A Role for Europe: Britain and the EU

1. Introduction

During the Cold War, the British government concentrated on developing the deterrent effect of NATO, recognizing that coalitions of the willing under UN authority such as that deployed to Korea in 1950 would be the exception rather than the rule. Consensual peacekeeping under the auspices of the UN developed as an alternative form of international military deployment and will be considered in the next chapter. During this period Britain had an uneasy and uneven relationship with, and eventually within, the growing European organization created by the Treaty of Rome signed in 1956. Although this organization did not claim competence in collective security matters at its inception, it did eventually step into that realm. Add to this growing network of security organizations the Helsinki process, which eventually led to the Organization on Security and Cooperation in Europe (OSCE), and there seems to be a surfeit of such bodies centred upon Europe. The reality, though, is very different, with European states manifesting a marked reluctance to co-operate in defence and security matters, in contrast to the relative speed with which economic integration was achieved.

The end of the Cold War saw NATO changing and adapting, but also European powers trying to distance themselves from the transatlantic relationship. The UK though remained committed to a special relationship with the United States. Within this complex political web, the member states of the European Community (EC) agreed in the Maastricht Treaty of 1992 to move the newly created European Union (EU) onto the international stage, not simply as an economic organization as had hitherto been the case, but as a security actor. By the end of 2008 the EU had been involved in significant military operations in Macedonia, the Congo, Bosnia, and Chad, as well as developing rapid reaction capability.

British troops are part of the EU military infrastructure that is being built up. This chapter will focus on the domestic, regional and international legal frameworks of this developing example of military action, while maintaining the book’s focus on Britain. In so doing this chapter completes the account of the wider legal and institutional contexts. The following chapters focus on analysing a number of British operations in conflict zones in order to illustrate the application of the
rules, principles and constitutional practices at the domestic and international levels, and to assess the impact of international law and institutions on the constitutional and political order of the UK.

2. Part of the Federal Dream

The idea of a European Union with centralized policing and military power is not just something that has been discussed since the advent of the Union in 1992 by the Maastricht Treaty, which contained provisions for a Common Foreign and Security Policy (CFSP). Indeed, as shall be seen, the idea of a common army was at the very heart of discussions that led to European integration starting in the 1950s. However, the rapid progress on economic integration thereafter can be contrasted starkly with the sluggish pace of co-operation and limited integration on regional defence and security matters. Why? In a nutshell, defence and control over the military are core aspects of a state, and European governments were not going to give up control of their armies or their national defence easily. In such issues of high politics there is inevitably going to be limited progress when it comes to co-operation, even less when the talk is of integration.

European countries though were torn between a desire to integrate and thereby remove any temptation for a powerful European state to wage war on its neighbours as had happened so often in the past, and fear of attack not just from within but from external forces, especially the Soviet Union, a fear which led to most European states each maintaining a small army. In addition, the benefits of moving towards a larger combined force, within which each state could provide specialist military forces, were outweighed by the fear that the decisions to deploy such a powerful force would be difficult to achieve if European governments were still going to have a say in issues of deployment.

The idea of a single unified European army is wrapped up in the federalist agenda. The dream of a ‘United States of Europe’ was not simply a post-Second World War phenomenon. After the Great War ended in 1918, Giovanni Agnelli, founder of the Italian FIAT company, and Attilio Cabiati, an economist, wrote:

Without hesitation we believe that, if we really want to make war in Europe a phenomenon which cannot be repeated, there is only one way to do so and we must be outspoken enough to consider it: a federation of European states under a central power which governs them. Any other milder version is an illusion.¹

The essential element of the federal ideal is the centralization of governmental power. Agnelli and Cabiati pointed to the two constitutions of the United States to illustrate their point that nothing short of a federal State in Europe would

be sufficient. The first constitution of the United States of 1781 essentially created a league or confederation of sovereign independent states, an unworkable system according to Agnelli and Cabiati, since the ‘essence of sovereignty is legal omnipotence…it cannot acknowledge a higher sovereignty without destroying itself’. The 1788 US Constitution resolved this problem and replaced the old constitutional system with a central federal government with legislative and executive power.

With the Second World War drawing to a close, there were strong arguments within Europe for a federal Europe, even in Britain. R.W.G. MacKay, a Labour MP, wrote a book in 1940 entitled Federal Europe in which he argued for a Federation consisting of a minimum of Britain, France, and Germany, without which ‘war in Europe will continue’. One of the conditions he identified for a successful federation was that ‘each of the States joining the Federation should transfer to it a minimum number of powers, which shall give to the Federation exclusive power to legislate in four matters, namely external affairs, defence, customs and currency’. Even Winston Churchill, the Conservative leader and Prime Minister during the war, suggested on a number of occasions the need for some form of post-war European unity. Indeed his speech in Zurich in September 1946, when he spoke about the United States of Europe (though without any detail), ‘helped revive the cause of European Union’.

A group sharing a federal vision for Europe was the European Union of Federalists established in Paris in 1946. At its first conference held in Montreux in December 1947 the Union provided some detail as to what elements were needed for a federal system:

Federalists must declare firmly and without compromise that it is absolute national sovereignty that must be abated, that a part of that sovereignty must be entrusted to a federal authority assisted by all the functional bodies necessary to the accomplishment, on the federal plane, of its economic and cultural tasks, whether in whole or in part. In particular the authority must possess:
(a) a government responsible to the peoples and groups and not to the federated states;
(b) a Supreme Court capable of resolving possible disputes between state members of the Federation;
(c) an armed police force under its own control…

A federal system entails not simply autonomy for the central body in certain areas, but entails full government, representing the people of Europe and not simply consisting of a Council of member states. The Supreme Court must not only adjudicate disputes between member states, as stated in this vision, but should also be able to review and declare unconstitutional any acts of the federal government that exceed the powers given to it in the founding treaty.

² Ibid., 7. ³ Ibid., 18.
⁴ See for example his note to President Roosevelt in February 1943, ibid., 33.
⁵ Ibid., 40–1. ⁶ Ibid., 42.
3. The Separation of Security

The ideal of a European federal union was tempered by the politicians of Europe who wanted greater co-operation in order to compete with the superpowers, but who were not ready for wholesale European integration, especially in matters of defence and security. The result was a gradual move towards greater centralization of powers; the first steps being the creation by ‘the Six’—France, West Germany, Italy, Belgium, Netherlands, and Luxembourg—of the European Coal and Steel Community (ECSC) in 1952, with a consultative Assembly, High Authority, Council and a Court. It must be remembered as well that this was part of a wider process of institutionalization in Europe with the creation of the Organization for European Economic Co-operation (OEEC), a European defence pact, NATO, and the Council of Europe—all institutions separate from the Community.

Focusing on defence, it must be noted that neither the Brussels Treaty of 1948 providing for mutual defence in Europe (and the WEU that was built upon it in 1954), nor the Washington Treaty of 1949 that created NATO, envisaged defence integration along the lines of the European federalists. They were built on traditional conceptions of sovereign equality, where the armies of the state parties would be deployed in defence of any state party that had been subject to an external attack. These were the defence structures that finally emerged from the numerous discussions and proposals on European integration of this period. In these circumstances it is easy to overlook the fact that there was nearly a very different European defence project in the form of a European Defence Community (EDC), originally envisaged in the Pleven Plan of October 1950. The French Prime Minister Rene Pleven argued:

The setting up of a European Army cannot result from a mere grouping together of national military units, which would in reality only mask a coalition of the old sort. For tasks which are inevitably common ones, only common institutions will do. The army of a united Europe, composed of men coming from different European countries, must, so far as is possible, achieve a complete fusion of the human and material elements which make it up under a single European political and military authority.\(^7\)

Six governments (Belgium, France, Germany, Italy, Luxembourg, and the Netherlands) signed the EDC Treaty in May 1952, and although four ratified it, it was ironically the French National Assembly’s failure to ratify that ended the EDC. The EDC Treaty ‘had envisaged nothing less than the creation of a supranational organization to supervise integrated European Defence Forces’.\(^8\)

Its failure led to a European version of NATO—the Western European Union

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\(^7\) Ibid., 75–7.
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(WEU)—being created in 1954, based on military co-operation not integration. The British response to the EDC proposal had been lukewarm. In a parliamentary debate held in response to the Pleven Plan in November 1950, Ernest Bevin, the Foreign Minister, stated the government’s preference was for a strong NATO: ‘Europe is not enough; it is not big enough, it is not strong enough and it is not able to stand by itself’, he declared.⁹ The conservative government of Winston Churchill was more positive about the EDC, but still refused to join.¹⁰

Though defence integration had been halted, the success of the common market in coal and steel led to the expansion of the idea of economic integration by the creation of the European Economic Community (EEC), and the European Atomic Energy Community (EURATOM) (governing the peaceful uses of nuclear power) in 1956—the purpose of these being largely about achieving European stability and security. Indeed, the preamble of the first treaty of 1952, establishing the coal and steel community, contained within it a resolve ‘to substitute for age-old rivalries the merging of member states’ ‘essential interests to create by establishing an economic community, the basis for broader and deeper community among peoples long divided by bloody conflicts’. Coal and steel are essential for the production of armaments: ‘if production and distribution of these commodities could be controlled by a centralized authority it would be far less possible for any country to develop a war machine which could be used against its neighbours’.¹¹ So began a process of pacification by economic unification.

4. The Birth of an Economic Giant

The EEC was based on the idea of free trade within a large market, and although it created a ‘new legal order’¹² independent of member states with centralized decision-making power having direct effect in national legal systems without the need for national parliamentary approval, its concern was with economic integration rather than a political union. Decision-making in the Community was a mixture of inter-governmental, in the Council of Ministers, and supranational in the independent but unelected Commission.¹³ The Assembly, to which MEPs were elected for the first time in 1979, had limited advisory and supervisory powers under the 1956 Treaty,¹⁴ not permitting it to represent the people of Europe in more than a token fashion. It can be seen therefore that under the 1956 treaties

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⁹ Weigall and Stirk, Origins, 78.
¹⁰ Ibid., 80–2.
¹³ Weigall and Stirk, Origins, 93.
the EEC, although possessing international legal personality, had a limited competence with its concentration on the creation of a common market, and at the decision-making level it was primarily controlled by member governments.

Nevertheless, there was sufficient centralization in the Treaty of Rome, as enhanced by the 1965 Treaty Establishing a Single Council and a Single Commission of the European Communities (the Merger Treaty), to encourage those European states fearing a loss of sovereignty—the United Kingdom, Norway, Sweden, Denmark, Austria, Portugal, Iceland, and Switzerland—to form the separate European Free Trade Association (EFTA) in 1959, which was explicit about the protection of the sovereignty of its member states.¹⁵ However, the success of the EEC/EC/EU led to the UK, Denmark and Ireland joining in 1972, Greece in 1981, Spain and Portugal in 1986, and Austria, Sweden, and Finland in 1995 bringing the membership to fifteen. Further expansion to twenty-five was achieved in 2004 with the accession of Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia; and to twenty-seven in 2007 when Bulgaria and Romania joined.

The UK's road to European membership had been a rocky one. It had twice tried to join in the 1960s, once under a Conservative government and once under a Labour administration, but on both occasions the French government blocked entry. Even within the British political parties there was disunity on entry to the EC: 'both the Labour left and Conservative right wings opposed accession'.¹⁶ Membership was achieved in 1972 under a Conservative government, but only with the help of Labour rebels, and a Labour election victory in 1974 led to the issue of membership being reconsidered by dint of an unprecedented referendum, held in 1975, which was won by the pro-EC supporters by 67.2 per cent to 32.8 per cent. This did not result in the British position within the EC/EU being a settled one. Each revision of the Treaty of Rome caused constitutional and political strife within the houses of parliament. The debates on these key events will be considered below, but it is worth noting at this point the major political turbulence caused by the Maastricht Treaty of 1992, which incorporated a common foreign and security policy into the newly created Union. The Conservative government of John Major survived, but only just. ‘Given the small size of... the [Conservative] government’s Commons majority, and the presence of a dozen anti-EC backbenchers within Conservative ranks, it was not clear that the government could win Commons approval for the treaty’, but the prospect of losing a vote of confidence and possibly losing their seats, persuaded the rebel MPs to vote in favour.¹⁷

As an international legal person, the EEC, by adopting a common external tariff, was able to negotiate as a single entity in the GATT (the precursor to the

¹⁵ Weigall and Stirk, Origins, 94.
¹⁷ Ibid., 684.
WTO) trade rounds. ‘The Community was set to become a very important force in the global economy, an economic giant. But this did not, at this stage, extend to foreign or defence policy. She was not a political giant’.¹⁸ The Community in effect served liberal economic purposes namely the ‘removal of impediments to voluntary and hence mutually beneficial transactions between individuals who happen to live on different sides of a border’.¹⁹ It did not as yet fulfil the liberal political vision of political integration with a central European government. The Single European Act of 1986 and, more particularly, the Treaty on European Union of 1992 (the Maastricht Treaty) can be said to have made tentative steps towards this aim with an increase in interventionist supranational activities, in the form of greater majority voting in the Council and a greater co-operative role for the Assembly, re-named the European Parliament. This occurred in the fields of economic, social and industrial policy, to be dealt with by the original EC itself (the so called first pillar of the Maastricht treaty). However, the Common Foreign and Security Policy (CFSP), and the areas of justice and home affairs (the second and third pillars), were to be left to inter-governmental co-operation, although the mechanisms for action in these areas were to be brought within the treaty framework for the first time.

5. The Common Foreign and Security Policy (CFSP)

Turning to look at the CFSP as introduced by the Maastricht Treaty of 1992, it can be seen that this built on the process of European Political Cooperation (EPC) started in the 1970s, whereby member states agreed on a common position, which to become Community Law had to be adopted by the Council of Ministers of the EC. This for example was used in relation to the economic measures taken by the Community in response to the Argentinian invasion of the Falklands in 1982.²⁰ The EPC process was formalized first by the 1986 Treaty and then by the Maastricht Treaty, but is still clearly separate from ‘the supranational aspects of the European Community (such as majority voting, the role of the European Parliament and the European Court of Justice)’.²¹ With the defence policy of the European Union being in the hands of the already established inter-governmental WEU created upon the failure of the EDC in 1954,²² the separation of defence and foreign policy from the supranational activities of the EC appeared complete. In the area of economic integration the European Court of Justice adopted a strong,

¹⁸ Weigall and Stirk, Origins, 115.
²⁰ EC Regulation 8777/82, OJ L102/1.
policy based role, to the extent that it could be compared with the US Supreme Court even though the EC was not fully a federal system.²³ The Court’s absence of competence in matters of foreign policy signifies that member states are not yet prepared wholeheartedly to follow a federal road. However, the absence of judicial competence over matters of foreign policy, particularly decisions to use force, is not unique to the EU; in many countries including the UK there is a marked reluctance for any judicial review of such issues of high policy.²⁴

Nevertheless, the further development of the second pillar by the Treaties of Amsterdam (1997) and Nice (2001), the adoption of a European Security and Defence Policy (ESDP) in 1999, and the gradual subsuming of the WEU into the EU, suggests that progress, albeit slow, is being made under the second pillar.²⁵ Article 17(1) of the Treaty on European Union provided that ‘the common foreign and security policy shall include all questions relating to the security of the Union, including the progressive framing of a common defence policy’. This provision also included the so-called Petersberg tasks adopted by the WEU in 1992 namely ‘humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking’. The development of military capability, even though a limited one, with small forces deployed to Macedonia and the Congo in 2002–3, seem to indicate the coming of age of the EU as a serious security organization, enhanced by the EU’s take over of Bosnian security from NATO in December 2004.

Though there have been many documents developing peace and security within the EU order, the European Security Strategy entitled ‘A Secure Europe in a Better World’ prepared by the EU’s High Representative, Javier Solana, and approved by the European Council on 12 December 2003, is perhaps the most far-reaching, reflecting as it does the shift towards confronting terrorism that has occurred following the events of 11 September 2001. The Strategy commences by declaring that ‘Europe has never been so prosperous, so secure nor so free’, and asserts that the EU ‘has been central to this development’. The link between democracy and peace is also strong with the introductory section stating that since the EU’s creation ‘the progressive spread of the rule of law and democracy has seen authoritarian regimes change into secure, stable and dynamic democracies’.²⁶

6. The EU as a Regional Arrangement

A thorny issue to be considered in this section is whether the EU is a ‘regional’ collective security organization in the sense of chapter VIII of the UN Charter.

²³ Freestone and Davidson, Institutional Framework, 27.
²⁴ See chapter eleven.
Chapter VIII purports to govern the relationship between the UN and regional arrangements or agencies in issues of peace and security, and includes within it a provision that requires that ‘enforcement’ action by regional arrangements has to be taken under the authority of the UN Security Council.²⁷

Henry Schermers and Niels Blokker, leading authorities on international institutional law, include regional organizations within a somewhat wider category of ‘closed’ organizations, which ‘seek only membership from a closed group of states and no members from outside the group will be admitted’.²⁸ Of course there may be some debate about whether an applicant country is within the group or not, as with the case of Turkey and the EU, but the contrast with universal organizations, which are normally open to all states,²⁹ is clear. It would seem that attempts at further refinement of the concept of regional organization are fraught with difficulty. To define regionalism in terms of geographical proximity is immediately appealing but in practice very difficult to judge as the endless debates about where Europe ends in a geographical sense illustrate only too well. Furthermore, ‘the criterion of common cultural, linguistic, or historical relations’³⁰ is also imprecise and likely to cause as many disputes as it solves.³¹

In reality, regional organizations are non-universal groupings of states that are essentially self-defining in terms of membership and objects and purposes, but generally have as their aim the protection or achievement of certain values, such as peace and security or economic prosperity among their membership. The principal ones often share similar goals and values to the UN, ranging across peace and security, human rights and justice, to economic and social well-being, but on a regional level. Thus the potential for overlap between the functions and activities of the UN and regional organizations such as the EU is considerable.

The EU is certainly a regional body in an economic sense having a well-developed level of integration between members under the first pillar (the EC). It is also developing its competence with regard to foreign and security policy. Unlike the established regional organizations of the Americas and Africa, which are concerned with regulating their own membership, the EU’s security policy is principally external to its membership, relating to threats to or breaches of the peace within or by states that are not members of the EU. This, though, does not disqualify it as a regional organization. The relative harmonious state of European affairs means that its main concern in security matters is external, though one

²⁷ Art 53 of the UN Charter.
²⁹ See art 4 of the UN Charter.
should not underestimate the propensity of the continent towards violence as history shows. The election of an extreme right-wing government in Austria in 2000 and the reaction of the EU to it, as well as the threat from terrorism as illustrated by the Madrid bombings of 11 March 2004 and London of 7 July 2005, show that European security is as much an internal issue as an external one.

In general terms although the EU has not expressly stated that it comes within the framework of chapter VIII (unlike for instance the OAS and the OSCE),³² it has not tried to opt out of the UN Charter system for collective security. Nevertheless, the proposition that the EU comes within chapter VIII of the UN Charter is not necessarily that clear cut. In the text of the Treaty on European Union (TEU), there is a clear statement that the Union, in defining and implementing a foreign and security policy, shall safeguard its values and preserve peace and security ‘in conformity with’ and ‘in accordance with’ the principles of the UN Charter.³³ Although there is no specific reference to chapter VIII of the Charter (articles 52 to 54) in the TEU, conformity with the principles of the Charter requires compliance with the rules governing the use of force, an integral element of which is the UN Security Council’s power to authorize states to use force under chapter VII, or regional arrangements under chapter VIII (article 53).

Interestingly though, in the three Security Council authorizations to EU forces to date—Artemis in the Democratic Republic of Congo (2003), Althea in Bosnia (2004), and the European peace support operation for Chad deployed in 2008—the Security Council authorized the forces under chapter VII rather than chapter VIII of the UN Charter.³⁴ Such practice is not incompatible with the EU being a regional arrangement within the meaning of chapter VIII, for as shown by past Security Council resolutions of the mid-1990s authorizing NATO in Bosnia,³⁵ the important issue is gaining Security Council authority to use force, and chapter VII is the normal method of granting this. This may also be explicable given that both the Bosnian and Congolese forces contained troops from outside the EU, and it was therefore more sensible to direct authorization at the member states of the UN (including EU states) undertaking the military action.

Following the rejection in 2005 of the Treaty Establishing a Constitution for Europe in referenda in both France and the Netherlands, EU leaders agreed to the Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community, signed on 13 December 2007. The Treaty, which is yet to come into force,³⁶ has a more elaborate set of security

³² OAS Charter art 1 reads in part: ‘Within the United Nations, the Organization of American States is a regional agency’. In 1992, the member states of the OSCE (then CSCE) declared the organization to be a ‘regional arrangement in the sense of Chapter VIII of the Charter of the United Nations’, (1992) 31 ILM 976 and 1390.
³³ Art 11 TEU.
³⁴ SC Res. 1484, 30 May 2003 (DRC); SC Res. 1525, 22 Nov. 2004 (Bosnia); SC Res. 1778, 25 Sept. 2007 (Chad).
³⁶ The Irish electorate rejected the Treaty in June 2008.
provisions, and also has an increased number of references to the EU acting in conformity with the principles of the UN Charter and international law. Article 2.5 states that:

In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and development of international law, including respect for the principles of the United Nations Charter.³⁷

Again though there are no specific references to chapter VIII of the UN Charter, the only Charter provision mentioned is article 51, which preserves the right of individual or collective self-defence in response to an armed attack, reference to which is found in the Treaty’s mutual defence clause.³⁸ The Treaty does state that the Union ‘shall promote multilateral solutions to common problems, in particular within the framework of the United Nations’,³⁹ and that the Union ‘shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies’,⁴⁰ but these are not specific enough obligations to expressly incorporate chapter VIII.

On balance though it is difficult for the EU to deny that it is subject to chapter VIII. Although it is clearly within the founding states’ competence to establish a closed organization by delimiting membership in certain ways, once such an organization is created having as one of its objects and purposes the maintenance or restoration of peace and security, then it is subject to the principle of the non-use of force and the rules of international law governing the use of force, which include the provisions of chapter VIII of the UN Charter.

There may be greater leeway in the case of economic measures (where a state has some freedom on trading matters), allowing a collection of states in a region powers of coercion. The EU has utilized this power, for example in taking non-forcible sanctions against Burma starting in 2000 and against Zimbabwe commencing in 2002, for human rights violations by the governments of those countries.⁴¹

³⁷ OJ C306/10, 17 Dec. 2007. See also art 10A.1, 10A.2.c, 28A.
³⁸ Art 28A.7. In the preamble to the Protocol on Permanent Structured Co-operation there is a recognition that the UN ‘may request the Union’s assistance for the urgent implementation of missions undertaken under Chapters VI and VII of the United Nations Charter’.
³⁹ Art 10A.1.
⁴⁰ Art 188P.1.
Although arguably enforcement action, and therefore subject to the requirement of article 53 of the Charter that Security Council authority be sought and gained, practice suggests otherwise.

When turning to consider the issue of whether regional organizations such as the EU have freedom of action in military matters, the debate is no longer about the interpretation of article 53. If ‘enforcement action’ has any meaning at all it must cover aggressive military action, action that would otherwise be unlawful if it were not permitted. The very idea of authorization in article 53 assumes that otherwise the action would be illegal, a situation which applies to military enforcement action which is prohibited by article 2(4) of the UN Charter, but not economic enforcement (or at least not all of it). While enforcement action may have been interpreted more restrictively than the 1945 consensus to exclude (at least presumptively) economic sanctions, if it still retains its core meaning, it must cover military enforcement action.

The continued application of article 53 of the UN Charter to military enforcement action by regional organizations is not just a result of the terms of the provision itself, but is underpinned by the other hierarchy provisions of the Charter. More profoundly it is underpinned by the fundamental and peremptory nature of the prohibition on the threat or use of force. Some regional military enforcement (including robust peacekeeping) practice appears contrary to article 53, for example the action of the OAS in the Dominican Republic in 1965, the Arab League in Lebanon in 1976, and of ECOWAS in Liberia and Sierra Leone in the 1990s and beyond. This might be argued to have undermined article 53 if it were not part of the more basic hierarchies of the UN Charter and international law. First, article 103, which states that UN Charter obligations prevail over inconsistent duties in other treaties, thereby including regional treaties. This signifies that the Charter obligation to refrain from the use of force prevails over any inconsistent regional treaty obligation. Second, there is the *jus cogens* obligation to refrain from the use of force, which cannot be derogated from by inconsistent treaties.

7. Post-War Parliamentary Debates

The idea of European security was soon on the agenda of the House of Commons after the Second World War ended. As discussed in chapter four, though allegiance to the UN was still strong in the House, there was a sober realization of its limitations. In debates in 1948, MPs spoke about the need for a ‘Western

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That the House was not simply foreseeing a security organization was made clear by the Labour Foreign Secretary Ernest Bevin in 1948 when he declared that ‘if anyone rushes off with the idea that we are going to build European Union or economic co-operation without mutual sacrifices he is suffering under a fatal delusion’. He spoke about the Brussels Treaty of 1948 providing for mutual defence in Western Europe, the machinery of which ‘was working well’, but made it clear that he desired a further integration of defence when he alluded to the inefficiencies of having a number of smaller national armies, which ‘cost money, and if there can be a planned defence system for Western Union which makes the greatest contribution to security with a minimum of cost it will be of great advantage to the economies of all countries’. The Labour Defence Minister, Albert Alexander, made it clear that the move towards regional actors was because of the political conditions in the UN, requiring ‘less ambitious means, by attempting to build collective security through regional security, which is expressly contemplated under the Charter of the United Nations’. He spoke about the Western Union Five-Power Military Committee set up under the Brussels Treaty, concluded within the terms of article 51 of the Charter, being a ‘development of first importance’. The Chiefs of Staff from the five State parties (Belgium, France, Luxembourg, the Netherlands, and the UK) to the treaty were joined by Canadian and American Chiefs of Staff as non-members.

Caught between the realities of the Cold War and the memories of German aggression, passionate advocates of European security, such as Reginald Paget, MP for Northampton, were in the minority in the Commons:

Western Europe cannot be defended—and many of us have recognised it for a long time—by a number of independent armies. We must get a European army co-ordinated and commanded as a single army. In that army there must be German units, and those German units ought not to be a threat to anybody else; any more then French or British units. That army should be built up—as indeed any great army is—that no unit can exist independently of the others.

Such advocates came under severe criticism from many MPs opposing German rearmament. West Germany eventually joined NATO in 1955 and the successor to the Brussels Treaty—the Western European Union (WEU)—a year earlier in 1954. That the debates in the Commons in the early 1950s were dominated by concerns to establish two strong defence organizations was made clear by Manny Shinwell (Labour Defence Minister) who spoke of the ‘desirability of co-ordinating, or perhaps I had better use another term, associating the Brussels

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45 Hansard HC vol 456, cols 82–3, 15 Sept. 1948 (Eden).
46 Ibid., cols 100–3 (Bevin).
48 Hansard HC vol 472, col 1320, 16 March 1950 (Paget).
Treaty Defence Organisation with the North Atlantic Treaty Organisation’.\(^{49}\) The Prime Minister, Clement Attlee, made it clear that European defence without US involvement was not achievable when he stated that ‘what is being done is only part of the general defence of the Atlantic area. The fullest co-operation with our friends in the United States and Canada is essential’.\(^ {50}\) This presages his remarks dismissing the European Defence Community made in November 1950 and discussed above. The UK was not ready for an organization that was solely European and supranational in the area of defence and security. The Prime Minister made it clear that:

We are, in fact, now seeing the coming into being of what we have been striving to create—a European Defence Force, made up of the forces of the Western Union and the North Atlantic allies, fully knit together to defend the democracies.\(^ {51}\)

Despite the fact that the Leader of the Opposition, Winston Churchill, called for a European army with integrated German units,\(^ {52}\) the collective defence approach under an American umbrella prevailed. Given the background of the Korean War, this approach seemed realistic, though it did put back the efficient unification of European forces until the next century. There were a number of debates in the lower house about the value of the proposed EDC,\(^ {53}\) with some members advocating that Britain join.\(^ {54}\) Britain did sign an agreement of cooperation with the EDC regarding a common policy on military association between UK forces and the EDC,\(^ {55}\) but this was as far as Britain was prepared to go, an attitude that probably influenced the French Assembly decision of August 1954 not to go ahead with the EDC. Even in Britain, which had been sceptical of joining the EDC, considerable parliamentary time was spent discussing what was clearly becoming a doomed project.

Whether for political or military reasons, despite the demise of the EDC, alternatives were sought. It was suggested in debates in the House in 1954 that ‘an alternative solution’ would be a ‘looser and more flexible European defence force’, which ‘would become an integral part of NATO’.\(^ {56}\) The Foreign Secretary, Anthony Eden, endorsed this in October 1954, where he explained the birth of the WEU as a ‘simpler’ organization, ‘where the presence of the United Kingdom might make up for some of the super-structure’.\(^ {57}\) He went on to state that ‘in our

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\(^{49}\) \textit{Hansard} HC vol 474, col 320, 20 April 1950 (Shinwell).

\(^{50}\) \textit{Hansard} HC vol 478, col 962, 12 Sept. 1950 (Attlee).

\(^{51}\) Ibid., col 963 (Attlee).

\(^{52}\) Ibid., col 984 (Churchill).


\(^{54}\) For example \textit{Hansard} vol 510, cols 310–11, 28 Jan. 1953 (Wyatt, Harvey).

\(^{55}\) \textit{Hansard} HC vol 526, col 1141, 14 April 1954 (Eden).

\(^{56}\) \textit{Hansard} HC vol 529, col 456, 23 June 1954 (Boothby).

\(^{57}\) \textit{Hansard} HC vol 531, col 1038, 19 Oct. 1954 (Eden).
search for means to this end, it seemed that the Brussels Treaty, re-shaped and enlarged, could furnish the instrument we needed'.

Whilst the failed EDC had received a vast amount of parliamentary time, its replacement the WEU was effectively announced to the House by the Conservative government as a *fait accompli*. When challenged about the legal basis of the WEU which, it was asserted, conflicted with both articles 53 and 103 of the UN Charter, the government minister recognized the obligations of the Charter, but also recited the provisions of article 51 which permit the exercise of the right of collective self-defence, without any need for UN Security Council authority. This exchange made it clear the UK’s position that the WEU was a defensive pact, not a collective security organization empowered to take enforcement action.

Very little parliamentary debate on European security occurred between the advent of the WEU and Britain’s entry into the Common Market in 1972. Indeed, even that momentous event was seen (quite rightly) as an issue of economic development, not of collective security, despite the premise underlying the Treaty of Rome. A debate on European security in December 1972 focused on the government’s decision to participate in the Conference on Security and Co-operation in Europe (CSCE). Although the Helsinki Final Act of December 1975 had a number of elements, including human rights and economic matters, the government made it clear that it saw its principal purpose as a forum ‘to try to eliminate what is, in our view, the principal source of tension in Europe; the present—and growing—imbalance between the conventional forces of the NATO and Warsaw Pact countries in Europe’. The government also summarized the existing security architecture in Europe when the minister stated ‘we believe in the need to maintain and foster the North Atlantic Alliance and to work for the gradual evolution of a more effective European contribution’, and ‘since the Treaty of Rome has no defence content, the enlargement of the Community is not relevant’.

The CSCE was a traditional conference-type organization based on consent and co-operation between member states drawn from the Soviet bloc, Western Europe and North America. During the Cold War it provided a limited bridge between East and West, where the balance between the military alliances of NATO (and the WEU) and the Warsaw Pact secured an uneasy peace. At the end of the Cold War it underwent a limited transformation and in 1995 was renamed the Organization for Security and Co-operation in Europe (OSCE), which has greater powers of intervention in member states, but very limited military capability.

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58 Ibid.
8. Maastricht Debates and Beyond

As the momentous parliamentary debates of 1992 on the Maastricht Treaty approached, the Conservative government appeared relatively sanguine about the issue of defence and security within the European Community. In 1991 in response to a question on this matter, the Minister, Douglas Hogg, stated that discussions were underway within the framework of EPC, and that the government would not support any extension of EC competence into security and defence matters, the latter should be left to NATO and a strengthened WEU.⁶³ Further, Douglas Hurd, the Foreign Secretary, stated that ‘NATO, including the presence of north American forces in Europe, remains the basis for our collective security’, though there might be some strengthening of the European pillar by building up the WEU.⁶⁴ A slightly clearer picture was given by Douglas Hogg in May 1991 when he stated that ‘as part of the process of political union we envis-age intensified co-operation of national positions among the Twelve on a range of security issues. We believe that defence issues should continue to be dealt with in the Western European Union and NATO’.⁶⁵

This bifurcation of defence and security matters was emphasized in a full debate in June 1991 on the progress of negotiations that would eventually lead to the Maastricht Treaty of 1992. Douglas Hurd conceded that there was a need for ‘common institutions which are to some degree supranational’, such as those governing ‘the single market and its external manifestations in negotiations on world trade’. However, he declared that such ‘logic does not apply in areas such as foreign and security policy’ where it was no less European to have co-operation between member governments ‘directly accountable to national Parliaments’, rather than ‘channelling all co-operation through the institutions of the Community’. Defence on the other hand ‘should not be embraced by the European Community, which includes neutral Ireland and which is likely—I hope—to include other neutral countries during the 1990s’.⁶⁶ The government won support for its negotiating position by 312 votes to 158.⁶⁷

The Conservative Prime Minister, John Major, introduced the final treaty to the House on 11 December 1991, the day after he had signed it at Maastricht:

The treaty creates a new framework for co-operation between member states in foreign and security policy and in the fight against international crime. That co-operation will take place on an intergovernmental basis outside the Treaty of Rome. That means that the Commission will not have the sole right of initiative and the European Court will have no jurisdiction. On defence, we have agreed a framework for co-operation in which

⁶⁵ Hansard HC vol 191, col 211w, 15 May 1991 (Hogg).
⁶⁶ Hansard HC vol 193, cols 1009–11, 26 June 1991 (Hurd).
⁶⁷ Ibid., col 1088.
the primacy of the Atlantic alliance has been confirmed and the role of the Western European Union has been enhanced.⁶⁸

The government’s justification for agreeing to the creation of the EU was that it only introduced traditional forms of inter-governmental co-operation in matters of foreign and security matters, in contrast to the supranational approach found in the more established EC pillar. This was put forward even more strenuously in the full debate that followed a week later, when the Prime Minister was concerned with convincing his own backbenchers that the creation of the EU was not a step too far towards a federal super-state:

Had it not been for Britain’s arguments, we would have had last week a treaty which brought foreign policy and interior and justice matters within the treaty of Rome. We would have had a community setting itself up as a rival defence organisation to NATO. The European Parliament would have had equal rights with the Governments of member states to decide on the policies and laws of the Community, and the Community’s competence could have extended into virtually every area of our national life.⁶⁹

The Prime Minister assured the House that ‘we set the framework of a stronger and more coherent European foreign policy, in which our national independence of action is assured’.⁷⁰ Despite abundant criticism of the government from the opposition (mainly as regards the British opt outs on monetary union and the social chapter),⁷¹ but, more importantly, from its own backbenchers, one of whom claimed to speak on behalf of the vast majority of the Conservative party who were ‘fed up with the EEC, with what it is doing and what it is spending’,⁷² the government’s decision to sign the treaty was endorsed in a vote on the European Communities (Amendment) Bill to implement it by 360 votes to 261.⁷³

Debates surrounded later revisions of the Treaty of Rome, especially in 2008 concerning the Lisbon Treaty. Though Maastricht constituted the breakthrough for advocates of European security, the common foreign and security policy was something that seemed to enhance Europe’s diplomatic and perhaps sanctioning capacity—in other words its competence to take non-forcible measures. There did not yet seem to be the real prospect of the deployment of forces under EU authority. Following the Treaty of Amsterdam of 1997, which further strengthened the second pillar, the government minister stated that the ‘European Union does not take military action’.⁷⁴ Furthermore, the government emphasized that after the Treaty, though closer co-operation would be achieved between the EU and the WEU, ‘the two organisations will remain separate until all Member

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⁷⁰ Ibid., col 285 (Major).
⁷¹ Ibid., col 286 (Kinnock). See also col 300 (Ashdown).
⁷² Ibid., col 358 (Taylor).
⁷⁴ *Hansard* HC vol 301, col 402w, 24 Nov. 1997 (Lloyd).
States…agree otherwise’. British contributions to nascent European forces such as EUROFOR and Eurocorps were rejected by the government.

It was not long though, following Labour’s 1997 election victory, before talk had moved towards a firmer CFSP within the EU, and in a debate on the EU’s defence policy in the House of Commons in 1998 the government minister spoke in terms of ‘if Europe is to have a stronger voice in the world, European armed forces will need to be capable of supporting’ the EU’s policy. Further, he spoke of the ‘need to put muscle behind Europe’s foreign policy for those few hard cases when the normal instruments of foreign policy—trade, economic and political relations and diplomacy—are not enough’. Indeed, at the St Malo Franco-British Summit on 4 December 1998, a Joint Declaration on European Defence was made by President Chirac and Prime Minister Blair, which stated that ‘the Union must have the capacity for autonomous action, backed up by credible military forces, the means to use them, and a readiness to do so, in order to respond to international crises’. Though this was designed to create greater military co-operation within the Union, it was not designed to produce an integrated European army with EU command and control as the Prime Minister made clear in the House of Commons in May 1999. Furthermore, Tony Blair made it clear that ‘the deployment of forces must remain a decision for national governments’. In essence the government’s policy amounted to treading a fine line between increasing co-operation on defence and security operations, which is acceptable; and integration, which appears to be a step too far. Following the Helsinki summit of EU leaders in December 1999, the government stated that:

At the Helsinki European Council, EU member states committed themselves to improving their military capabilities, including a specific headline goal of being able [by 2003] to assemble, deploy rapidly and sustain up to 50,000–60,000 troops for Petersberg Tasks, including peacekeeping. There is no intention to create a Standing European Peacekeeping Corps.

With the WEU being largely subsumed into the EU by 2000, and the Treaty of Nice of December 2000 further developing the second pillar, there clearly was greater momentum in defence co-operation though, with the perception that the public remained on the whole sceptical of the European project, the government was wary of integration. The government made it clear that the 50,000 troops would not constitute a ‘European army’, they would form a pool ‘of potentially available national forces’. EU operations would occur only when NATO ‘as a whole is not engaged’, and that for the ‘foreseeable future, such major operations

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75 Hansard HC vol 306, col 31w, 26 Jan. 1998 (Robertson).
76 Hansard HC vol 307, col 161w, 24 Feb. 1998 (Reid).
77 Hansard HC vol 319, col 304, 11 Nov. 1998 (Spellar).
78 Hansard HC vol 332, col 12w, 24 May 1999 (Blair).
80 The government minister described the process as one of ‘winding down’ the WEU, rather than a merging of the WEU with the EU: Hansard HC vol 357, col 630, 27 Nov. 2000 (Hoon).
would draw on NATO assets and use NATO operational planning and command structures’.⁸¹ On being pressed about the nature of the Rapid Reaction Force, the government minister was forced to reassert Labour’s NATO credentials:

The situation is simple. NATO constitutes the cornerstone of our security. The United Kingdom is a leading member of NATO, and our forces make a key contribution to the alliance. Since the Attlee Labour Government played a key part in the foundation of the alliance in 1949, Britain and NATO have been indivisible. This Government are also wholly committed to NATO, and to European defence.⁸²

The government dismissed arguments that the Nice Treaty’s requirement of an independent European chain of command for the Rapid Reaction Force undermined NATO’s supremacy.⁸³

In a full debate on European Security and Defence Policy arising out of the Nice Treaty the government Minister, Keith Vaz, attempted to distinguish the circumstances in which European forces and NATO forces would act. He stated that the EU will carry out the Petersberg tasks ‘humanitarian and rescue tasks, peace-keeping tasks and tasks of combat forces in crisis management, including peace-making’, whereas ‘war-fighting or collective defence . . . remain within NATO alone’. He reminded the opposition that the Petersberg tasks were agreed to by the previous Conservative government, ‘so it is somewhat hypocritical to criticise the European Union for being ready to take on the same roles’.⁸⁴ He brushed away criticisms that the Rapid Reaction Force would take away capability from NATO: ‘of course the force will draw on NATO assets, but will do so because NATO remains the cornerstone of our defence policy. There will not be any operations other than those in which NATO said that it will not act’.⁸⁵ He finished by declaring that: ‘Nice was an important step towards realizing the goals of a NATO-friendly ESDP. It was a good result for NATO and a good result for Britain’.⁸⁶ Despite bruising criticisms from the opposition that there was nothing in the Nice Treaty that gave NATO first choice on any operation,⁸⁷

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⁸¹ Hansard HC vol 357, col 311, 22 Nov. 2000 (Hoon). He later stated that up to 12,500 UK troops could be committed: vol 357, col 639w, 29 Nov. 2000 (Hoon). See also vol 360, col 349w, 8 Jan. 2001 (Spellar). The government reiterated this position on a number of occasions; Geoff Hoon, for instance stated on 10 Jan. 2001 that ‘there is no such entity as a standing European Rapid Reaction Force. In the maximum scale operation envisaged at Helsinki—a corps-level deployment of up to 60,000 ground troops—the UK component could be around 12,500 strong. Maritime and air deployments of up to 18 warships and 72 combat aircraft could be made in addition. The appropriate scaling of medical staff and facilities to support such a deployment will be dependent on the operational circumstances at the time’: vol 360, cols 543–4w, 10 Jan. 2001 (Hoon). This remains the government’s position: see vol 450, col 1882w, 25 Oct. 2006 (Ingram), who repeated the above figures and stated that ‘the commitment of national forces to an EU-led operation remains a sovereign decision for nations concerned’.

⁸² Hansard HC vol 361, col 253w, 23 Jan. 2001 (Spellar).

⁸³ See for example Hansard HC vol 363, cols 700–1, 27 Feb. 2001 (Fabricant, Vaz).


⁸⁵ Ibid., col 144 (Vaz).

⁸⁶ Ibid., col 146 (Vaz).

⁸⁷ Ibid., col 157 (Howard).
the government’s majority was such that it easily won a vote endorsing its policy on European security by 303 votes to 133.⁸⁸

Inevitably after Maastricht the emphasis remained on NATO and the WEU providing concrete defence structures for Europe. Both organizations were also involved in the naval security operation in the Adriatic in the early 1990s enforcing UN and EC sanctions imposed against Serbia. As the government minister explained in the House of Commons: ‘NATO and WEU naval forces are operating in the Adriatic to monitor and enforce compliance with the arms embargo against the whole of the former Yugoslavia and the trade sanctions against Serbia and Montenegro’.⁸⁹

Nevertheless, the limitations of Maastricht were eroded at Nice in 2000, and as security co-operation increased, the EU moved towards mandating a number of EU operations, in Macedonia, the Democratic Republic of the Congo, Bosnia, and Chad. While the Bosnian conflict will be discussed in greater detail in the next chapter, it is worth briefly considering the role of Britain in the EU operation in Congo, which was rather cursorily considered by the House of Commons in June 2003.

With the UN peace operation in the Congo (MONUC) struggling to maintain order, especially in the Ituri Province centred around the town of Bunia, the EU decided on 5 June to send a 1,800 strong French-led force to that area, acting under a mandate from the UN Security Council adopted on 30 May. Although the operation came within the Petersberg tasks of the EU, the line between humanitarian or crisis management operations and war fighting is not as clear as the British government professed, as shown by the clashes between French troops and rival militias shortly after the EU force’s deployment on 12 June. Having restored some calm, Operation Artemis was withdrawn on 1 September 2003.

The British contribution to this operation was limited to 85 personnel, mainly Royal Engineers to assist in improving Bunia airfield.⁹⁰ In the House the Minister reported that this was an EU-led operation undertaken without recourse to NATO assets, though NATO would be kept informed of the progress of the operation. France, as the lead nation, would provide the operation’s headquarters, with officers from other participating nations including Britain.⁹¹ In a further elaboration, the Minister stated that the forces involved would wear EU insignia and be under the political control and strategic direction of the EU Council of Ministers, exercised through the Political and Security Committee, consisting of representatives of member states. The force’s success would be measured by the fulfilment of the Security Council’s mandate in Resolution 1484, namely stabilizing Bunia and improving the humanitarian situation there, and securing the airport so that additional UN forces could land there.⁹² On being asked whether it was wise to

⁹² Hansard HC vol 406, col 513w, 20 June 2003 (Ingram).
send British forces to ‘a hugely dangerous theatre’ without any combat elements, and only the ‘French forces to defend them’, the Minister responded by praising the French combat troops and stated that the British personnel were all trained in self-defence and the use of weapons. He stressed the limited time-scale of the operation, which should be terminated with the arrival of more UN troops.  

The success of Operation Artemis, and before that Operation Concordia in Macedonia, meant that by 2007, 654 British troops were on deployment in European Security and Defence Policy (ESDP) missions, but this was low compared to the number of British troops on NATO missions, which was 6,360.

The failure of the EU Constitutional Treaty in 2005 and the subsequent signature of the modified version in the Lisbon Treaty in 2007, led to acrimonious debates in Parliament in March 2008 over the European Union Amendment Bill. On foreign policy aspects, the Foreign Secretary, David Miliband, was content to quote parliament’s own Select Committee on European Scrutiny to the effect that ‘the largely intergovernmental nature of the CFSP and ESDP will be maintained, with no significant departures from the arrangements which currently apply’. In so doing he dismissed the opposition’s assertion that the New High Representative of the Union for Foreign Affairs and Security Policy would replace member states’ voices in foreign affairs, and that further integration under the Lisbon Treaty would tear NATO apart. The government won the day by 346 votes to 206.

Though the debates raged about whether the Lisbon Treaty was the Constitution in disguise (an argument supported by the same European Scrutiny Select Committee report) and therefore, arguably, should have been the subject of a referendum as promised by the government, there was little of substance in the debate on the development of the ESDP. In particular, the expansion of the Petersberg tasks went largely unnoticed. New article 28B inserted by the Lisbon Treaty provides:

The tasks referred to . . . 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 peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their countries.

Assuming the Lisbon Treaty enters into force, article 28B broadens the tasks of the Union in security matters. With the expansion of tasks will come the expansion of operations and the further development of the EU as a security organization.

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94 *Hansard* HC vol 455, col 1776w, 24 Jan. 2007 (Browne).
9. Conclusion

In the matter of military enforcement action, the UN Security Council still has constitutional authority on its side, by dint of the Charter and by reason of the peremptory rules of international law, but as with other constitutional systems it is dependent upon issues of legitimacy, authority and loyalty. If the UN Security Council cannot respect and uphold the fundamental principles of the Charter and of international law including principles of human rights law, then authority may pass elsewhere to regional organizations and to individually powerful states. While there may be confidence in the legitimacy of actions undertaken by the EU, this dissipates when considering action taken unilaterally or with one or two allies, as the invasion of Iraq in 2003 shows. Nevertheless, until a consensus is reached on a right of military intervention outside of the authority of the Security Council, then the emphasis must be upon making the Security Council work more effectively, including recognizing that it has a duty to act when faced with violations of human rights of the magnitude of genocide, crimes against humanity or large-scale commission of war crimes. Organizations like the EU need to build up their military capability, be better integrated, and be prepared to take effective military action at the behest of the Security Council when enforcement action is necessary, though there may be more independence for the EU in peacekeeping matters as the next chapter will show.

Progress for the EU though is slow, as some member states such as the UK show a reluctance to cede control in matters of military deployment. As a relatively effective military power Britain can operate independently of the EU, but this is both costly and has limitations when it comes to delivering significant military force in far flung corners of the globe. An effective European military force though is, at least in the short to medium term, dependent on Britain being committed to the project. Although there has been a significant warming to the idea in the last decade, there still remains a fair degree of scepticism over the ability of the EU institutions to achieve the necessary consensus to mandate military operations. Nevertheless, an encouraging development has been the creation in October 2008 of an EU-mandated naval operation to try and address the serious security concerns for international shipping caused by the actions of pirates off the coast of Somalia.

There have also been a number of occasions on which military operations mandated by international organizations have failed to deliver security to the country where they have been deployed. The failure of the UN in Bosnia will be considered in the next chapter, though the lessons learnt from this episode are applicable to all international organizations. It is to Bosnia that the book now turns.