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Mutual Defence Clause of the Treaty of Lisbon versus Article 5 of the Washington Treaty

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MUTUAL DEFENCE CLAUSE OF THE TREATY OF LISBON VERSUS ARTICLE 5 OF THE WASHINGTON TREATY

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ABSTRACT

Article points out the conditions and legal foundations forming the mutual defence clauses enshrined in the North Atlantic Treaty and the Treaty of Lisbon. It also points out different philosophies in their wording and application options in practice. In the next part, the article defines the main aspects of mutual defence under the Common Security and Defence Policy of the European Union (CSDP). Subsequently, the article addresses the definition and phases of hybrid warfare and characterizes aspects of the CSDP in relation to Crimean crisis. Finally, article raises the question of whether the current Level of ambitions of the CSDP corresponds with the existing priorities of individual EU countries.

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INTRODUCTION

After the end of World War II, the world community was looking for the way how the world peace could be maintained and military conflicts in the future avoided. Consequently, arose the idea of founding the world or-

ganization, whose decisions would be binding on the contracting countries, and whose bylaws would include procedures for conflicts managing. These ideas led, on 25th April 1945, to the establishment the United Nations as a global organization to ensure peace, prevent and respond to crises and armed conflicts. On the same day, 50 participating delegations from different countries¹ signed the United Nations Charter, forming the basic document of the organization. This, still valid document, in its wording includes the procedures for resolving the conflicts as well as the right of countries of individual or collective self-defence (Chapter VII, Article 51 of the UN Charter²). In this vein, the articles of the collective defence of the European Union and NATO, namely mutual defence clause of the Treaty of Lisbon and Article 5 of the Washington Treaty, are based on the same principles.

ARTICLE 5 OF WASHINGTON TREATY

With the vision of maintaining the peace in the world after World War II, arose the idea of creating a permanent, contract binding alliance of countries whose collective military force shall be sufficiently deterrent against possible attack against one of the contracting countries. On 4th April 1949, this idea was transformed into the signing of the Washington Treaty (establishing the North Atlantic Treaty Organization).

Its' probably the most important paragraph, creating the "musketeer's principle" – one for all, all for one – is Article 5, which states:

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 and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area³.

However, analysing the wording of the Article 5, we find that the text speaks only of the fact that a countries-members of the Alliance shall

¹ Nowadays, UN consists of 193 member states.

² UN Charter, official web-page of United Nations, <http://www.un.org/en/documents/charter>.

³ The North Atlantic Treaty, official web-page of NATO, http://www.nato.int/cps/en/natolive/official_texts_17120.htm.

consider an attack on one of them as to all the countries, but does not imply direct military action – whether defensive or offensive. In this sense, Article 5 gives to the Members freedom of action – countries can mobilize militarily, diplomatically or limit their reaction to the expression of political support without further direct action. Otherwise, similar reasoning is not entirely new in the Alliance; such views are heard in Brussels on an informal level as well. After all, this fact was pointed out also by Robert Coalson⁴ in his article in summer 2012, as he mentioned: *However, it only commits members to “assist the party or parties so attacked” and to take “such action as it deems necessary, including the use of armed force (...)”.* It does not automatically result in military action. Even in 1997, Paul E. Gallis (specialist in European Affairs) in his CRS Report for Congress⁵ stated: *Article V of the North Atlantic Treaty does not guarantee the use of force to assist an ally under attack (...).*

That statement can be supported by one more argument. Till the present time, from the outset of the Alliance, Article 5 was activated only once – after the attack on the “Twin Towers” of the World Trade Centre on 11 September 2001. However, even that time all member countries of the Alliance, despite agreeing on the activation of Article 5, did not participate directly militarily within the operation in Afghanistan. The fact also is, that during the Persian Gulf War, when Turkey agreed to use its air bases, at the same time considered to invoke Article 5 in a case of Iraqi’s retaliation.

MUTUAL DEFENCE CLAUSE OF TREATY OF LISBON

While NATO after the Cold War was trying to redefine, the role of European Union in the position of a global player in the area of security and defence policy increased⁶. Endeavour of European Security and Defence Policy was one of the pillars of the functioning of the European Union. By the adoption of Treaty of Lisbon, CSDP was emphasized in multiple paragraphs: mutual defence clause, article founding the possibility of establishing permanent structured cooperation in defence, and moreover the creation of the EEAS as an organization comprising political, diplomatic and military tools of CSDP.

⁴ R. Coalson, *What are NATO’s Articles 4 and 5?*, Radio Free Europe.

⁵ P. E. Gallis, *NATO: Article V and Collective Defense*, “CRS Report for Congress”, Federation of American Scientists, Washington, 1997.

⁶ P. Spilý, *Nástroje Európskej únie na komplexné riešenie kríz*, „MNB 2011“, Armed Forces Academy of General Milan Rastislav Stefanik, Liptovský Mikuláš, 2011.

Mutual defence clause reads as follows:

If a Member State is the victim of an armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the UN Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States. Commitments and cooperation in this area shall be consistent with commitment under the NATO, which, for those States which are member of it, remains the foundation of their collective defence and the forum for its implementation⁷.

Again, taking a closer look at the wording is *prima facie* evidence of two facts:

1. The clause, by wording *by all the means in their power* puts greater demands on the EU Member States within the meaning of the contested State aid in comparison with Article 5 of the Washington Treaty.
2. The clause also brings EU member states to the status of certain schizophrenia, stating that these actions *shall not prejudice the specific character of the security and defence policy of certain Member States and shall be consistent with commitment under the NATO*.

The fact is that the Treaty of Lisbon does not exclude (even indirectly establishing) the possibility of creating “EU Armed Force”, but for the establishment of such an army is not enough political will (and of course money). And only just signs of mentioned “EU Armed Force”, even during the informal political discussions, are dying at least on 3 points:

- a) European Union declares herself as political, diplomatic and economic organisation, not as the military one.
- b) Any permanent structured cooperation⁸ must be based on the principle of inclusivity.
- c) The possible existence of EU permanent operational headquarters would give the impression of duplication in crisis management area with the SHAPE⁹ as Operational Headquarters of the North Atlantic Treaty Organization.

⁷ Treaty of Lisbon, Article 28a para 7, official web-page of European Union, http://europa.eu/lisbon_treaty/full_text/index_en.htm.

⁸ Treaty of Lisbon, Article 28a, para 6, official web-page of European Union, http://europa.eu/lisbon_treaty/full_text/index_en.htm.

⁹ Supreme Headquarters Allied Powers Europe.

Abovementioned reservations can be argued by the following arguments:

- a) It is true that the EU has never had the ambition to be a military organization; it always placed emphasis on diplomatic and political solutions to the contentious issues. On the other hand, it is also true that the armed forces are an instrument of foreign policy. Therefore, the military component is also an integral part of the CSDP. In this context, it may be worth mentioning that the EU in its history never implemented operation without resolution of UN Security Council.
- b) First of all, it should be noted that permanent structured cooperation is mentioned directly in the Treaty of Lisbon, which was ratified by all EU Member States. As Armand Steinmeyer rightly pointed out:

This structure will bring together the states that have fulfilled their military commitments to the EU and can operate without the participation of a fixed number of participating states. Operating under qualified majority voting, the structure allows states at the forefront of CSDP to pursue greater harmonisation of their defence apparatus along the lines of a 'two-speed' Europe¹⁰.

The stumbling block is that smaller countries fear that they could be excluded from the process of co-decision on possible activities in the field of CSDP. But the fact is that there are already initiatives within European countries creating closer cooperation (including in the military field), thus creating more or less exclusive groupings, for example: The Weimar Troika, NORDEFECO, France – Great Britain Defence Cooperation or Visegrad 4.

- c) Relations between NATO and the EU are in one thing very different: while NATO is primarily focused on military operations and post-conflict, and reconstruction phase resolves at the second place, within the European Union the opposite is true. EU primarily addresses the possibility of civilian crisis management solution and appropriate military one just afterwards. Moreover, the European Union has to its disposal the capability for joint civilian-military operation which brings opportunity for greater civil-military syner-

¹⁰ A. Steinmeyer, *European Defence and the Treaty of Lisbon – What now?*, TheEuros.eu.

gies¹¹, while NATO is still just looking around in this area. However, the current planning and conduct capabilities for EU missions/operations are quite largely fragmented. Also the use of SHAPE for planning and conducting European Union's crisis management operations under Berlin+ mechanism is for the future more than questionable. Hence, permanent operational headquarters EU would be logical solution which would both improve the coordination of the use of civilian and military capabilities, while also greatly accelerate planning their deployment in missions/operations.

HYBRID WARFARE VERSUS MUTUAL DEFENCE CLAUSE

In recent years, the procedures as well as the essence of warfare began to shift from symmetric to asymmetric conflict management. Activities, enabling to neutralize the predominance of regular armed forces in open combat, begin to be widely applied. These activities include: SOF and internal opposition operations; sabotage activities; dissemination of information including the aggressive misinformation; weakening institutions and bodies dealing with the ensuring the sovereignty of the state, guerrilla fighting using armed saboteurs and local criminal elements¹².

This new way of warfare mentioned above and a parallel operation of regular armed forces is called hybrid warfare. Use of guerrilla fighting saboteurs and criminal elements allows the aggressor to implement such activities which the state (officially) as a subject of international law in respect of the Geneva Conventions and Hague Convention could not afford.

Recently, at an international conference on the ground of the Armed Forces Academy of General M. R. Stefanik, a presentation focused on the phases of the hybrid warfare and how those phases were implemented to the different stages of the Crimean crisis was given¹³.

¹¹ P. Nečas, B. Lippay, R. Naď, *European Union's current approach towards capability development*, AARMS, vol. 11, No. 2, Budapest 2012, p. 187–194.

¹² J. Beskid, *New Generation Warfare realized on Crimea*, „MNB 2014“, Armed Forces Academy of General Milan Rastislav Stefanik, Liptovský Mikuláš, 2014.

¹³ *Ibidem*.

TABLE 1. HYBRID WARFARE PHASES (PROCESSED ACCORDING TO BESKID¹⁴)

Phase	Main activities
1st Phase	Non-military asymmetric warfare: information, moral, psychological, ideological, diplomatic and economic measures
2nd Phase	Special operations, focusing on misrepresentation of political and military leaders through coordinated measures implemented via diplomatic channels, media and senior government officials and military agencies, in the form of false orders, directives and regulations
3rd Phase	Intimidation, deception, and bribery of government officials and military officers with the aim to force them not to fulfil their duties
4th Phase	Destabilizing propaganda to raise discontent among the population, strengthened by the arrival of non-military (aggressor organized) armed groups, criminal elements of local armed groups' involvement, escalating the subverting situation
5th Phase	Establishing a no-fly zone over the entire country to be invaded, blockades introduction and extensive use of private militarized companies (private security services, military agencies) in close cooperation with the armed opposition forces
6th Phase	Conduct of regular military actions, immediately preceded by an extensive reconnaissance and diversionary activities using SOF; cosmic, radio and electronic survey; diplomatic, intelligence and industrial espionage; high-precision interventions against key infrastructure
7th Phase	The combination of targeted information operations, electronic warfare, space operations, continuous air harassment in combination with the use of high-precision weapons (artillery, non-lethal weapons based on microwave radiation, etc.)
8th Phase	Eliminating last cells of resistance and destruction of the last enemy combatant units by special operations conducted by SOF and ground units

¹⁴ *Ibidem.*

In connection with the Crimean crisis, there are some opinions¹⁵ whether the European Union should take action on the basis of Article 28a (7) of Treaty of Lisbon or not. In closer comparison between these phases of hybrid warfare and activities during the annexation of the Crimea, is obvious that the operation was stopped somewhere at the 4th to 5th phase, so it was not possible directly to accuse Russia of violation of international law. Moreover, so called “the Crimean referendum” on incorporating Crimea to the Russian Federation (implemented in conflict with the Constitution of Ukraine, which allows announcing the referendum on the separation of part of the territory solely across whole of the country), and *de jure* served as a fictional legal basis for affiliation of territory to Russia.

Here also lies the answer to the question, where in the context of hybrid warfare we can speak about direct attacking the state, and hence the phase which meets the conditions of activation of collective defence article (whether Article 5 of Washington treaty or Article 28a /para 7/ of Treaty of Lisbon). Since there has not been direct intervention against the state (and certainly not a Member State of the European Union or NATO), collective defence articles should not be, in terms of international law, enabled.

In our point of view, actions and measures of European Union or NATO could not exceed the political and diplomatic level, and could possible include assistance in security sector reform, as the condition of armed intervention against a European Union member, and NATO was not fulfilled.

QUO VADIS, CSDP?

In conclusion we may raise two questions: Since both the European Union and NATO have in their treaties an article(s) dedicated to collective defence, to which organization the member state ships the request to activate it? Which organization is in terms of mutual security and defence cooperation greater guarantee of security?

At first glance, it seems that the answer is clear: the NATO. However, it is necessary to take into account the political and geographical context. The fact is that the main contributor to the budget of NATO is the USA. And right here is the stumbling block. It is in the USA that resound most objections regarding additional funding for the Alliance. President Oba-

¹⁵ N. Helwig, T. Iso-Markku, *All for one? EU's toothless mutual defence clause*, Verfassungsblog.

ma faces a huge internal pressure regarding the amount of the defence budget, while the European allies are often more or less ignoring the obligation/recommendation regarding spending 2% of GDP on defence. Another question that resounds in informal circles, and directly relates to the previous one, is that for how long will the United States keep financing the security of Europe?

The EU has defined herself as it has to be able to intervene militarily in the distance of 6000 km from Brussels (Belgium) for military operations, as it is declared in *the Level of Ambition* in the field of CSDP. In the context of the on-going conflict in Ukraine, the EU should be aware that it would be politically unacceptable that another organisation would take care for its security and interests. By such behaviour would European Union also admit its toothless and impotence, as was pointed by Niklas Helwig and Tuomas Iso-Markku¹⁶.

However, this question is also secondarily directed towards EU countries. They should clarify themselves what is, from the medium and long term perspective, more important: policy of values or their own interests? Probably too many representatives of EU member countries have forgotten the old Slavic legend of Svätopluku's twigs saying that one by one we can be broken down, but together we are too strong to be broken. And exactly this is the highest principle of common defence.

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