

## RESPONDING TO INTERNATIONAL TERRORISM: WHAT ROLE FOR NATO AND THE EU? \*

Jan Wouters \*\* and Frederik Naert \*\*\*

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The events of September 11th have led to an unprecedented international campaign or 'war' against terrorism. Hereinafter, we will briefly explore what role NATO and the EU play in this campaign. We will first sketch the immediate reactions of NATO and the EU to September 11th and then outline relevant developments in both organizations before concluding with some final remarks.

### I. The immediate response

On October 7, 2001, the day operation *Enduring Freedom* began, the United States (US) and the United Kingdom (UK) invoked the right of self-defence as a legal basis.<sup>1</sup> This was supported by NATO and the EU.

As early as September 12, 2001 the North Atlantic Council adopted a declaration stating 'if it is determined that this attack was directed from abroad against the [US], it shall be regarded as an action covered by Article 5 of the Washington Treaty'.<sup>2</sup> On October 2, 2001, NATO's Secretary-General announced that 'it has now been determined that the attack [...] was directed from abroad and shall therefore be regarded as an action covered by Article 5'. Thus, for the first time, NATO invoked its collective defence clause. On October 8, 2001, the Secretary-General added: 'NATO Ambassadors [...] expressed their full support for the actions of the [US] and the [UK]'.<sup>3</sup> This was novel in that terrorism appeared to have been regarded in the *Alliance's Strategic Concept* as an 'other risk of a wider nature' rather than an 'armed attack', even though this concept hinted at a broad reading of 'armed attack' ('Any armed attack on the territory of the Allies, from whatever direction').<sup>4</sup> Nevertheless, the US mainly asked for military support from individual nations on a bilateral basis and NATO as such mostly contributed only indirectly, e.g. by sending an AWACS unit to the US and a naval force to the Mediterranean.<sup>5</sup>

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\*\* Professor of International Law and the Law of International Organizations, Director of the Institute for International Law, University of Leuven; *Of Counsel*, Linklaters De Bandt, Brussels.

\*\*\* Assistant in International Law, Institute for International Law, University of Leuven.

<sup>1</sup> See their letters to the Security Council, both 7 October 2001.

<sup>2</sup> NATO press release (2001)124.

<sup>3</sup> NATO press release (2001)138.

<sup>4</sup> Washington, 24 April 1999, § 24.

<sup>5</sup> NATO press release M-NAC-2 (2001)159.

The EU's European Council (i.e. the heads of State and Government of the EU's Member States), at an extraordinary meeting on September 21, 2001, strongly supported the right of the US to respond militarily: 'On the basis of Security Council Resolution 1368, a riposte by the US is legitimate'. Moreover, the 13 countries applying for accession to the EU aligned themselves with these conclusions<sup>6</sup> and on October 8, 2001 the EU's General Affairs Council stated: 'The EU declares [...] its wholehearted support for the action that is being taken in self-defence and in conformity with the UN Charter and the UNSCR 1368'. This was confirmed at the highest level by the conclusions of the Ghent European Council (October 19, 2001).

## **II. The respective roles of NATO and the EU**

NATO has stepped up its efforts considerably in the fight against terrorism.<sup>7</sup> We will confine ourselves to what is particularly relevant to the *ius ad bellum*. First, NATO appears to have decided that, as far as the Alliance is concerned, terrorist acts by non-State actors can constitute an armed attack, giving rise to self-defence regardless of attribution to a State: the final communiqué of Reykjavik (March 14, 2002) states: '[w]e will [...] protect our populations, territory and forces from any armed attack, including terrorist attack, directed from abroad' (§ 3) and NATO's Secretary-General declared that NATO had extended its collective defence commitment to 'a terrorist attack by a non-State actor'.<sup>8</sup> Thus, NATO is influencing the interpretation of the right of self-defence. On the other hand, the Reykjavik communiqué stipulates that 'Actions taken [...] will be [...] in full compliance with [...] international law and [...] the [UN] Charter'. These developments were reaffirmed at the November 2002 Prague Summit (final communiqué, § 4). Similarly, boarding operations as part of NATO's anti-terrorism operation *Active Endeavour*<sup>9</sup> are 'conducted in accordance with [...] international law and [...] of a compliant nature'.<sup>10</sup>

The EU's response is more comprehensive: it has adopted an impressive number of legal instruments and other initiatives covering various aspects of the fight against terrorism, mainly concerning criminal justice but also pertaining to external relations and root causes of terrorism.<sup>11</sup> In fact, its military response is probably the least developed. This is understandable since the EU's competence in military matters until now only has only encompassed 'humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking' (art. 17(2) EU Treaty). Thus, military counterterrorism actions qualified as self-defence fall outside this remit.<sup>12</sup> Furthermore, for the sake of complementarity, the EU is not supposed to act militarily under its Security and Defense Policy when NATO as a whole is engaged.<sup>13</sup>

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<sup>6</sup> Belgian Presidency press release, 22 September 2001.

<sup>7</sup> See especially the Prague Summit Declaration, 21 November 2002, containing numerous measures (in particular § 4).

<sup>8</sup> "Towards the Prague Summit", 15 November 2002.

<sup>9</sup> See <http://www.afsouth.nato.int/operations/Endeavour/Endeavour.htm>.

<sup>10</sup> AFSOUTH press release, 30 April 2003.

<sup>11</sup> See J. Wouters & F. Naert, 'The European Union and "September 11"', 13 *Indiana Int'l & Comp. Law Rev.* 2003, forthcoming; Working Paper No 40 of the Leuven Institute for International Law, available at <http://www.internationallaw.be>

<sup>12</sup> The European Council may decide to establish a common defence (art. 17(1) EU Treaty) but has not yet done so, see the *Declaration of the European Council* in response to the *National Declaration by Ireland* at the Seville European Council, June 2002, § 4.

<sup>13</sup> See e.g. the conclusions of the Helsinki European Council (December 1999), § 27.

However, things will probably change when the EU gets its (new) constitution. The Draft Constitution adopted by the European Convention<sup>14</sup> comprises three relevant developments. First, it is provided that the progressive framing of a common defence policy ‘will lead to a common defence’,<sup>15</sup> whereas, at present, the EU Treaty only states ‘might lead to a common defence’ (art. 17(1)). Moreover, as long as this step has not been taken, those Member States willing to do so will be allowed to establish a mutual defence among one another through what is called ‘closer cooperation’.<sup>16</sup> Second, it is proposed to include anti-terrorism operations among the military operations for which the EU would be competent: ‘The tasks referred to in Article I-40(1), in the course of which the Union may use civilian and military means shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peacekeeping, tasks of combat forces in crisis management, including peacemaking and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism and include supporting third countries in combating terrorism in their territories’ (art. III-210(a)). Third, there is a ‘solidarity clause’ requiring ‘the Union and its Member States [to] act jointly in a spirit of solidarity if a Member State is the victim of terrorist attack’ and demanding that the EU ‘mobilize all the instruments at its disposal, including the military resources made available by the Member States’ to ‘prevent the terrorist threat in the territory of the Member States; protect democratic institutions and the civilian population from any terrorist attack; assist a Member State in its territory at the request of its political authorities in the event of a terrorist attack’.<sup>17</sup>

Of course, it remains to be seen whether these proposals will be adopted as such in the end, and if so, whether they will be fully used. Still, there are some positive indications. In particular, the EU has declared its willingness to consider the use of force in the context of non-proliferation<sup>18</sup>. It is working on a Security Concept, which, in its current draft version, *inter alia* identifies terrorism and proliferation of Weapons of Mass Destruction as key threats. The EU propounds as strategic objectives to build an international order based on effective multilateralism that includes being ready to act when the rules are broken and tackling the threats by, *inter alia*, early conflict and threat prevention.<sup>19</sup> However, even with this ‘tougher’ approach, the EU clearly places its efforts squarely within the framework of the UN.<sup>20</sup> It is also committed to the primacy of the UN Security Council.<sup>21</sup>

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<sup>14</sup> The ‘Convention on the Future of Europe’ adopted a ‘Draft Treaty Establishing a Constitution for Europe’ on 13 June and 10 July 2003 (CONV 850/03, <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf>). This Draft Constitution has been welcomed by the Thessaloniki European Council (June 2003) as ‘a good basis for starting in the Intergovernmental Conference’, which will in the end decide on treaty changes to be ratified by all EU Member States (Presidency Conclusions, § 5).

<sup>15</sup> ‘... when the European Council, acting unanimously, so decides’: Art. I-40(2).

<sup>16</sup> Art. I-40(7), elaborated in Art. III-214.

<sup>17</sup> Art. I-42(1)(a), elaborated in Art. III-231.

<sup>18</sup> On June 16, 2003, the external relations Council endorsed the *Basic principles for an EU strategy against proliferation of Weapons of Mass Destruction* and an *Action plan* for the implementation thereof, contained in EU Council Documents 10352/03, June 10, 2003 and 10354/1/03 REV 1, June 13, 2003. See especially § 4 and 13 of the former.

<sup>19</sup> *A Secure Europe in a Better World*, draft presented to the June 2003 Thessaloniki European Council.

<sup>20</sup> See art. 11(1) EU Treaty; the draft Security Strategy (*supra* previous note) and the *Basic principles for an EU strategy against proliferation of Weapons of Mass Destruction* (*supra* note 18, § 4 and 13). See also art. I-3(4) and I-40(1) Draft Constitution (*supra* note 14).

<sup>21</sup> See § 26 of the Conclusions of the December 1999 Helsinki European Council (‘The Union recognises the primary responsibility of the [UN] Security Council for the maintenance of international peace and security’). However, in the *Basic principles for an EU strategy against proliferation of Weapons of Mass Destruction* (*supra* note 18, § 4) this appears to have been formulated less strongly (‘The UN Security Council should play a central role’).

### **III. Final Remarks**

To tackle the present security challenges and avoid unilateralism, strengthening the existing security framework is essential. Developments within NATO and within the EU indicate that such a corroboration is taking place on a regional level in Europe, with the EU adopting a broad approach and NATO a more focused and military one. Both the EU and NATO profess to respect the UN Charter - although 'Kosovo' illustrates that this is no ironclad guarantee as far as NATO is concerned - and the EU explicitly recognizes the primacy of the Security Council. If States allow both regional organizations and the UN Security Council, which has shown a willingness to combat terrorism,<sup>22</sup> to fully assume their responsibilities and to cooperate,<sup>23</sup> the campaign against international terrorism will undoubtedly be better off and controversial unilateral action may be rendered unnecessary.

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<sup>22</sup> See e.g. 'its readiness to take all necessary steps to respond to the terrorist attacks of September 11 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the [UN Charter]' expressed in resolution 1368 (2001) and its unprecedented resolution 1373 (2001).

<sup>23</sup> Such cooperation is increasing, see resolutions 1377 (2001) and 1456 (2003), § 7-8; Security Council presidential statement 2002/38; the March 2003 special meeting and the fifth High-Level Meeting between the UN and Regional Organizations (July 2003).