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Do NATO Obligations Trump European Budgetary Constraints?

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Abstract

This Article examines the relation between North Atlantic Treaty Organization (NATO) obligations and European Union (EU) budgetary constraints from an international law and policy perspective. Its aim is to understand whether the binding target to spend 2% of annual gross domestic product (GDP) on defense that NATO members have undertaken can trump EU rules adopted in the aftermath of the Euro Crisis that strictly limit governmental deficits. The topic of this Article has acquired particular relevance since the election of U.S. President Donald Trump. President Trump has repeatedly complained about inadequate defense spending on the part of European countries and has threatened to disregard the NATO mutual defense pledge—that an attack on one is an attack on all—vis-à-vis those NATO members that fail to pay their fair share to the organization. In combining conflict-of-laws analysis with public policy research on trade-offs in budget-making, this Article argues that EU rules do not legally prevent EU member states from fulfilling their NATO obligations, but make it politically difficult to do so. In order to address this state of affairs, the Article considers how greater integration in the field of defense by EU member states could overcome the underspending problem and revive the transatlantic alliance. In this regard, this Article examines recent EU legal and policy developments, including the milestone EU Council decision to establish for the first time a permanent structured cooperation (PESCO) in the field of defense between twenty-five EU member states in December 2017, and suggests that defense union lies at the core of Europe's future, regardless of whether NATO obligations trump EU rules or not.

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I. Introduction

Since the end of World War II (WWII), the North Atlantic Treaty Organization (NATO) has ensured European security. Established by the North Atlantic Treaty signed in Washington, DC in April 1949,¹ NATO pledges its members—originally the United States, Canada, and ten countries of Western Europe: the United Kingdom, France, Belgium, the Netherlands, Luxembourg, Italy, Portugal, Denmark, Norway, and Iceland—to mutually protect one another in response to an enemy attack. Pursuant to Article 5 of the NATO Treaty, “the Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all.”² For roughly three quarters of a century, the mutual defense pledge has been a cornerstone of the transatlantic alliance. NATO successfully contained the Soviet Union, and flexibly turned against the threats of global terrorism following 9/11.³ NATO continued to expand, and through several rounds of enlargement it came to englobe almost all of Europe, including states that were originally part of the Soviet-led Warsaw Pact. With twenty-nine members, today NATO arguably represents the most successful military alliance in the modern world.⁴

Nevertheless, NATO’s viability has been increasingly called into question since the election of U.S. President Donald Trump in November 2016. In his first interview after taking office, President Trump repeated statements he had made during the campaign,⁵ questioning the utility of NATO and complaining that the United States was shouldering too much of a burden in guaranteeing Europeans’ security.⁶ Upon meeting German Chancellor Angela Merkel, President Trump affirmed that Germany owed the United States large sums of money for its failure to live up to its obligation to spend an adequate share of its budget on defense.⁷ And at an official NATO meeting in Brussels in May 2017, President Trump

¹ See North Atlantic Treaty, April 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

² *Id.* art 5.

³ See generally A HISTORY OF NATO (G. Schmidt ed., 2001).

⁴ The success of NATO can be contrasted with the failure of the South East Asian Treaty Organization (SEATO), another military alliance set up by the U.S. in the wake of the Cold War with southern-east Asian nations and colonial powers of the region. SEATO, established in 1955, was dissolved in 1977 due to lack of interest in cooperation among member nations, and disputes between them.

⁵ See Philip Rucker & Robert Costa, *Trump Questions Need for NATO, Outlines Non-Interventionist Foreign Policy*, WASH. POST (Mar. 21, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/03/21/donald-trump-reveals-foreign-policy-team-in-meeting-with-the-washington-post/?utm_term=.c2153bcc8dae [https://perma.cc/U489-RCCK].

⁶ See *Trump Exklusiv im Bild Interview*, “Ich Mag Starke, Ich Mag Ordnung”, BILD (Jan. 20, 2017), <http://www.bild.de/video/clip/donald-trump/das-grosse-bild-interview-49795050.bild.html>.

⁷ See Jim Puzzanghera, *Trump Says Merkel Meeting Was ‘Great’, Then Blasts Germany for NATO Bills*, L.A. TIMES (Mar. 18, 2017), <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-trump-says-merkel-meeting-was-great-1489845711-htmlstory.html> [https://perma.cc/G4TE-HSWQ].

lectured heads of state and government of the other NATO countries on their “chronic underpayments” to the NATO alliance and failed to reaffirm the U.S. pledge to the mutual defense clause of the NATO Treaty.⁸ Although President Trump later expressly mentioned approvingly Article 5 of the NATO Treaty during a state visit to Poland in July 2017,⁹ European policy-makers seem to remain in the dark as to what the U.S. position would be if a NATO member’s security were at risk.¹⁰ Since the United States effectively represents the flesh and bones of the NATO,¹¹ American disengagement would make the transatlantic military alliance practically moot.

Yet, for all the fuss raised by President Trump’s position on NATO, the reality is that for several years now U.S. administrations—both Republican and Democratic—had asked European partners to increase their contributions to the defense alliance. During George W. Bush’s presidency, Administration officials demanded greater collaboration from Europe on security,¹² and President Barack Obama himself had requested that Europe surge security spending to ensure a fairer burden sharing.¹³ In fact, governments of NATO members meeting in the North Atlantic Council, the main decision-making body of NATO, decided at the Wales Summit in September 2014 that all states in the military alliance had to spend at least 2% of their GDP per year on defense.¹⁴ This commitment was regarded as crucial to preserve the alliance in a post-unipolar world.¹⁵ As of 2016, however, apart from the United States, only four members of NATO—the United Kingdom, Greece, Estonia and Poland—are meeting this spending target.¹⁶ In

⁸ See Michael D. Shear, Mark Lander, & James Kanter, *In NATO Speech, Trump Is Vague About Mutual Defense Pledge*, N.Y. TIMES (May 25, 2017), <https://www.nytimes.com/2017/05/25/world/europe/donald-trump-eu-nato.html>.

⁹ See Abby Phillip, John Wagner & Michael Birnbaum, *Western Values Increasingly Endangered by Terrorism and Extremism, Trump Warns Europe*, WASH. POST (July 6, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/07/06/in-poland-trump-reaffirms-commitment-to-nato-chides-russia/?utm_term=.99eb6778a8cb [<https://perma.cc/B274-RPER>].

¹⁰ See *Donald Trump Fails to Endorse NATO’s Mutual Defence Pledge*, ECONOMIST (May 26, 2017), <https://www.economist.com/blogs/democracyinamerica/2017/05/trump-s-trip>.

¹¹ See *Could NATO Survive Without US Support?*, VOICE OF AM. (Jan. 28, 2017), <https://learningenglish.voanews.com/a/could-nato-survive-without-us-support/3695600.html> [<https://perma.cc/FL2N-MY8H>] (reporting that 75% of NATO military assets belong to the U.S.).

¹² See *Bush to Press Allies for More Defense Spending at NATO Summit*, FOXNEWS.COM (Nov. 27, 2006), <http://www.foxnews.com/story/2006/11/27/bush-to-press-allies-for-more-defense-spending-at-nato-summit.html>.

¹³ See Ewen MacAskill, *US Presses NATO Members to Increase Defence Spending*, GUARDIAN (June 23, 2014), <https://www.theguardian.com/world/2014/jun/23/us-nato-members-increase-defence-spending> [<https://perma.cc/KW9D-T9U2>].

¹⁴ See *Summit Declaration Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Wales ¶ 14* (Sept. 5, 2014), https://www.nato.int/cps/ic/natohq/official_texts_112964.htm [<https://perma.cc/C3J6-2Y5Q>].

¹⁵ See generally ROBERT O. KEOHANE, *AFTER HEGEMONY* (2005).

¹⁶ See NATO Press Release, *Defense Expenditures of NATO Countries (2009-2016)* (July 4, 2016), https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2016_07/20160704_160704-pr2016-116.pdf [<https://perma.cc/Z2RC-JTNQ>] (reporting the following data for the year 2016):

fact, during the Great Recession,¹⁷ a number of NATO members even decreased defense spending. Due to the tight budgetary constraints the EU has adopted in response to the Euro Crisis, it remains uncertain whether European countries are able to meet their financial obligation under NATO.¹⁸

The purpose of this Article is to consider from an international law and politics perspective the interaction between NATO obligations and European budgetary constraints. In particular, it examines whether the obligations that EU member states have undertaken as members of NATO trump the budgetary constraints that EU law imposes on them to cap their spending. To this end, the Article analyzes the legal nature of the NATO obligation set in the 2014 Wales Summit Declaration to spend at least 2% of GDP on defense, with particular emphasis on the constitutional authority of the North Atlantic Council to adopt legally binding norms under the NATO Treaty. The Article next considers the effect that NATO obligations have had on the EU legal order, also in light of the EU treaty clause regulating conflict of laws between EU norms and prior international obligations that EU member states have undertaken vis-à-vis third parties. Lastly, the Article evaluates the extent to which EU rules adopted in the aftermath of the Euro Crisis and designed to limit states' budgetary deficits have constrained EU member states in meeting their NATO obligations.

The Article argues that, legally, it is questionable whether NATO obligations ultimately prevail over conflicting European budgetary constraints. At the same time, the Article explains that the failure by most EU nations to reach the defense spending target set by NATO derives more from rational public policy choices than from law. Electoral incentives and the need to fund an expensive welfare state push European policy-makers to underfund defense. However,

Country	% GDP on defense	Country (<i>cont.</i>)	% GDP on defense (<i>cont.</i>)
Albania	1.21	Lithuania	1.49
Belgium	0.85	Luxembourg	0.44
Bulgaria	1.35	Montenegro	N/A (joined 2017)
Canada	0.99	Netherlands	1.17
Croatia	1.23	Norway	1.54
Czech Republic	1.04	Poland	2.00
Denmark	1.17	Portugal	1.38
Estonia	2.16	Romania	1.48
France	1.78	Slovakia	1.16
Germany	1.19	Slovenia	0.94
Greece	2.38	Spain	0.91
Hungary	1.01	Turkey	1.56
Italy	1.11	United Kingdom	2.21
Latvia	1.45	United States	3.61

¹⁷ See generally CARMEN REINHART & KENNETH ROGOFF, THIS TIME IS DIFFERENT (2009).

¹⁸ See generally THE CONSTITUTIONALIZATION OF EUROPEAN BUDGETARY CONSTRAINTS (Federico Fabbrini et al. eds., 2014).

because the duty for NATO members to spend at least 2% of GDP on defense is a binding obligation under international law, this Article therefore warns that repeated failure by EU member states to reach this target could lead to retaliation by the United States, which would ultimately undermine the mutual defense pledge that lies at the foundation of the transatlantic alliance. Yet this would pose a major threat for Europe's security. This Article therefore concludes suggesting that EU member states should more effectively pool their resources in order to *jointly* meet the NATO spending target within the EU. Instruments already exist under EU law to allow member states to engage in deeper integration in the field of Common Foreign and Security Policy (CFSP). In particular, under Article 42(6) of the Treaty of the EU (TEU),¹⁹ member states whose military capabilities fulfill higher criteria can establish a “permanent structured cooperation” (PESCO), developing common defense projects and potentially pooling military forces.²⁰ In June 2017, under French leadership, the European Council eventually endorsed greater EU integration in defense,²¹ and, in December 2017, the Council authorized the activation of PESCO among 25 EU member states,²² marking a major step forward for the EU in this arena.²³ Yet further action would be needed, particularly following the U.K. withdrawal from the EU—Brexit²⁴—to allow the

¹⁹ Consolidated Version of the Treaty on European Union art. 42(6), May 9, 2008, 2008 O.J. (C 115) 13 [hereinafter TEU].

²⁰ See *Permanent Structured Cooperation (PESCO) – Factsheet*, EUR. EXTERNAL ACTION SERV. (Mar. 5, 2018), https://eeas.europa.eu/headquarters/headquarters-homepage/34226/permanent-structured-cooperation-pesco-factsheet_en [<https://perma.cc/G25B-EJAQ>].

²¹ See *European Council Meeting (22 and 23 June 2017) – Conclusions*, ¶¶ 1–10, EUCO 8/17 (June 23, 2017), <http://www.consilium.europa.eu/media/23985/22-23-euco-final-conclusions.pdf> [<https://perma.cc/MBH8-54ZS>].

²² See Council Decision (CFSP) 2017/2315 of 11 December 2017 Establishing Permanent Structured Cooperation (PESCO) and Determining the List of Participating Member States, arts. 1–2, 2017 O.J. (L 331) 57.

²³ See Steven Erlanger, *E.U. Moves Closer to a Joint Military Force*, N.Y. TIMES (Nov. 13, 2017), <https://www.nytimes.com/2017/11/13/world/europe/eu-military-force.html>; *EU Countries Sign Key Defence Pact*, GUARDIAN (Nov. 13 2017), <https://guardian.ng/news/eu-countries-sign-key-defence-pact/> [<https://perma.cc/9FKA-97FR>].

²⁴ On June 23, 2016 U.K. citizens voted in a national referendum to leave the EU. See *EU Referendum Results*, ELECT. COMM'N, <http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information> (last visited Mar. 24, 2018) [<https://perma.cc/E4NT-N5T3>]. On March 29, 2017 the U.K. Government notified the European Council of its intention to withdraw from the EU pursuant to Article 50 TEU. See Letter from Theresa May, Prime Minister, U.K., to Donald Tusk, President, European Council (Mar. 29, 2017), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf [<https://perma.cc/RW7Q-TCE4>]. On April 29, 2017 the European Council approved guidelines for the negotiations of the withdrawal of the U.K. from the EU. See *European Council Guidelines Following the United Kingdom's Notification Under Article 50 TEU* (Apr. 29, 2017) EUCO XT 20004/17. Since June 2017, the European Commission has been conducting negotiations with the U.K. Government to settle the divorce and set the framework of a possible new relation between the U.K. and the EU. By default, the U.K. will leave the EU by March 2019. See generally THE LAW & POLITICS OF BREXIT (Federico Fabbrini ed., 2017).

EU to grow its defense capacities so as to ensure its autonomous security in an ever more unsafe world.²⁵

The Article is structured as follows. Part II analyzes the institutional architecture of NATO as an international treaty organization, and highlights the North Atlantic Council's legal authority to adopt rules implementing the NATO Treaty—notably with regard to the definition of specific defense spending targets. Part III considers the interplay between NATO obligations and EU budgetary constraints, examining the EU treaty rules regulating conflict of norms between EU law and previously ratified international treaties, as well as relevant case law of the European Court of Justice (ECJ) adjudicating cases of conflict between international obligations and foundational constitutional principles of the EU legal order. Part IV discusses the interplay between NATO obligations and national budgetary policies, specifically exploring the political incentives and economic rationales for why EU member states underspend on defense and emphasizing that this state of affairs may produce dire consequences if the United States retaliates, as it legally could—and as President Trump has indicated he would.²⁶ In light of these concerns, Part V submits that EU member states should strengthen their cooperation in the field of defense and jointly reach the NATO spending target in order to preserve the transatlantic alliance and endow the EU with sufficient, autonomous military capabilities. Finally, Part VI concludes claiming that defense union stands at the core of the future of Europe, regardless of whether NATO obligations trump EU rules or not.

II. The North Atlantic Treaty Organization

The NATO Treaty is an international agreement concluded in 1949 with the aim to “promote stability and well-being in the North Atlantic area” by uniting in a military alliance the North American and Western European nations.²⁷ It is a multilateral treaty that, along with the Bretton Woods agreements establishing the International Monetary Fund (IMF),²⁸ and the General Agreement on Tariffs and Trade (GATT)²⁹ liberalizing commerce among capitalist nations, constitutes an essential component of the world order established by the United States and its allies in the aftermath of WWII, and at the beginning of the Cold War.³⁰ In fact,

²⁵ The U.K. is (with France) the only European country with a nuclear deterrent. See Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968–Mar. 5, 1970, 21 U.S.T. 483, 729 U.N.T.S. 161. Moreover, it is one of the few European countries spending at least 2% of its budget on defense. See *supra* note 16.

²⁶ See Ben Jacobs, *Donald Trump Reiterates He Will Only Help NATO Countries that Pay 'Fair Share'*, GUARDIAN (July 28, 2016), <https://www.theguardian.com/us-news/2016/jul/27/donald-trump-nato-isolationist> [<https://perma.cc/UC3Z-6BXC>].

²⁷ See North Atlantic Treaty, *supra* note 1, pmbl.

²⁸ See Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 39.

²⁹ See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

³⁰ See generally ANNE-MARIE SLAUGHTER, THE NEW WORLD ORDER (2004) (describing the post-WWII world order).

while the Preamble of the NATO Treaty reaffirms the faith of the contracting parties “in the purposes and principles of the Charter of the United Nations and their desire to live in peace with all peoples and all governments,” it also clarified that the alliance aims to defend Western values in competition with the Soviet bloc:³¹ NATO members resolve to unite their efforts for collective defense “to safeguard the freedom, common heritage and civilization of their peoples, founded on the principles of democracy, individual liberty and the rule of law.”³² Admittedly, not all NATO founding members fulfilled these criteria.³³ Yet NATO has arguably succeeded in creating a framework of international cooperation, which has secured liberty and peace in the European continent.³⁴

In legal terms, the NATO Treaty is a relatively short document, comprised of just fourteen articles. Several of these provisions are designed to bridge the NATO Treaty with the Charter of the United Nations (UN).³⁵ Hence, Article 1 reaffirms the commitment of the NATO members to refrain from the threat or the use of force in their international relations in any manner inconsistent with the purposes of the UN.³⁶ Article 2 commits contracting parties to contribute to peaceful and friendly international relations, including by encouraging economic cooperation.³⁷ And Article 7 affirms that “[t]his Treaty does not affect, and shall not be interpreted as affecting, in any way the rights and obligations under the Charter of the Parties which are members of the United Nations, or the primary responsibility of the Security Council for the maintenance of international peace and security.”³⁸ As mentioned above, the cornerstone of the NATO Treaty is Article 5, which enshrines the mutual defense pledge that an attack on one is an

³¹ The quick transformation of NATO from a post-WWII alliance into an instrument of the Cold War is reflected by the position of Germany. In 1949, West Germany was not included among the members of NATO, which in this respect expanded to the North American partners the Treaty of Brussels of March 1948 concluded between France, the U.K. and the Benelux countries in anti-German mode. *See* Treaty for Collaboration in Economic, Social and Cultural Matters and for Collective Self-Defence, Mar. 17, 1948, 19 U.N.T.S. 51. However, following the geo-political changes produced by the Korean War, in 1955 West Germany was quickly included into the NATO alliance with the purpose of consolidating the Eastern flank of the military alliance vis-à-vis the Soviet Union. *See generally* JOHN A. REED, JR., GERMANY AND NATO (1987).

³² *See* North Atlantic Treaty, *supra* note 1, pmbl.

³³ In particular, Portugal was in 1949 still ruled by an authoritarian regime led by Antonio Salazar but its geographical position made it a strategic partner in the military alliance. The country would transition to democracy only in 1974 after the so-called Carnation Revolution. *See generally* JUAN J. LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE (1996).

³⁴ *See generally* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

³⁵ *See* U.N. Charter, June 26 1945, 1 U.N.T.S. XVI.

³⁶ North Atlantic Treaty, *supra* note 1, art 1; *see also* Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529, 568 (1998) (arguing that the UN Charter serves as the constitution of international law).

³⁷ North Atlantic Treaty, *supra* note 1, art 2.

³⁸ *Id.* art 7.

attack on all.³⁹ Connected to this, Article 6 clarifies the geographical coverage and substantive meaning of an armed attack.⁴⁰ Article 3 requires NATO members to “maintain and develop their individual and collective capacity to resist armed attack.”⁴¹ And Article 4 creates a duty on signing parties to consult one another whenever the security or independence of a member may be threatened.⁴²

Like any international agreement,⁴³ the NATO Treaty contains general and final provisions. Hence, Article 11 states that “[t]his Treaty shall be ratified and its provisions carried out by the Parties in accordance with their respective constitutional processes” and clarifies that, to enter into force, the United States, the United Kingdom, France, Canada, and the Benelux countries (Belgium, the Netherlands, and Luxembourg) must ratify it.⁴⁴ Article 12 establishes a rendezvous clause, which permits revisions to the Treaty after ten years of operation.⁴⁵ Article 13 allows any contracting party to denounce the Treaty after twenty years of operation.⁴⁶ And Article 14 states that English and French will be the official languages of the Treaty, both having authentic values.⁴⁷ Moreover, Article 10 allows the contracting parties, by unanimous agreement, to “invite any other European State in a position to further the principles of this Treaty and to contribute to the security of the North Atlantic area to accede to this Treaty.”⁴⁸ This has occurred several times since 1949 and has resulted in the expansion of the alliance to Greece and Turkey (1952);⁴⁹ West Germany (1955);⁵⁰ Spain (1982);⁵¹ the Czech Republic, Hungary, and Poland (1998);⁵² Slovakia, Bulgaria, Romania, Estonia, Latvia, Lithuania, and Slovenia (2004);⁵³ Croatia and Albania

³⁹ *Id.* art 5; see also Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT’L L. 1 (1999).

⁴⁰ North Atlantic Treaty, *supra* note 1, art. 6.

⁴¹ *Id.* art. 3.

⁴² *Id.* art. 4.

⁴³ See generally JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (8th ed. 2012).

⁴⁴ North Atlantic Treaty, *supra* note 1, art. 11.

⁴⁵ *Id.* art. 12.

⁴⁶ *Id.* art. 13.

⁴⁷ *Id.* art. 14.

⁴⁸ *Id.* art. 10.

⁴⁹ Protocol to the North Atlantic Treaty on the Accession of Greece and Turkey, Oct. 17, 1951, 3 U.S.T. 43, 126 U.N.T.S. 350 (entered into force Feb. 15, 1952).

⁵⁰ Protocol to the North Atlantic Treaty on the Accession of the Federal Republic of Germany, Oct. 23, 1954, 6.5 U.S.T. 5707, 243 U.N.T.S. 308 (entered into force May 5, 1955).

⁵¹ Protocol to the North Atlantic Treaty on the Accession of Spain, Dec. 10, 1981, T.I.A.S. 10564 (entered into force May 29, 1982).

⁵² Protocol to the North Atlantic Treaty on the Accession of the Czech Republic, Dec. 16 1997, T.I.A.S. 98-1204 (entered into force Dec. 4, 1998); Protocol to the North Atlantic Treaty on the Accession of the Republic of Hungary, Dec. 16 1997, T.I.A.S. 98-1204.1 (entered into force Dec. 4, 1998); Protocol of the North Atlantic Treaty on the Accession of the Republic of Poland, Dec. 16 1997, T.I.A.S. 98-1204.2 (entered into force Dec. 4, 1998).

⁵³ Protocol to the North Atlantic Treaty on the Accession of the Republic of Bulgaria, Mar. 26, 2003, T.I.A.S. 04-227 (entered into force Feb. 27, 2004); Protocol to the North Atlantic Treaty on

(2009);⁵⁴ and now Montenegro (2017).⁵⁵ Moreover, Article 8 states that “[e]ach Party declares that none of the international engagements now in force between it and any other of the Parties or any third State is in conflict with the provisions of this Treaty, and undertakes not to enter into any international engagement in conflict with this Treaty.”⁵⁶

At the same time, as a treaty establishing an international organization, the NATO Treaty did not only introduce mandatory obligations for its contracting parties, but also created common institutions.⁵⁷ According to Article 9, “[t]he Parties hereby establish a Council, on which each of them shall be represented, to consider matters concerning the implementation of this Treaty.”⁵⁸ Admittedly, NATO’s common institutions are more simplified than the governing structures of other international organizations, like the UN.⁵⁹ Consistent with the nature of a military alliance, Article 9 only states that “[t]he Council shall be so organised as to be able to meet promptly at any time. The Council shall set up such subsidiary bodies as may be necessary; in particular it shall establish immediately a defence committee which shall recommend measures for the implementation of Articles 3 and 5.”⁶⁰ Nevertheless, NATO has practically developed a sizable architecture, housed in the organization’s headquarters in Brussels,⁶¹ with a parliamentary assembly,⁶² a civilian Secretary General—a position which by custom is always

the Accession of the Republic of Estonia, Mar. 26, 2003, T.I.A.S. 04-227.1 (entered into force Feb. 27, 2004); Protocol to the North Atlantic Treaty on the Accession of the Republic of Latvia, Mar. 26, 2003, T.I.A.S. 04-227.2 (entered into force Feb. 27, 2004); Protocol to the North Atlantic Treaty on the Accession of the Republic of Lithuania, Mar. 26, 2003, T.I.A.S. 04-227.3 (entered into force Feb. 27, 2004); Protocol to the North Atlantic Treaty on the Accession of Romania, Mar. 26, 2003, T.I.A.S. 04-227.4 (entered into force Feb. 27, 2004); Protocol to the North Atlantic Treaty on the Accession of the Slovak Republic, Mar. 26, 2003, T.I.A.S. 04-227.5 (entered into force Feb. 27, 2004); Protocol to the North Atlantic Treaty on the Accession of the Republic of Slovenia, Mar. 26, 2003, T.I.A.S. 04-227.6 (entered into force Feb. 27, 2004).

⁵⁴ Protocol to the North Atlantic Treaty on the Accession of the Republic of Albania, July 9, 2008, S. TREATY DOC. NO. 110-22 (entered into force Mar. 27, 2009); Protocol to the North Atlantic Treaty on the Accession of the Republic of Croatia, July 9, 2008, S. TREATY DOC. NO. 110-22 (entered into force Mar. 30, 2009).

⁵⁵ Protocol to the North Atlantic Treaty on the Accession of Montenegro, May 19, 2016, S. TREATY DOC. NO. 114-12 (entered into force June 5, 2017).

⁵⁶ North Atlantic Treaty, *supra* note 1, art. 8.

⁵⁷ See generally JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW (2d ed. 2009).

⁵⁸ North Atlantic Treaty, *supra* note 1, art. 9.

⁵⁹ See Julian Arato, *Constitutionality and Constitutionalism Beyond the State: Two Perspectives on the Material Constitution of the United Nations*, 10 INT’L J. CONST. L. 627, 651–52 (2012) (discussing institutional separation of powers within the UN system).

⁶⁰ North Atlantic Treaty, *supra* note 1, art. 9.

⁶¹ See *NATO Organization*, NATO, <http://www.nato.int/cps/en/natohq/structure.htm> (last updated Jan. 4, 2017) [<https://perma.cc/9RYD-TZWW>].

⁶² See NATO PARLIAMENTARY ASSEMBLY, <https://www.nato-pa.int/> (last visited Mar. 27, 2018) [<https://perma.cc/KG8A-YXXL>].

held by a European policy-maker—and a military Central Command—a position conventionally led by a U.S. military officer.⁶³

The main governing body of NATO is however the Council—also known as the North Atlantic Council—which groups the heads of state and government of NATO members. The Council only meets periodically: on average it has assembled every 2.5 years.⁶⁴ However, because of its composition, it is the institution that provides NATO with the necessary impetus for its development and defines NATO's general political direction and priorities. In fact, as previously mentioned, Article 9 gives the Council the power to make decisions on the implementation of the treaty: a responsibility that, absent provisions to the contrary, requires unanimity among all contracting parties.⁶⁵ The broad language of this clause suggests that the Council acts as the executive branch of the organization.⁶⁶ Yet, because the NATO Treaty does not create an internal system of separation of powers among different institutions, the Council, as the only constituted treaty-body, is also vested with quasi-legislative powers, since it is for it to adopt any implementing rule which may be necessary to achieve the objectives of the organization. For instance, Article 3 provides that NATO members “will maintain and develop their individual and collective capacity to resist armed attacks,” so the Council can specify the precise action that contracting parties must take in order to fulfill this goal.

At the Wales Summit of 2014, the Council seems to have engaged precisely in this exercise. After reaffirming their commitment to the mutual defense pledge of Article 5, the heads of state and government of NATO members meeting in the North Atlantic Council “agree[d] to reverse the trend of declining defence budgets, to make the most effective use of our funds and to further a more balanced sharing of costs and responsibilities.”⁶⁷ To this end, NATO members decided that:

⁶³ All NATO members today participate both in the political and military structures of NATO. However, historically France embraced a peculiar stand. In 1967 French President Charles de Gaulle decided to withdraw France from the integrated military command, to express his disapproval of U.S. domination of the military alliance. Nevertheless in 2009, French President Nicolas Sarkozy reintegrated France in all NATO structures.

⁶⁴ See *Events*, NATO, http://www.nato.int/cps/en/natolive/events.htm?query=&date_from=&date_to=&event_types=Summit&sort=date:D:R:d1&start=0 (last visited Mar. 27, 2018) [<https://perma.cc/736C-BJQ8>] (reporting that Heads of State and Government of the NATO members have met 29 times since the establishment of NATO: specifically in 1957, 1974, 1975, 1977, 1978, 1982, 1985, 1988, 1989 (twice), 1990, 1991, 1994, 1997 (twice), 1999, 2001, 2002 (twice), 2004, 2005, 2006, 2008, 2009, 2010, 2012, 2014, 2016, and 2017).

⁶⁵ See Stephen Zamora, *Voting in International Economic Organizations*, 74 AM. J. INT'L L. 566, 574 n.30 (1980).

⁶⁶ See JEAN-CLAUDE GAUTRON, *DROIT EUROPEEN* 17 (12th ed. 2006).

⁶⁷ See Wales Summit Declaration, *supra* note 14, ¶ 14.

- Allies currently meeting the NATO guideline to spend a minimum of 2% of their [GDP] on defence will aim to continue to do so. Likewise, Allies spending more than 20% of their defence budgets on major equipment, including related Research & Development, will continue to do so.
- Allies whose current proportion of GDP spent on defence is below this level will:
 - halt any decline in defence expenditure;
 - aim to increase defence expenditure in real terms as GDP grows;
 - aim to move towards the 2% guideline within a decade with a view to meeting their NATO Capability Targets and filling NATO's capability shortfalls.⁶⁸

NATO members also reaffirmed the importance of increasing “defence budgets . . . towards the goals we pledged in Wales” in the Declaration concluding the July 2016 North Atlantic Council in Warsaw,⁶⁹ and the commitment to spend at least 2% of GDP on defense was at the heart of the NATO meetings of heads of state and government in Brussels in May 2017.⁷⁰ The precise spending targets originally agreed upon in Wales are established in a declaration concluding the NATO Summit.⁷¹ However, unlike the purely political nature of final communiqués at other intergovernmental summits such as the G20 meetings, this declaration is binding in international law, since it can be regarded as adopted by the North Atlantic Council in pursuance of its functions under the NATO Treaty. As a result, NATO members have an obligation to respect these spending targets on common defense as parties to an international organization.

III. Conflict of Laws: The Interaction Between NATO Obligations and EU Rules

While NATO obligations compel member states to increase spending, EU rules oblige member states to do the exact opposite.⁷² In particular, since the enactment of the Maastricht Treaty in 1992, the Stability and Growth Pact (SGP) has prohibited all EU member states that adopt the euro as their currency from running a yearly budget with a deficit higher than 3% of GDP (and simultaneously required them to keep their public debt below 60% of GDP).⁷³ Moreover, since the explosion of the Euro Crisis, EU budgetary rules have been

⁶⁸ *Id.*

⁶⁹ See Warsaw Declaration on Transatlantic Security Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Warsaw, ¶ 3 (July 9, 2016), https://www.nato.int/cps/ie/natohq/official_texts_133168.htm [<https://perma.cc/T978-CNTG>].

⁷⁰ See Jens Stoltenberg, Sec’y Gen., NATO, Press Conference Following the Meeting of NATO Heads of State and/or Government in Brussels (May 25, 2017), http://www.nato.int/cps/en/natohq/opinions_144098.htm [<https://perma.cc/K4VV-XMFJ>].

⁷¹ See Wales Summit Declaration, *supra* note 14.

⁷² See generally FEDERICO FABBRINI, *ECONOMIC GOVERNANCE IN EUROPE* (2016).

⁷³ See TEU, *supra* note 19, Protocol (No. 12) on the Excessive Debt Procedure, May 9, 2008, 2008 O.J. (C 115) 279.

remarkably strengthened to prevent member governments' spending.⁷⁴ Two new packages of EU laws—the so-called “six-pack” of 2011,⁷⁵ and “two-pack” of 2013⁷⁶—have tightened SGP rules and increased the European Commission's ability to police national budgetary policies. At the same time, the Fiscal Compact of 2012⁷⁷—an intergovernmental treaty concluded by twenty-five out of the then-twenty-seven EU member states operating outside the framework of EU law—required contracting parties to constitutionalize the “golden rule” of the balanced budget amendment in their basic law, setting an even more restrictive fiscal target.⁷⁸ Article 3 of the Fiscal Compact prevents contracting parties from running a yearly budget with a deficit higher than 0.5% of GDP,⁷⁹ effectively foreclosing any margin for deficit spending.

As it has been argued, the constitutional architecture of EU economic governance emerging from the Euro Crisis reflects a German-dominated policy preference for budgetary consolidation⁸⁰ and austerity. The question however is the extent to which EU budgetary constraints must give way to the spending obligations that EU member states have undertaken as members of NATO. Admittedly, this question does not apply equally to all twenty-eight EU member states. Currently, six EU member states—Austria, Sweden, Finland, Ireland,

⁷⁴ See generally Kenneth Armstrong, *The New Governance of EU Fiscal Discipline*, 38 EUR. L. REV. 601 (2013); MARTIN HEIPERTZ & AMY VERDUN, *RULING EUROPE: THE POLITICS OF THE STABILITY AND GROWTH PACT* (2010).

⁷⁵ See Regulation 1173/2011, of the European Parliament and of the Council of 16 November 2011 on the Effective Enforcement of Budgetary Surveillance in the Euro Area, 2011 O.J. (L 306) 1; Regulation 1174/2011, of the European Parliament and of the Council of 16 November 2011 on Enforcement Measures to Correct Excessive Macroeconomic Imbalances in the Euro Area, 2011 O.J. (L 306) 8; Regulation 1175/2011, of the European Parliament and of the Council of 16 November 2011 Amending Council Regulation (EC) No 1466/97 on the Strengthening of the Surveillance of Budgetary Positions and the Surveillance and Coordination of Economic Policies, 2011 O.J. (L 306) 12; Regulation 1176/2011, of the European Parliament and of the Council of 16 November 2011 on the Prevention and Correction of Macroeconomic Imbalances, 2011 O.J. (L 306) 25; Council Regulation 1177/2011, of 8 November 2011 amending Regulation (EC) No 1467/97 on Speeding Up and Clarifying the Implementation of the Excessive Deficit Procedure, 2011 O.J. (L 306) 33; Council Directive 2011/85/EU of 8 November 2011 on Requirements for Budgetary Frameworks of the Member States, 2011 O.J. (L 306) 41.

⁷⁶ See Regulation 473/2013 of the European Parliament and the Council of 21 May 2013 on Monitoring and Assessing Draft Budgetary Plans and Ensuring the Correction of Excessive Deficits in Euro-area Member States, 2013 O.J. (L 140) 11; Regulation 472/2013 of the European Parliament and the Council of 21 May 2013 on Strengthening of Economic and Budgetary Surveillance of Member States in the Euro area Experiencing or Threatened with Serious Difficulties with respect to their Financial Stability, 2013 O. J. (L 140) 1.

⁷⁷ See Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, Mar. 2, 2012, http://www.eurozone.europa.eu/media/304649/st00tscg26_en12.pdf.

⁷⁸ See Federico Fabbrini, *The Fiscal Compact, the Golden Rule and the Paradox of European Federalism*, 36 B. C. INT'L & COMP. L. REV. 1, 4–5, 11 (2013).

⁷⁹ Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, *supra* note 77, art. 3.

⁸⁰ See Leonard Besselink & Jan Herman Reestman, Editorial, *The Fiscal Compact and the European Constitutions: 'Europe Speaking German'*, 8 EUR. CONST. L. REV. 1 (2012).

Malta, and Cyprus—are not members of NATO, pursuant to a tradition of neutrality that dates to independence (Ireland),⁸¹ the Cold War (Austria, Sweden, and Finland),⁸² or their complex relation with the United Kingdom (Malta and Cyprus).⁸³ Nevertheless, with the exception of Cyprus (whose borders are contested),⁸⁴ these states closely cooperate with NATO through the Partnership for Peace program.⁸⁵ Moreover, all other EU member states—three-fifths of them, including the largest one—are members of NATO. In fact, all EU member states who are also members of NATO were members of NATO *before* becoming members of the EU—either because the EU (or its predecessor, the European Communities established by the Treaties of Rome of 1957) did not exist yet, or because accession to NATO preceded accession to the EU.⁸⁶

This point is of major legal significance because of Article 351 of the Treaty on the Functioning of the EU (TFEU). This clause, which has existed in the EU legal order since the Treaties of Rome, is designed to preserve the obligations that EU member states have undertaken with third parties prior to the creation of the EU, or their accession to it.⁸⁷ According to Article 351 TFEU:

The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more

⁸¹ See generally ROISIN DOHERTY, IRELAND, NEUTRALITY AND EUROPEAN SECURITY INTEGRATION (2002).

⁸² See BUNDES-VERFASSUNGSGESETZ [B-VG] [FEDERAL CONSTITUTIONAL LAW ON THE NEUTRALITY OF AUSTRIA], BGBl. No. 211/1955, art. 1, 26 October 1955 (Austria); Treaty of Friendship, Co-operation and Mutual Assistance Between the Union of Soviet Socialist Republics and the Republic of Finland, Apr. 6, 1948, 48 U.N.T.S. 156. *But see generally* JOHANNA RAINIO-NIEMI, THE IDEOLOGICAL COLD WAR: THE POLITICS OF NEUTRALITY IN AUSTRIA AND FINLAND (2014) (explaining that neutrality coexisted with an ideological leaning toward the West).

⁸³ Both Malta and Cyprus are members of the U.K.-led Commonwealth. In fact, the U.K. owns a Sovereign Base area on the Republic of Cyprus which is part of British Overseas Territory.

⁸⁴ Following its independence from the U.K. in 1960, Cyprus experienced intercommunity violence between the Greek and Cypriot populations, which led to UN Security Council resolution 186 of 1964 establishing a UN Peacekeeping force in Cyprus. A military coup d'état in Greece in 1974 led to the Turkish invasion of Northern Cyprus, which created a puppet state—the Republic of Northern Cyprus—internationally recognized only by Turkey itself. The UN Peacekeeping mission was subsequently expanded, but efforts to re-unite the island have thus far failed to achieve any results. When Cyprus joined the EU in 2004 special arrangements were taken to account for the fact that the island remains divided. See Treaty of Accession of Cyprus to the European Union, Protocol 10, Apr. 16, 2003, 2003 O.J. (L 236) 955.

⁸⁵ See *Partnership for Peace Program*, NATO http://www.nato.int/cps/en/natolive/topics_50349.htm (last visited May 30, 2018) [<https://perma.cc/2KSH-DTBA>].

⁸⁶ See generally WADE JACOBY, THE ENLARGEMENT OF THE EUROPEAN UNION AND NATO (2004).

⁸⁷ See PIET ECKHOUT, EU EXTERNAL RELATIONS LAW 421–22 (2011).

third countries on the other, shall not be affected by the provisions of the Treaties.⁸⁸

As Robert Schütze has explained, “Article 351 [TFEU] codified the ‘precedence’ or prior international obligations of the Member States over conflicting European law.”⁸⁹ In technical terms, Article 351 TFEU is a conflict-of-law rule, which—consistent with the foundational principle of international law that *pacta sunt servanda*⁹⁰—empowers EU member states to give prevalence to obligations they have assumed vis-à-vis third parties before creating or joining the EU when these clash with provisions of EU law.⁹¹ Such a conflict-of-law rule is only partially mitigated by the provision of Article 351 TFEU, which states: “To the extent that such [prior] agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.”⁹² While Article 351 TFEU requires EU member states to seek to overcome possible conflicts between EU law and international law, it ultimately allows them to disregard EU law if necessary to comply with prior international treaties.⁹³

Article 351 TFEU is clearly relevant in the context of a discussion of the NATO obligations of EU member states. Because, as explained in Part II, the defense spending target set in the 2014 Wales Summit must be interpreted as the exercise of the regulatory powers constitutionally assigned to the North Atlantic Council by the NATO Treaty—a treaty concluded by EU member states with third countries before the creation of the EU, or the accession to it—one could argue that whatever EU rule prevents the fulfillment of this obligation must be discarded in the name of Article 351 TFEU. If the NATO Treaty, as interpreted by the North Atlantic Council, imposes a duty on NATO members to increase their defense spending to maintain the ability of the alliance to protect each of its members, should this not imply pursuant to Article 351 TFEU that EU fiscal rules that interfere with this objective must give way? In fact, in other contexts, the ECJ has accepted that an EU member state may disregard an EU norm if “necessary in order to ensure the performance by the Member State concerned of obligations

⁸⁸ Consolidated Version of the Treaty on the Functioning European Union art. 351, May 9, 2008, 2008 O.J. (C 115) 196 [hereinafter TFEU].

⁸⁹ ROBERT SCHÜTZE, FOREIGN AFFAIRS AND THE EU CONSTITUTION 125 (2014).

⁹⁰ See Vienna Convention on the Law of the Treaties (VCLS) art. 26, May 26, 1969, 1155 U.N.T.S. 331 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

⁹¹ See Marise Cremona, *Defending the Community Interest*, in EU FOREIGN RELATIONS LAW: CONSTITUTIONAL FUNDAMENTALS 131 (Marise Cremona & Bruno De Witte eds., 2008).

⁹² TFEU, *supra* note 88, art. 351.

⁹³ See generally GEERT DE BEARE, CONSTITUTIONAL PRINCIPLES OF EU EXTERNAL RELATIONS (2008).

arising under an agreement concluded with non-member countries prior to the entry into force of the [EU] Treaty.”⁹⁴

Nevertheless, aware that the conflict-of law rule of Article 351 TFEU represents a significant interference in the autonomy and supremacy of the EU legal order, the ECJ has construed the clause restrictively, and has, over time, introduced limitations on the ability of international legal obligations to prevail over EU fundamental constitutional norms.⁹⁵ In *Kadi & Al Barakaat*,⁹⁶ in particular, the ECJ was faced with the question of whether an EU regulation implementing a resolution of the UN Security Council listing an individual as a terrorist suspect could be applied in the EU legal order, even though it conflicted with EU principles of due process rights.⁹⁷ On the EU side, Article 351 TFEU was clearly relevant, since all EU member states are members of the UN, and had been UN members well before becoming EU members.⁹⁸ Moreover, special UN provisions were at stake. Article 25 of the UN Charter states that “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” And, Article 103 of the UN Charter entrenches a hierarchical rule among international treaties,⁹⁹ proclaiming: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”¹⁰⁰

Yet, in what has been regarded as one of its most important judgments ever,¹⁰¹ the ECJ ruled in *Kadi & Al Barakaat* that UN obligations could not undermine the constitutional protection of human rights guaranteed by EU law.¹⁰² Specifically addressing the effect of Article 351 TFEU (at the time, Article 307 EC), the ECJ ruled that the clause cannot “be understood to authorise any

⁹⁴ Case C-158/91, Criminal Proceedings against Jean-Claude Levy, 1993 E.C.R. I-4287, ¶ 22.

⁹⁵ See SCHÜTZE, *supra* note 89, at 105.

⁹⁶ Joined Cases C-402/05 P and C-415/05 P, Yassin A. Kadi and Al Barakaat International Foundation v. Council and Commission, 2008 E.C.R. I-6351.

⁹⁷ In response to the threat of global terrorism, UN Security Council resolution 1267 of 1999 had established a Sanctions Committee empowered to blacklist individuals and organizations suspected of financing terrorism. See generally Peter L. Fitzgerald, *Managing ‘Smart Sanctions’ Against Terrorism Wisely*, 36 NEW ENG. L.REV. 957 (2002). The Sanctions Committee, subsequently expanded and reformed by several UN Security Council resolutions, operated however as a diplomatic body, falling short of due process rules. See Clemens Feinaugle, *The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of the Individuals?*, 9 GERMAN L.J. 1513, 1535–36 (2008).

⁹⁸ See CHRISTINA ECKES, EU COUNTER-TERRORIST POLICIES AND FUNDAMENTAL RIGHTS: THE CASE OF INDIVIDUAL SANCTIONS 99 (2009).

⁹⁹ See Fassbender, *supra* note 36, at 529.

¹⁰⁰ U.N. Charter art. 103.

¹⁰¹ See generally KADI ON TRIAL: A MULTIFACETED ANALYSIS OF THE KADI TRIAL (Matej Avbelj et al. eds., 2014).

¹⁰² See *Kadi*, 2008 E.C.R. I-6351.

derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms [which are at the] foundation of the Union.”¹⁰³ In fact, the ECJ added that Article 351 TFEU “may in no circumstances permit any challenge to the principles that form part of the very foundations of the [EU] legal order, one of which is the protection of fundamental rights, including the review by the [EU] judicature of the lawfulness of [EU] measures as regards their consistency with those fundamental rights.”¹⁰⁴ By embracing a dualist approach, and separating the review of the EU regulation from the analysis of the underlying UN resolutions, the ECJ effectively ensured the prevalence of EU constitutional law over international treaty law.¹⁰⁵ In fact, while EU and human rights lawyers have hailed *Kadi & Al Barakaat* as the appropriate response to the flawed UN global anti-terror regime,¹⁰⁶ international lawyers have criticized the ECJ ruling for disregarding international law and weakening UN obligations.¹⁰⁷

Thus, interpreting the ECJ judgment in *Kadi & Al Barakaat* is crucial to resolving a potential conflict between NATO obligations and EU rules. While Article 351 TFEU allows EU member states to disregard EU rules that conflict with international obligations previously assumed vis-à-vis third parties, the ECJ has specifically held that international law cannot trump the constitutional foundations of the EU legal order.¹⁰⁸ Certainly, in *Kadi & Al Barakaat* the ECJ discarded UN anti-terrorism rules that undermined the protection of core fundamental rights.¹⁰⁹ NATO spending rules, on the contrary, would likely not affect this feature of the EU legal order. And while budgetary rules are entrenched in the EU treaties and a dense web of EU legislation, it is not clear that they represent the deep core of the EU constitutional order that would authorize disregarding international obligations.¹¹⁰ Nevertheless, as Grainne de Búrca recently explained, the ECJ has increasingly embraced a defensive attitude of the

¹⁰³ *Id.* ¶ 303.

¹⁰⁴ *Id.* ¶ 304.

¹⁰⁵ See Federico Fabbrini, *The Role of the Judiciaries in Times of Emergency: Judicial Review of Counter-Terrorism Measures in the US Supreme Court and the European Court of Justice*, 28 YBK EUR. L. 664, 694 (2009).

¹⁰⁶ See, e.g., Takis Tridimas & Jose A. Gutierrez-Fons, *EU Law, International Law and Economic Sanctions Against Terrorism: the Judiciary in Distress?*, 32 FORDHAM INT’L L.J. 660 (2009); Martin Scheinin, *Is the ECJ Ruling in Kadi Incompatible with International Law?*, 28 Y.B. EUR. L. 637 (2009).

¹⁰⁷ See, e.g., Grainne de Búrca, *The European Court of Justice and the International Legal Order after Kadi*, 51 HARV. J. INT’L L. 1, 37 (2010).

¹⁰⁸ See Daniel Halberstam & Eric Stein, *The United Nations, the European Union and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, 46 COMM. MKT. L. REV. 13, 43 (2009).

¹⁰⁹ See FEDERICO FABBRINI, FUNDAMENTAL RIGHTS IN EUROPE: CHALLENGES AND TRANSFORMATIONS IN COMPARATIVE PERSPECTIVE 52–53 (2014).

¹¹⁰ *But see* Christian Joerges, *The European Economic Constitution and its Transformation during the Financial Crisis*, (ZenTra Ctr. for Transnat’l Studies, Working Paper in Transnational Studies No. 47, 2015) (explaining the centrality of Economic and Monetary Union in the constitutional system of the EU).

autonomy of the EU legal order, and, much like the U.S. Supreme Court, has found ways to shield domestic law from the external influence of international law.¹¹¹ If the approach of the ECJ, which reflects a reading of the EU treaties as the constitutional charter of the EU,¹¹² were to hold, it remains possible that a conflict between NATO obligations and EU constitutional rules constraining deficit spending would be solved in favor of the latter—not of the former.

IV. Trade-offs: Fiscal Constraints and Defense Spending

Given this legal and theoretical background, the political and empirical question is to what extent EU fiscal rules effectively constrain member states' ability to spend on defense as required by NATO. This question is relevant considering that even some leaders of EU member states and EU institutions have blamed EU budgetary constraints, and notably the SGP, as an obstacle to fulfilling their responsibility to guarantee the security of citizens in the face of terrorist threats. In particular, following a series of deadly terrorist attacks in Paris, in November 2015 then-President of France Francois Hollande declared in front of the two houses of French Parliament that “the security pact prevails over the stability pact”¹¹³ and pledged to increase security spending in disregard of European budgetary constraints.¹¹⁴ At the same time, European Commission President Jean-Claude Juncker recognized that the military role played by France—one of the only two European countries with nuclear capabilities and a sizable engagement in peace-keeping missions around the world¹¹⁵—justified particular leniency when assessing compliance with the rules of the SGP.¹¹⁶ In fact, even though France is the only EU member state that never met until recently the SGP target of running a yearly budget with a deficit below 3% of GDP,¹¹⁷ it has never been fined under EU fiscal rules—arguably also because of its responsibilities in foreign affairs.

Yet it is questionable whether compliance with NATO obligations would necessarily entail a violation of EU budgetary constraints. Indeed, while France is currently falling short of its NATO obligations (spending only 1.7% of GDP in

¹¹¹ See Grainne de Búrca, *International Law before the Courts: The European Union and the United States Compared*, 55 VA. J. INT'L L. 685 (2015).

¹¹² See Case 294/83, *Les Verts v. Parliament*, 1986 E.C.R. 1339 (ECJ affirming for the first time that the EU Treaty is the Constitutional Charter of the EU).

¹¹³ See François Hollande, *Discours du Président de la République devant le Parlement réuni en Congrès* (Nov. 16, 2015) (stating that “le pacte de sécurité l’emporte sur le pacte de stabilité”).

¹¹⁴ *Id.*

¹¹⁵ France is the only European country other than the U.K. to have a permanent seat within the UN Security Council. U.N. Charter art. 23.

¹¹⁶ *Terrorism Spending Outside Stability Pact – Juncker*, ANSA (Nov. 16, 2015), http://www.ansa.it/english/news/2015/11/18/terrorism-spending-outside-stability-pact-juncker_ed6d5f99-349c-472f-97a3-28c8e8915edc.html [<https://perma.cc/YJ66-4EB4>].

¹¹⁷ See *Commission Opinion on the Draft Budgetary Plan of France*, at 2, COM (2016) 8007 final (Nov. 16, 2016) (reporting that France has consistently been running budgets with a deficit higher than 3% of GDP).

2016)¹¹⁸ and simultaneously failing to comply with the SGP¹¹⁹—with the effect that an increase in military spending would most likely complicate its objective to reduce its deficit—a member state like Estonia is actually meeting both: in 2016, Estonia matched its duty to spend 2% on defense,¹²⁰ while predicting a budget *surplus* of 0.5%,¹²¹ in perfect compliance with the rules of the SGP and the Fiscal Compact. In fact, while EU budgetary constraints limit the ability of EU member states to embrace a policy of deficit spending, they do not predetermine the composition of national expenditures. It is up to the EU member states to decide, through their national budgetary process, how to allocate their fiscal resources to alternative programs, including defense.¹²² In principle, therefore, member states could meet their defense spending targets while cutting the budget on all other public programs. Greece, for example, has done just that even in the aftermath of the Euro Crisis,¹²³ prioritizing its military capacity out of concern for historical tensions with its neighbor, Turkey.¹²⁴

Budgeting is always a matter of trade-offs.¹²⁵ National governments have limited resources when drawing their budgets, as tax increases can produce capital outflows or a recession, and increased borrowing may diminish the

¹¹⁸ See *supra* note 16.

¹¹⁹ See *supra* note 117.

¹²⁰ See *supra* note 16.

¹²¹ See *Commission Opinion on the Draft Budgetary Plan of Estonia*, at 3, COM (2016) 8004 final (Nov. 16, 2016) (reporting that Estonia would run a budget surplus of 0.5% GDP in 2016).

¹²² See *Constitutional Change through Euro-Crisis Law*, EUR. UNIV. INST., <http://eurocrisislaw.eui.eu/topic/budgetary-process-changes/> (last visited May 29, 2018) [<https://perma.cc/HC4W-2PUD>] (analyzing the mechanisms of budget-making in EU member states).

¹²³ Greece has been the EU member state most severely hit by the Euro Crisis, and since 2010, has had to request a bailout three times from other European states and international creditors. Each financial assistance program implied the imposition of significant austerity measures. See Memorandum of Understanding on Specific Economic Policy Conditionality (May 3, 2010), http://crisisobs.gr/wp-content/uploads/2013/03/Mou_03_05_20101.pdf [<https://perma.cc/TX46-P2M4>]; Memorandum of Understanding between the European Commission and the Hellenic Republic (Mar. 1, 2012), http://ec.europa.eu/economy_finance/eu_borrower/mou/2012-03-01-greece-mou_en.pdf [<https://perma.cc/8MRC-F4UX>]; Memorandum of Understanding between the European Commission and the Hellenic Republic and the Bank of Greece (Aug. 19, 2015), https://ec.europa.eu/info/files/memorandum-understanding-greece-august-2015_en [<https://perma.cc/3HP5-3S3V>]. See generally Lina Papadopoulou, *Can Constitutional Rules, even if 'Golden', Tame Greek Public Debt?*, in *THE CONSTITUTIONALIZATION OF EUROPEAN BUDGETARY CONSTRAINTS* 223 (Federico Fabbrini et al. eds., 2014).

¹²⁴ Although both Turkey and Greece are members of NATO, relations between the two states remain tense. See generally HARALAMBOS ATHANASOPOULOS, *GREECE, TURKEY AND THE AEGEAN SEA: A CASE STUDY IN INTERNATIONAL LAW* (2001). A factor in the geopolitical tensions between the two countries is Cyprus. See *supra* note 84. For these geostrategic reasons, Greece has kept a high spending on defense notwithstanding the budget cuts imposed since the bailouts. See *supra* note 16.

¹²⁵ See JAMES M. BUCHANAN & RICHARD E. WAGNER, *DEMOCRACY IN DEFICIT* 21–22 (1977); DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 21–23 (1991).

creditworthiness of state bonds. Limited resources otherwise must be allocated among possible competing programs. In this context, therefore, political incentives become the main drivers behind budget making,¹²⁶ which may explain why European politicians have traditionally underspent on defense. In many EU member states, including Germany and Italy, the tragic experience of the first half of the twentieth century has rendered the citizenry wary of militarism,¹²⁷ with the result that no politician could conceivably campaign on a program of greater spending on the armed forces. Moreover, in all EU member states, it would not be economically feasible to increase defense spending while keeping the budget expenditures at the same level. To do so, national governments would have to curb spending in other sectors. And since EU member states are directly engaged in the provision of essential public services like healthcare, education, and pensions, this would imply a significant reduction in spending on welfare.¹²⁸ Unsurprisingly, this is a path no rational politician is willing to take. Particularly after the deep cuts that the recent financial crisis forced on many EU member states, it would be political suicide for any national government to slash spending on the welfare state in order to increase spending on defense.¹²⁹

Hence, it is certainly true, as Daniel Kelemen has argued, that the adoption of the Fiscal Compact reflected the reality that Europe lacks a meaningful defense capacity—for it is difficult to run a balanced budget while maintaining a standing army.¹³⁰ In fact, in the United States, all proposals to amend the U.S. Constitution to introduce a balanced budget amendment have been rejected precisely on argument that this would undermine the federal government’s ability to finance the largest military apparatus in the world.¹³¹ Nevertheless, the decision by most

¹²⁶ See Min Shi & Jakob Svensson, *Political Budget Cycles: Do they Differ Across Countries and Why?*, 90 J. PUB. ECON. 1367, 1368 (2006) (explaining how electoral incentives shape budgetary decision-making).

¹²⁷ See Art. 11 Costituzione [Cost.] (It.) (rejecting war as an instrument to restrict other peoples’ liberty and to resolve international disputes); GRUNDGESETZ [GG] [BASIC LAW], art. 26(1), *translation at* https://www.gesetze-im-internet.de/englisch_gg/ [<https://perma.cc/RMP4-CWFE>] (prohibiting war).

¹²⁸ See Fritz W. Scharpf, *Economic Integration, Democracy and the Welfare State*, 4 J. EUR. PUB. POL’Y 18 (1997) (discussing implications of EU integration for the national welfare state).

¹²⁹ In fact, budgetary cuts to welfare benefits imposed in several EU member states since the Euro Crisis have been increasingly challenged in courts as a violation of social rights protected in national constitutions and European human rights documents. See Olivier De Schutter & Paul Dermine, *The Two Constitutions of Europe: Integrating Social Right in the New Economic Architecture of the Union*, EUR. J. HUM. RTS. 108, 127 (2017). So far, most legal challenges have been unsuccessful. See, e.g., *Da Silva Carvalho Rico v. Portugal*, 13341/14 Eur. Ct. H.R. (2015), ¶ 44 (holding that “budgetary constraints on the implementation of social rights can be accepted”). But see *Acórdão N° 187/2013*, Const. Ct. Portugal, (April 2013) (striking down a budget law reducing salaries for public employees as a violation of the principle of equality). See generally Federico Fabbrini, *The Euro-Crisis and the Courts*, 32 BERK. J. INT’L L. 64 (2014).

¹³⁰ Daniel Kelemen, *Law, Fiscal Federalism and Austerity*, 22 IND. J. GLOB. LEG. STUD. 379 (2015).

¹³¹ See JAMES V. SATURNO & MEGAN SUZANNE LYNCH, CONG. RESEARCH SERV., R41907, A BALANCED BUDGET CONSTITUTIONAL AMENDMENT: BACKGROUND AND CONGRESSIONAL

EU member states not to invest adequate resources in defense finds its explanation in politics, more than in law. Indeed, politics is the art of allocating scarce resources,¹³² and political incentives have traditionally pushed European decision-makers to underspend on defense with the aim to achieve other public policy objectives, and cut defense spending when savings were needed. This state of affairs has fueled the conventional American critique that European states free-ride on U.S. taxpayers for their defense, using their domestic revenues to maintain a welfare state that the United States lacks.¹³³ In reality, Social Security is the most expensive federal program also in the United States.¹³⁴ Yet in 2016, the United States spent on national defense more than twice as much as all the EU member states combined,¹³⁵ notwithstanding that the European population is almost double that of the United States.¹³⁶

Because the decision of European countries to spend less than they should on common defense is more the result of political choices, as opposed to legal constraints, it seems possible to maintain that no direct conflict exists between NATO obligations and EU fiscal rules. Be that as it may, from the point of view of NATO, these nations are simply failing to abide by commonly agreed-upon international commitments.¹³⁷ In this situation, however, one cannot exclude that other NATO members may decide to take counter-measures. The NATO Treaty does not provide for a dispute resolution mechanism by which a contracting party can start proceedings in front of an independent adjudicatory body to contest the failure by another contracting party to fulfill its obligations under the treaty.¹³⁸ Nevertheless, in the field of public international law, general remedies exist, and states can retaliate against other contracting parties that fail to abide by the treaty.¹³⁹ In the worst case scenario, a state may even declare itself no longer

OPTIONS (2011), <https://fas.org/sgp/crs/misc/R41907.pdf> [<https://perma.cc/M73S-7SUL>] (discussing failed attempts to introduce a balanced budget amendment in the U.S. Constitution).

¹³² See DAVID EASTON, *A FRAMEWORK FOR POLITICAL ANALYSIS* 50 (1965).

¹³³ See ROBERT KAGAN, *OF PARADISE AND POWER: AMERICAN AND EUROPE IN THE NEW WORLD ORDER* 18–27, 33–37 (2003).

¹³⁴ *Social Security*, CONG. BUDGET OFFICE, <https://www.cbo.gov/topics/social-security> (last visited May 31, 2018) [<https://perma.cc/LJ89-VSS8>].

¹³⁵ See STOCKHOLM INT'L PEACE RES. INST., *SIPRI MILITARY EXPENDITURE DATABASE* (2017), <https://www.sipri.org/databases/milex> (reporting that in 2016, the United States spent 548 billion euros, while a mathematical calculation reveals that the 28 member states of the EU combined spent 227 billion euros).

¹³⁶ See *DataBank: Population, total*, WORLD BANK, <https://data.worldbank.org/indicator/sp.pop.totl> (last visited May 30, 2018) [<https://perma.cc/U2GW-LARX>] (reporting that in 2016, the EU had a population of 511 million inhabitants, and the United States a population of 323 million).

¹³⁷ See *supra* note 14.

¹³⁸ See generally DUNCAN FRENCH ET AL., *INTERNATIONAL LAW AND DISPUTE SETTLEMENT* (2010).

¹³⁹ See TULLIO TREVES, *DIRITTO INTERNAZIONALE* 507 (2005) (discussing retaliation and counter-measures). Retaliation is instead prohibited when an international treaty creates specific mechanisms of dispute resolution and collective enforcement. See WILLIAM PHELAN, *IN PLACE OF*

bound by the treaty—or selectively disapply it.¹⁴⁰ In fact, this seems to be what U.S. President Trump suggested when he stated, in response to a question about whether the United States would maintain its commitment to Article 5 of the NATO Treaty, that the United States would only support those NATO countries that paid their fair share to the organization.¹⁴¹

Needless to say, a decision by the United States to suspend the mutual defense pledge would effectively bury NATO.¹⁴² Although the only time when Article 5 was invoked in the entire history of NATO was by the United States, after 9/11,¹⁴³ only the United States has the military capacity to intervene in support of an ally facing an enemy attack.¹⁴⁴ Therefore, disengagement by the United States would sound the death knell of the alliance.¹⁴⁵ Even the remote possibility that this may happen should cause major concern for EU member states.¹⁴⁶ The EU faces significant geopolitical threats from all sides.¹⁴⁷ Civil war in Iraq and Syria has operated as a training ground for foreign fighters, who return to EU member states to commit terrorist attacks.¹⁴⁸ Climate change in Sub-

INTER-STATE RETALIATION: THE EUROPEAN UNION'S REJECTION OF WTO-STYLE TRADE SANCTIONS AND TRADE REMEDIES 73–76 (2015).

¹⁴⁰ See Vienna Convention on the Law of Treaties, *supra* note 90, art. 60.

¹⁴¹ See *supra* notes 5–11 and accompanying text.

¹⁴² See Editorial, *President Trump Fails NATO*, N.Y. TIMES (May 26, 2017), <https://www.nytimes.com/2017/05/26/opinion/donald-trump-nato-russia.html>.

¹⁴³ See Press Release, NATO, Invocation of Article 5 Confirmed (Oct. 2, 2011), <http://www.nato.int/docu/update/2001/1001/e1002a.htm> [<https://perma.cc/VD8V-CYUP>].

¹⁴⁴ The strongest evidence of the point being made here emerged in 2011 during the Libyan civil war, which led to the involvement of NATO forces. Following news of mass atrocities by the then-strongman of Libya, Muammar Gaddafi, France and the UK started airstrikes in the country – ostensibly to implement UN Security Council Resolution 1973 (2011). However, after only a few days of military operation—and against an enemy with extremely limited defense capabilities – both countries ran out of critical ammunition and were forced to request assistance from the US. See Karen DeYoung & Greg Jaffe, *NATO Runs Short of Some Munitions in Libya*, WASH. POST (April 15, 2011), https://www.washingtonpost.com/world/nato-runs-short-on-some-munitions-in-libya/2011/04/15/AF307EID_story.html?utm_term=.60359cf2d6c4 [<https://perma.cc/AU5J-AHF3>].

¹⁴⁵ Given the focus here on NATO, this Article does not consider the opposite problem of possible retaliation by European countries in the face of other breaches of international law by the U.S. government—but the issue is anything but hypothetical. See Milan Schreuer, *E.U. Pledges to Fight Back on Trump Tariffs as Trade War Looms*, N.Y. TIMES, (March 7, 2018), <https://www.nytimes.com/2018/03/07/business/trump-tariffs-eu-trade.html> (reporting preparations by the EU to respond to trade tariffs introduced by U.S. President Donald Trump in breach of international economic law and WTO rules).

¹⁴⁶ See also Joseph H. H. Weiler, Editorial, *Sleepwalking Again: The End of Pax Americana*, 25 EUR. J. INT'L L. 635 (2014) (stressing the erosion of U.S. leadership in Europe).

¹⁴⁷ See European Council Press Release 35/17, "United we stand, divided we fall": Letter by President Donald Tusk to the 27 EU Heads of State or Government on the Future of the EU Before the Malta Summit (Jan. 31, 2017).

¹⁴⁸ See Piotr Bakowski & Laura Puccio, *Foreign Fighters – Member States Responses and EU Action*, EUR. PARL. RES. SERV. BRIEFING (Mar. 10, 2016), <https://epthinktank.eu/2016/03/10/foreign-fighters-member-state-responses-and-eu-action/> [<https://perma.cc/293T-DF9T>].

Saharan Africa, combined with instability on the Mediterranean coast, has led to a surge in immigration, challenging Europe's capacity to accommodate migrants and refugees.¹⁴⁹ And, while authoritarian developments in Turkey have complicated relations within NATO,¹⁵⁰ a resurgent Russia has shattered any expectation of a possible partnership between NATO and the successor of the Soviet Union. In fact, the Russian invasion of Crimea in 2014—the first ever redefinition of European maps by force since the end of WWII¹⁵¹—has raised worries that the security of Central and Eastern European nations may be seriously at stake.¹⁵² In this situation, the strategic interest of the EU members should be to take greater ownership of their defense by sharing a higher burden of their security costs than is currently the case.¹⁵³

¹⁴⁹ See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration*, at 7, COM (2015) 240 final (May 13, 2015), https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication_on_the_european_agenda_on_migration_en.pdf [<https://perma.cc/A5DT-K8C2>]; see also generally *Communication from the Commission to the European Parliament, The European Council and the Council, Managing the Refugee Crisis: State of Play of the Implementation of the Priority Actions Under the European Agenda on Migration Commission*, COM (2015) 510 final (Oct. 10, 2015), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/communication_on_eam_state_of_play_20151014_en.pdf [<https://perma.cc/XQ3Q-J4HZ>].

¹⁵⁰ While Turkey is a member of NATO and has one of the most powerful forces of the military alliance, its recent constitutional involution has raised concerns about the ability for European countries—and the U.S.—to continue cooperating with Turkey within NATO. See the former NATO Supreme Allied Commander U.S. Admiral James Stavridis, *Turkey and NATO: What Comes Next is Messy*, FOREIGN POL'Y (July 18, 2016), <http://foreignpolicy.com/2016/07/18/turkey-and-nato-what-comes-next-is-messy-coup-erdogan-incirlik-air-base-nuclear-weapons/> [<https://perma.cc/29DJ-Q76W>].

¹⁵¹ See COUNCIL OF EUR., PARL. ASS., RESOLUTION 1990: RECONSIDERATION ON SUBSTANTIVE GROUNDS OF THE PREVIOUSLY RATIFIED CREDENTIALS OF THE RUSSIAN DELEGATION (Apr. 11, 2014) (suspending the Russian delegation in the Parliamentary Assembly of the Council of Europe in response to the illegal annexation of Crimea by the Russian Federation).

¹⁵² See Wiktor Szary, *CEE and Baltics say Gravely Concerned by Russia's 'Aggressive' Stance*, REUTERS (Nov. 4, 2015), <https://www.reuters.com/article/us-nato-cee-bucharest/cee-and-baltics-say-gravely-concerned-by-russias-aggressive-stance-idUSKCN0ST1EW20151104> [<https://perma.cc/3AWF-3CEZ>] (reporting joint statement by nine leaders of central and eastern European states expressing concerns for Russian aggressive stance).

¹⁵³ Cf. Government of Denmark, *Foreign Policy and Security Strategy: Security in Denmark and the Surrounding Region* (June 14, 2017), <http://um.dk/~media/UM/English-site/Documents/News/Faktaark2English.pdf?la=en> [<https://perma.cc/SYP3-K2W8>] (explaining that the Danish government will allocate more funding to defense in its next budget). *But see German Foreign Minister Gabriel Questions NATO's Defense Spending Target*, DEUTSCHE WELLE (Mar. 1, 2017), <http://www.dw.com/en/german-foreign-minister-gabriel-questions-natos-defense-spending-target/a-37758402> [<https://perma.cc/SYP3-K2W8>] (reporting opinion of the German Minister of Foreign Affairs Sigmar Gabriel, who suggested that spending on other goals, like integrating migrants, is more relevant than spending on security).

V. A European Defense Union?

Yet, what should European states practically do? This Article proposes that EU member states should increase their cooperation in the field of defense, and meet the spending targets set by NATO *jointly*.¹⁵⁴ While it is not legally impossible for European states to spend on defense, it is politically difficult to do so when acting *separately*. However, if EU member states were to combine their efforts through the framework of the CFSP—the EU foreign security and defense policy¹⁵⁵—they may be able to surge the overall spending on security through synergies and economies of scale. Coordinated action by the EU member states would increase the ability to devote a total overall percentage of GDP on defense, while simultaneously expanding the effective capacity of action of European military forces. As several analyses have highlighted, the lack of a common European defense policy has major opportunity costs, as it produces duplications, diverts resources to staff expenditures (as opposed to hardware expenditures), and reduces the ability to invest in research and development.¹⁵⁶ By acting together, instead, EU member states would not only make their expenditures more rational, but they could also increase their operational capacity—hence rebalancing the transatlantic alliance as requested by the United States.¹⁵⁷

The European Council—the body grouping the heads of state and government of the EU member states, with the President of the European Commission, under the guidance of a semi-permanent president¹⁵⁸—has recently indicated this direction. Under the leadership of the new French President Emmanuel Macron, who during his election campaign had called for a “Europe which better protects,”¹⁵⁹ the European Council outlined a plan for further development of the CFSP in June 2017.¹⁶⁰ After re-affirming that “[t]he transatlantic relationship and EU-NATO cooperation remain key to [the] overall

¹⁵⁴ The proposals articulated here would have peculiar ramifications for those EU member states that are not part of NATO. See *supra* notes 81–85 and accompanying text. The EU currently respects the decision by several EU member states to maintain a policy of neutrality. See, e.g., Presidency Conclusions, Brussels European Council (Dec. 11–12, 2008) (reassuring the Irish people after they voted against the Treaty of Lisbon that nothing in that Treaty among others undermined the policy of neutrality of Ireland, thus paving the way to a second referendum). Clearly, developments toward greater integration by a group of EU member states in the field of defense would pose particular challenges for the hold-out countries.

¹⁵⁵ See PANOS KOUTRAKOS, *THE EU COMMON SECURITY AND DEFENSE POLICY* 22–37 (2013).

¹⁵⁶ See BLANCA BALLESTER, EUR. PARL. RES. SERV., PE 494.466, *THE COSTS OF NON-EUROPE IN COMMON SECURITY AND DEFENSE POLICY* (2013); Valerio Brani, *I costi della non-Europa della difesa*, Centro studi sul Federalismo and Istituto Affari Internazionali (April 2013).

¹⁵⁷ See also the former EU High Representative for CFSP Javier Solana, Opinion, *European Defense Integration Now*, PROJ. SYNDICATE (Sept. 20, 2016), <https://www.project-syndicate.org/commentary/european-defense-integration-now-by-javier-solana-2016-09?barrier=accessreg> [<https://perma.cc/KT4B-RQJG>].

¹⁵⁸ See TEU, *supra* note 19, art. 15 (establishing the European Council).

¹⁵⁹ See EMMANUEL MACRON, *REVOLUTION* (2017).

¹⁶⁰ See European Council Conclusions, *supra* note 21.

security” of the EU member states,¹⁶¹ the European Council identified as a strategic objective the “joint development of capability projects agreed by Member States to fill the existing major shortfalls and develop the technologies of the future.”¹⁶² To this end, the European Council invited member states to work on options for the joint procurement of capabilities and encouraged investment on enterprises involved in the area of security and defense.¹⁶³ Specifically, the European Council called for the rapid establishment of a European Defense Industrial Development Programme and invited the European Investment Bank—an international public investment bank owned jointly by all EU member states and funding infrastructural investments—to increase its financial support for private companies active in the fields of security and defense.¹⁶⁴

Moreover, the European Council, for the first time ever, agreed on “the need to launch an inclusive and ambitious Permanent Structured Cooperation.”¹⁶⁵ PESCO is a form of enhanced cooperation in the field of defense, originally introduced in the EU by the defunct constitutional Treaty of 2005, and later resumed by the Treaty of Lisbon of 2009.¹⁶⁶ According to Article 42(6) TEU the PESCO allows “those Member States whose military capabilities fulfill higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions” to unite their forces, developing greater operational capabilities.¹⁶⁷ Article 1 of Protocol No. 10 attached to the EU treaties clarifies that PESCO is open to any member state that undertakes to “proceed more intensively to develop its defence capacities through the development of national contributions and the participation, where appropriate in multinational forces.”¹⁶⁸ In fact, as indicated in Article 2 of the same Protocol, member states participating in PESCO undertake to cooperate “with a view to achieve approved objectives concerning the level of investment expenditure on defense equipment . . . in the light of the security environment and of the Union’s international responsibilities.”¹⁶⁹ Hence, while historically such security cooperation has been undertaken to develop mixed battle groups,¹⁷⁰ the European

¹⁶¹ *Id.* ¶ 6.

¹⁶² *Id.* ¶ 7.

¹⁶³ *Id.*

¹⁶⁴ See also European Commission Communication to the European Parliament and the Council, “Launching the European Defense Fund” (June 7, 2016), COM(2017) 295 final.

¹⁶⁵ See European Council Conclusions, *supra* note 21, ¶ 8.

¹⁶⁶ See Hervé Bribosia, *Les nouvelles formes de flexibilité en matière de défense*, in GENESIS AND DESTINY OF THE EUROPEAN CONSTITUTION 835 (Giuliano Amato et al. eds., 2007).

¹⁶⁷ See TEU, *supra* note 19, art. 42.

¹⁶⁸ *Id.*, Protocol (No. 10) on Permanent Structured Cooperation Established by Art. 42 of the Treaty on European Union, art. 1, May 9, 2008, 2008 O.J. (C 115) 276.

¹⁶⁹ *Id.* art. 2.

¹⁷⁰ The antecedent of the permanent structured cooperation is the Joint Declaration Issued at the British-French Summit, Saint Malo, France, Dec. 4, 1998 (establishing the principle that the EU should be in a position to play its role in the international stage through the creation of rapid response forces made available by the member states willing and able to carry out military operations).

Council has also clarified that this “has to be consistent with Member States’ national defence planning and commitments agreed within NATO,”¹⁷¹ which suggests that the mechanism could be used to address spending gaps as well.

Following the endorsement of the European Council, France, Germany, Italy, and Spain drafted a formal request to set up an ambitious and inclusive PESCO.¹⁷² The proposal to activate the mechanism was joined by twenty-one other member states.¹⁷³ The United Kingdom, on its way out of the EU, refrained from stopping the initiative.¹⁷⁴ Hence, on November 13, 2017 a large group of EU member states¹⁷⁵ notified the EU High Representative for Foreign Policy (the EU Chief Diplomat)¹⁷⁶ and the Council of its intention to establish PESCO,¹⁷⁷ and on December 8, 2017 the Council formally approved the creation of the military cooperation between twenty-five EU member states.¹⁷⁸ As indicated in the decision establishing PESCO, “participating Member States shall make contributions which fulfill the more binding commitments which they have made to one another,”¹⁷⁹ and to this end they must participate in individual projects

¹⁷¹ European Council Conclusions, *supra* note 21, ¶ 8.

¹⁷² See Andrea Shalal & Robin Emmott, *EU to Sign Joint Defense Pact in Show of Post-Brexit Unity*, REUTERS (Nov. 8, 2017), <https://www.reuters.com/article/us-eu-defence/eu-to-sign-joint-defense-pact-in-show-of-post-brexit-unity-idUSKBN1D81CT> [<https://perma.cc/WT5B-QWPN>].

¹⁷³ The other member states joining the letter notifying the request to establish PESCO include Austria, Belgium, Bulgaria, the Czech Republic, Croatia, Cyprus, Estonia, Finland, Greece, Hungary, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Rumania, Slovakia, Slovenia, and Sweden. Ireland and Portugal did not initially join the letter of notification to activate PESCO as they had to obtain special parliamentary consent for that, but they expressed their intention to join PESCO a few days afterwards. See, e.g., Marie O’Halloran, *Dáil Approves Ireland Joining EU’s PESCO Military Framework*, IRISH TIMES (Dec. 7, 2017), <https://www.irishtimes.com/news/politics/oireachtas/dail-approves-ireland-joining-eu-s-pesco-military-framework-1.3319228> [<https://perma.cc/T3CX-57QW>] (reporting vote by the Irish Parliament to authorize Ireland’s participation in PESCO).

¹⁷⁴ Traditionally the U.K. had opposed EU military integration perceiving this as competitive with its NATO commitments. See Sven Biscop, *The UK and European Defence: Leading or Leaving?*, 88 INT’L AFF. 1297, 1303-04 (2012). The decision of the U.K. to withdraw from the EU, see *supra* note 24, obviously deprived the U.K. of any leverage in stopping the other EU member states from moving forward with PESCO.

¹⁷⁵ Only Denmark, Malta and the U.K. are not participating in PESCO. Denmark’s decision not to participate in PESCO is consistent with its optout. See TEU, *supra* note 19, Protocol (No. 22) on the Position of Denmark, art. 5, Oct. 26, 2012, 2012 O.J. (C 326) 1 (exempting Denmark from participating in EU decisions and actions with implications on the field of defense). Malta’s decision instead is political. See *Malta Among Three Countries Opting Out of EU’s New Defense Agreement*, TIMES OF MALTA (Dec. 11, 2017), <https://www.timesofmalta.com/articles/view/20171211/local/malta-among-three-countries-opting-out-of-eus-new-defence-agreement.665421> [<https://perma.cc/PT95-57AP>].

¹⁷⁶ See TEU, *supra* note 19, art. 18 (defining the position of the High Representative of the Union for Foreign Affairs and Security Policy).

¹⁷⁷ See Notification on Permanent Structured Cooperation (PESCO) to the Council and to the High Representative of the Union for Foreign Affairs and Security Policy 2 (Nov. 13, 2017).

¹⁷⁸ Council Decision, *supra* note 22.

¹⁷⁹ *Id.* art. 3(1).

detailed in an annex to the decision.¹⁸⁰ In fact, the Council decision creates a governance structure for the PESCO,¹⁸¹ with regular assessments of states' performances, and foresees that states failing to fulfill their obligations may be expelled from the military cooperation.¹⁸² Specifically, on the question of defense expenditures, the PESCO commits participating member states to "regularly increase defence budgets in real terms,"¹⁸³ increase "defence investment expenditure to 20% of total defence spending,"¹⁸⁴ and increase "the share of expenditures allocated to defense research and technology with a view to nearing the 2% of total defence spending"¹⁸⁵—indicating this as a collective benchmark.

The establishment of PESCO epitomizes the growing interest of EU institutions and member states in defense cooperation.¹⁸⁶ In fact, while the High Representative of the EU for Foreign and Security Policy had called for developments of greater military capacity to back the EU foreign policy in its June 2016 global strategy,¹⁸⁷ the election of U.S. President Trump has accelerated debates on the creation of a true EU defense union. In November 2016, the European Parliament (EP) approved a resolution calling for the creation of a real European defense union, offering guarantees and capabilities to member states beyond their individual ones.¹⁸⁸ In March 2017, the Council of the EU approved an operational planning and conduct capability designed to oversee common security and defense policy missions and operations.¹⁸⁹ And in June 2017, the European Commission published a reflection paper on the "Future of European Defense,"¹⁹⁰ in which the scenario of the development of a full-fledged "common" EU defense policy was clearly indicated as the most appropriate

¹⁸⁰ See also Council Recommendation 6588/1/18 of Mar. 6, 2018, Concerning a Roadmap for the Implementation of PESCO, CORLX 123, CFSP/PESC 196, CSDP/PSDC 93, FIN 174.

¹⁸¹ Council Decision, *supra* note 22, art. 4.

¹⁸² *Id.* art. 6(3).

¹⁸³ Notification on Permanent Structured Cooperation, *supra* note 177, annex II, ¶ 1.

¹⁸⁴ *Id.* annex II, ¶ 2.

¹⁸⁵ *Id.* annex II, ¶ 4.

¹⁸⁶ See Government of the Netherlands, Press Release, L'Allemagne et les Pays-Bas donnent une impulsion à leur coopération militaire (Feb. 4, 2016) (reporting greater military cooperation between the Netherlands and Germany); Conseil des Ministres Franco-Allemand de Défense et de Sécurité (July 13, 2017) (indicating the joint pledge by France and Germany to strengthen European defense and proposing the development of specific research programs such as on drone technology).

¹⁸⁷ See HIGH REPRESENTATIVE OF THE EU FOR FOREIGN AFFAIRS AND SECURITY POLICY, SHARED VISION, COMMON ACTION: A STRONGER EUROPE, A GLOBAL STRATEGY FOR THE EU FOREIGN & SECURITY POLICY 37 (2016).

¹⁸⁸ See European Parliament Resolution of 22 November 2016 on the European Defense Union, EUR. PARL. DOC. P8_TA(2016)0435.

¹⁸⁹ See Council Conclusions Doc. 110/17 of March 6, 2017, On Progress in Implementing the EU Global Strategy in the Area of Security and Defence, Annex – Concept Note: Operational Planning and Conduct Capabilities for CSDP Missions and Operations.

¹⁹⁰ See *European Commission Reflection Paper on the Future of European Defense*, COM (2017) 315 final (June 7, 2017).

response to the challenges facing the EU, which include evolving transatlantic relations and the need for greater financial solidarity.¹⁹¹

These latest developments suggest that awareness is growing in the EU for the need to strengthen the ability to act in the field of CFSP. Nevertheless, as Joris Larik has pointed out, a recurrent problem in EU foreign and security policy is the disconnect between ambitions and proclamations on the one hand, and acts and deeds on the other.¹⁹² In particular, with regard to defense spending, it is clear that additional action would be required for the EU to achieve the targets set by NATO, even in the framework of the PESCO. In fact, the Council decision establishing PESCO indicated that “operating expenditures arising from projects undertaken within the framework of PESCO shall be supported primarily by the participating Member States.”¹⁹³ However, particularly after Brexit, only an increase in the EU budget would expand the resources available for EU security and defense purposes.¹⁹⁴ Therefore, the strengthening of EU defense depends on a reform of the EU architecture of economic governance¹⁹⁵ and the creation of a fiscal capacity—an EU budget, financed by real own resources (rather than

¹⁹¹ *Id.* at 2. See also *European Interview No. 95: We have reached a crucial moment for European Defence*, FONDATION ROBERT SCHUMAN (June 19, 2017), <https://www.robert-schuman.eu/en/european-interviews/0095-we-have-reached-a-crucial-momentum-for-european-defence> [<https://perma.cc/8TFC-CYAB>] (interview with Jorge Somecq, Executive Director of the European Defense Agency, who argues that European defense is at a crucial turning point).

¹⁹² See JORIS LARIK, *FOREIGN POLICY OBJECTIVES IN EUROPEAN CONSTITUTIONAL LAW* 1 (2016).

¹⁹³ Council Decision, *supra* note 22, art. 6(2).

¹⁹⁴ See European Parliament Resolution of 16 February 2017 on Improving the Functioning of the European Union Building on the Potential of the Lisbon Treaty, EUR. PARL. DOC. P8_TA(2017)0049, ¶ 39 (stating that only an increase of “the resources earmarked for the Common Foreign and Security Policy [can] ensure that the cost of military operations carried out in the framework of the Common Security and Defence Policy or the European Defence Union is shared more fairly.”); see also *Commission Proposal for a Regulation of the European Parliament and of the Council Establishing the European Defence Industrial Development Programme Aiming at Supporting the Competitiveness and Innovative Capacity of the EU Defense Industry*, COM (2017) 294 final (June 7, 2017) (investing 25 million euros on defense research until the end of 2019, and 500 million euros per year after 2020; and simultaneously offering co-financing of 500 million euros per year in 2019 and 2020 to the member states for defense hardware developments and acquisitions).

¹⁹⁵ A number of proposals to reform the architecture of Economic and Monetary Union have been advanced at the highest institutional level since the beginning of the euro-crisis. See *Report by Herman Van Rompuy, Towards a Genuine Economic and Monetary Union* (Dec. 5, 2012), https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/134069.pdf [<https://perma.cc/B3QP-QJCM>]; *Report by Jean-Claude Juncker, Completing Europe’s Economic and Monetary Union* (June 22, 2015), https://ec.europa.eu/commission/sites/beta-political/files/5-presidents-report_en.pdf [<https://perma.cc/6JJZ-RZWV>]; *Final Report and Recommendations of the High Level Group on Own Resources on Future Financing of the EU* (Dec. 2016), http://ec.europa.eu/budget/mff/hlgor/library/reports-communication/hlgor-report_20170104.pdf [<https://perma.cc/VT79-SV8S>].

member states' transfers) and designed to support action by the EU.¹⁹⁶ As the EP—one of the strongest supporters of an EU fiscal capacity¹⁹⁷—pointed out in its latest annual report on the implementation of CFSP, the next multi-annual financial framework of the EU should establish “a fully-fledged EU defense budget” that “will have to be financed through new resources.”¹⁹⁸

In summary, while the EU imposes budgetary constraints on the EU member states, it also offers a framework in which European nations can enhance their collective security, including increasing their joint investment in common defense.¹⁹⁹ Recent institutional attention for the need to strengthen CFSP—and the establishment for the first time of PESCO—signals that EU member states are increasing their ability and willingness to work together in the field of defense. In fact, in its resolution of November 2016 on European Defense Union, the EP renewed the call “on the Member States to aim for the target of 2% of GDP for defence spending,”²⁰⁰ but pointed out that the only way for member states to do so in the face of European budgetary constraints would be through greater EU military integration. As the EP clarified, “the challenges which financial constraints represent to national budgets are at the same time accompanied by opportunities for progress arising from the evident need for closer cooperation between Member States in defence matters.”²⁰¹ While almost all EU member states still fall short of meeting their NATO spending target, developments in the EU—including through the creation of a fiscal capacity—could create the conditions for European countries to take charge of a greater share of their defense costs, boosting their contribution to the transatlantic security alliance.

¹⁹⁶ See Federico Fabbrini, *From Fiscal Constraints to Fiscal Capacity: The Future of EMU and its Challenges*, in *THE CONSTITUTIONALIZATION OF EUROPEAN BUDGETARY CONSTRAINTS* 399 (Federico Fabbrini et al eds., 2014).

¹⁹⁷ See European Parliament Resolution of 23 May 2013 on Future Legislative Proposals for EMU, EUR. PARL. DOC. P7_TA(2013)0222; European Parliament Resolution of 24 June 2015 on the Review of Economic Governance Framework: Stock-tacking and Challenges, EUR. PARL. DOC. P8_TA(2015)0238; European Parliament resolution of 16 February 2017 on Budgetary Capacity for the Eurozone, EUR. PARL. DOC. P8_TA(2017)0050.

¹⁹⁸ See European Parliament Resolution of 13 December 2017 on the Annual Report on the implementation of the Common Security and Defense Policy, EUR. PARL. DOC. P8_TA(2017)0492, ¶¶ 27–28.

¹⁹⁹ A connected question that this article does not address is to what extent greater integration in the field of defense can be achieved in a situation where at least two EU member states—Poland and Hungary—are increasingly abandoning common principles of democracy, human rights, and the rule of law. See generally *CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA: THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA* (Armin von Bogdandy & Pal Sonnevend eds., 2015). In July 2017 Poland approved a law infringing on the independence of the judiciary. In December 2017, the European Commission activated for the first time ever the procedure foreseen in Article 7 TEU against Poland, which may ultimately lead to the suspension of the states' voting rights within the EU institutions. See *Commission Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law*, COM (2017) 835 final (Dec. 20, 2017).

²⁰⁰ European Parliament Resolution, *supra* note 188, ¶ 40.

²⁰¹ *Id.* ¶ 41.

VI. Conclusion

This Article has sought to answer a provocative question: do NATO obligations trump European budgetary constraints? While the North Atlantic Council decided in the 2014 Wales Summit, in execution of the constitutional mandate it pursues under the NATO Treaty, that NATO members must spend at least 2% of their annual GDP on defense, only Poland, Estonia, Greece, and the United Kingdom (which is on its way out of the EU)²⁰² are currently meeting this target.²⁰³ At the same time, EU rules adopted in the aftermath of the Euro Crisis have limited the ability of EU member states to run large deficits, introducing tight budgetary constraints at both the national and international level.²⁰⁴ The failure by European countries to meet their binding international NATO obligations, however, has recently triggered intense transatlantic quarreling: particularly since the election of U.S. President Donald Trump, accusations that EU member states are not spending sufficiently on defense has led to questions about whether the United States would still back up the mutual defense pledge underpinning NATO.²⁰⁵ This has raised major worries about the very survival of the transatlantic alliance.²⁰⁶ Since NATO constitutes the backbone of European security, it seems pressing to understand how NATO rules interact with the law and politics of budget making in the EU.

As this Article has explained, from a conflict-of-laws perspective, EU treaties empower EU member states to disregard EU norms if they conflict with prior international obligations. Nevertheless, the ECJ has interpreted this rule narrowly and introduced limitations on the ability of prior international obligations to undermine basic constitutional principles of the EU legal order. This raises several doubts on whether NATO spending rules could legally allow member states to set aside EU budgetary constraints. At the same time, this Article has suggested that political trade-offs, more than legal constraints, explain European nations' under-spending on defense: since budget making implies the allocation of scarce resources, political incentives have driven EU policy-makers

²⁰² See *supra* note 24.

²⁰³ See *supra* note 16.

²⁰⁴ See *supra* notes 72–79 and accompanying text.

²⁰⁵ But see U.S. Ambassador to NATO Kay Bailey Hutchison, Opinion, *Washington Remains United Behind NATO*, N.Y. TIMES (Aug. 30, 2017), <https://www.nytimes.com/2017/08/30/opinion/washington-remains-united-behind-nato.html>.

²⁰⁶ Another area of transatlantic tensions in the field of security has recently been created by the conflicting approaches of the EU and the U.S. institutions on questions of privacy and surveillance. See Case C-362/14 Maximilian Schrems v. Data Prot. Comm'r, 2015 E.C.R. 650 (Oct. 6, 2015) (ECJ striking down the EU-US Safe Harbor Agreement allowing the free flow of data between the EU and the US on the argument that privacy and data protection standards in the US failed short of EU constitutional requirements). The ruling of the ECJ prompted the adoption of a new transatlantic agreement. See European Commission Press Release IP/16/216, EU Commission and United States Agree on New Framework for Transatlantic Data Flows: EU-US Privacy Shield (Feb. 2 2016). See generally SURVEILLANCE, PRIVACY AND TRANSATLANTIC RELATIONS (Federico Fabbrini et al eds., 2017).

to reduce spending on the military in order to support other public policy objectives, such as welfare. Yet, because the failure by European parties of NATO to reach their spending target may lead to retaliation by the United States, EU member states should strategically seek to strengthen their cooperation in the field of defense, so as to achieve jointly what they cannot do individually. By pooling forces through a real European defense union, EU member states can create economies of scale and increase their operational capabilities. Moreover, if cooperation in the field of CFSP through the mechanism of the PESCO were supported by the development of new budgetary instruments at the EU level, member states could collectively fill the gaps in defense spending and endow the EU with a real security capacity.²⁰⁷

Ironically, shortly after WWII, six European nations engaged in an attempt to establish a European Defense Community.²⁰⁸ That project failed in 1954,²⁰⁹ leading the six (France, Italy, West Germany, and the Benelux countries) instead to create the EU, while European security was outsourced to NATO. In 2017, however, the need for the EU member states to take on a greater responsibility in their defense has once again become pressing.²¹⁰ While geostrategic challenges around Europe have increased, American complaints that NATO unfairly relies on U.S. funding and manpower have raised concerns on the continuing validity of Article 5 of the NATO Treaty: the mutual defense pledge that an attack on one is an attack on all. In this scenario, increasing defense integration seems to be the only rational choice for EU member states moving forward. For countries acting under tight EU legal constraints and powerful national political incentives, cooperation in the field of CFSP is the way to achieve jointly what they cannot do

²⁰⁷ The debate on the future of European defense hence connects closely with that about the future of Europe more generally. See Commission Whitepaper on “The Future of Europe” (March 1, 2017) (outlining alternative scenarios for the EU future); European Council Press Release 149/17, Rome Declaration of the leaders of 27 Member States and of the European Council, the European Parliament and the European Commission (March 25, 2017) (calling for further steps in EU integration on the occasion of the 60th anniversary of the Treaties of Rome). See generally Federico Fabbrini, *Constitutional Crises, Institutional Reforms: the European Union at the Crossroads*, 32 CONN. J. INT’L L. 50 (2017).

²⁰⁸ See Treaty Establishing the European Defense Community, signed May 27, 1952. This treaty was meant to complement the Treaty of Paris Establishing the European Carbon and Steel Community, April 18, 1951, 261 U.N.T.S. 140.

²⁰⁹ See Assemblée Nationale, Resolution of August 30, 1954 (voting down the Treaty by a vote of 319 to 264). See generally DESMOND DINAN, *EUROPE RECAST: A HISTORY OF EUROPEAN UNION* (2d ed. 2014).

²¹⁰ While this article was going to press U.S. President Donald Trump decided to impose stiff tariffs on the import in the U.S. of steel and aluminum produced among others in the EU and Canada, on the rationale that this was necessary to protect U.S. national security. See Presidential Proclamation on Adjusting Imports of Steel in the United States, May 31, 2018. By this unprecedented measure the U.S. Administration for the first time since WWII identifies key NATO allies as a potential threat to the economic national security of the U.S., raising dark clouds on the future of trans-Atlantic military cooperation. See also Editorial, *America Declares War on Its Friends* N.Y. TIMES (June 1, 2018), <https://www.nytimes.com/2018/05/31/opinion/trade-tariffs-trump-eu-mexico-canada.html>

separately. NATO obligations call for member nations to spend at least 2% of their annual GDP on defense. By reaching that target as a Union, European states can reaffirm their commitment to the transatlantic defense alliance and simultaneously take greater ownership of their freedom and security. Regardless of whether NATO obligations trump European budgetary constraints or not, it seems time for the EU to establish a Defense Union.