²⁰ Equally contentious is the proposal to continue the exclusion of all foreign and security provisions from the jurisdiction of the ECJ. Again, it was thought that the drafters might have extended the Court’s jurisdiction so far as to include a competence to adjudge matters of procedural integrity.²²¹ But they have not, and so all the questions of jurisprudential (in)coherence will remain.

Amendment of the Commission’s role in the formalisation of EU foreign and security policy is superficially more notable, though not in any sense that might make it seem more democratic or accountable. Under article III-194(2), the Commission will now share the right to initiate foreign policy, at least insofar as it can, alongside the newly designated European Union Minister for Foreign Affairs, “submit joint proposals.”²²² Article III-230 further proposes the establishment of what will effectively become the European Union’s diplomatic corps,²²³ an

216. *Id.* art. III-201.4.

217. *Id.* art. III-325.

218. *Id.* art. III-201.2.

219. *Id.* art. III-205.1.

220. *See* Thym, *supra* note 30, at 13-14.

221. If only to protect the interests of smaller Member States, excluded from the informal gatherings of heads of state of larger Member States (for example, France, Germany, and the United Kingdom). *See id.* at 15-17.

222. DRAFT TREATY, *supra* note 54, art. III-194.2.

223. *Id.* art. III-230.

External Action Service, which will be drawn not just from the Commission itself but from the Secretariat of the Council and staff seconded from the diplomatic services of the Member States.²²⁴

Perhaps the most striking proposed reform relates to the designation of "Mr. CFSP." The disadvantage of a system of rotating Council presidencies has long attracted criticism, not least in terms of consistent foreign policy representation.²²⁵ In place of the existing "troika" of external representation, article I-27 proposes that there should be a single European Union Minister for Foreign Affairs who shall conduct the European Union's common foreign and security policy.²²⁶ Once again, it represents an attempt to provide a more coherent response to Kissinger's question. The prospective minister will have what is termed a "double-hat," not just serving as the Council's, and thus the European Union's, representative, but also as Vice-President of the Commission.²²⁷ He or she will be appointed by the Council acting on qualified majority voting with the consent of the President of the Commission, which will then be submitted for approval by the European Parliament together with a college of Commissioners.²²⁸

How easy it will be for the same person to function as a representative of both the Council and Commission remains to be seen. Questions also remain regarding the likely relationship between the Foreign Minister and the putative new, and crucially redefined, President of the European Council. Article I-26 of the Draft Constitution proposes a rather different presidency, not just subject to election within Council, but also to be held for a fixed term of two and a half years.²²⁹ The President of the Council is thus likely to feel an enhanced sense of legitimacy, as well as an enhanced sense of responsibility. He or she may feel more inclined to stray into matters of foreign and security policy. Of course, the fact that the election will take place through the new system of revised qualified majority voting might actually detract from any presumed legitimacy. The bigger Member States, in possession of the greater voting ratios, will necessarily enjoy a greater influence in "electing" the president. The revised version of article I-26, following intergovernmental negotiations at the Brussels Council in June 2004, confirmed that both the President of the Council and the European Union

224. *Id.* art. III-197.3.

225. *See* Crowe, *supra* note 119, at 543-44.

226. DRAFT TREATY, *supra* note 54, art. I-27.

227. *Id.*

228. For a substantive commentary on this particular proposal, see Thym, *supra* note 30, at 18-22.

229. DRAFT TREATY, *supra* note 54, art. I-26.

Minister for Foreign Affairs will be subject to a “vote of approval” in Parliament.²³⁰ But votes of disapproval are likely to be few and far between.

Aside from the institutional reforms, certain other proposed measures, essentially rhetorical in nature, have aroused interest. The first is the so-called “loyalty” clause, articulated in articles I-15(2) and III-195(2), which reinvests the same now-dormant statement found in article 11, that “member states shall support the Union’s common foreign and security policy actively and unreservedly.”²³¹ Such a statement is made to sit alongside a series of articles that are clearly designed to provide a broader framework of flexibility in matters of security and defence policy. One such article is the “mutual assistance” clause (article I-40(7)) which allows any Member State to ask for particular help from another Member State or States if it comes under attack.²³² Another is article III-213(1), which reaffirms the possibility of “structured cooperation” between certain Member States with “higher military capability,”²³³ as well as article III-214(1) which advances the notion of “closer cooperation” in the field of defence between those Member States who wish to move more rapidly towards some kind of common military capability.²³⁴ Such measures might be interpreted as either a slight on NATO or, given the reality of NATO’s European presence, an aimless irrelevance. Sadly, the latter thought continues to haunt the whole idea of a common foreign and security policy, every bit as much after the presentation of the Draft Constitution as before.

And there is, of course, one final overriding conclusion. The present Draft Constitution may well be rather different in its future, and potentially final, form. There is certainly sufficient criticism to suggest that it should; “not exactly Philadelphia,” has become a common aside among commentators.²³⁵ At present, various domestic politicians are struggling to devise strategies whereby they might be able to persuade sceptical electorates that a new constitution should be endorsed, strategies that may well, in due course, need to nurture a sense that various Member States have got a particularly “good deal.” For now,

230. *Id.*

231. *Id.* art. I-15.2.

232. *Id.* art. I-40.7.

233. *Id.* art. III-213.1.

234. *Id.* art. III-214.1. The Brussels Council, which approved the Draft Constitution in June 2004, was keen to emphasise that such cooperation must be approved unanimously by Council.

235. *Europe’s Proposed Constitution: Where to File It*, ECONOMIST.COM, June 19, 2003, at http://www.economist.com/opinion/displayStory.cfm?story_id=1859243.

however, there is a Draft Constitution which contains a revised CFSP. The revisions may not be terribly radical—and they may skirt many of the more pressing questions which a nascent European foreign policy currently faces—but they do, at least, witness a realisation that the European Union's CFSP, like the European Union itself, must change if it is to address properly the global, as well as the European, challenges of the new century.

III. THE GLOBAL PROSPECTIVE

It is commonly suggested that if the 1990s began with a wave of optimism, the first decade of the twenty-first century was greeted with more than a little wariness, if not pessimism.²³⁶ The events of September 11, 2001, in New York and March 11, 2004, in Madrid have only exacerbated this pervasive sense of foreboding, describing what Timothy Garton Ash terms a “crisis of the west.”²³⁷ The global “age of complexity” within which we now live poses an array of particular problems and paradoxes, not the least of which is the concurrent potential for both greater violence and greater transnational order and justice.²³⁸ It is not, of course, a peculiarly European experience. But the emergence of what Robert Cooper terms a “postmodern system of security in Europe” is peculiar.²³⁹ Moreover, the particular state of the new European Union at the dawn of the new century—an economic “superpower,” but a political and military “pygmy,” as the Secretary-General of NATO rather ungenerously puts it—adds a further dimension of complexity, as well as peculiarity.²⁴⁰ At best, the new Europe finds itself in a state of evolutionary limbo, somewhere twixt and between; as Roy Ginsberg puts it, “more than a dwarf and less than a superpower.”²⁴¹ The potential is undeniable.²⁴² But the essential question remains: Is the

236. See BOBBITT, *supra* note 65, at 797, 807; COOPER, *supra* note 124, at viii-xii; see also MICHAEL HOWARD, *THE INVENTION OF PEACE: REFLECTIONS ON WAR AND INTERNATIONAL ORDER* 92-95 (2000).

237. ASH, *supra* note 4, at 8.

238. DOMENIC MCGOLDRICK, *FROM '9-11' TO THE 'IRAQ WAR 2003': INTERNATIONAL LAW IN AN AGE OF COMPLEXITY* 4-7 (2004).

239. COOPER, *supra* note 124, at x.

240. *Id.* at 26-29, 36-37; David S. Yost, *Transatlantic Relations and Peace in Europe*, 78 INT'L AFF. 277, 278, 298 (2002); see also KAGAN, *supra* note 3, at 21-25.

241. ROY H. GINSBERG, *THE EUROPEAN UNION IN INTERNATIONAL POLITICS: BAPTISM BY FIRE* 9 (2001).

242. Mark Leonard, *The Dream of a Mighty Europe*, WALL ST. J. EUR., Feb. 5, 2004, at A13. For a similar conclusion, see Penksa & Mason, *supra* note 120, at 256.

European Union's foreign and security policy an instrument for global or purely European politics?²⁴³

A. *The European Union and the United States*

To a considerable extent, any answer to this defining question will be shaped by the particular and evolving relation between the European Union and the only existing superpower in contemporary global politics, the United States. The challenge is overt. According to Romano Prodi, one of the essential goals of the European Union is to create "a superpower on the European continent that stands equal to the United States."²⁴⁴ To a certain extent the challenge carries an antagonistic edge. Samuel Huntington famously described a prospective "clash of civilizations," between the "west" and "Islam."²⁴⁵ More recently, it has been posited that there might be an equally vital "clash" *within* western "civilization," between the "soft" power of Europe and the "hard" power of the United States, the multilateralism of the former and the unilateralism of the latter.²⁴⁶

It is in this antagonistic spirit that Will Hutton welcomes a century that will belong to Europe rather than to the United States, in which the former will carry the primary responsibility of promoting a global "liberal order."²⁴⁷ The same assumption, perhaps even the same antagonism, lies behind George Soros's suggestion that along with the "future of Europe" lies the "validity of the concept of an open society."²⁴⁸ Without the antagonism, Robert Cooper has recently argued that it is this particular European commitment to "openness" which serves to define it as a "postmodern" political enterprise.²⁴⁹

The idea that the transatlantic alliance has "unravelling" has gained popularity. The two protagonists, according to Richard Sinkin, are "on very different political paths."²⁵⁰ "Transatlantic relations," Christina Schweiss posits, "are arguably worse today than at any point since the Second World War."²⁵¹ Stanley Hoffmann agrees, suggesting that a wide

243. See MCGOLDRICK, *supra* note 238, at 116-17 (posing precisely this question).

244. Richard Sinkin, *The EU and US: From Cooperation to Rivalry*, 26 EUR. INTEGRATION 93, 96 (2004).

245. SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 207-18 (1996).

246. See Charles A. Kupchan, *The End of the West*, ATLANTIC MONTHLY, Nov. 2002, at 42.

247. WILL HUTTON, THE WORLD WE'RE IN 10-12, 17-18, 48, 312, 365 (2002).

248. GEORGE SOROS, OPEN SOCIETY: REFORMING GLOBAL CAPITALISM 329 (2000).

249. COOPER, *supra* note 124, at 28-29, 35.

250. Sinkin, *supra* note 244, at 93.

251. Christina Schweiss, *Sharing Hegemony: The Future of Transatlantic Security*, 38 COOPERATION & CONFLICT 211, 212 (2003).

range of issues, from the Kyoto Protocol to the International Criminal Court and the role of the United Nations, sign these apparently divergent paths.²⁵² At present, he concludes, EU-U.S. relations are in “limbo,” and the “days of relative harmony” have seemingly passed, at least for now.²⁵³ Metaphorical recourse is common. Joseph Nye prefers to describe a bickering couple who “will remain partners rather than divorce and go their separate ways.”²⁵⁴ Deploying the same metaphor, Ivo Daalder suggests that whilst “divorce” is unlikely, further “drift” is not.²⁵⁵ Moreover, he adds pointedly, this may not be to Europe’s disadvantage.²⁵⁶ According to Daalder, there is a stark disparity, in terms of global politics, between the multilateralism of Europe and the unilateralism of the United States.²⁵⁷

It is commonly suggested that the European Union’s apparently greater interest in dealing with the supposed causes of global unrest makes it a “soft” actor, whilst the United States, rather more concerned with the prosaic issue of “homeland security,” is altogether “harder.”²⁵⁸ Such an approach is implicit in Solana’s observation that the overriding purpose of the European Union’s security policy must be to resolve the challenges of global insecurity by breaking the cycle of conflict, insecurity, and poverty which nurtures it.²⁵⁹ For the European Union, the overarching aspiration is to foster economic and social development in order to promote greater global security. In this vein, Robert Cooper has suggested that, in comparison with the United States, the European Union “speaks softly and carries a big carrot.”²⁶⁰ It is a resonant metaphor.

In one of the most provocative analyses of current U.S.-European relations, Robert Kagan argues that Europe determinedly pursues a “more peaceful strategic culture,” whilst the United States seems ever more resolved to deploy power to erase presumed sources of “evil.”²⁶¹

252. Stanley Hoffmann, *US-European Relations: Past and Future*, 79 INT’L AFF. 1032, 1036 (2003).

253. *Id.*; see also Julie Smith, *The Future of the European Union and the Transatlantic Relationship*, 79 INT’L AFF. 943, 947 (2003).

254. Joseph S. Nye, *The US and Europe: Continental Drift?*, 76 INT’L AFF. 51, 51 (2000).

255. Ivo H. Daalder, *Are the United States and Europe Heading for Divorce?*, 77 INT’L AFF. 553, 555, 565 (2001).

256. *Id.*

257. *Id.* at 553-57, 560-63, 565-67.

258. Sinkin, *supra* note 244, at 95.

259. Solana, *supra* note 129, at 3-4.

260. Mark Leonard, *State of the Union: The Dream of Mighty Europe*, WALL ST. J. EUR., Feb. 5, 2004, at A13.

261. KAGAN, *supra* note 3, at 8.

Whilst the latter deals in terms of “threats,” the former prefers to see “challenges.”²⁶² In idealistic terms, Europeans like to think that they “have stepped out of the Hobbesian world of anarchy into the Kantian world of perpetual peace.”²⁶³ Of course, as Kagan concludes, there is a very particular irony, for “Europe’s new Kantian order could flourish only under the umbrella of American power exercised according to the rules of the old Hobbesian order.”²⁶⁴

Certainly, post-9/11 the United States seems altogether more concerned with the military aspects of homeland security, a concern that appears to promote both simplicity and belligerence.²⁶⁵ After 9/11, in the words of President George W. Bush, foreign policy is a matter of simple choices: “Either you are with us, or you are with the terrorists.”²⁶⁶ Such an approach has been termed “heroic” inasmuch as it echoes the simplistic politics of pre-Socratic agonism.²⁶⁷ To others, it can be best understood as a kind of renewed “imperialism,” and should, the implication tends to follow, be resisted as such.²⁶⁸ The accusation that the present Bush administration is engaged in some kind of latter-day “crusade” has attracted a similar degree of European suspicion.²⁶⁹ Some commentators, not just Europeans such as Hutton or Soros, but also Americans such as Isaac Wallerstein, suggest that such pseudo-imperial belligerence actually smacks of a corrosive lack of self-confidence, a sense of foreboding in modern-day America regarding economic decline and domestic instability.²⁷⁰ It certainly does little to promote the kind of ideals that shaped the post-1945 settlement, or which accompanied—even if only momentarily—the exuberance of 1989.

262. *Id.* at 32.

263. *Id.* at 57.

264. *Id.* at 73.

265. See ASH, *supra* note 4, at 114-17; see also Hoffmann, *supra* note 252, at 1031-32.

266. Michael Hirsh, *Bush and the World*, 81 FOREIGN AFF. 18, 18-19 (2002).

267. See Michael Brenner, *The CFSP Factor: A Comparison of United States and French Strategies*, 38 COOPERATION & CONFLICT 187, 190 (2003). For a discussion of agonism in political thought, see CHANTAL MOUFFE, *THE DEMOCRATIC PARADOX* 80-107 (2000).

268. Robert Cooper detects an imperial tinge in American policy in its desire to promote democracy. See COOPER, *supra* note 124, at 48. For a further discussion of the imperialist accusation, see Mikkel Vedby Rasmussen, ‘A Parallel Globalization of Terror’: 9-11, *Security and Globalization*, 37 COOPERATION & CONFLICT 323, 337-40 (2002).

269. See JOHN SIMPSON, *THE WARS AGAINST SADDAM: TAKING THE HIGH ROAD TO BAGHDAD* 386 (2003); see also ASH, *supra* note 4, at 132.

270. For a provocative commentary on the decline of America, see Immanuel Wallerstein, *The Eagle Has Crash Landed*, FOREIGN POL. 60 (July/Aug. 2002). For a balanced consideration of this obviously provocative view, see Robert W. Cox, *Gramsci Hegemony and International Relations: An Essay in Method*, 12 MILLENNIUM J. INT’L STUD. 162 (1983), at 53-70.

Moreover, whilst Hutton and Soros might welcome a new European-led world order, others are less sure that the isolation of an “exceptionalist” United States is likely to make the world a better, more stable place.²⁷¹ According to British Prime Minister Blair, any EU-U.S. schism would be “profoundly dangerous” for global security.²⁷² The same doubts are voiced by Timothy Garton Ash, who believes that the transatlantic relationship may not be entirely harmonious, still less perfect, but it is the only credible means for pursuing the goal of a free, or at least a freer, world—a goal that both parties share.²⁷³ A similar conclusion is vigorously pressed by William Wallace, from whom “Europe remains the indispensable partner” for “American global leadership.”²⁷⁴ According to Wallace, the apparent transatlantic divergence is a misconception, representing a critical and dangerous “gap between perception and reality.”²⁷⁵ The same conclusion is advanced by Antony Blinken, who has likewise characterised the much-vaunted “crisis” as a “myth manufactured by elites,” both political and academic.²⁷⁶

The importance and vitality of the transatlantic relation is, of course, frequently championed by the European Union and its representatives. Indeed, its High Representative has been keen to stress how “irreplaceable” this relationship is.²⁷⁷ It is the only credible and effective “force for good in the world.”²⁷⁸ It is for this reason that achieving “an effective and balanced partnership” is so vital for a “fairer” and “more secure world.”²⁷⁹ The same sentiment has been recently voiced by the European Union’s new Co-ordinator for Counter-Terrorism, Gijs De Vries, who confirms that “America and Europe are natural partners in the fight against terrorism.”²⁸⁰ And it can also be found to be repeatedly affirmed in the recent Council Declaration on Transatlantic Relations.²⁸¹ The relationship, founded on “shared values

271. See Sinkin, *supra* note 244, at 99-100; see also Gordon, *supra* note 91, at 13.

272. See Schweiss, *supra* note 251, at 213.

273. Ash, *supra* note 4, at 186-87, 193-94.

274. William Wallace, *Europe, The Necessary Partner*, 80 FOREIGN AFF. 16 (2001).

275. *Id.* at 17, 22-23.

276. Antony J. Blinken, *The False Crisis over the Atlantic*, 80 FOREIGN AFF. 35, 47 (2001).

277. *European Security Strategy*, *supra* note 121, at 13.

278. *Id.*

279. *Id.*

280. Gijs De Vries, European Co-ordinator for Counter-Terrorism, *European Strategy in the Fight Against Terrorism and the Co-operation with the United States*, Address Before the CSIS European Dialogue Lunch (May 13, 2004), at http://europa-eu-un.org/articles/en/article_3510_3n.htm.

281. Presidency Conclusions, Brussels European Council, Annex: European Council Declaration on Transatlantic Relations, 12 and 13 December 2003 (rev. version dated Feb. 5,

and common interests,” is again deemed to be “irreplaceable,” not least because it remains the most “convincing” means to countering the present challenges of “massive terrorism” and “weapons of mass destruction” (WMD), something that we will consider shortly.²⁸² Naturally, the same kind of rhetoric emanates from Washington, at least for most of the time. The most hawkish, such as Richard Perle, have been heard to opine that the new Europe has lost its “moral compass.”²⁸³ But the official line tends to be more conciliatory. Former Secretary of State Colin Powell duly waxed lyrical about the importance of building and maintaining a “strategy of partnerships.”²⁸⁴ Any differences, he urged, are “differences among friends.”²⁸⁵

But whilst both unions might proclaim a common interest in creating a “better world,” it is only too obvious that a number of constituent Member States of the European version have a very different vision of what shape this world might take and how it might be best shaped. As we shall see shortly, collective and individual responses to the Iraq war and the broader threats of terrorism and WMD have revealed a Europe, not just in disagreement with the United States, but in disagreement with itself.²⁸⁶ Some, most obviously, the French and the German governments, have been overt in their disagreement, accusing the United States of dangerous unilateralism.²⁸⁷ In doing so, it has been suggested that the French, with successive German governments in dutiful tow, have stubbornly retained a distinctively Gaullist desire to detach France, and Europe, from any perceived dependence on the United States.²⁸⁸

According to French Foreign Minister Hubert Védrine, neither France nor Europe can “accept a politically unipolar world,” nor “the unilateralism of a single hyperpower.”²⁸⁹ Another French minister, Dominique Strauss-Kahn, even went so far as to suggest that a nascent European identity has finally emerged in the anti-American rallies that filled the streets of various capitals in reaction to the Iraq war in Summer 2003, a view that gained implicit intellectual approval in the famous open

2004), THE COUNCIL OF THE EUROPEAN UNION, *available at* http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/cc/78364.pdf.

282. *Id.*

283. ASH, *supra* note 4, at 124.

284. Colin L. Powell, *A Strategy of Partnerships*, 83 FOREIGN AFF. 22, 22 (2004).

285. *Id.* at 30.

286. Sinkin, *supra* note 244, at 93.

287. *See* Hoffmann, *supra* note 13, at 192.

288. ASH, *supra* note 4, at 64-73, 91-94.

289. *See* Blinken, *supra* note 276, at 41; *see also* Jocelyn Coulon, *How Unipolarity Died in Baghdad*, 8 EUR. FOREIGN AFF. REV. 537, 538-41 (2003).

letter written by the influential German philosopher, Jürgen Habermas.²⁹⁰ Robert Kagan also comes to a provocative, but pertinent, conclusion: “many Europeans today have come to consider the United States itself to be the outlaw, a rogue colossus.”²⁹¹

Other governments, most obviously the current Blair administration in the United Kingdom, whilst sharing the broad sentiment behind Védrine’s fears, have resolved that the best way of ameliorating U.S. “exceptionalism” is from within by making it rather less exceptional in fact.²⁹² It is in this spirit that the Blair government has consistently pursued the traditional postwar British aspiration of providing some kind of transatlantic “bridge,” an aspiration most grandly described in his speech to Congress in July 2003.²⁹³ It is this aspiration that defines “Janus Britain,” as Timothy Garton Ash terms it.²⁹⁴ The position of the United Kingdom, however, remains tenuous and is not reflected in much of the rest of Europe.²⁹⁵ In this context it is hardly surprising that the transatlantic relationship might be suffering a degree of strain. Moreover, the transatlantic relationship is not the only apparent casualty. The coherence of the European Union’s foreign policy, as we shall shortly see, remains critically undermined by this tendency for different Member States to assume very different positions with regard to the European Union’s relationship with the United States.²⁹⁶

There is, of course, a further dimension to this pivotal global relationship: the role of NATO.²⁹⁷ As we have already noted, events in the Balkans have confirmed the importance of NATO, and ultimately the United States, as the guarantor of security in Europe. Without it, it is more than likely that the wars would still be ongoing.²⁹⁸ The strengthening of NATO’s credibility during the 1990s thus creates another paradox: whilst the European Union seeks to flex its own muscles in terms of European defence capabilities, the vital importance of NATO’s military power in Europe becomes ever less arguable. NATO is, as Gianni Bonvicini has recently affirmed, simply “indispensable.”²⁹⁹

290. ASH, *supra* note 4, at 54-55, 63-64.

291. KAGAN, *supra* note 3, at 100.

292. ASH, *supra* note 4, at 100.

293. *Id.* at 41-52.

294. *Id.* at 20-21, 199.

295. *Id.* at 53.

296. Brenner, *supra* note 267, at 187.

297. In the words of Stanley Hoffmann, NATO is a “field for US-European relations.” Hoffmann, *supra* note 252, at 1031.

298. See ASH, *supra* note 4, at 61; see also Yost, *supra* note 240, at 291.

299. Bonvicini, *supra* note 8, at 69. For a similar sentiment, see Borinski, *supra* note 86, at 116-17.

And yet, as Christina Schweiss has rightly suggested, a “sort of paranoia” continues to exist, bred largely of an inability to pin down relative competences and capabilities.³⁰⁰ For obvious reasons the paranoia is all the greater in Washington; for whilst the United States has long argued for a greater European contribution to European security, a residual anxiety regarding the shape and role of this contribution remains.³⁰¹ The capabilities issue is, once again, defining. To date, the European Union has focused almost exclusively on the Petersburg “tasks” described in article 17 EU. Successive “Headline Goals,” however, imply a new impetus, with the 2010 version explicitly reaffirming the European Union’s determination to “share in the responsibility for global security.”³⁰² Moreover, the Council declaration which accompanies the 2010 Goal adds, aside from a commitment to these “tasks,” a preparedness to promote “joint disarmament operations,” as well as provide “support for third countries in combating terrorism and security sector reform.”³⁰³ Commenting on the impetus provided by the 2010 Goal, Solana has emphasised that capabilities, “together with political will,” are the “key” to the development of an effective EU security strategy.³⁰⁴

However, although the actual financial commitment remains modest, the paranoia remains. The Brussels Council was, as ever, careful to emphasise the “importance it attaches to the principle of complementarity and mutual reinforcement between NATO and the EU.”³⁰⁵ The rhetoric is always cautious.³⁰⁶ Back in 1998, the St. Malo declaration alluded gnominically to the value of a “modernised Atlantic alliance,” of which an “autonomous” EU defence capability would be a constituent.³⁰⁷ Such vacuity is pervasive. But there is a discernible shift in tone.³⁰⁸ The joint EU-NATO declaration in December 2002 contained

300. Schweiss, *supra* note 251, at 216.

301. *Id.*

302. Presidency Conclusions, Brussels European Council, *supra* note 162.

303. Press Release, Brussels European Council, European Security and Defence Policy (May 17, 2004) 9210/04, THE COUNCIL OF THE EUROPEAN UNION, *available at* http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/gena/80498.pdf.

304. Javier Solana, Remarks at the Informal Meeting of EU Defence Ministers in Brussels (Apr. 6, 2004), *available at* http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/discours/79815.pdf.

305. Council Conclusions: European Security and Defence Policy at Conclusion 18 (May 17, 2004), *available at* http://europa.eu.int/comm/external_relations/cfsp/intro/gac.htm#cfsp170504-02.

306. For an account of some of these anxieties, see Wallace, *supra* note 274, at 20.

307. See Roper, *supra* note 87, at 12-16; Howorth, *supra* note 47, at 782-83; Webber et al., *supra* note 113, at 17-18.

308. Webber et al., *supra* note 113, at 17-18.

all the usual rhetoric regarding the value of their “permanent relations.”³⁰⁹ More significantly, however, it also provided, in the “Berlin Plus” agreement, for concrete mechanisms for the sharing of “assets and capabilities,” as well as “command options” and “planning.”³¹⁰

And there is, of course, no particular reason why the European Union and NATO should not work together. They are complementary institutions, sharing largely complementary aspirations. Both were founded originally to secure peace in Europe, even if the European Union has evolved into something more. The EU Treaty openly talks of uniting the “peoples of Europe,” whilst NATO’s Strategic Concept document in 1999 reaffirmed that a central ambition of the organisation is to achieve an “undivided continent,” of a “Europe whole and free.”³¹¹ Moreover, as Frank Schimmelfennig has observed, NATO is itself more than a mere military organisation.³¹² It is an alliance which claims to represent a liberal “international community,” replete with appropriately liberal “values and norms.”³¹³

Certain Member States, most vocally France and Germany, have pressed the case for a European defence capability as an alternative to NATO. According to French President Jacques Chirac, European defence should no longer be “subordinated to NATO.”³¹⁴ The rhetoric of the Franco-British declaration in February 2003—which concluded that the European Union “now has the capacity to take decisions and act in crisis management . . . with or without recourse to NATO assets”—has been cited as a “guarded declaration of independence.”³¹⁵ As yet, however, there is rather more wish-fulfillment than reality. And the prospect of a European Union acting “with or without recourse to NATO” is not necessarily appealing. For the present, the European Union must instead focus on the development of a more complementary role, of the kind that former United States Defense Secretary William Cohen terms “separable but not separate from NATO.”³¹⁶

Accordingly, rather than dreaming of some kind of autonomous defence capacity that might exist regardless of NATO, there is rather

309. Paul Cornish & Geoffrey Edwards, *Beyond the EU/NATO Dichotomy: The Beginnings of a European Strategic Culture*, 77 INT’L AFF. 590-611 (2001).

310. *Id.* at 590.

311. See Borinski, *supra* note 86, at 119.

312. Frank Schimmelfennig, *NATO Enlargement: A Constructivist Explanation*, 8 SECURITY STUD. 198, 213 (1999). For a similar assertion, see Borinski, *supra* note 86, at 118-19.

313. Borinski, *supra* note 86, at 118-19.

314. Cornish & Edwards, *supra* note 309, at 591; see also Smith, *supra* note 253, at 948.

315. Penksa & Mason, *supra* note 120, at 267-68.

316. Pliakos, *supra* note 95, at 284.

greater sense in thinking in terms of a collateral capability that might be able to take a sensible share of the burden of European security.³¹⁷ Former Czech President Vaclav Havel has referred to a new “Euro-Atlantic structure” codescribed by a new European Union and a new NATO.³¹⁸ Perhaps. But it is commitment that counts, and the notion of a sensible share translates, of course, into a preparedness to make a sensible financial commitment, and despite the progress of the last couple of years in terms of material commitment as well as muscle, the “new” Europe remains a “military pygmy.”³¹⁹ As long as it remains so, the European Union cannot pretend to have greater global power and responsibility. More importantly, its ultimate security will continue to depend upon the good offices and the goodwill of NATO.³²⁰

B. *Global Security After 9/11*

Throughout much of the 1990s, as we have seen, the testing ground for the European Union’s evolving relations with the United States and with NATO could be found in the Balkans. And, as we have also seen, the test remains current. The events of September 11, 2001, however, changed everything, on both sides of the Atlantic. Indeed, as Prime Minister Blair suggested, it “changed the psychology of the world.”³²¹ The idea of global security, previously so nebulous, has emerged as a very immediate and very real concern.

Terrorism, whatever the term might mean, is a global threat requiring global solutions.³²² In this, according to Robert Cooper, it represents the quintessential expression and antithesis of post-modern international order.³²³ If there was any lingering doubt as to the extent of the challenge, and the threat, it was erased on March 11, 2004, in Madrid. Peace between European nations does not preclude the visitation of carnage from without. Terrorism and the related issues of WMD and the Iraq war have dominated EU foreign and security agenda for the last three years. It has, perhaps all too predictably, been a

317. See Lord Robertson, *European Defence: Challenges and Prospects*, 39 J. COMMON MKT. STUD. 791, 795 (2001).

318. ASH, *supra* note 4, at 109.

319. See Yost, *supra* note 240, at 278, 298. For a commentary on the relative paucity of EU expenditure on defence, see Schweiss, *supra* note 251, at 218-19.

320. See Penksa & Mason, *supra* note 120, at 270-75.

321. MCGOLDRICK, *supra* note 238, at 21.

322. Rasmussen, *supra* note 268, at 323-49. For a discussion of the nexus between “complex terrorism” and globalisation, see Thomas Homer-Dixon, *The Rise of Complex Terrorism*, FOREIGN POL’Y 52, 52-62 (Jan./Feb. 2002).

323. COOPER, *supra* note 124, at 77.

conspicuously painful and at times bitter business—and one that reinforces the suspicion that a coherent European foreign policy remains more of an aspiration than a current reality.

Of course, the threat of terrorism had been anticipated during the 1990s. Specific provisions relating to “combating crime” in general, and terrorism in particular, are to be found in the second of the European Union’s intergovernmental “pillars,” originally designated in the EU Treaty as “Justice and Home Affairs.”³²⁴ Whilst many provisions originally found in this pillar were later transferred into the Community pillar in 1997, and thus rendered justiciable, matters of internal “security” remain firmly within the recast Title VI, entitled “Provisions on Police and Judicial Cooperation in Criminal Matters.”³²⁵ Article 29 EU opens by refining the European Union’s objective to be that of providing citizens “with a high level of safety within an area of freedom, security and justice.”³²⁶ It further provides a list of particular concerns, namely “terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud.”³²⁷ These concerns, article 30 EU goes on to say, will be addressed by “[c]ommon action in the field of police cooperation.”³²⁸ Essentially the same provision can now be found in articles III-171 to 178 of the Draft Constitution, relating to judicial and police cooperation.³²⁹

The extrajudicial situation of these provisions has attracted an obvious criticism. The modern terrorist is, in both metaphor and practice, a true outlaw, seemingly beyond the reach of EU law. The European Union’s attitude towards human rights issues outside its own borders has never been terribly convincing.³³⁰ Whilst it is understandably anxious to avoid a repeat of the kind of atrocity which it suffered in Madrid in early 2004, there is an ever-present danger that the European Union’s anxieties will lead to precisely the kind of intolerance and disregard for humanity and human rights which characterises the terrorist cause.³³¹

324. See Proposal for a Council Decision, Communication from the Commission to the Council and the European Parliament on Measures to Be Taken to Combat Terrorism and Other Forms of Serious Crime, in Particular to Improve Exchanges of Information, COM (2004) 221 final, at 18; CONSOLIDATED EU TREATY, *supra* note 14, at 221-28.

325. CONSOLIDATED EU TREATY, *supra* note 14, tit. VI.

326. *Id.* art. 29.

327. *Id.*

328. *Id.* art. 30.

329. DRAFT TREATY, *supra* note 54, art. III-171 to 178.

330. King, *supra* note 178, at 335-37.

331. For a discussion of this hazard within the broader context of a crisis of international human rights, see Mark A. Drumbl, *Judging the 11 September Terrorist Attack*, 24 HUM. RTS. Q.

To a considerable extent this criticism is founded in a particularly European intellectual tradition, a defining ambivalence and ambiguity surrounding the identity of “otherness.” According to Jacques Derrida, one of its most compelling chroniclers, the politics of “otherness” is today most obviously described in Europe’s rather confused attitude to so-called “terrorists.”³³² Terrorism is notoriously hard to define, and so too, accordingly, is a strategy designed to counter it. It is difficult to wage war against an abstract noun. There is no identifiable and, critically, no finite enemy to be defeated.³³³ The very notion of terrorism is notoriously difficult to pin down in terms of existing international law.³³⁴ Moreover, there are anxieties regarding the rhetoric of counterterrorism as evidenced by the familiar “one man’s terrorist is another man’s freedom fighter.”³³⁵ Terrorism, as Conor Gearty argues, is simply another form of politics, the accusation “terrorist” bandied about liberally by various governments and states as best fits their particular strategies of self-justification.³³⁶

Overall, there is no doubt that European commentators favour a more differentiated approach to terrorism. As Stanley Hoffmann observes, there is a clear distinction between the “dogmatism” of the United States, which refuses to countenance any such differentiation, and European “empiricism,” which is inclined to admit that terrorism is not a uniform experience.³³⁷ This has led, perhaps predictably, to accusations that Europe is just plain soft on terrorism.³³⁸ There is just too much “handwringing and vacillation,” as former Secretary of State Albright put it.³³⁹ By way of repost, of course, European politicians and commentators have tended to voice a haughty disdain with regard to the seeming simplicity of the American “with us or against us” position.³⁴⁰

Regardless of the different intellectual and political attitudes assumed on alternate sides of the Atlantic, the European Union has

323, 357-58 (2002); MCGOLDRICK, *supra* note 238, at 37-45; Bruce Hoffmann, *Is Europe Soft on Terrorism*, 8 FOREIGN POL’Y 72-73 (1999); Conor Gearty, *Terrorism and Morality*, 8 EUR. HUM. RTS. L. REV. 377, 382-83 (2003).

332. See Borradori, *supra* note 147, at 96-104, 130-32 (aligning the concepts of human rights and terrorism).

333. MCGOLDRICK, *supra* note 238, at 28-29; BOBBITT, *supra* note 65, at 812-13.

334. See MCGOLDRICK, *supra* note 238, at 32-33.

335. Sami Zeidan, *Desperately Seeking Definition: The International Community’s Quest for Identifying the Specter of Terrorism*, 36 CORNELL INT’L L.J. 491, 491 (2004).

336. Gearty, *supra* note 331, at 378-82.

337. Hoffmann, *supra* note 252, at 1032, 1035.

338. See Hoffmann, *supra* note 331, at 63.

339. *Id.*

340. Hirsh, *supra* note 266, at 18-29, 32-37, 41-43.

remained consistent in its pursuit of multilateral responses to the challenges of global security. Even as it voiced sympathy for the United States in the wake of 9/11, the Council was quick to caution the need for a multilateral “global coalition against terrorism,” one that must be pursued “under United Nations aegis.”³⁴¹ The security of the European Union must be secured outside its borders, and cannot, accordingly, be secured by any one global actor alone.³⁴² The challenges of global security, it is repeatedly argued, require global solutions. As Javier Solana has rightly urged, “We need to think globally and to act locally,” for in “an era of globalisation, distant threats may be as much a concern as those near at hand.”³⁴³ For this reason, Europeans must realise that the “first line of Defense will often be abroad.”³⁴⁴ The challenges of terrorism and weapons of mass destruction require “concerted” European and international action.³⁴⁵

The sentiment has been echoed at recent Council meetings. The Brussels Council of Foreign Ministers, in December 2003, affirmed that the “fight against terrorism is one of the highest priorities of the European Union.”³⁴⁶ It also affirmed that the only legitimate means for conducting this “fight” was through multilateral institutions, most obviously the United Nations.³⁴⁷ Four months later, in the wake of the Madrid bombings, the full Council adopted a Declaration on Combating Terrorism.³⁴⁸ “The threat of terrorism,” it declared, “affects us all,” and so, accordingly, a “terrorist act against one country concerns the international community as a whole.”³⁴⁹ The multilateral tone was again pronounced. The Declaration further confirmed an EU “Plan of Action to Combat Terrorism,” together with a Counter-Terrorism Coordinator, as well as a series of legislative measures in the form of framework directives intended to reinforce various provisions for “combating terrorism”—for example, freezing the assets of suspected terrorists, as well as measures intended to ease the workings of a European arrest

341. Conclusions and Plan of Action of the Extraordinary European Council Meeting, Sep. 21, 2001, SN 140/01.

342. Wessel, *supra* note 48, at 1138.

343. Solana, *supra* note 129, at 4-5, 7-8.

344. *Id.*

345. *Id.* at 6.

346. Press Release 356, 2552th Council Meeting, General Affairs, Brussels (May 17, 2004) 155535/03 (Presse 356).

347. *Id.*

348. EUROPEAN COUNCIL, *Declaration on Combating Terrorism*, Brussels, Mar. 25, 2004, available at <http://www.statewatch.org/news/2004/mar/eu-terr-decl.pdf>.

349. *Id.*

warrant and facilitate a more rigorous collection and exchange of intelligence on suspected terrorist movements.³⁵⁰

The security of Europeans within the European Union is then entirely dependant on the responsibilities of the European Union without.³⁵¹ The Iraq crisis, and in particular the issue of WMD, was cast in precisely this context (or at least it was by those, most obviously the United Kingdom, who pressed the European Union to rally behind the American-led coalition of the willing). The European Union readily acknowledged the potential threat of WMD at the Thessaloniki Council in 2003, where it devised a “Strategy Against Proliferation of Weapons of Mass Destruction.”³⁵² This particular “threat to international peace and security” could not, the Council confirmed, be “ignored.”³⁵³ Moreover, the Council further acknowledged the implicit link between WMD and the “global fight against terrorism.”³⁵⁴ Significantly, the Council confirmed the European Union’s view that “effective multilateralism is the cornerstone” of any viable policies for “combating” the proliferation of WMD.³⁵⁵ Proliferation of WMD, it concluded, “is a global threat, which requires a global approach.”³⁵⁶ The Council further resolved to implement more rigorous procedures for monitoring the export of WMD-related materials, a commitment reaffirmed at the Washington EU-U.S. summit in Summer 2003.³⁵⁷ Most recently, in June 2004, the Council confirmed the European Union’s commitment to United Nations Security Resolution 1540 which is directed against the proliferation of such weapons.³⁵⁸

Moreover, the Thessaloniki strategy went on to voice a very European concern with what it perceived to be the broader context of

350. The Schengen Information System had originally emerged in the more innocent times of the mid-1980s, and had been intended to provide a means of monitoring the movement of all persons, particularly third-country nationals, following the removal of formal barriers to movement around the Community.

351. Wessel, *supra* note 48, at 1145-49.

352. Council Common Position 2003/805/CFSP (EU Strategy Against Proliferation of Weapons of Mass Destruction), THE COUNCIL OF THE EUROPEAN UNION, *available at* <http://ue.eu.int/ueDocs/cmsUpload/st15708.en03.pdf> [hereinafter Council Common Position].

353. *Id.* Introduction para. 2.

354. *Id.* Introduction para. 3.

355. *Id.* at A.

356. *Id.* at II.B.24.

357. *Id.* at III; Press Release, Joint Statement by European Council President Costas Simitis, European Commission President Romano Prodi, and United States President George W. Bush on the Proliferation of Weapons of Mass Destruction, Washington, June 25, 2003, *available at* http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/er/76340.pdf [hereinafter Joint Statement].

358. S.C. Res. 1540, U.N. SCOR, 4956th mtg., U.N. Doc. S/RES/1540 (2004), *available at* <http://ods-dds-ny.un.org/UNDOC/GEN/N04/328/43/PDF/N0432843.pdf?OpenElement>.

WMD and unrest in the Arab world. It identified a series of the “root causes” of “instability” which nurture rogue states and terrorist groups.³⁵⁹ These, it suggested, were primarily economic rather than cultural or moral, and being economic were readily surmountable by “development assistance” and the “reduction of poverty.”³⁶⁰ This “root causes” approach has been articulated further by the current External Relations Commissioner, for whom the European Union owes a particular responsibility to share the potential fruits of globalisation. According to Commissioner Chris Patten, the “root of the problem” in the Mideast is not an inability to locate WMD anywhere, but a pressing need to promote wealth and democracy.³⁶¹ As the United Nations Development Programme Report on the Arab world concluded in 2002, the real problem is “poverty of opportunity.”³⁶² The need to address this poverty, and the need to do so multilaterally, Patten adds, is a “salutary reminder” of the limitations of “occasional American exceptionalism.”³⁶³ Invasions can oust dictators, but they feed no one. The “alienated and the dispossessed” feel no less alienated and are no less dispossessed.³⁶⁴

Although the Council might pretend to hold a uniform position, the depth of division became only too apparent during the Iraq crisis. Whilst President Bush and Prime Minister Blair desperately strove to align WMD and the need to remove the present Iraqi regime, much of the rest of Europe remained stolidly unconvinced.³⁶⁵ Famously, United States Secretary of Defense, Donald Rumsfeld, declared that there were now two Europes, an old and a new: the former being led by the likes of France and Germany, the latter by the United Kingdom and a majority of newer Member States.³⁶⁶ Certainly, French opposition was conspicuous and loud, as evidenced by their blocking of a second United Nations Resolution.³⁶⁷ But what was perhaps most striking about the French position was President Chirac’s determination to assume the leadership

359. Council Common Position, *supra* note 352, at II para. 14.

360. *Id.*

361. Chris Patten, *Globalisation and the Law*, 9 EUR. HUM. RTS. L. REV. 9, 10-13 (2004).

362. S.C. Res. 687, U.N. SCOR, 2981st mtg., U.N. Doc S/RES/687 (Apr. 3, 1991), available at <http://ods-dds.ny.un.org/doc/RESOLUTION/GEN/NR0/596/23/IMG/NR059623.pdf?OpenElement>.

363. Patten, *supra* note 361, at 11.

364. *Id.* at 10-13.

365. MCGOLDRICK, *supra* note 238, at 18-19; KAGAN, *supra* note 3, at 37.

366. Judy Dempsey, *We Used To Be Sandwiched Between the Big Powers. That Won't Happen When We Join the European Union*, FIN. TIMES, Apr. 29, 2004, at 17.

367. See Brenner, *supra* note 267, at 202; MCGOLDRICK, *supra* note 238, at 13-14.

of a European opposition.³⁶⁸ The European Union also ventured to voice its discontent; perhaps most conspicuous was Commissioner Patten's observation that the United States should not presume that the European Union will feel obliged to open up its cheque book in order to clear up the mess from a war it did not support.³⁶⁹

Of course, as Timothy Garton Ash has suggested, such a schismatic picture is misleading.³⁷⁰ Just as many in America voiced reservations regarding the war, so, too, many European citizens voiced at least hesitant support. With regard to popular political support, the picture was, and is, far from clear. Much the same can be said of the question of legality. Certainly, there is no clear answer to the question whether the supposed breaches of United Nations Resolution 687 actually justified military engagement. Presuming some kind of customary jurisprudence, founded on a creative understanding of the doctrine of self defence and the redefining of a collateral doctrine of preemption, the U.S. and U.K. governments maintained that it did.³⁷¹ Citing the fact that Resolution 1441 patently refrained from providing explicit authority for military intervention, the French government, along with the governments of most other European Union Members, argued that it did not.³⁷²

All in all, as Brian Crowe suggests, the events of the Iraq war "humiliatingly exposed" the continuing weaknesses of the European Union's CFSP when faced with a real life crisis.³⁷³ Moreover, it was not just a matter of internal disagreement. Even if the European Union could have agreed on a "common foreign policy" position, the conduct of the war revealed once again that, in comparison with the United States and NATO, Europe's military capabilities remain limited.³⁷⁴ The United Kingdom did its best. Spain sent a few units along.³⁷⁵ But otherwise, as

368. This caused particular friction between London and Paris. See Brenner, *supra* note 267, at 203-05.

369. See *id.* at 195.

370. ASH, *supra* note 4, at 9-10.

371. See Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, 83 FOREIGN AFF. 136 (2004) (arguing case for broader international duty to prevent, and suggesting it can be derived from already existing doctrine of preemption).

372. For a broad overview of the alternative arguments, see MCGOLDRICK, *supra* note 238, at 53-86; Vaughan Lowe, *The Iraq Crisis: What Now?*, 52 INT'L & COMP. L.Q. 859, 859-71 (2003). See also Christopher Greenwood, *International Law and the 'War Against Terrorism'*, 78 INT'L AFF. 301, 301-17 (2002); Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Categories of International Law*, 12 EUR. J. INT'L L. 993, 993-1001 (2001) (discussing related arguments surrounding wider U.S. response to 9/11 and supposed "war against terrorism").

373. Crowe, *supra* note 119, at 534-35.

374. *Id.*

375. Carita Vitthum, *Iraq, Terrorism Loom Large in Europe Parliament Vote; Polls Show Socialists in Lead*, WALL ST. J. EUR., June 11, 2004, at A2.

in the Balkans, the Iraq war was very much an American enterprise. Once again, it seems, if someone has to actually do something about a pending crisis, whether it be humanitarian crises in the Balkans or WMD proliferation in the Mideast, there is really only one credible option. The United States, acting within NATO or in the alternative guise of some kind of "coalition of the willing," must be persuaded to act. Alternatively, nothing happens. And the situation is not likely to change, not for the immediate future at any rate.³⁷⁶

The crisis in Iraq is ongoing, even if disagreements in the European Union have been largely papered over. The challenges of terrorism, counter-terrorism, and WMD, however, remain. At present, the same kind of tensions, both within the European Union and between the European Union and the United States, can be seen in attitudes towards Iran. Last June, the European Union, along with the United States, expressed its "continuing serious concern" regarding Iran's nuclear programme.³⁷⁷ Significantly, however, the United Kingdom has already joined France and Germany in articulating a clear preference for diplomacy rather than guns and, moreover, for working through the offices of the European Union rather than NATO or any ad hoc coalition.³⁷⁸ It may work. But if it does not, then it will be a matter of picking up the phone to Washington once again, which is the only, as Henry Kissinger famously remarked, 911 number in the international system.³⁷⁹

And yet the case for multilateralism is compelling. The post-modern world order, as Robert Cooper describes it, is defined by threats which are distinctive in their lack of clear distinction.³⁸⁰ It requires a post-modern response, a response that is effected by more than one, or even a coalition of nation-states determined to act as sovereign political bodies.³⁸¹ No one nation-state can effectively counter the terrorist threat, and neither can any one particular transnational body, whether it be the United Nations, NATO, or the European Union.³⁸²

376. Borinski, *supra* note 86, at 119-20.

377. Joint Statement, *supra* note 357.

378. Hoffmann, *supra* 331, at 69-70.

379. Cox, *supra* note 270, at 66.

380. COOPER, *supra* note 124, at 48.

381. *Id.*

382. See Webber et al., *supra* note 113, at 11-12; Robertson, *supra* note 317, at 792-93, 795. For a more particular discussion of the potential of the International Criminal Court in dealing with the terrorist challenge, see Richard J. Goldstone & Janine Simpson, *Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism*, 16 HARV. HUM. RTS. J. 13, 13-26 (2003).

At the same time, however, it must never be forgotten that, in the real Hobbesian world, power talks. It is for this reason that the European Union's relations with the United States will retain their central importance. Whilst the organs of security must remain multilateral, the tools will, for the foreseeable future, be supplied by NATO and, in reality, by the United States. The European Union must work within this context. As the European Union's new Coordinator for Counter-Terrorism has recently confirmed, the effectiveness of an international response to terrorism will be geared by the strength of the EU-U.S. partnership.³⁸³ It has become fashionable to argue for the continuation of a "good cop, bad cop" approach, with the European Union sweet-talking the terrorists and dictators, whilst the United States and NATO hover menacingly in the background threatening apocalyptic intervention.³⁸⁴

As Timothy Garton Ash concludes, for now and the foreseeable future, the prospects for a credible EU foreign and security policy depends upon working through a viable relationship with the United States and NATO.³⁸⁵ The present standoff is absurd, and it can profit neither party. The future, not just of the United States and Europe itself, but of the cause of freedom in the wider world, depends on its resolution.³⁸⁶ In making this plea, Garton Ash repeatedly invokes President John F. Kennedy's famous Declaration of Interdependence: "[W]e don't regard a strong, united Europe as a rival, but as a partner."³⁸⁷ It may, in military terms, be a subordinate partner. But that does not mean that it should be either supine or uncommitted. Neither stance will suit either party. Europe's role, Garton Ash concludes, must be to provide the Lockean constraint on sovereign power, which in this context means to provide a "check and balance" on the one "solitary hyperpower" in the world today.³⁸⁸

Europe must, as the twenty-first century dawns, be a real partner, one that is prepared to make a real commitment. It is for this reason that the issue of capabilities remains the most pressing in current EU foreign and security policy. As Robert Cooper confirms, the greatest danger to face the "postmodern state" is the "temptation to neglect defences, both physical and psychological."³⁸⁹ The value of promoting trade and development should not be denied. But peace must be forced. The

383. De Vries, *supra* note 280.

384. See Hoffmann, *supra* note 331, at 74-75.

385. ASH, *supra* note 4, at 224.

386. *Id.* at 222-24.

387. *Id.* at 102, 221-22.

388. *Id.* at 229.

389. COOPER, *supra* note 124, at 162.

countries that “only do peace are missing half the story—perhaps the most important half.”³⁹⁰ Internal dissension within the new European Union is one potential hazard, but sheer naivety and complacency are just as great. Ours, Cooper soberly concludes, is “a dangerous world and it is going to get more dangerous.”³⁹¹ The warning is salutary. The stakes are high. If the new Europe does indeed want its voice to be heard in the global context, then it will have to make a real commitment to the cause of global, as well as European, security—one that impresses not just those who share a zeal for freedom, but also those who do not.

390. *Id.*

391. *Id.* at 62, 83, 162.