

INSERTING FLEXIBILITY INTO NATO?

Lessons for NATO from the EU

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The recent crisis in NATO concerning lending support to Turkey in anticipation of a war against Iraq was no doubt a major one. And as such it was a serious blow to those arguing for the ongoing and ever-continuing relevancy of the Alliance and its ‘successful’ adaptation in the post-Cold War era. It poses challenging and puzzling questions to the students of NATO, the most interesting one being: Why -- after having survived the post-Cold War identity crisis by successfully managing the challenge of the enlargement rounds, contributing to cooperative security in Europe through several programs, engaging in a constructive relationship with other regional and international organizations in a network of interlocking institutions, and extending its repertoire of missions -- was the institution deadlocked when it was called upon to assist a member in the face of an imminent threat to its security, which was in fact its traditional *raison d’état*?

This question entails an element of irony, if not constituting a fatal contradiction: an Alliance that was able to unite around a common stance and take on several crisis management operations throughout the 1990s, deciding recently in Prague to be the ‘bulwark against terrorism’, ran into serious trouble when agreeing to start contingency planning at NATO headquarters to provide defensive support to Turkey which invoked Article 4 of the North Atlantic Treaty.¹ In fact, this was just the type of contingency the Alliance was created for, and since its inception - particularly during the Cold War - supreme and subordinated NATO headquarters have been engaged heavily in planning and training for exactly such contingencies. Article 4 states: “the Parties will consult together whenever, in the

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¹ In fact, it was only recently that Lord Robertson argued that NATO was back in business. After contending that the Prague Summit’s decision to invite seven eastern European nations into the Alliance, the creation of a forum for closer cooperation with Russia and a new program to rebuild military capabilities had proved NATO’s obituary writers wrong, Lord Robertson said “what was to happen during the year was to completely contradict those who prophesied doom... We’re back in business, real business of the current and new and fresh threats for the future”. See John Chalmers, ‘Robertson Says NATO Is ‘Back in Business’, *Reuters*, 10 January, 2002.

opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened.”²

It is clear from the wording of Article 4 that it does not involve mutual defence obligations similar to those of Article 5; nevertheless, the fact that it came to the agenda in itself implies that such a request could be put forward by the interested party.³ Therefore, the recent crisis has quite understandably reheated the debate on NATO. However, though the themes which dominate the discussions on NATO and its “future”, i.e. how to adjust it to respond to the new international setting, are abundant, one fundamental question has been conspicuously absent. There has been, and there still is, much talk about how NATO should respond to new threats, such as transnational terror, instabilities on its periphery, and refugee flows; how it could develop co-operative relationship with major actors, namely Russia, and other security organizations, such as the OSCE and the EU/ESDP; what role NATO could play in its troubled neighborhood, such as the Balkans and the Mediterranean; and how it can improve its capabilities to meet the new contingencies. Hence, the famous motto after Prague: “New members, new capabilities, new relationships”. But what about the question of how NATO reaches decisions, and the ways in which its decision-making mechanisms could be best improved? In other words, how can a certain element of flexibility in decision-making be inserted into NATO’s institutional structure?

In this article, I intend to stimulate a debate around these somewhat neglected themes by introducing some perspectives from the standpoint of European integration, however odd and provocative the idea might seem to be. The contention here is that serious consideration should be paid to the prospects of introducing a concept of flexibility into NATO decision-making in order to make it possible for a group of member states to focus on certain crises, issues or regions, by utilizing NATO’s structures, mechanisms or capabilities in place, while the other states prefer not to take part in the action.⁴ In particular, I will focus on

² *The North Atlantic Treaty (NAT)*, (Washington D.C., 4 April 1949).

³ Indeed, during the Cold War, Article 4 was originally conceived “as a sort of ‘trigger’ or precursor for honoring Article 5, the mutual defense commitment.” David S. Yost, ‘The New NATO and Collective Security’, *Survival* (Vol.40, No.2, Summer 1998), p.144.

⁴ Flexibility could at the same time imply the inclusion of non-members into the working of NATO, an aspect not analyzed in this study. For more on the concept of flexibility in international organizations, see Hanspeter Neuhold ‘Institutional Flexibility in a Wider Context’, in Antonio Missiroli ed., *Flexibility and Enhanced Cooperation in European Security Matters: Assets or Liabilities?* (WEU Institute for Security Studies, Occasional Paper 6, January 1999), <http://www.iss-eu.org/occasion/occ06.html>. An extensive – and skeptical – account of flexibility in a wider sense can also be found in Joanne Wright, ‘Trusting Flexible Friends: The

two practices which occupy a central and growing place in the EU and its security and defense pillar, Common Foreign and Security Policy (CFSP), namely, *enhanced cooperation*, and *constructive abstention* to put NATO into question as an ‘all for one, one for all’ collective defence alliance and make it better fit its new role encompassing collective defense and collective security. In conclusion, I will suggest a certain flexibility model revolving around the principle of ‘constructive abstention’ which is already applied in EU foreign and security policy.

The reader is called to bear in mind the following caveats. First, although the article is stimulated by the recent crisis concerning Turkey, the basic rationale behind a plea for bringing forward the issue of decision-making at NATO lies elsewhere: putting NATO’s flexibility in question is justified by reference to two interrelated processes, NATO’s expansion both in its membership and functions. Second, it is therefore not necessarily the contention here that the recent crisis was all about a problem of decision-making, nor are the proposals discussed here offered as a panacea for such crises. On the contrary, as long as NATO’s crises remain political in nature and so long as NATO is a battleground where some other political wars are waged, which is mostly the case, the utility of discussing institutional aspects could be of limited effect. In this sense, third, I assume a minimum degree of willingness on the part of the members to have the Alliance address a given crisis. Once a member is determined to block the organization from taking on a certain responsibility, there seems to be no way of overcoming an ensuing crisis through institutional arrangements. Moreover, the dimension I am interested in is what organizational lessons can be derived for NATO through the study of another international organization, namely the EU; thus I approach NATO from a neutral, institutional point of view. That is to say, I will focus on NATO’s institutional arrangements on decision-making by treating NATO as an institution free from other political influences, or underlying political divisions in its response to a specific crisis. (yes. I think, that conveys the meaning better than my awkward wording)

This segues into our next limitation. As in the current crisis, the unique political and military role and dominance of the United States in Euro-Atlantic security will remain, and thus contribute to a predisposition among NATO members to seek common solutions. This

Dangers of Flexibility in NATO and the West European Union / European Union’, *Contemporary Security Policy* (Vol.20, No.1, April 1999), pp.111-129. The author draws attention to the pitfalls of flexibility, in particular, the risk of breaking down trust.

'US dominance' presents puzzling questions: whether it makes sense at all to discuss NATO institutionally, while everything might be dictated, in one way or another, from 'above'.⁵ Nevertheless, US influence will be left aside like other political factors, and NATO will be discussed in isolation. In this context, it is worth underlying that, whatever different national reactions to increased flexibility might be, one thing can be taken for sure: such flexibility is not a one-way street. Although in the current crisis it seems to play into the hands of the US, in another situation it might be quite the contrary. The parties, issues or the underlying merit of problems may change from one case to another, so do the beneficiaries of a more flexible NATO. For instance, when it comes to the realization of European ambitions for 'European defence autonomy', an idea primarily advocated by France, or when the Americans do not want to get engaged in a future crisis in Europe, enhanced flexibility could provide a solid legal ground for the European Allies to operate within the NATO framework - or use its assets and capabilities - while at the same time accommodating this practice in NATO's institutional structure.⁶

Putting NATO decision-making into question

In an ever-expanding organization, both in terms of its membership and the type and scope of its roles and missions, the question of decision-making begs more attention than it currently gets in NATO. To be sure, political bargaining always allows for a considerable degree of flexibility in an intergovernmental forum. Even the considerations of how serious are the implications of failing to overcome their disagreement on the organization's prestige and credibility might incite the members to reach a solution, as Lord Robertson wished. Last but not least, there could always be some last-minute compromise packages to overcome the

⁵ For the American dominance in NATO's political consultation and decision-making mechanisms, particularly through the configuration of military forces, see Guillaume Parmentier 'Redressing NATO's Imbalances', *Survival* (Vol.42, No.2, Summer 2000). The author contends that '(p)olitical consultation does exist inside the North Atlantic Council and its subordinate committees, but the state of dependence into which the geographical imbalance puts the European nations relative to the United States guarantees that these negotiations are very often no more than a formality', p.98.

⁶ In an attempt to bridge the gap between NATO and ESDP, a Canadian analyst has come up with a proposal that advocates the positive-sum nature of a combined ESDP-NATO crisis management system. His suggestion also gives a central place to constructive abstention and flexibility, and underlined the benefits of this to all: 'Flexibility and constructive abstention help both European non-NATO members and the non-European NATO allies. One of the key issues in this arrangement is that the United States would also be given the constructive abstention option - most likely in terms of committing troops on the ground - without this action resulting in an immediate end of NATO's involvement or the end of American participation in the command and control function of the operation'. See: Alexander Moens, *Canada and Europe: The Primacy of the New NATO* (Council for Canadian Security in the 21st Century, Research Paper), <http://www.ccs21.org/ccspapers/papers/moens-nato.htm>.

deadlocks, like the one proposed by Belgium to end the quagmire over supporting Turkey. But if NATO is to continue its adaptation to the new international security agenda, there is a need to develop some formal, well-defined mechanisms within NATO's institutional structure, rather than waiting for *ad hoc* quick-fix solutions in a future crisis of similar gravity. Hence, it is high time to shift the emphasis to and delve deeper into whether NATO's decision-making procedures could be streamlined to enhance the relevancy and effectiveness of the organization.

The North Atlantic Council (NAC) is the only body within the Alliance, set up explicitly by the North Atlantic Treaty, which has treaty-based competences. Over the years, NAC has created several committees and planning groups so as to support its work or to assume responsibility in specific fields.⁷ Nevertheless, it remains the supreme body and the central decision-making organ of the organization.⁸ As explained in *NATO Handbook*, the NAC “has effective political authority and powers of decision... When decisions have to be made action is agreed upon on the basis of unanimity and common accord. There is no voting or decision by majority. Each nation represented at the Council table or on any of its subordinate committees retains complete sovereignty and responsibility for its own decisions.”⁹ Somewhere else in the same document, it is underlined that “(i)n making their joint decision-making process dependent on consensus and common consent, the members of the Alliance safeguard the role of each country's individual experience and outlook while at the same time availing themselves of the machinery and procedures which allow them jointly to act rapidly and decisively if circumstances require them to do so. The practice of exchanging information and consulting together on a daily basis ensures that governments can come together at short notice whenever necessary, often with prior knowledge of their respective preoccupations, in order to agree on common policies.”¹⁰

That being so, behind the formal rhetoric lies a different picture. Like any other international organization, growing numbers and expanding competences – double expansion - make it more and more cumbersome to reach consensus. Over the last decade, although

⁷ *NAT.*, Article 9 provides for the legal ground.

⁸ However, it is sometimes claimed that “(t)here is a fundamental gap... between the appearance and reality of NATO authority. ‘Pretend’ authority lies with the North Atlantic Council; real authority lies with the SACEUR.”, see Parmentier, *op.cit.*, p.104.

⁹ *NATO Handbook*, (Brussels: NATO Office of Information and Press, 2001), pp.149-150; however, it must be noted that this decision-making method was introduced by the practice. *NAT* itself contains only one provision requiring unanimity: for the admission of new members (Article-10).

¹⁰ *Ibid*, p.154.

the Alliance's traditional focus, collective defense commitments, have remained intact, it has at the same time gone far beyond it. Today, crisis management and crisis response operations, conflict prevention and peacekeeping – the so-called non-Article 5 missions - have come to be recognized as NATO's main roles.¹¹ This means, starting with the Alliance's Strategic Concept Published in 1991, NATO has been going through a transformation from a primarily collective defence organization to a collective security platform.¹² In an altered security environment, characterized by multifaceted security issues, the degree of interestedness, and capacity and willingness for action inevitably vary from one state to another.¹³ This increased disparity raises the possibility of resorting to veto in a way to block other willing and interested parties from taking action. Therefore, NATO faces the difficulty of “how to incorporate the benefits of consensus without risking gridlock or introducing unequal decision-making.”¹⁴

In other words, a broad approach to security needs to offer flexible models of cooperation. Moreover, it is increasingly difficult to operate a NATO of 19 and soon 26 countries – plus Russia - on the basis of an institutional setting originally designed for 12 member states, which had a clear-cut idea as to why they came together and were unified around a common purpose and direction. Adding several new members with their own policy priorities and views on security and defence is bound to impede NATO decision-making processes. That the latest enlargement was driven more by political objectives than military considerations would only add to complicate the picture.¹⁵ The numbers, geographical positions, more diverse historical background, threat perceptions and political orientation of incoming members, and the more extensive obligations the member states are expected to undertake, raise questions as to whether the Alliance will be easily able to absorb its new members while retaining the ability to operate effectively and efficiently.

¹¹ See for instance, *NATO Review*, Summer 2001; *NATO Handbook*, chapter 5: The Alliance's Operational Role in Peacekeeping; Joseph Leggold, 'NATO's Post-Cold War Collective Action Problem', *International Security* (Vol. 23, No.1, Summer 1998), pp.78-105; Gülnur Aybet, 'NATO's New Missions', *Perceptions* (Vol.4, No.1, March-May 1999), pp.65-75.

¹² See Stanley R. Sloan, *NATO's Future beyond Collective Defense* (Washington, D.C.; Institute for National Strategic Studies, National Defense University, McNair Paper 46, December 1995).

¹³ A.J. K Bailes, 'NATO: Towards a New Synthesis', *Survival* (Vol.38, No.3, Autumn 1996), p.31.

¹⁴ Wright, op.cit., p.117.

¹⁵ “The seven new NATO allies are gaining access to agenda setting in European security that is not commensurate with their capabilities or geostrategic value.” Sean Kay, 'Putting NATO Back Together Again', *Current History* (Vol.102, No.662, March 2003), p.111.

Consequently, expanding roles, taken together with a diverse and large membership pool, quite naturally create mismatch between different member states' approaches to the problems. A collectivity of states with diverging interests and foreign policy objectives reflecting their geography or own culture of security may sometimes find little commonalities to forge a unified response, except perhaps being the members of one single organization. Some may be concerned with one sort of crisis, issue, or region, whereas the others may be more preoccupied with quite another, or they may have different positions on the same problem. For instance, while arguing that the Allies should conform to the Charter of the United Nations, and "settle any international dispute in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered, and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations,"¹⁶ France, Germany, and Belgium had a strong case.¹⁷ Is it then legitimate to ask these states in such cases to unify around a common position for the sole purpose of 'alliance solidarity or credibility', though a vast number of underlying differences are present and continue to dominate their positions? Would it be right to 'pressurize' the dissident few to come to the terms with the rest of the club, as though the majority held a god-given truth?¹⁸ Is the failure to share the same view with the others in itself equal to renegeing one's commitment? Are not these questions of practical and ontological importance to a community of democratic states, like NATO?

The opposite set of questions is equally compelling: Should the vast majority of an organization be captive to a few fellow nations in cases where cooperation is required to address a situation which is deemed to be of prime urgency? Are the minority entitled to prevent the others from taking action under the banner of that particular institution? These somewhat hypothetical and academic questions are actually very relevant and, in a sense, lie at the heart of the recent crisis at NATO, as far as it concerns institutional aspects.

¹⁶ *NAT*, Article 1.

¹⁷ They therefore changed their position after the UNSC meeting on 14 February 14, 2003. I am indebted to one anonymous referee for drawing my attention to this point.

¹⁸ In an illustrative example in the recent crisis, it was even reported that Lord Robertson "held a secret trump card." He was "planning to have NATO go ahead with or without Belgium's support. In that case, Belgium would have been isolated diplomatically if it had failed to go along and its dissent would have had no practical effect." Acting without unanimity from NATO would have been a serious derogation from NATO's practice and would have had a precedent-setting impact. See Michael R. Gordon, 'NATO Chief Wins Praise from US for Turkey Role', *New York Times*, 26 February, 2003.

In principle, as the *NATO Handbook* states, “all NATO Member countries participate fully in the political level of cooperation within the Alliance and are equally committed to the terms of the North Atlantic Treaty, not least to the reciprocal undertaking made in Article 5 which symbolises the indivisibility of their security - namely to consider an attack against one or more of them as an attack upon them all.”¹⁹ That is, NATO remains to be an ‘all for one, one for all’ collective self defence organization.

That being so, in fact, the idea of working in variable groupings is not unfamiliar to the Alliance. First, as was also acknowledged by the same NATO document, “the manner in which the Alliance has evolved nevertheless ensures that variations in the requirements and policies of member countries can be taken into account in their positions within the Alliance. This flexibility manifests itself in a number of different ways. In some cases differences may be largely procedural and are accommodated without difficulty. Iceland, for example, has no military forces and is therefore represented in NATO military forums by a civilian if it so wishes. In other cases, the distinctions may be of a more substantive nature. France, a founding member of the Alliance in 1949, withdrew from the Alliance's integrated military structure in 1966 while remaining a full member of its political structures ... Distinctions between NATO member countries may also exist as a result of their geographical, political, military or constitutional situations. The participation of Norway and Denmark in NATO's military dispositions, for example, must comply with national legislation which does not allow nuclear weapons or foreign forces to be stationed on their national territory in peacetime. In another context, military arrangements organised on a regional basis may involve only the forces of those countries directly concerned or equipped to participate in the specific area in which the activity takes place. This applies, for example, to the forces contributed by nations to the ACE Mobile Force and to NATO's Standing Naval Forces.”²⁰

Moreover, the concept of the Combined Joint Task Forces (CJTF), approved at the 1994 NATO Brussels Summit to provide a flexible and efficient means whereby the Alliance can generate rapidly deployable forces with appropriate command and control arrangements,

¹⁹ *NATO Handbook*, p.154.

²⁰ *ibid*, pp.154-155; similarly van Eekelen notes that “repeated instances of footnotes to Alliance communiqués, distancing a member state from specific paragraphs” were another channel through which some flexibility swept in NATO. See W. F. van Eekelen, ‘Pros and Cons of Ad-hocery’, in Missiroli, *op.cit.*

is another case that reflects NATO's ability to work in variable constellations.²¹ CJTF would allow NATO allies to work in smaller, variable coalitions that draw on NATO assets, especially when they wanted to become involved in non-Article 5 contingencies. Although, as such, it was essentially meant to meet the European Allies' concern to develop separable but not separate defence capabilities enabling, in effect, the WEU to make use of NATO assets for specific contingencies with or without direct US contribution, it is to remain an essential feature of NATO operations in the future. Although it could be open to the charge that it allows for free-riding and coalition rather than consensus building,²² it would be legitimate to claim that through CJTF, NATO is already acquainted with working in *ad hoc* combinations at the *operational/tactical level* to deliver flexible responses. Indeed, that CJTF is seen by the Alliance officials as one of the basic initiatives through which the Alliance has accomplished its 'internal adaptation', "which concerns the Alliance's military arrangements to support the new crisis management mission"²³, is illustrative of this point. In this sense, the nascent cooperation between the EU and NATO in the field of crisis management will require that, although NATO as a whole is not engaged, NATO assets and capabilities be made available for the EU's use.²⁴ That will be an illustrative example of using NATO flexibly at the operational level.

In fact a *de facto* development of a policy of flexibility is also taking root in NATO in non-Article 5 crises, as well. Although it has not been formalized, it was the case in NATO operations in the Balkans and worked well. In those operations, neither all NATO members actively participated, nor did they impede the action of the group.²⁵ Even during NATO operation Allied Force against former Yugoslavia in 1999, Greece had to waive its veto under pressure. Although it initially opposed NATO's use of force without a UNSC mandate, Prime Minister Costas Simitis later said that if NATO decided that there was no reason to get a UN mandate, then Greece would not oppose NATO operations against

²¹ On CJTF, see: <http://www.nato.int/docu/facts/2000/cjtf-con.htm>; also see Michael E. Firlie, 'Standing Combined Joint Task Forces', *Joint Force Quarterly*, (Autumn/Winter 1999-2000), pp.32-35.

²² Wright, *op.cit.*, p.123.

²³ Stuart Croft, Jolyon Howorth, Terry Terriff, and Mark Webber, 'NATO's Triple Challenge', *International Affairs* (Vol.76, No.3, May 2000), p.511.

²⁴ see *EU-NATO Declaration on ESDP* (NATO Press Release 2002:142, 16 December 2002).

²⁵ James O. Ellis, (Admiral, CINC Allied Forces Southern Europe), 'Some Command and Control Observations Derived from Operation Allied Force', in Anne D. Baylon ed., *XVIth International Workshop on Political-Military Decision Making in the Atlantic Alliance* (Budapest: 20-23 June 1999), http://www.cedr.org/99Book/1999_chap17.htm.

Yugoslavia and Greece. Later Greece went along with NATO decisions.²⁶ Moreover, NATO's approach to those operations was developed selectively, on a case-by-case basis; remember NATO's refusal to dispatch a peacekeeping force to Albania. Although it implies a great deal of flexibility in the Alliance's ability to manage crises in Europe, this case-by-case approach in non-Article 5 missions has been criticized for increasing "the likelihood that even within NATO doubts may emerge about commitment to the security concerns, if not defence, of some members."²⁷ This new development was largely because of the Alliance's response to stepping into a collective security role, in addition to its traditional function of collective self-defense. Through this hybrid 'two-track' policy, the Allies sought not to create a genuine, comprehensive system of collective security as far as their operational practice and the guidelines for decision-making are concerned. Rather, "the Allies are gradually adapting their military and institutional instruments [created for collective-defense], so that they can be applied to operations in support of collective security when selected Allies choose to undertake them and the Alliance as a whole is prepared to offer political endorsement."²⁸

On the other hand, it must be noted that multilateral diplomacy and decision-making procedures during those crisis management operations relying on a 'contact group' or 'directoires' model with the participation of few 'big' nations have come under criticism on the grounds that inequality in contributions gave way to inequality in decision-making.²⁹ This, however, is open to the counter argument that if institutions cannot accommodate flexible responses and yield efficiency in crisis management, there is a danger that they could be bypassed by *ad-hoc* arrangements.³⁰

Furthermore, and similarly, NATO nations are very familiar with the notion of 'coalition of the willing', which is an excellent way of addressing a crisis or threat that concerns a limited number of countries through any *ad hoc* constellation. Although these missions take place outside an established institution, in this case NATO, they still greatly profit from the habit of joint planning, training and exercises within NATO or the Partnership for Peace (PfP). When the NATO – as well as the WEU - community as a whole was

²⁶ see Carol Migdalovitz, *Kosovo: Greek and Turkish Perspectives* (CRS Report for Congress, 27 May, 1999), <http://www.fas.org/man/crs/RS20149.pdf>. This would have been perfectly a case where "constructive abstention" to be proposed below could have been applicable.

²⁷ Wright, *op.cit.*, p.123.

²⁸ Yost, *op.cit.*, p.150.

²⁹ see: Parmentier, *op.cit.*, pp.101-102.

³⁰ A similar point was raised by van Eekelen, *op.cit.*.

reluctant to dispatch a robust peacekeeping force to Albania in 1997, despite the pledges that ‘security is indivisible’, it was mainly NATO’s Mediterranean nations which came together under Italy’s leadership and conducted a successful coalition operation. Similarly, the members of NATO are providing the main bulk of the International Security Assistance Force (ISAF) in Afghanistan, which was under British, Turkish, and now German-Dutch joint command. Lately it is also possible to hear that the Alliance is willing to take on new responsibilities in Afghanistan.³¹

Why not, then, should the decision-making rules and procedures of NATO also evolve in a corresponding way to allow for a similar flexibility at the *strategic level* so that those particular *ad hoc* actions remain under NATO’s roof? Although in practice it is also possible to achieve the same outcome through several ways and under different labels, not least on a bilateral basis, as offered by Germany on the question of lending defensive support to Turkey,³² the crux of the issue is whether the given action is going to bear NATO’s name or not. In other words, whether German tanks or Dutch Patriot air defense systems to be deployed in Turkey, or AWACS early warning airborne systems patrolling the Turkish skies serve under the NATO flag or not. The contention here is that serious consideration should be paid to the prospects of introducing a more formal and institutionalized concept of flexibility into NATO in order to make it possible for a group of member states to focus on certain crises, issues or regions, by utilizing NATO’s structures, mechanisms or capabilities in place, while the other states prefer not to take part in the action. That would be necessary in order to ensure that the growing practice of temporary coalitions does not give way to a permanent system whereby NATO is reduced to a mere interoperability-facilitator or force-provider in the formation of *ad hoc* coalitions of the willing outside the Alliance’s structures.

³¹ Michael, R. Gordon, ‘NATO Chief Says Alliance Needs Role in Afghanistan’, *New York Times*, 21 February, 2003; Andrew F. Tully, ‘NATO Shifting from Defense to Security Force’, *RFE/RL*, 25 February, 2003. As this article was under review, on 11 August 2003, NATO already assumed command and coordination of the ISAF (4), see: <http://www.nato.int/issues/afghanistan/index.htm>.

³² For a German view on the crisis, see Christian Tuschhoff, ‘When Reason Breaks Down... Emotions Take Over’, *American Institute for Contemporary German* (<http://www.aicgs.org/c/tuschhoffc.shtml>).

Towards a solution to NATO's decision-making problem: lessons from EU integration

The study of international organizations is a highly developed field, and there could be several alternatives to fix NATO's problem of decision-making, which is based on consensus among the member countries. Whereas the principle of unanimity in decision-making stands at one extreme of the spectrum, some form of majority voting stands at the other. At first glance, indeed, moving away from inter-governmentalism and blending NATO with some features of supranationalism could seem to be an attractive and revolutionary idea as a way forward. Yet, it is apparent that it would not be a realistic alternative. Few exceptions notwithstanding, it is hardly possible to discern an international organization in which the constituting units have transferred their decision-making powers to supranational bodies. Although at the implementation - operational/tactical - level, the member states of NATO were eager to creating structures for joint planning and coordination, and integrated command of their military forces, this would not be forthcoming at the decision-making/strategic level. A transfer of decision-making competences from the member states to international organizations, and the extent to which this transfer takes place, signifies the erosion of sovereignty and a substantial step away from the nation state. Perhaps nowhere is this more visible than in the field of security and defense. It is, therefore, not surprising to see that even EU member states, the champions of supranationalism, are wary of furthering integration in foreign policy making. Whereas the supranational EC/EU bodies play a central role in other fields of the European integration, the member states remain the core actors in foreign policy matters. Hence, the so-called intergovernmental second-pillar where unanimity is the principal decision-making rule, reflecting the sensitive nature of foreign and security policy.³³ Bearing that example in mind, therefore, it seems unlikely that NATO could abandon the principle of unanimity and move towards some kind of majority voting. This is largely because unanimity principle by definition endows each member with an implicit right of veto, and it is this right of veto that no country is willing to relinquish when it comes to the sensitive issue of collective self-defense.

³³ However, it would also be misleading to conceive the CFSP as a purely intergovernmental forum; it is rather a hybrid decision-making mechanism. As argued by Müller-Brandeck-Bocquet, four principles are effective in the CFSP decision-making system: It entails sovereignty-preserving, sovereignty-sharing, Brusselized and supranational elements, though the supranational is the least noticeable. For an excellent treatment of how these distinct elements are represented in the CFSP, see Gisela Müller-Brandeck-Bocquet, 'The New CFSP and ESDP Decision-Making System of the European Union', *European Foreign Affairs Review* (7: 2002), in particular, pp.259-278.

Indeed, such a proposal, to ease the unanimity rule, was raised within NATO for non-Article 5 missions in the mid-1990s. Cognizant of the fact that the requirement to achieve consensus for all actions among the Allies could, in theory, immobilize the alliance, the issue was addressed in a non-attribution paper that circulated at NATO headquarters in 1994. The author was of the opinion that NATO's consensus system forces member nations either to approve an operation politically or to draw criticism from others for blocking action. "A better solution would provide an 'emergency exit' for those unable or unwilling to participate which does not prohibit action by others. This can be done by *removing the requirement for consensus for Article 4 operations...* The solution proposed would have created a separate NATO decision-making body for non-Article 5 operations, ranging from humanitarian relief and disaster assistance through peacekeeping to peace enforcement. According to the proposal, decisions in that body could be taken by at least two-thirds of Alliance members, with the majority including at least two of the four largest financial contributors to the alliance."³⁴ However, moving towards a non-consensual approach to decision-making for non-Article 5 operations was rejected. As Sloan concludes, "(a)ny majority voting procedure for non-Article 5 operations probably will remain beyond political acceptance for the foreseeable future", although "the challenge of finding a way around the potential consensus barrier for non-Article 5 operations remains."³⁵

How then could we make our way out of the dilemma between majority voting and unanimity? Some lessons could be drawn from European integration. If we are to turn our attention to the EU, we have quite an interesting picture there. Indeed, those discussions limited among the students of NATO have been extensively taking place within EU circles. For instance, while the EU is concerned with the repercussions of the eastern enlargement on the EU's institutional architecture, and has tried to address some of these problems through institutional reforms at the Nice Summit, it is astonishing to observe that the NATO community has not engaged in a similar wide-ranging debate before and after NATO's latest enlargements.

Likewise, the effects of the challenging experiences of the 1990s are felt differently in both organizations. As expressed by Wright, the crisis in Bosnia was a wake-up call for the

³⁴ cited by Sloan, op.cit., p.39.

³⁵ *ibid.*

European security institutions to reconsider the consensus-based decision making of both NATO and the CFSP that may at times present a barrier to some sort of action being taken in addressing a security problem. Although various proposals were raised to address the problem for both institutions, as far as decision-making procedures are concerned, NATO's track record is not comparable to that of the EU. The major concern in those proposals was to have a system whereby "no state should be forced to participate in any security related action against its will, but neither should it be able to prevent those wishing to act from doing so."³⁶ Whereas the EU has taken a step in that direction through constructive abstention, to be discussed below, the NATO community has not been able to realize Sloan's similar offer for NATO: "explicit agreement on NATO decision-making procedures that would allow nations to stand aside from future non-Article 5 operations without exercising a veto over operations that are favored by most other allies,"³⁷ as part of the reforms intended to adapt the Alliance to new circumstances.

It is true that for an alliance with primary responsibility in collective defense, the question of capabilities is quintessential, and the key to its relevance and survival in the future. Starting with the Kosovo War, there has been a visible leaning on the part of the US towards using NATO for political legitimacy, but de-emphasizing it for planning and conducting military campaigns, peacekeeping operations notwithstanding. This trend, which reached its climax after September 11, was mainly due to US concern at being slowed down by small, non-contributing Allies vetoing American military priorities.³⁸ Thus, Lord Robertson's famous motto: "Capabilities, Capabilities, Capabilities".³⁹ However, one part of the American dissatisfaction with NATO stems from the Alliance's decision-making processes. It is therefore difficult to understand why, compared to the excessive focus on the question of whether and to what extent the upcoming enlargement wave after Prague adds to NATO's military capabilities, little attention was paid to the concerns over what the enlargement implies for the manner in which NATO functions. There seem to be no serious attempts to allay fears that NATO's decision-making process could be compromised by the growth of Alliance membership. For instance, a few exceptions notwithstanding, the

³⁶ Wright, *op.cit.*, p.117.

³⁷ Sloan, *op.cit.*, pp.4,39.

³⁸ See, David S. Yost, 'Transatlantic Relations and Peace in Europe', *International Affairs* (Vol.78, No.2, April 2002), pp.297-299; Peter Finn, 'Military Gap Grows Between US, NATO Allies', *Washington Post*, 19 May, 2002, p.A22.

³⁹ Secretary-General Lord Robertson, speech in London, 24 January, 2002, <http://www.nato.int/docu/speech/2002/s020124a.htm>; for more on the new "capabilitocracy" see Alan L. Isenberg, 'Last Chance: A Roadmap for NATO Revitalization', *Orbis* (Vol.46, No.4, Fall 2002), pp.641-659.

contributions to the Summer 2002 issue of *NATO Review*, entitled 'Transforming the Alliance', which focuses on the debate over the modernization of NATO in the run-up to the Prague Summit, and the Spring 2002 issue of *NATO Review*, entitled 'Examining Enlargement', devoted to the enlargement debate, fail to address in detail the issue of decision-making in an enlarged Alliance.⁴⁰ Ronald D. Asmus, in his correspondence with Charles Grant on the question of whether NATO can remain an effective military and political alliance if it keeps growing, was signaling that NATO was in need of institutional reform: "First, we need to discuss how to streamline a bigger NATO. The Alliance's way of doing business may have to be revamped -perhaps even radically. We should discuss this openly and without taboos. It is striking that the European Union is having a far-reaching debate about how it will function as it enlarges, yet there is hardly a murmur about this in NATO. I understand the sensitivities. But if we can't debate this within NATO officialdom, then perhaps we should gather a group of wise men to reflect on the issue -before Prague."⁴¹

Similarly, several other observers have underlined the need for NATO to review its consensus-based decision-making procedures in the face of growing membership. Serfaty has underlined the point that "NATO needs to remain adaptive lest it become *de facto* what Lord Robertson called 'an optional part.' Decisions by consensus are no longer possible, and by implication, security dependence on increasingly cacophonous 'coalitions of the willing' is cumbersome, as was shown during the 1999 war in Kosovo."⁴² In discussing the major political challenges awaiting the Alliance, Flanagan has contended that "(c)onsensus building in the North Atlantic Council (NAC) and in various committees has worked thus far. This will not necessarily continue to be the case in the future. NAC decision-making will likely be further complicated by enlargement to 26 countries, countervailing pressures that EU membership will place on certain allies, and divergent EU and NATO memberships. NATO's present committee structure - with working groups numbering 400 - is too cumbersome and in

⁴⁰ In the same vein, Philip Gordon's case for saving NATO and adapting it to the most important security challenges of the day in Prague, and five tasks to be undertaken to this end, do not entail institutional reform. Moving from the question of American supremacy in NATO, Gordon contends that "there is not, however, a fundamental difference between an Alliance at 19 and an Alliance at 24 or 26 .NATO never was an alliance of equals and always depended on American leadership in the past, as it will in the future. Moreover, to the degree that NATO is being transformed from a defensive warfighting organization into a force-providing and coalition-facilitating organization the dilution issue largely goes away." Philip H. Gordon, 'Reforging the Atlantic Alliance', *National Interest* (No.69, Fall 2002), p.97.

⁴¹ 'Debate: Can NATO Remain an Effective Military and Political Alliance if it Keeps Growing?' *NATO Review* (Spring 2002).

⁴² Simon Serfaty, 'Thinking about and beyond NATO', in Christina V. Balis ed., *Beyond the NATO Prague Summit* (Washington, D.C.: Center for Strategic and International Studies, US-German Bilateral Dialogue, Conference Report, September 2002), p.3.

need of overhaul. Consideration should also be given to expanding the authority of the NATO secretary general to initiate and orchestrate action ... The alliance may also want to reconsider the way the NAC makes decisions.”⁴³ Klaus Becher’s opinions are similar: “As it stands, NATO’s political profile is not configured optimally for rapid, successful action. While little evidence exists that incoming new members would be less cooperative than existing ones, the expansion in numbers alone may well make discussions, decisions, and bureaucracies more cumbersome... it would make sense to streamline NATO’s political and diplomatic decisionmaking mechanisms in relation to the conduct of military operations. In particular, the core group of force-contributing nations should be able to determine the conduct of NATO operations flexibly and efficiently, even if some other member countries hold reservations.”⁴⁴

This challenge was, however, not addressed in Prague. In his assessment of the achievements of the Prague Summit, Lord Robertson took a rather conservative stance in regards to decision-making; he was content with the expanding numbers: “Some security analysts have questioned whether NATO will be able to operate with many more members. To be sure, more views will be expressed around a larger North Atlantic Council table. But, as we have seen with earlier rounds of NATO enlargement, more views do not necessarily mean more different views.” Therefore he saw no need to put the streamlining of NATO decision-making on the demanding agenda of NATO and its members ahead of meeting the various commitments that were made at the Prague Summit: “The security environment is changing, as is the way in which we react to it, and to each other. What is crucial during such a period of transition is that we preserve and strengthen what has brought us where we are today, and delivered so much for our security, prosperity and well-being. That is, in a nutshell, our common transatlantic culture of trust, cooperation and mutual support.”⁴⁵ That goes in parallel with the earlier optimism expressed in the 1995 NATO *Study on Enlargement*: “A smooth and effective decision-making process in an enlarged Alliance will be key to preserving its effectiveness. Maintenance of the consensus principle will be essential in the political, military and defence areas. All Allies must therefore be willing to work constructively towards this. To this end, it will be important that prospective new members

⁴³ Stephen J. Flanagan, ‘Adapting NATO for the 21st Century’, in Balis , op.cit., p.59.

⁴⁴ Klaus Becher, ‘Organizing NATO for the Future’, in Balis , op.cit., pp.69-70.

⁴⁵ Lord Robertson, ‘Transforming NATO’, *NATO Review* (Spring 2003).

become familiar with the Alliance decision-making process, and the modalities and traditions of consensus and compromise, before joining.”⁴⁶

However, in order to manage the enlargement process effectively, as underlined by a senior German analyst on NATO, Karl-Heinz Kamp, the existing structures and mechanisms regarding decision-making at NATO headquarters in Brussels may need to be rearranged, a process that would turn out to be very laborious.⁴⁷ That being so, in the discussions on the issue, the only prospect for putting NATO decision-making into question appears to be the forthcoming US Senate discussions for ratifying the new enlargement round.⁴⁸ As expressed bluntly by Kay, “the need to generate creative institutional decision-making reform for European security is urgent... Absent a quick course redirection from the United States Senate, NATO’s new enlargement will further complicate the workings of an alliance that is already politically unmanageable, militarily dysfunctional, and strategically irrelevant.”⁴⁹

Shall we really wait that the U.S. Senate takes up the issue?⁵⁰ Let us in the meantime have a closer look at developments on the EU side. Since its beginning, the European integration process has ‘spilled-over’ from one field to another, and today the EU/EC institutions have come to embrace large competences in a wide range of policies. All these have taken place in tandem with several expansions of its membership; thus the so-called enlargement-deepening analogy. Several milestones in this process are also remembered as the periods the EEC/EC/EU’s institutional framework and decision-making rules underwent substantial transformations in order to match the changes the organization was experiencing. Likewise, as far as the institutional implications of the latest enlargement are concerned, it is a commonly held view that the enlargement will inevitably have a decisive impact on the future functioning and direction of the EU. With the ratification of the

⁴⁶ *Study on NATO Enlargement*, September 1995, para.46, <http://www.nato.int/docu/basicxt/enl-9501.htm>.

⁴⁷ Karl-Heinz Kamp, *Die NATO nach dem Prager Gipfel* (Sankt Augustin: Konrad-Adenauer-Stiftung Arbeitspapier Nr.97, January 2003), p.6.

⁴⁸ See, for instance: James M. Goldgeier, ‘Not when but who’, *NATO Review* (Spring 2002).

⁴⁹ Kay, *op.cit.*, pp.111-112.

⁵⁰ As this article was under review, the Senate voted unanimously in support of NATO enlargement. However, partly as a reflection of US frustration over the recent crisis concerning Turkey, the Senate raised the possibility of dropping the requirement that decisions be unanimous. In an amendment approved by voice vote, the Senate instructed the administration to raise the unanimity issue with NATO’s policy-making North Atlantic Council within 18 months. The amendment also asks NATO to consider a policy for suspending members that no longer adhere to democratic principles. Ken Guggenheim, ‘US Senate Approves NATO Enlargement, Asks to Review Consensus Policy’, *AP*, 8 May 2003.

Nice Treaty, the EU has completed the institutional changes required by the accession of new member states. The institutional reforms of Nice were intended to help reduce the negative impacts and eliminate the risk of paralysis of the whole decision-making processes within the EU. Now the question is even being asked whether, in addition to changes to the internal composition of existing institutions and decision-making rules, it will be necessary to fundamentally reshape the structure and the competences of the current institutions, especially the Council. Hence, the European Convention proposals on the future of the EU. As far as foreign and security policy is concerned, similar discussions are also being conducted and countless proposals are being put forward that address the question of how to allow flexibility into decision-making so as to have an efficient and effective as well as democratic and transparent CFSP/ESDP.⁵¹ Current EU institutional architecture, by far the most sophisticated among the international organizations, is the product of this long and open-ended process.

Enhanced cooperation: a revolutionary step forward?

It is apparent that the EU's institutional architecture is so *sui generis* that it would be rather difficult for other international organizations to adapt similar structures. Nevertheless, some mechanisms which are already in use in the EU framework could provide us with useful insights to derive lessons for NATO. The debate around the concept of a multi-speed or two-tiered EU is the right point of departure. Such a development within the EU brings about an increasing resort to 'flexibility' introduced by the Amsterdam Treaty and further elaborated in Nice as 'enhanced cooperation'⁵² whose aim is to allow for differential development within the Union by enabling the more integration-minded states to go ahead and leaving the others to catch up later. Although this trend offers advantages in terms of keeping the integration process alive and allowing the willing, or the so-called 'core', to deepen integration in certain policy fields, due attention is also paid to ensure that increasing differentiation does not create discrimination, or erosion of unity. The list of safeguards introduced by the Nice Treaty in order to ensure that enhanced cooperation initiatives do not undermine the *acquis* is a step in this direction. On the other hand, others concerned with the increasing heterogeneity as a result of differential developments are also called to be aware of

⁵¹ Udo Diedrichs, Wolfgang Wessels, 'Die erweiterte EU als internationaler Akteur: Für eine gemeinschaftsorientierte Flexibilitätsstrategie', *Internationale Politik* (Vol.58, No.1, January 2003), pp.11-18.

⁵² see *Consolidated Version of the Treaty on European Union*, 2002, Title VII: Provisions on Enhanced Cooperation -Articles: 43, 43a-b, 44, 44a, 45.

the fact that if an enlarged EU becomes paralyzed and unable to make decisions, everybody will suffer equally.⁵³

At first glance, having NATO proceed in a similar way and elaborate more on introducing a practice similar to that of enhanced cooperation may seem attractive. Nevertheless, we are reminded to be cautious in calling for such a watershed in NATO, again by turning back to the practice in the EU. The Nice Treaty⁵⁴ has inserted this concept into the decision-making system of CFSP, now encompassing the ESDP, and made it possible that if a core group aspires to develop the CFSP at a faster pace, they will be able to do so - previously the Amsterdam Treaty's new chapter on flexibility did not apply to the CFSP.⁵⁵ Yet, a number of caveats are in place: enhanced cooperation pursuant to CFSP provisions is confined to the "implementation of a joint action or a common position", which is decided by a qualified majority⁵⁶ on the basis of a common strategy, and does not concern the principles, general guidelines and common strategies, to be decided by unanimity. That is to say, it will be applicable only when and where a framework Union policy already exists. Therefore, "(t)he integrative added value of this instrument remains very limited in the CFSP, particularly since it is basically applicable only for time-limited decisions, namely joint actions and common positions."⁵⁷ Moreover, "matters having military or defence implications" are to be kept

⁵³ for pre-Nice discussions on flexibility, see Ben Hall, *How Flexible should Europe Be?* (London: Centre for European Reform Working Paper, October 2000); however, there is a shared belief that the modifications of the TEU introduced at Nice as far as the CFSP is concerned were minor: Elfriede Regelsberger, 'Die Gemeinsame Außen- und Sicherheitspolitik nach Nizza-begrenzter Reformeifer und außervertragliche Dynamik', *Integration* (No. 2, April 2001), pp. 156–166; also see Simon Duke, 'CESDP: Nice's Overtrumped Success', *European Foreign Affairs Review* (6: 2001), pp.155-175.

⁵⁴ TEU, Articles: 27a-e; for more on the application of enhanced cooperation in CFSP, see Thomas Jaeger, 'Enhanced Cooperation in the Treaty of Nice and Flexibility in the Common Foreign and Security Policy', *European Foreign Affairs Review* (7: 2002), pp. 297–316.

⁵⁵ Although original drafts for the Amsterdam Treaty included a specific flexibility clause for CFSP, similar to the respective provisions in the other two pillars, this proposal was dropped in the final phase of the negotiations. Instead, Title V on CFSP contained a "constructive abstention" mechanism; see Francesco Miller and Alkuin Kölliker, *How to Make Use of Closer Cooperation? The Amsterdam Clauses and the Dynamics of European Integration* (European Commission Forward Studies Unit Working Paper, 2000), p.15. <http://europa.eu.int/comm/cdp/working-paper/cooperation.pdf>.

⁵⁶ Qualified majority voting (QMV) is the principal method of reaching decisions in the Council of Ministers. "A qualified majority is the number of votes required in the Council for a decision to be adopted... [Previously], member states' votes are weighted on the basis of their population and corrected in favour of less-populated countries... [However], following the Nice Treaty, the number of votes allocated to each member state has been reweighted, in particular for those States with larger populations, so that the legitimacy of the Council's decisions can be safeguarded in terms of their demographic representativeness... The Nice Treaty also amended the qualified majority decision-making system. A qualified majority is deemed to have been reached when two conditions are fulfilled: the decision receives a set number of votes (which will change as new countries join) and is agreed by a majority of Member States. Moreover, a Member State may request that it be verified that the qualified majority represents at least 62% of the total population of the Union. If this is not the case, the decision is not adopted." European Union Online, *Glossary*, (<http://europa.eu.int/scadplus/leg/en/cig/g4000q.htm>).

⁵⁷ Müller-Brandeck-Bocquet, op.cit., p.269.

outside the confines of enhanced cooperation. This also draws criticism because the armaments sector and the structure of military forces are said to be the most likely fields for successful application of lasting ‘enhanced cooperations’.⁵⁸ Jaeger, however, argues that “(a)lthough the provisions on enhanced cooperation would ... in principle provide an ideal framework for the operation of a European defence capacity, whatever its form, this ambitious goal was for the time being abandoned. Nonetheless the Nice compromise of allowing enhanced cooperation in the Second Pillar while excluding defence was, on the part of some Member States, likely performed with a view to creating the precursory basis for eventual defence cooperation following another Treaty reform.”⁵⁹

When it comes to security and defense issues, in short, sensitivities on the limitation of the national scope of international action at the expense of international organizations come to the fore. Therefore, NATO’s prospects for taking such a ground-breaking step are highly limited. It is at this point that another, rather more modest, practice from the EU/ CFSP could be discussed. That is, *constructive abstention*, which is intended to exert limits on the unanimity principle in decision making.

Constructive abstention: a middle-way solution?

Decisions under the CFSP are taken by the Council of Ministers on the basis of unanimity,⁶⁰ except for the situations when a qualified majority applies. Art. 23, para.2 allows for the Council to act by qualified majority “when adopting joint actions, common positions or taking any other decision on the basis of a common strategy; or when adopting any decision implementing a joint action or a common position.” That means, given that common strategies are to be decided on the basis of unanimity by the European Council, which is the Summit of EU Heads of State and Government, the application of the qualified majority is in fact limited in practice. Decisions on the basis of a qualified majority can only be taken within the framework of a wider decision which has been already formulated at a higher level by unanimity. Moreover, another caveat inserted by Article 23, para.2 acts like an ‘emergency brake’ system and further exerts limitations on the application of the qualified

⁵⁸ Claus Giering and Josef Janning, ‘Flexibilität als Katalysator der Finalität? Die Gestaltungskraft der Verstärkten Zusammenarbeit nach Nizza’, *Integration* (No. 2, April 2001), p. 151, cited by Müller-Brandeck-Bocquet, op.cit., p.269.

⁵⁹ Jaeger, op.cit., p.313.

⁶⁰ TEU, Article: 23, para.1.

majority: “If a member of the Council declares that, for important and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority, a vote shall not be taken. The Council may, acting by a qualified majority, request that the matter be referred to the European Council for decision by unanimity”. This last-minute insertion of an emergency-brake was seen as the resurgence of the ‘Luxembourg compromise’ of 1966, whereby every single EU member potentially exercises a veto power. Furthermore, resort to the qualified majority “shall not apply to decisions having military or defence implications.” In short, the principle of unanimity, with its inherent veto power, retains its central place in the EU’s decision-making rules on foreign and security policy.⁶¹

That said, another principle from the CFSP is relevant for our purposes here. The so-called constructive abstention, although this is not a treaty term, is a procedure by which a member state’s abstention within the Council does not act as an obstacle to unanimity amongst the others. It was introduced by the Amsterdam Treaty; previously unanimity had been required. Article 23. para.1 reads as follows: “Abstentions ... shall not prevent the adoption of such decisions [to be taken by unanimity]” and in this case of unqualified, or simple abstention, the abstaining state will be bound to apply the decision. However, “when abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration... In that case, it shall not be obliged to apply the decision, but shall accept that the decision commits the Union. In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position.” Constructive abstention is, however, limited in the following way: “if the members of the Council qualifying their abstention in this way represent more than one third of the votes weighted in accordance with Article 205(2) of the Treaty establishing the European Community”, this mechanism cannot be employed and a decision cannot be taken.

It can be said that, through this interplay between unanimity on the one hand and qualified majority and constructive abstention on the other, the drafters of the decision-making provisions of the CFSP were essentially concerned with bridging different

⁶¹ it must also be noted that, “(i)n practice with regard to the CFSP, the Council has hardly ever decided by qualified majority, since the need for coordination and cooptation is still too strong. This also explains why the subject of extending qualified majority voting for CFSP resolutions, though hotly debated earlier, hardly came up at the Nice reform summit.” Müller-Brandeck-Bocquet, *op.cit.*, p.268.

considerations: they sought to reach a compromise⁶² between the need to develop qualified majority voting, for reasons of efficiency, and the determination to safeguard essential national interests, which were to be guaranteed by the unanimity principle. The elaboration of several types of instruments and the setting-up of new mechanisms for this purpose were the results of this attempt. The major contribution of these procedures has been to help minimise problems stemming from the EU's bold step into the field of security and defence, which hitherto had been primarily the prerogative of the member states.⁶³ In particular, constructive abstention was instrumental in allaying the worries of neutral EU members about the growing militarization of the EU. Constructive abstention provides a middle way solution through which the interests of both neutral and other EU member states can be safeguarded.

Constructive abstention is a mix between a decision-making mechanism and flexibility.⁶⁴ As already stated, it was inserted into the Amsterdam Treaty to compensate for dropping the specific flexibility clause from the CFSP. On a case-by-case basis, it allows an unwilling member state not to subscribe to certain actions, whilst at the same time agreeing that the decision commits the EU as a whole. As such, it enables the 'coalition of the willing' to proceed further. It was mainly for this reason that, before the Nice Treaty, constructive abstention was in fact the main instrument for flexibility in the CFSP. It could therefore be questioned whether, after the introduction of a specified regime for enhanced cooperation into the CFSP by the Nice Treaty, constructive abstention still retains its relevancy. However, as underlined by Jaeger, it remains "a separate and independent instrument of flexibility alongside enhanced cooperation in the Second Pillar. Its significance is not likely to diminish, given that constructive abstention is, without limits, possible in all policy areas and in relation to all instruments foreseen by Title V EU Treaty, whereas enhanced cooperation in the CFSP even after the Treaty of Nice reform of the general provisions remains to be subject to multiple and rather rigid conditions for authorization and application. More likely, alternatives to formalized enhanced cooperation will retain a dominant role in this Pillar."⁶⁵

⁶² Franklin Dehousse, 'After Amsterdam: A Report on the Common Foreign and Security Policy of the European Union', *European Journal of International Law* (9, 1998), p.533.

⁶³ 'Constructive abstention'. Rodney Leach ed., *The Concise Encyclopedia of the European Union*, (London: Profile Books) <http://www.euro-know.org/dictionary/>.

⁶⁴ "EUROPEAN UNION- Enhanced Cooperation" *The Oxford Analytica Weekly Column- In Perspective* (August 28, 2001), http://www.oxan.com/columns/wkcol_30082001.html; however, Missiroli contends that it "is primarily a decision-making mechanism and only secondarily a trigger mechanism for flexibility." Antonio Missiroli, *CFSP, Defence, and Flexibility* (Institute for Security Studies of WEU, Chaillot Paper 38, February 2000), pp.10,13.

⁶⁵ Jaeger, op.cit., p.300.

Any member state that does not concur with a given decision could, of course, just squash a decision by a no vote, but the existence of such an avenue for that state would in itself certainly exert a pressure on it to stay aside and not to take part if the majority is in favor. On the other hand, the proponents of closer integration in security and defence issues sometimes level their criticism at constructive abstention for perpetuating the intergovernmental nature of the CFSP because it hinders genuine communitarization of the CFSP, and allows room for the EU members to act “for reasons of national rather than European interest.”⁶⁶ Other shortcomings identified by Missiroli include: first, similar to other limited flexibility provisions of Amsterdam, it could primarily remain as an institutional deterrent against blockade by a single country rather than as a device to deepen integration among more willing countries. Second, constructive abstention puts the main emphasis on non-participation, and case-by-case opting-out makes it a rather ambivalent device; it could serve only as a device for silent defection. Third, the quantity and quality of the abstentions may also create another source of problem. Who abstains on what decision is particularly important, especially on ‘decisions having military or defence implications’, because some countries are considered more ‘equal’ in this field than others. Finally, its constructive impact could be diminished if a member state is tempted to abstain for purely financial reasons. Given that the expenditures for missions approved under ‘constructive abstention’ are borne by the countries participating, not by the Community budget, this may be prone to systematic ‘free-riding’ and may turn out to be ‘destructive’, rather than ‘constructive’, for CFSP.⁶⁷

Nevertheless, though far from being complete, constructive abstention also makes it possible to channel more decisions through the EU, which may otherwise be pursued outside it. This contributes to the relevance of the EU in the eyes of member states and keeps the momentum for further integration alive, while at the same time encouraging them “to identify with broader European interests.”⁶⁸ Like other mechanisms of flexibility, as stated by Jaeger, constructive abstention makes it possible that “vanguard Member States need not establish a parallel institutional and procedural framework outside the Union for collaboration. Reference

⁶⁶ Martin Walker, ‘The New European Strategic Relationship’, *World Policy Journal* (Vol.16, No.2, Summer 1999), p.26.

⁶⁷ Missiroli, *op.cit.*, pp.13-15; similarly Janning is also critical of it: “I have some doubts about [whether it is really constructive] because constructive abstention is almost consensus or ‘consensus minus one’ but not the one who cares about a certain issue but minus the one or very few who do not care.”, Josef Janning, ‘Looking to the Future’, in Missiroli, *ibid.*

⁶⁸ Louise Gibbs, *Is the European Union Becoming a Great Power*, (Occasional Paper, Program in Arms Control, Disarmament, and International Security University of Illinois at Urbana-Champaign, September 2000), p.20.

to closer cooperation rather than to some other form of cooperation under common International Public Law is mutually beneficial for participants and non-participants, as it renders the extent and content of such a joint effort foreseeable and controllable on the one hand, and more efficient and less expensive on the other”.⁶⁹ Furthermore, although not satisfied with the limited scope of constructive abstention, as a general observation, Missiroli also adds that “a selective insertion and a limited use of some institutional flexibility in the CFSP machinery - especially now that the EU has decided to take its defence dimension seriously - may bring significant benefits to the Union’s international presence and ‘identity’ without diluting or undermining internal cohesion and mutual solidarity.”⁷⁰

As stated, the discussions within the framework of the European Convention on the reform of the CFSP decision-making structures are mainly the EU’s attempts to ease the effects of the upcoming enlargement. Because the risk of inertia will increase in an enlarged Union and the EU will not be able to reach decisions in the CFSP issues speedily and efficiently enough due to the mismatch between the current procedures and a higher number of member states, a very lively debate is taking place. There is a determination to look at solutions that would help the system to continue to function. As far as foreign policy aspects are concerned, the possible extension of qualified majority voting, better use of constructive abstention and enhanced cooperation occupy the central place among a variety of proposals. In several working group meetings a number of issues have been explored, including the possible conditions in which a group of member states, acting as a coalition of the willing, could take forward an initiative on behalf of the EU (enhanced co-operation); how constructive abstention could be used more effectively for member states that do not necessarily want to join an EU initiative but do not want to block it either; and whether it is possible to extend the use of qualified majority in foreign policy decisions, as well as whether any other aspects of the community method could be applied to CFSP are extensively explored.⁷¹

Constructive abstention for the UN Security Council?

⁶⁹ Jaeger, op.cit., p.298.

⁷⁰ Missiroli, op.cit., p.4.

⁷¹ see, for instance European Convention Secretariat, *Summary of the Meeting held on 15 October 2002*, (Brussels: WG VII 8, CONV 356/02, 21 October 2002).

A similar practice, which is worth noting in this context, is also being discussed with regard to the UN Security Council, which represents largely the leadership of five states given the right to veto, rather than the international community at large. No SC resolution can be adopted if one of the permanent members of the SC objects to it. This rule, encapsulated in Article 27(3) of the UN Charter, has been nonetheless interpreted flexibly in practice. Article 27(3) reads as follows: “decisions of the Security Council on all other non-procedural matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members...”⁷² If a permanent member abstains from voting, a resolution that has attracted the positive vote of the other permanent members plus the majority of the states sitting in the Security Council is deemed adopted. In other words, abstention does not amount to vetoing a decision. In an interesting shift in recent years, a common code of conduct in matters relating to humanitarian intervention resembling constructive abstention was proposed for the SC as well. Despite extensive debate on the issue during the 1990s, so far there have been no concrete steps taken toward structural reform of the UN in general and the SC in particular. Throughout these discussions, a great deal of criticism has been directed at the SC as being the source of the problems. Its composition, particularly the position of the permanent members, and the use of veto have been vigorously debated issues.

In general, as an interim solution, which does not require Charter amendment, the adoption of modified voting clauses which would limit the use of veto in certain conditions has already been discussed.⁷³ As far as the particular case of humanitarian intervention is concerned, it has been argued that the great power veto should not be exercised in the worst human emergencies.⁷⁴ Actually, until the NATO intervention in Kosovo, the practice of the SC reflected such a common understanding. Russia and China, two main contenders of increasing Western interventionism in the 1990s, went along the other permanent members or mainly abstained while voting on the SC-authorized humanitarian interventions. Moreover, as shown in several analyses, the permanent members of the SC made a very limited use of their veto power during the 1990s, at a time when the number of Council resolutions was

⁷² *The Charter of the United Nations*.

⁷³ David D. Caron, ‘The Legitimacy of the Collective Authority of the Security Council’, *American Journal of International Law* (Vol. 87, No.4, October 1993), pp.552-588.

⁷⁴ Andrew Linklater, ‘The Good International Citizen and the Crisis in Kosovo’, in Albrecht Schnabel and Ramesh Thakur, eds., *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship* (Tokyo: United Nations University Press, 2000), p.490.

rising⁷⁵ It was this positive situation which led to emerging cooperation within the international system and a growing place for the UN in world politics. In a nutshell, at first glance, the introduction of such a code of conduct on the use of a veto during considerations of genocide and other grave violations of humanitarian law can be seen as an explicit challenge to the legitimacy of veto power. Nevertheless, it might offer an important middle way as a solution to the dilemma of SC *inaction* versus the *bypassing* of the SC in the face of extreme humanitarian suffering.⁷⁶ It was against this background that the International Commission on Intervention and State Sovereignty also took up the issue and included a similar proposal into its basic principles for military intervention in its report from December 2001.⁷⁷

A constructive abstention clause for NATO?

In NATO, on the other hand, “(i)f need be, efforts to reconcile differences between them [the member states] will be made in order that joint actions may be backed by the full force of decisions to which all the member governments subscribe. Once taken, such decisions represent the common determination of all the countries involved to implement them in full. Decisions which may be politically difficult, or which face competing demands on resources, thus acquire added force and credibility.”⁷⁸

However as the recent crisis has revealed, in practice, agreeing on ‘decisions to which all the member governments may subscribe’ may turn out to be problematic and more difficult to achieve than anticipated. Moreover, rather than yielding decisions with ‘added force and credibility’, such a process of adapting decisions may be politically divisive in the face of serious crises; in the words of the US ambassador to NATO, Nicholas Burns, the

⁷⁵ Advisory Council on International Affairs (Netherlands), *Humanitarian Intervention* (Advisory Report No.13, April 2000), p.16, footnote.28.

⁷⁶ for more on this argument see Saban Kardas, *Humanitarian Intervention: The Evolution of the Idea and Practice* (Ankara: Graduate School of Social Sciences, Middle East Technical University, Unpublished MSc. Thesis, September 2001), p.139.

⁷⁷ International Commission on Intervention and State Sovereignty (ICISS), *Report: The Responsibility to Protect*, (Ottawa: International Development, Research Centre, December 2001), para.6.1, p.50; In the run-up-to the final report, a number of consultation meetings were held. In one of those meetings, Leshukov, quite interestingly, analyzed the constructive abstention in the EU to derive lessons for the UN SC, see: Igor Leshukov, *Towards more Flexibility in Authorizing Humanitarian Intervention* (St. Petersburg: Round Table Consultation –International Commission on Intervention and State Sovereignty, Discussion Paper, 16 July 2001), <http://web.gc.cuny.edu/icissresearch/Reports/St.Pet.Leshukov.paper.htm>.

⁷⁸ *NATO Handbook*, p.154.

alliance may even suffer a ‘crisis of credibility.’⁷⁹ Therefore, exploring the prospects for streamlining NATO decision-making, at a minimum, through equipping it with a constructive abstention clause, could help relieve the gravity of a future crisis similar to the latest one concerning Turkey. Although that may be a solution at the decision-making level, when it is judged against real-time political situations and considerations, we have to admit that it might be of limited practical use, particularly if the abstaining states are the ones which possess substantial military capabilities. This is so because, in the field of security and defence, what counts in the final analysis is how much in the way of military capability one is going to bring to the table. Moreover, if one of the Allies is determined to prevent the Alliance from addressing a certain crisis by exercising its veto power, such a proposal would offer no way out, especially for Article 5 contingencies. Nevertheless, this somewhat soft option is worth trying, not least to avoid delays and deadlocks on the decision-making level in mobilizing the assets the rest of the Allies and the Alliance itself can generate. It would also make it possible to better match the actual contributions to military operations and the necessary decision-making methods in handling a certain crisis or issue. Thus it would come a long way to respond to Rumsfeld’s concern that “the mission must determine the coalition.”⁸⁰

Although non-participation of an important actor could at the same time entail the risk that it could give way to the erosion of solidarity and trust, in any case, the damage may be less than no action at all, or than by-passing an Ally by a ‘trump card.’ There could also be a review mechanism to judge whether, after the Allies offered or withheld contributions, the operation could be feasibly carried out.⁸¹ Given that NATO has stepped into a role of crisis manager, and the appearance of collective security organization seems to take precedence over collective self-defence function, allowing for appropriate variable combinations in decision-making processes would yield more flexibility and efficiency in the conduct of many present-day operations to which uneven contributions are made by different members, depending on their degree of interestedness. Therefore, non-Article 5 missions could be the most appropriate policy area to apply this proposal. The proposal, meanwhile, also addresses the worries that the opponents might be sidestepped by the rest to a considerable extent, since it does not deprive them of the emergency brake of vetoing a decision. That, however, does not relieve them of one additional liability: the burden of substantiating their

⁷⁹ ‘An Alliance in Turmoil’, *The Economist Global Agenda* (10 February, 2003).

⁸⁰ Donald Rumsfeld’s remarks at National Defense University (Washington, D.C.: January 31, 2002). <http://www.defenselink.mil/speeches/2002/s20020131-secdef.html>.

⁸¹ Sloan, assigns that role to SACEUR, *op.cit.*, p.40.

opposition with solid reasoning will be on those particular members, and the rest of the Allies would exert a strong pressure on them to do so. The justification could most probably be vital national interests that those member states deem to be at stake. To some up, through a more serious elaboration of constructive abstention, we can make a modest but substantial shift away from a NATO of ‘engaging as a whole or not’ to a more flexible one, at least in certain contingencies.