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From Structure to Substance: Has the Constitutional Treaty improved the Chances for a Common Foreign and Security Policy?

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From Structure to Substance: Has the Constitutional Treaty improved the Chances for a Common Foreign and Security Policy?

Dieter Mahncke[1]

Introduction

A common foreign and security policy for the European Union is an issue of the day. While most academic and many political observers believe that it would be in the interest of the Union to have a common policy, there is quite some disagreement as to how this is to be achieved and whether it should be accomplished in an assured and regular manner or whether it should come about on an *ad hoc* basis only when it is in the clear interest of all member states at any particular time. In other words, is a common foreign policy to be a fundamental characteristic of the Union or is it to be an occasional occurrence when advantageous and convenient, the 'C' in CFSP – as one observer has sarcastically commented – standing not for 'Common' but for 'Convenient'?[2]

Ever since the European Community began to consider a more common stance on foreign policy issues, progress has been the result of compromise. Such compromise had to be found between integrationists, who believe that more supranationality and, for example, majority voting on foreign policy questions are necessary, and inter-governmentalists, who consider foreign policy questions as too close to the heart of state sovereignty and too controversial between states to expect more than increased coherence and, indeed, a common policy only when there is consensus. The issue to be considered here is what compromises have been reached in the Constitutional Treaty, and specifically, what implications this will have with regard to a common foreign and security policy for the EU. Will the Treaty

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2 See Poul Nielson, 'Building Credibility: The role of European development policy in preventing conflicts', speech given at the Foreign Policy Centre, London, 8 February 2001, p. 6.

make a significant difference compared to previous and current procedures according to the Maastricht, Amsterdam and Nice Treaties? To be sure, the Constitutional Treaty will not go into effect for some time, and it may, if things go badly, not go into effect at all. But, whatever the case may be, an analysis of what has been achieved after long, intensive and comprehensive negotiations within the ambitious framework of a Constitutional Treaty grants insight into what the governments of the European member states consider possible and probably for most of them desirable at this stage.

Both the Common Foreign and Security Policy and the European Security and Defence Policy (ESDP) are primarily political, not legal issues. But they function – or are supposed to function – within a legal framework. At the same time the legal framework indicates what the member states are willing to do. A valid question is how these two levels interact, i.e. how, on the one hand, legal provisions have influenced the political framing of CFSP, and on the other, in what way political developments have influenced the framing of the treaties.

Origin and Motives of CFSP and ESDP

In order to fully comprehend the development of a common European foreign and security policy, the ambitions, ambiguities and limitations, it is essential to understand, in addition to the discourse between integrationists and inter-governmentalists, the motives of the involved players. The idea that it would be in the interest of 'Europe' to stand together in its relations with the outside world has a long history. The introduction of foreign policy issues into the EC/EU can be traced back to the early 1950s, and was developed in the 1970s in the framework of the CSCE process with various initiatives being taken to include foreign policy cooperation into the framework of the European Community. Owing mainly to resistance by Britain and some of the neutral countries (primarily Ireland in the early stages) advances were slow, starting out with introducing first at least the 'economic aspects' of security policy.[3]

[3] For a brief history see Roberto Francia and Miguel Angel Medina Abellán, 'Striving for a Common Foreign Policy. A Brief History', and Wolfgang Wessels, 'Theoretical Perspectives. CFSP beyond the Supranational and Intergovernmental Dichotomy', both in Dieter Mahncke, Alicia Ambos and

Indeed, it took more than two decades (from 1970 to 1993) to move from a purely intergovernmental cooperation model (European Political Cooperation) to the inclusion of a common foreign and security policy into the Treaty of Maastricht. All military components of foreign policy remained with the member states, although at the WEU Petersberg conference near Bonn in 1992 certain tasks were defined which the WEU might carry out at the request of the EU member states.[4]

European Political Cooperation (EPC) was a result of the international environment and the negotiations in the framework of the Conference on Security and Cooperation (CSCE) during the years leading up to the signing of the Helsinki Final Act in 1975.[5] The member states of the European Union were concerned with coordinating their policies in a way that would strengthen the West in the negotiations of the CSCE with the Soviet Union. This was "the EPC's Entrance onto the World Stage".[6]

In these negotiations the countries of the West primarily aimed at an improvement of human rights in the East. Their main tool was economic incentives. This appeared most promising since for the Warsaw Pact countries in their growing economic plight this had been a major motive in agreeing to the CSCE basically on Western terms. But beyond this immediate incentive, EPC enabled the EEC member states to become more actively involved in a number of other issues, such as the Middle East, Cyprus and

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Christopher Reynolds (eds.), *European Foreign Policy. From Rhetoric to Reality?* (Brussels: PIE-Peter Lang, 2004), pp. 117ff. and 61ff. resp.

[4] See Mathias Jopp, 'The Defense Dimension of the European Union: the Role and Performance of the WEU', in Elfriede Regelsberger et al., *Foreign Policy of the European Union: From EPC to CFSP and Beyond* (London: Lynne Rienner, 1997), pp. 153-169.

[5] See on this Simon Nuttall, 'The Institutional Network and the Instruments of Action', in Reinhardt Rummel (ed.), *Toward Political Union: Planning a Common Foreign and Security Policy in the European Community* (Baden-Baden: Nomos, 1992), pp. 61-81. The first Davignon Report is commonly referred as the starting point of the EPC. It is named after its author, a senior Belgian official of the Foreign Ministry, Vicomte Etienne Davignon, and was adopted on 27 October 1970 by the foreign ministers of the Six and the applicant countries Denmark, Ireland, Norway and the United Kingdom. Its content were four basic recommendations on which the EPC procedures were built until they were replaced by CFSP in 1993.

[6] Simon Nuttall, 'Two Decades of EPC Performance', in Elfriede Regelsberger et al., *op. cit.* (note 3), p.23.

South Africa. It is important to note, however, that EPC took place not within, but outside the Community framework. This is reflected by its organisational structure. The Commission's right of initiative did not apply to the EPC, the Conference of Foreign Ministers meetings dealing with EPC were clearly distinguished from the General Affairs Council, and the European Parliament was given the right to present questions to the Conference only in 1976.[7]

The London Report of 13 October 1981 reflected the necessity to reaffirm the EPC's institutional set-up and to codify its practices. The establishment of a secretariat in Brussels, the practice of the 'Troika mechanism' and the extension and increasing use of EU delegations abroad[8] led to further consolidation of the EPC though still outside the Treaty framework. As far as security issues were concerned, the scope of commitments remained clearly focused on the 'political' aspects of security, Ireland being one of the main opponents of going any further.

But efforts were made to bring foreign and security policy more into the realm of the European Community. The Genscher/Colombo plan, based on a

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[7] See Michael E. Smith, *Europe's Foreign and Security Policy: The Institutionalization of Cooperation* (Cambridge: Cambridge University Press, 2004), p. 262.

[8] See on this David Spence, The Commission's External Service, (http://www.les.aston.ac.uk/eureformds.html): "The London Report of 1981 foresaw crisis procedures including meetings of ambassadors within 48 hours at the request of three Member States and joint reports either on ambassadors' own initiative or at the request of the Political Committee, composed of the Political Directors of Member State foreign ministries. The subsequent Stuttgart declaration of 19 June 1983 also called for close cooperation in the field. And the Single European Act, which formalised political cooperation by treaty, began the codification of the obligation to consult and coordinate on the ground by explicitly demanding that Member State embassies and Commission delegations should 'intensify cooperation' (Single European Act title III Art. 30 point 9). The 1980s saw an expansion of the network, with the focus on new delegations in the Mediterranean, Asia and Latin America, in part because of the Iberian enlargement of 1986. In political cooperation, Member States were beginning to rely on the Delegations' unique expertise in EC policy, its institutional memory and the fact that the Commission was the only stable element in the fluctuating constellation of *troikas.* In trade relations, Member State officials had an essential support role to the Commission's negotiators, and they looked to the Commission to solve everyday trade disputes. The conception, implementation and monitoring of development cooperation depended critically on Delegation staff. The Commission delegations also acquired responsibility for assisting high-level visits, including from the European Parliament. As for public diplomacy, the 'mission to explain' begun in Washington in 1954 was now needed everywhere. The status of the delegations varied greatly, from the EAC-run ACP missions with their mainly contracted staff and modest political profile, to the Washington delegation, now a fully accredited diplomatic mission."

bilateral initiative by Hans Dietrich Genscher and Emilio Colombo, the German and Italian Foreign Ministers, represented such an attempt to formally introduce EPC into the European Community. Moreover, to further coordinate member states' foreign policies the European Council was to be given the role of an organ of political guidance. Although governments could not agree on the plan a number of elements were taken up and included in the Solemn Declaration of Stuttgart (1983),[9] a text of a non-binding nature seen by many observers "as the ultimate compromise" in the efforts of member states to move beyond a policy of identifying a lowest common denominator.[10] Its real meaning, however, became apparent three years later in the Single European Act (SEA) in which many of the Stuttgart elements were formalised. Nevertheless, although the SEA created stronger legal ties, it was not foreseen to transfer EPC into the Community, as the deliberate exclusion of the European Court of Justice by the member states indicates.[11]

The most dramatic and perhaps decisive move towards trying to establish a common foreign and security policy within the framework of the European Community came with the fall of the Berlin Wall. The new international environment seemed to require a more united foreign policy stance by the Community, soon to be renamed the European Union. Thus, when the Treaty on European Union was signed in Maastricht in 1992 a common foreign and security policy (CFSP) was for the first time formally introduced into the treaty text, replacing EPC. Next to Justice and Home Affairs, it was one of the two intergovernmental pillars of the Union. Maastricht thus created "a complex mix of intergovernmental and supranational elements, involving enhancements and extensions of institutional mechanisms that had developed under EPC".[12] The new mechanisms were designed to cover "all areas of European foreign and security policy".[13] However, defence or, more precisely, military matters were still kept outside the EU framework. A "Declaration on Western

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9 See Simon Wiegand, htttp://cdl.niedersachsen.de/blob/images/C4786923_L20.pdfin.

10 See Wessels, 'Theoretical Perspectives', *op. cit.* (note 2).

11 See on this Smith, *op. cit.* (note 6).

12 *Ibid.*, p.180.

13 TEU, Title V, Art. J.1.1, http://www.eurotreaties.com/maastrichteu.pdf.

European Union" was attached to the Treaty recognising WEU "as the defence arm of the EU and as the European pillar of the Atlantic Alliance".[14]

The Amsterdam Treaty (which came into force in 1999) added procedural amendments to the TEU and, at the initiative of Finland, included the 1992 WEU 'Petersberg tasks'. The objective of the member states was to improve "the efficiency of their procedures without giving up their ultimate say".[15] The strict adherence to national control applied particularly to all matters with military implications.

Hence, it is clear that while the notion of a common foreign policy found support already in early phases, the idea of including security issues met with much more resistance. Accepting security policy as an area of EU interest came slowly. Moreover, military capabilities were only considered as a component of joint action as late as 1999 at the Cologne and Helsinki meetings. This is important because it shows that CFSP and ESDP were two closely related, but at the same time quite separate processes, both historically and in terms of content. Indeed, whereas CFSP was first inserted into the treaty text in the Treaty of Amsterdam, ESDP still rests on the decisions of Cologne and Helsinki and has been cast into treaty language only in the Constitutional Treaty. This continuing differentiation is also evident in that the member states of the European Union, while displaying at least a limited readiness to move towards majority decisions in general foreign policy areas, in matters concerning security and defence have insisted on maintaining the general rule of unanimity.

Broadly speaking, there were – or still are – three sets of motives for the development of a common European foreign and security policy.[16] The first is as old as the European integration process itself. It is the belief among most of the protagonists of European integration that a true union is and should be the target of the integration process, and that such a union would sooner or

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14 See Smith, *op. cit.* (note 6), p. 182.

15 Wessels, 'Theoretical Perspectives', *op. cit.* (note 2), p. 79.

16 See on this Dieter Mahncke, 'Reform of the CFSP: From Maastricht to Amsterdam', in Jörg Monar and Wolfgang Wessels, *The European Union after the Treaty of Amsterdam* (London, New York: Continuum, 2001), pp. 227-248, and Dieter Mahncke, 'The Need for a Common Foreign Policy', in Mahncke et al., *European Foreign Policy, op. cit.* (note 2), pp. 27-42.

later require a common foreign and security policy (and ultimately even a common defence). In fact, a political union would necessarily be incomplete and unfinished without such a policy. The problem, of course, is that this motive sets unity as a prerequisite. It assumes that unity should and will be achieved and would then necessarily have to be accompanied by a common foreign policy.

A second motive – shared by both the integrationists and the inter-governmentalists – is the idea that a common foreign policy is likely to carry more weight and hence grant more influence than the separate foreign policies of the several small and medium-sized European nation-states. Of course, one should not overlook that this motive incorporates the inclination of many – in fact, probably all – of the European member states to 'Europeanise' their own national interests, i.e. the tendency to present a national interest as representing a (common) European interest. In this line of thinking, a common European foreign policy is accepted only if it includes or at least does not restrict national interests. Solely under this unspoken reservation are inter-governmentalists prepared to accept a common policy. Indeed, the agreements on CFSP and ESDP reflect this consistently.

The third set of motives has to do with the end of the Cold War. On the one hand, there is the feeling that Europeans are no longer constrained by the limitations of the Cold War and are less dependent on the United States. In other words, there is less of a need to fall in line under United States' leadership and hence more room for autonomous activity. But, on the other hand, there is also the growing recognition that the Europeans will have to do more on their own, that they will have to rely more on their own means and will perhaps even be called upon to act independently. New threats have arisen, and it seems uncertain whether the United States will always be willing to help and to lead, particularly when dealing with limited problems in Europe or on the European periphery. Under such circumstances it may be wise to act together. The Balkan crises in the 1990s brought this home to the Europeans, and this was also the main motive for the British initiative at

Pörtschach,[17] the subsequent meeting with France at St. Malo[18] and the decisions of Cologne[19] and Helsinki[20] adding ESDP to CFSP. But a reservation needs to be made. As the summit meeting in Nice clearly showed, the British initiative was European, but based on strong Atlantic foundations. For the British, a European reaction force is to act only after consultation with the United States and when the United States for whatever reasons decides not to participate; at the same time it is intended to improve European capabilities and make the European allies better able to cooperate with American forces, thus allaying American criticism of European insufficiency. France, on the other hand, saw in it a move towards European independence and away from what it considered American tutelage.[21]

The Status quo

There are two good reasons for keeping the status quo with regard to CFSP and ESDP in mind. The first is that this is the basis on which the EU currently operates and may continue to operate for quite some time; the second is that all changes must be measured against the existing background.

First and foremost, it should be clear that what exists under the currently valid Treaty on European Union (TEU) is modest as far as a common foreign and security policy is concerned.[22] Although there is a growing degree of

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17 Informal European Summit, Pörtschach, 24-25 October 1998, http://www.iss.eu.org/chaillot/chai47e.html; see also Jolyon Howorth, 'Britain, Nato and the European Defence Initiative', *Survival*, Vol. 42, No. 2, Summer 2000, pp. 33-55.

18 British-French Summit, St-Malo, 3-4 December 1998, http://www.iss-eu.org/chaillot/chai47e.html; see also Daniel Wincott, 'Policy Change and Discourse in Europe: Can the EU Make a 'Square Meal out of a Stew of Paradox'', in *West European Politics*, Vol. 27, No. 2, p. 354.

19 Cologne European Council, Presidency Conclusions, 3-4 June 1999, http://ue.eu.int/ueDocs/cms_ Data/docs/pressData/en/ec/kolnen.htm.

20 Helsinki European Council, Presidency Conclusions, 9-10 December 1999, http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/ACFA4C.htm.

21 See on this Dieter Mahncke, 'Maintaining European Security: Issues, Interests and attitudes, in Dieter Mahncke, Wyn Rees and Wayne C. Thompson, *Redefining Transatlantic Security Relations: The Challenge of Change* (Manchester: Manchester University Press, 2004), p. 20.

22 Mahncke, 'The Need for a Common Foreign Policy', *op. cit.* (note 15), p. 39.

coordination, common positions and common actions, the European Union does not have a common foreign and security policy in the true sense of the word. This became obvious during the Iraq crisis,[23] but it is evident also in many other issues such as the German-Italian disagreement about the reform of the United Nations Security Council.[24] To point out that the EU member states now vote along the same lines in the United Nations in an increasing number of cases[25] is not a sufficient indication, because it is the remaining percentile that really counts. Only the overall picture with agreement and disagreement shows whether there is a common policy or simply co-incidental agreement that would exist even without the EU and its CFSP. Iraq and the German-Italian differences highlight this. They demonstrate not only a lack of agreement on specific issues but reveal more basic disagreement. The question is whether these are singular and temporary events that will gradually fade into a common policy or whether they portray that as far as foreign policy is concerned, the Union is not a Union based on common values, common interests and a sense of a common destiny, but in fact a 'union of convenience'. Where common interests exist and seem to advise common action, this is done, but beyond that there is no commitment.

Moreover, it seems highly unlikely that this situation will become easier in a Union of 25 or more members. On the contrary, it is likely to become more difficult, not only because of increased diversity owing to the different background, experience and traditions of the new members,[26] but also

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[23] See Peter van Ham, 'The EU's War over Iraq. A last Wake-up Call', in Mahncke et al., *European Foreign Policy*, *op. cit.* (note 2), pp. 209-226.

[24] Germany is seeking a seat as a permanent member of the UN Security Council. Italy opposes this, probably because it does not want to be left out, but with the argument that this would undermine the effort to achieve a seat for the EU, a worthy goal but with little chance of being realised for some time to come. See, for example, *Süddeutsche Zeitung*, 'Frankreich und Deutschland für deutschen Sitz im Sicherheitsrat", 24 September 2004.

[25] The percentages vary quite significantly over the years; see the analysis by Paul Luif, 'EU Cohesion in the UN General Assembly', *Occasional Papers* 49, (Paris: EU Institute for Security Studies, December 2003); and Elisabeth Johannson-Nogués, 'The Fifteen and the Accession States in the UN General Assembly: What Future for European Foreign Policy in the Coming Together of the 'Old' and the 'New' Europe?', *European Foreign Affairs Review,* Vol. 9, No. 3, pp. 67–92, Autumn 2004.

[26] See on this Christopher Reynolds, 'Irreconcilable Differences? National Convergence and Divergence in the CFSP', in Mahncke et al., *European Foreign Policy, op. cit.* (note 2), pp. 43-60.

because for them even more than for the old members the EU is a 'union of convenience'. While an underlying motive is the desire to 'move west' and to gain security and status by joining Western institutions, the immediate interest is economic, not political. The President of the Czech Republic, Vaclav Klaus, stated as much. According to him there is neither a need nor a realistic chance of achieving a common foreign and security policy in the EU.[27]

The question is whether this and the other issues will be better met by the Constitutional Treaty. Can this treaty create new objectives, obligations and procedures that will smoothen the road leading to a common foreign and security policy?

The Constitutional Treaty[28]

The Constitutional Treaty is divided into four main parts. Part I of the Treaty deals mainly with objectives, institutions and general competences. Part II is the Charter of Fundamental Rights of the Union. Part III, the most extensive section, delineates the "Policies and Functioning of the Union", including decision-making procedures, instruments and role of the actors involved. Finally, Part IV foresees "General and Final Provisions" with a number of additional protocols.[29]

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[27] "Ich habe gesagt, daß sie [eine gemeinsame EU Außenpolitik] unnötig wäre. Angesichts der Verteilung der Kräfte und Meinungen im heutigen Europa wäre eine solche Politik künstlich. Der Versuch einer Gleichschaltung kann nicht erwünscht sein." Interview in *Süddeutsche Zeitung,* 2 May 2003. See also the interview in *Die Presse* (Vienna), 25 April 2003: "Ich will keine kompakte politische Union. Deshalb kann ich mir eine kompakte Außenpolitik auch nicht vorstellen. Alle Leute in Europa wissen, daß die außenpolitischen Positionen von verschiedenen Ländern verschieden sind. Das ist die Realität. Ich möchte nicht die verschiedenen Positionen gleichschalten. Das ist für mich die Drohung. Die Gleichschaltung. Das haben wir in der Vergangenheit erlebt. Ich brauche das nie wieder."

[28] Treaty establishing a Constitution for Europe (CIG 87/04) of 6 August 2004, including Corrigendum 1of 27 September 2004. See also the thorough analysis by Mathias Jopp and Elfriede Regelsberger, 'GASP und ESVP im Verfassungsvertrag – eine neue Angebotsvielfalt mit Chancen und Mämgeln, *Integration*, 4/2003, pp. 550-563.

[29] At an early stage there was some discussion on whether it would be useful to create two treaties, one including the basic constitutional principles (more or less what is now covered by Parts I and II) and which would presumably not require frequent amendment, while a second treaty dealing with policies, functioning and decision-making procedures would be more flexible and easier to adapt when necessary.

A first and obvious weakness of the new treaty is its complex structure. The stipulations dealing with foreign and security policy are spread over Parts I and III; seldom is any particular question dealt with in only one place. The main reason for this is that, while the division into separate parts – a 'constitutional' part and a part dealing with the setting and implementation of policies – makes sense, the constitutional part is too detailed. The framers clearly did not see themselves in a position to create a 'real' constitution, which sets down objectives and principles only. An oddity, for example, is the declaration that "Member States shall undertake progressively to improve their military capabilities", contained in the 'constitutional' section of the treaty (Article I-41(3)). Apparently, the EU members feel a need to give themselves a 'push' by raising this to constitutional status.

Secondly, it is remarkable that there should be two 'common security policies', especially since paragraph (1) of Article I-41 maintains that the common security and defence policy is "an integral part of the common foreign and security policy". The reason, of course, is twofold. First, while ESDP includes civilian measures, it also includes military means and measures and deals with quite another category of foreign policy, namely crises and crisis management. Second, it is fairly obvious that this area is intended to be kept strictly subject to decisions by unanimous vote. Whether an integral part or not, it is considered to be 'a different type of beef' and hence to be kept in a separate category.

The Common Foreign and Security Policy

Objectives

The general terms of the common foreign and security policy of the EU can be found in Article I-16. It asserts that the

Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence.

Member states are requested to “actively and unreservedly” support EU policies and to “refrain from action contrary to the Union’s interest or likely to impair its effectiveness”.

Much of this is repeated in Article I-40(1):

The European Union shall conduct a common foreign and security policy, based on the development of mutual political solidarity among Member States, the identification of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States’ actions.

The article frames the issue well. The Union shall conduct a common foreign policy, but this will not replace national foreign policies. Questions “of general interest” will be identified, and everything will depend on the “development of mutual political solidarity” and an “ever-increasing degree of convergence” among the member states.

The supreme authority of the European Council is established which “shall identify The Union’s strategic interests and determine the objectives of its common foreign and security policy”, while the Council of Ministers “shall frame this policy within the framework of the strategic guidelines established by the European Council” (Article I-40(2)). The policy is to be “put into effect” by the Union Minister for Foreign Affairs and by the member states “using national and Union resources” (Article I-40(4)). Finally, all decisions are to be taken unanimously, with only a few exceptions for the Council of Ministers delineated in Part III (see below).

Following these general assertions, it would seem appropriate to outline the objectives and fields of interest of the EU. This, however, is formulated only in Part III, Article III-292 stating that the

Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral

solutions to common problems, in particular in the framework of the United Nations.

More specifically, the purposes of foreign policy cooperation are to:

(a) safeguard its values, fundamental interests, security, independence and integrity;

(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;

(c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;

(d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;

(e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;

(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;

(g) assist populations, countries and regions confronting natural or man-made disasters;

(h) promote an international system based on stronger multilateral cooperation and good global governance.

Consistency is to be assured between different policies by the Council of Ministers and the Commission, “assisted by the Union Minister for Foreign Affairs” (Article 292(3)).

Instruments and Decision-making

According to Article III-294 the common foreign and security policy will be conducted by:

(a) defining the general guidelines;

(b) adopting European decisions defining:

(i) actions to be undertaken by the Union,

(ii) positions to be taken by the Union,

(iii) arrangements for the implementation of the European decisions referred to in points (i) and (ii);

(c) strengthening systematic cooperation between Member States in the conduct of policy.

The concepts of common positions and joint actions, going back to Maastricht, are thus maintained, except that they are now simply called "European decisions". The "general guidelines" will be decided upon unanimously by the European Council. The former Common Strategies, unlike the "general guidelines", are no longer listed amongst the instruments. However, they continue to exist as "European decisions" made by the European Council "on the strategic interests and objectives of the Union" that "may concern the relations of the Union with a specific country or region or may be thematic in approach" (Art. III-293.1). As before, the European Council takes these decisions unanimously. This remains true even when the Council of Ministers, the Commission, or both together, make a proposal.

Just as the European Council, the Council of Ministers[30] takes its decisions on CFSP unanimously (Article III-300(1)). There are only a few exceptions to this general rule, thus ensuring and re-ensuring the veto of each member state. According to Article III-300(2) the exceptions are:

a) when adopting European decisions defining a Union action or position on the basis of a European decision of the European Council relating to the Union's strategic interests and objectives [the "general guidelines" or former Common Strategies];

b) when adopting a European decision defining a Union action or position, on a proposal which the Union Minister for Foreign Affairs has presented following a specific request to him or her from the European Council, made on its own initiative or that of the Minister [note that the proposal has to be based on a "specific request" by the European Council which obviously decides by unanimity];

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[30] It is useful to speak either of the 'European Council' or the 'Council of Ministers' rather than the 'European Council' and simply the 'Council'. This was done in earlier drafts of the Constitutional Treaty but was not maintained in the final version. Thus, in Art. III-300 the expression used is 'Council', the Council of Ministers being implied.

c) when adopting a European decision implementing a European decision defining a Union action or position [the former joint actions or common positions];

d) when adopting a European decision concerning the appointment of a special representative.

The possibility for further exceptions is granted in the next paragraph: “[...] the European Council may unanimously adopt a European decision stipulating that the Council shall act by a qualified majority in cases other than those referred to in paragraph 2 [...]”, i.e. other than those decisions mentioned above and already defined as to be taken by qualified majority (Article III-300(3)). Clearly, this is a careful opening of the possibility of more qualified majority voting – though based on a preceding unanimous vote – which many of the integrationists are calling for. But it is an “enabling clause” that may in the end remain little more than a possibility.

But, whatever the case may be, none of these exceptions or possibilities for deciding by qualified majority “shall […] apply to decisions having military or defence implications” (Article III-300(4)).

When the Council of Ministers takes decisions, any member “may qualify its abstention by making a formal declaration”. In that case the abstaining state shall not be “obliged to apply the European decision, but shall accept that the latter commits the Union”. It shall also, “in a spirit of mutual solidarity [...] refrain from any action likely to conflict with or impede Union action”. This is the so-called ‘constructive abstention’.[31] If the members of the Council abstaining in this way “represent at least one third of the Member States comprising at least one third of the population of the Union, the decision shall not be adopted” (Article III-300(1)). Beyond this, if a member “for vital and stated reasons of national policy” declares that it intends to oppose the adoption of a decision by qualified majority – i.e. going further than the ‘constructive abstention’ – a vote will not be taken (Article III-300(2)). This is a

[31] This repeats Art. III-294(2): “The Member States shall support the common foreign and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity. The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.”

clear possibility for a veto, even though the member will have to explain its position giving “vital reasons”. The Minister for Foreign Affairs will then try to negotiate a solution. If this fails, “the Council may, acting by a qualified majority”, refer the matter to the European Council “for a European decision by unanimity”.

To ensure coherence (and adherence) even after a European decision has been taken, Article III-297(3) declares that:

Whenever there is any plan to adopt a national position or take national action pursuant to a European decision […], information shall be provided […] in time to allow, if necessary, for prior consultations within the Council. The obligation to provide prior information shall not apply to measures which are merely a national transposition of such a decision.

To summarise: While all decisions by the European Council remain subject to unanimity, for the Council of Ministers

- a decision can come about even if some members abstain;
- however, if it is a formal abstention and the abstaining states represent at least one third of the member states (i.e. 9) representing at least one third of the population of the Union, a decision will not come about;
- finally, if a member declares that for important and stated reasons of national policy it will oppose a position taken by qualified majority, a decision will likewise not come about.

Once again, the role of the Parliament has not been significantly strengthened. Nevertheless, the “Union Minister for Foreign Affairs shall consult and inform the European Parliament” and its views are to be “duly taken into consideration” (Article III-304(1)). It may also ask questions of the Council of Ministers or the Minister for Foreign Affairs, and will twice yearly hold a debate on the progress in implementing CFSP, “including the common security and defence policy” (Article III-304(2)).

Consultation

Perhaps influenced by the Iraq crisis, the requirement for consultation and mutual solidarity is repeatedly emphasised. Article I-40(5) states that:

Member States shall consult one another within the European Council and the Council on any foreign and security policy issue which is of general interest in order to determine a common approach. Before undertaking any action on the international scene or any commitment which could affect the Union's interests, each Member State shall consult the others within the European Council or the Council. Member States shall ensure, through the convergence of their actions, that the Union is able to assert its interests and values on the international scene. Member States shall show mutual solidarity.

Likewise, Article III-301 aims to strengthen cooperation between diplomatic missions of EU member states: "The diplomatic missions of the Member States and the Union delegations in third countries and at international organisations shall cooperate and shall contribute to formulating and implementing the common approach."[32]

The Common Security and Defence Policy

The European Security and Defence Policy (ESDP), that is currently based on the agreements of Cologne and Helsinki, is now formally included into the treaty text. The main objective, as elucidated in Article I-41**,** is to "provide the Union with an operational capacity drawing on civil and military assets". Such capacity may be used by the Union for "missions outside the Union for peace-keeping, conflict prevention and strengthening international security". The tasks "shall be undertaken using capabilities provided by the Member States".

Decisions are to be taken unanimously either on a proposal by a member state or by the Union Minister for Foreign Affairs.[33] The latter "may propose the use of both national resources and Union instruments, together with the Commission where appropriate" (Article 41(4)).

The aim of ultimately creating a common defence is marginally strengthened in comparison with previous texts: "The common security and defence policy shall include the progressive framing of a common Union

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[32] Already in Art. III-296(3) the obligation of the European External Action Service is put forward "to work in cooperation with the diplomatic services of the Member States".

[33] See section on the Foreign Minister below.

defence policy. This will lead to a common defence [...]", however only "when the European Council, acting unanimously, so decides" (Article I-41(2)).[34]

Reference is made to the responsibilities of those member states that are members of the Atlantic Alliance: ESDP "shall not prejudice the specific character of the security and defence policy of certain Member States, it shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation [...]" (Article I-41(2)).

Finally, reference is made to the establishment of an "Agency in the field of defence capabilities development, research, acquisition and armaments (European Defence Agency)" as well as to the possibility of requesting a group of member states to perform specific tasks.

Enhanced and Structured Cooperation

The framers of the Constitutional Treaty were clearly aware that with the continuing enlargement of the European Union it is likely to become more and more difficult to achieve consensus, particularly when military issues are involved. Hence, possibilities were created to enable cooperation amongst a smaller group of states but still within the framework of the Union.

Article I-44 foresees what is called "enhanced cooperation", which "shall be open at any time to all Member States". Enhanced cooperation in the field of the common foreign and security policy can be authorised by the Council of Ministers[35] whenever the objectives cannot be attained within a reasonable

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[34] However, a Protocol on Art. 41(2) is attached to the Treaty: The High Contracting Parties, bearing in mind the need to implement fully the provisions of Article I-41(2) of the Constitution; bearing in mind that the policy of the Union in accordance with Article I-41(2) of the Constitution shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation, under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework, have agreed upon the following provision, which is annexed to the Treaty establishing a Constitution for Europe: The Union shall draw up, together with the Western European Union, arrangements for enhanced cooperation between them. (16.12.2004 EN Official Journal of the European Union, *O.J.* C 310/367)

[35] The procedure is somewhat different for other areas where the Council of Ministers decides on the basis of a proposal by the Commission, see Art. III-419(1).

time by the Union as a whole and when at least one third of the member states participate. The Union Minister for Foreign Affairs is requested to give an opinion about whether the proposed enhanced cooperation is consistent with the Union's common foreign and security policy, while the Commission is requested to give an opinion as to consistency with "other Union policies". The European Parliament will be informed only (Article III-419(2)).[36] Acts adopted within the framework will be decided upon by the participating states only and they will bind only these states. However, in contrast to "structured cooperation" (see below) all members of the Council of Ministers can participate in the deliberations.

An example of enhanced cooperation would be if the Council of Ministers, after taking a unanimous decision (with the possibility of a 'constructive abstention') on a certain action, entrusts its execution to a group of states, "which are willing and have the necessary capability for such a task", within the framework of the Union (Article III-310(1)). Thus, only the actual conduct of the operation would be entrusted to a more limited group of states, the others either not wishing to participate (for whatever reasons) or not able to take part because of a lack of appropriate capabilities. The "management of the task" would be agreed upon by the participating states "in association with the Union Minister for Foreign Affairs" (Article III-310(1)). The Council of Ministers is to be kept informed. Should the task involve "major consequences or require amendment" the member states participating "shall inform the Council immediately" (Article III-310(2)).

A new and possibly far-reaching proposal is the concept of 'permanent structured cooperation', specifically foreseen for the security and defence sector (Article I-41(6) and III-312). This provides for a closer form of cooperation between member states "whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area" (Article I-41(6)). The motivation is evident, namely to establish the possibility of closer military cooperation for those members that wish to advance more rapidly in this field. The advantage lies in that what might

[36] In the case of other areas of enhanced cooperation the European Parliament has to give, in certain cases, its consent (Art. III-325(6a)), and in other cases provide an opinion (Art.-325(6b)).

otherwise be a ‘coalition of the willing’ outside the Union could now be included in the Union framework, the ‘added political value’ of such a move being mutual. The coalition would gain the weight of the entire Union, while the Union would find itself more capable of taking action even when it is not possible to bring all members on board.

‘Permanent structured cooperation’, however, will be more of a ‘closed shop’ than enhanced cooperation. When the Council of Ministers entrusts “the execution of a task, within the Union framework, to a group of Member States” (Article I-41(5)) not only the decisions but also the deliberations will take place among the participating states only, with the Union Minister for Foreign Affairs attending the deliberations and informing the other member states (Articles III-312(1) and (2)).

Member states wishing to participate in permanent structured cooperation, “which fulfil the criteria and have made the commitments on military capabilities set out in the Protocol on permanent structured cooperation shall notify their intention to the Council and to the Union Minister for Foreign Affairs” (Article III-312(1)). Within three months the Council of Ministers, acting “by a qualified majority after consulting the Union Minister for Foreign Affairs” will determine the list of participating states (Article III-312(2)). Members wishing to join at a later stage may apply and will be voted upon by the same procedure, except that only the members already participating “shall take part in the vote”. A qualified majority “shall be defined as at least 55% of the members of the Council representing the participating Member States, comprising at least 65% of the population of these states”. A “blocking minority” would require “at least the minimum number of Council members representing more than 35% of the population of the participating Member States, plus one member [...]” (Article III-312(3)). By the same procedure a member state may be suspended if it “no longer fulfils the criteria or is no longer able to meet the commitments referred to in Articles 1 and 2 of the Protocol [...]” (Article III-213(4)).

The *Protocol on Permanent Structured Cooperation*[37] details the conditions for participation. Permanent structured cooperation is to be open to any member state that undertakes to:

(a) proceed more intensively to develop its defence capacities through the development of its national contributions and participation, where appropriate, in multinational forces, in the main European equipment programmes, and in the activity of the Agency in the field of defence capabilities development, research, acquisition and armaments (European Defence Agency), and

(b) have the capacity to supply by 2007 at the latest, either at national level or as a component of multinational force groups, targeted combat units for the missions planned, structured at a tactical level as a battle group, with support elements including transport and logistics, capable of carrying out the tasks referred to in Article III-309, within a period of 5 to 30 days, in particular in response to requests from the United Nations Organisation, and which can be sustained for an initial period of 30 days and be extended up to at least 120 days. [38]

To achieve these objectives, Article 2 of the Protocol lists the following obligations of the members:

(a) cooperate, as from the entry into force of the Treaty establishing a Constitution for Europe, with a view to achieving approved objectives concerning the level of investment expenditure on defence equipment, and

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[37] Protocol on Permanent Structured Cooperation established by Article I-41(6) and Article III-312 of the Constitution, 16.12.2004 EN Official Journal of the European Union, *O.J.* C 310/365.

[38] Existing multinational military units with headquarters and/or general staff are: the Eurocorps (Land forces: Germany, Belgium, Spain, France, Luxembourg); Eurofor (land forces: Spain, France, Italy, Portugal); Euromarfor (maritime forces: Spain, France, Italy, Portugal); the European Air Group (Belgium, France, Germany, Italy, Spain, UK); Multinational Division Central (Belgium, Germany, Netherlands, UK); and the headquarters of the 1 German/Dutch Corps (Germany, Netherlands, UK). Further multinational forces have been established between EU member states, but they do not have joint headquarters (e.g. the UK-Netherlands Landing Force or the Spanish-Italian Amphibious Force). Moreover, the Defence Ministers of the EU member states decided on 22 November 2004 to establish thirteen 'battle groups' of roughly 1500 soldiers each and available for robust intervention within a radius of 6000 Km from Brussels by 2007. Eighteen of the 25 EU member states will participate. France, Britain, Italy and Spain will set up one purely national battle group each; all others will be battle groups with the participation of two or more member states. Germany will participate in three battle groups. See *Frankfurter Allgemeine Zeitung,* 22 and 23 November 2004. See also http://www.euroactiv.com.

regularly review these objectives, in the light of the security environment and of the Union's international responsibilities;

(b) bring their defence apparatus into line with each other as far as possible, particularly by harmonising the identification of their military needs, by pooling and, where appropriate, specialising their defence means and capabilities, and by encouraging cooperation in the fields of training and logistics;

(c) take concrete measures to enhance the availability, interoperability, flexibility and deployability of their forces, in particular by identifying common objectives regarding the commitment of forces, including possibly reviewing their national decision-making procedures;

(d) work together to ensure that they take the necessary measures to make good, including through multinational approaches, and without prejudice to undertakings in this regard within the North Atlantic Treaty Organisation, the shortfalls perceived in the framework of the ‘Capability Development Mechanism’;

(e) take part, where appropriate, in the development of major joint or European equipment programmes in the framework of the European Defence Agency.

The European Defence Agency (see below), mentioned in Article 3,

shall contribute to the regular assessment of participating Member States' contributions with regard to capabilities [...] and shall report thereon at least once a year. The assessment may serve as a basis for Council recommendations and European decisions adopted in accordance with Article III-312 of the Constitution.

In sum, we thus find two types of ‘flexibility’ in the Constitutional Treaty: a small group of members undertaking an action for the Union, more or less on an *ad hoc* basis, and ‘structured cooperation’ in the sense that a limited number of members develop closer security and defence cooperation on a permanent, i.e. not *ad hoc*, basis (and may then be the small group of states entrusted with the execution of a specific task).

Mutual Assistance Clause

While an original text of the Constitutional Treaty, submitted in Rome on 18 July 2003,[39] contained a third option for closer cooperation, namely "closer cooperation [...] in the Union framework, as regards mutual defence" (Article I-40(7) of that version),[40] this option was dropped from the final version.[41] However, the mutual assistance clause was maintained. In the previous version it would have applied only to those engaged in such "closer cooperation [...] as regards mutual defence."[42] Now it clearly applies to all members:

If a Member State is the victim of 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 United Nations 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 commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation."(Article I-41(7))[43]

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[39] Draft Treaty establishing a Constitution for Europe, adopted by consensus by the European Convention on 13 June and 10 July 2003 submitted to the President of the European Council in Rome 18 July 2003 (http://europa.eu.int/futurumconstitution/ table/index_en.htm).

[40] Although still directed at limited crisis management tasks, e.g. when using battle groups, this went back to the idea of a "European Defence Union", presented by France, Germany, Belgium and Luxembourg in Brussels in April 2003. See *Meeting of the Heads of State and Government of Germany, France, Luxembourg and Belgium on European Defence,* Brussels, 29 April 2003. It was, however, agreed, e.g. by Blair, Chirac and Schröder in Berlin in September 2003, that some European capability to head operations was needed whenever it was not a 'Berlin-plus' operation with NATO or one in which a member state provided headquarters (such as in operation *Artemis*). The compromise reached was that the EU Military Staff would be increased by 30 soldiers and civilians that would form the nucleus of an EU Operational Centre. The compromise was accepted at the EU summit meeting in Brussels in December 2004. See the detailed report in *Frankfurter Allgemeine Zeitung,* 13 December 2004.

[41] See also note 33 above.

[42] The text was: "Under this cooperation, if one of the Member States participating in such cooperation is the victim of armed aggression on its territory, the other participating States shall give it aid and assistance by all means in their power, military or other..."

[43] The phrase "on its territory" limits such assistance to Europe and to what seems like clear cases of defence.

This is remarkable and was not much noticed. The Constitutional Treaty thus contains a general assistance clause, comparable to Article V of the Brussels Treaty, and in principle applicable to *all* members. However, "the specific character of the security and defence policy of certain Member States" refers to a policy of neutrality. In fact, in the Seville Declaration of the European Council of 21 June 2002 Ireland drew attention, "in this regard, to its traditional policy of military neutrality".[44]

Solidarity Clause

Like the 'assistance clause' the 'solidarity clause' – thus named and embodied in a separate article – applies to all members, but refers to terrorist attacks and natural or man-made disasters only. In such cases "the Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States [...]" (Article I-43).[45] Assistance is made available at the request of the "political authorities" of the member state (Article III-329(1)). When a decision to assist the requesting state is taken by the Council of Ministers, the European Parliament is to be informed.

The specific measures to be taken are to "be defined by a European decision adopted by the Council acting on a joint proposal by the Commission and the Union Minister for Foreign Affairs" (Article III-329(2)). Where such a decision has "defence implications" it has to be taken in accordance with the regular decision-making procedure of the Council of Ministers as described in Article III-300(1).

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[44] See text of the declaration under http://www.rte.ie/news/2002/0621/print /declarations.html. The declaration, which cites the National Declaration of Ireland, continues: "The European Council acknowledges that the Treaty on European Union does not impose any binding mutual defence commitments. Nor does the development of the Union's capacity to conduct humanitarian and crisis management tasks involve the establishment of a European army".

[45] In its recommendations Working Group VIII on Defence suggested that such terrorist attacks should be understood to include attacks by non-state bodies only. Any terrorist attack by a state would be aggression and hence be subject to different considerations.

The Council of Ministers “shall be assisted by the Political and Security Committee with the support of the structures developed in the context of the common security and defence policy”, although without prejudice to the Committee of Permanent Representatives (COREPER), and in cooperation with the “standing committee” within the Council entrusted with ensuring “that operational cooperation on internal security is promoted and strengthened within the Union” (Article III-261).

Extended Petersberg Tasks

Another component of increased flexibility or broadened possibilities is the extension of the Petersberg Tasks in the Constitutional Treaty. Humanitarian and rescue tasks, peace-keeping tasks, and tasks of combat forces in crisis management, including peacemaking, have been maintained, but further tasks have been added: joint disarmament operations, military advice and assistance tasks, conflict prevention tasks, support action in combating terrorism at the request of a third country and post-conflict stabilisation (Article III-309).

Decisions related to these tasks are to be taken unanimously by the Council of Ministers. The Union Minister for Foreign Affairs, acting under the authority of the Council of Ministers (and in constant contact with the Political and Security Committee) “shall ensure coordination of the civilian and military aspects of such tasks” (Article III-309(2)). It is obvious that while the Minister for Foreign Affairs is involved in a coordinating capacity, ultimate national control is maintained through the Council of Ministers.

European Defence Agency

Article I-41(3) foresees the establishment of a “European Defence Agency” for defence capabilities development, research, acquisition and armaments to identify operational requirements, to promote measures to satisfy those requirements, to contribute to identifying and, where appropriate, implementing any measure needed to strengthen the industrial and technological base of the defence sector, to participate in defining a European

capabilities and armaments policy, and to assist the Council [of Ministers] in evaluating the improvement of military capabilities.

Part III of the Treaty defines this more precisely, stating that any member wishing to participate may join the Agency (Article III-311(2)). A decision by the Council of Ministers, acting by qualified majority, is called for to establish the statute, seat and operational rules of the Agency. Where necessary, the Agency "shall carry out its tasks in liaison with the Commission". Five specific objectives are outlined (Article III-311(1)):

- contribute to identifying military capability objectives of member states and evaluating the observance of commitments;
- promote harmonisation of operational needs and compatible procurement methods;
- propose multilateral projects and ensure the coordination of programmes implemented by member states;
- support defence technology research and coordinate and plan joint research activities;
- contribute to identifying and implementing measures for strengthening the industrial and technological base of the defence sector and for improving the effectiveness of military expenditure.

The words "contribute", "propose" or "promote" attest to the limited authority of this Agency. It can encourage more cooperation, but it cannot bring it about if member states are unwilling. Structural difficulties and national resistance remain. Nevertheless, there is evidently a feeling that improved cooperation in this field would be beneficial. Hence, first steps have already been undertaken. On 30 July 2004 the first chief executive of the EDA was appointed, and the first meeting of the EDA Steering Board took place on 17 September 2004. Chaired by the High Representative for the CFSP, it comprises the Defence Ministers of the 24 participating states as well as a representative from the Commission. On 13 November 2004 four directors were appointed,[46] and in its second Steering Board meeting in Brussels the EDA agreed on an initial annual budget of Euro 20 million that will allow a staff of more than 70 persons. Furthermore, a work programme was accepted that

[46] EU Online, http://ue.eu.int/uedocs/cmsUpload/Appointment%20Directors%20of% 20EDA.pdf.

covers the European Commission initiatives on defence procurement, space policy and security research. For the first year, the priorities are to strengthen command, control and communications interoperability, to enhance research and technology efforts on so-called 'unmanned aerial vehicles' and to further explore ideas on defence procurement presented in the Commission's Green Paper.[47]

The Minister for Foreign Affairs

The major institutional innovation with regard to foreign and security policy is the introduction of an EU Foreign Minister. The most important articles are I-23 I-24, I-27, I-28, I-40(4), I-41(4), III-193, III-292, III-197, III-296, III-200, III-299, III-203, III-302, III-205, III-304, III-206, III-305, III-210, III-309, III-229(3), and III-327(2).[48]

The institution of a Union Minister for Foreign Affairs, combining the competences of the present High Representative for the CFSP with those of the present Commissioner for External Affairs is formulated in Article I-28. The Minister for Foreign Affairs is to be appointed in agreement with the President of the Commission by the European Council, deciding by qualified majority. The Minister "shall conduct the Union's common foreign and security policy" and "contribute by his or her proposals to the development of that policy". However, both the common foreign and security policy and the common security and defence policy shall be carried out "as mandated by the Council".

The Foreign Minister is to be one of the Vice-Presidents of the Commission (Article I-28(4)). As such he or she will be responsible for all those components of external action of the EU that fall under the authority of the

[47] Green paper on public procurement, European Commission, http://europa.eu.int/comm/internal_market/publicprocurement/docs/defence/green-paper/com04-608_en.pdf See further http://www.euractiv.com/Article?tcmuri= tcm:29-132567-16&type=News and Press Release Council Meeting 2621, No. 14723/04(Press324), http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/gena/82772.pdf.

[48] But see also I-21(2): Participation of EUFM in the European Council; III-310: Participation of EUFM in the management of structured cooperation; III-313: Financial Provisions; III-328(2): Union delegations are placed under the EUFM's authority; III-420: EUFM must be consulted on participation of member states in enhanced cooperation.

Commission: “In exercising these responsibilities within the Commission, and only for these responsibilities, the Union Minister for Foreign Affairs shall be bound by Commission procedures [...].” It is thus evident, from this as well as from the previous paragraph, that the Minister for Foreign Affairs is to be under intergovernmental control with the exception of those functions clearly assigned to the competence of the Commission.

Indeed, it is the Council of Ministers, meeting as the Foreign Affairs Council, that shall, “elaborate the Union’s external action on the basis of strategic guidelines laid down by the European Council and ensure that [its actions are] consistent” (Article I-24(3)). However – and this may turn out to be one of the strongest ingredients of the Union Foreign Minister’s competences – the “Union Minister for Foreign Affairs shall preside over the Foreign Affairs Council” (Article I-28(3)). In addition, the Union Minister may in fact influence the European Council directly. While not being named as a member of the European Council that is composed of the Heads of State and Government, the President of the Council and the President of the Commission, the Minister for Foreign Affairs “shall take part in its work” (Article I-21(2)). It is not entirely clear from the text whether this means that he or she will be specifically asked to attend certain meetings or whether the Union Minister for Foreign Affairs will quasi-automatically participate in all of the meetings of the European Council.

The responsibilities of the Union Minister for Foreign Affairs are repeated in Article III-296(1): to “contribute through his or her proposals towards the preparation of the common foreign and security policy and [...] ensure implementation of the European decisions adopted by the European Council and the Council”. In fulfilling this mandate, the Minister “shall be assisted by a European External Action Service” (Article III-296(3)). This Service is to be composed of “officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services”.[49]

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[49] See Declaration on the Creation of a European External Action Service attached to the Constitutional Treaty. The arrangements for the establishment of the Service are to be made within the first year after entry into force of the Constitutional Treaty.

Paragraph 2 of Article III-296 states that “The Minister for Foreign Affairs shall represent the Union for matters relating to the common foreign and security policy. He or she shall conduct political dialogue [...] on the Union’s behalf and shall express the Union’s position in international organisations and at international conferences.” This seems to be clear, although there may be room for conflict with the President of the European Council, who, whatever the personality of the Union Foreign Minister might be, is unlikely to be a political lightweight. In Article I-22 it says that “The President of the European Council shall, at his or her level and in that capacity ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the [responsibilities] of the Union Minister for Foreign Affairs”. But perhaps this potential area of conflict will turn out to be more theoretical than real. The Minister for Foreign Affairs, being subject to the European Council as far as a common foreign and security policy is concerned, would be likely to grant the President precedence whenever they appear together (much like a national Foreign Minister grants precedence to his Prime Minister), except where the competence of the Foreign Minister is specifically affirmed by the Treaty. Moreover, the President, representing the European Council that determines the “basic guidelines” would hardly feel the need to differ from the Foreign Minister, and if the Foreign Minister differs from the President as representative of the European Council often enough, he or she would be unlikely to remain in that position for long. In sum, this issue may be less of a problem than it first appears to be.

While the President therefore might be the high-ranking spokesman from time to time, the Minister for Foreign Affairs would deal with the day-to-day business. In this he or she will be supported by the extensive structure he/she will inherit from the Commissioner for External Affairs. This position would be further buttressed by the chairmanship of the Foreign Affairs Council and the right of initiative as well as the multiple areas in which the Union Foreign Minister is requested to give an opinion. Indeed, the Union Minister for Foreign Affairs has extensive possibilities to take the initiative. Most importantly, decisions on the common foreign and security policy, including the initiation of military missions, will be taken by the Council of Ministers

"acting unanimously on a proposal from the Union Minister for Foreign Affairs or an initiative from a Member State". Moreover, the "Union Minister for Foreign Affairs may propose the use of both national resources and Union instruments, together with the Commission where appropriate" (Article I-41(4)).[50] More than that, the Minister can, "in cases requiring a rapid decision", at his or her own initiative or at the request of a member state, "convene an extraordinary meeting of the Council [of Ministers]" within forty-eight hours or even a shorter period (Article III-299(2)).

Thus, while remaining under an intergovernmental mandate, the Minister for Foreign Affairs could exercise quite a measure of influence, depending on his or her own initiative and how skilfully he or she succeeds in using the instruments at his or her disposal.

Moreover, there are a number of further competences that the Minister has. One of these is the right to propose the appointment of a special representative to the Council of Ministers "with a mandate in relation to particular policy issues" (Article III-302). The special representative is appointed by qualitative majority and carries out the mandate "under the Minister's authority".

Member states are expected to "coordinate their action in international organisations and at international conferences", and it is the Union Foreign Minister that "shall organise this coordination" (Article III-305(1)). Much is made of the possibility that the Union Foreign Minister may be asked to present a Union position in the United Nations Security Council when "the Union has defined a position on a subject which is on the United Nations Security Council agenda" (Article III-305(2)). However, this is not likely to occur in crucial and thus potentially controversial cases. If, on the other hand, the Union Minister for Foreign Affairs were to speak for the Union more and more often, this would be an indication of "ever-increasing convergence" and a growing common approach of the EU member states and as such a signal that a common foreign policy was indeed coming about.

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[50] This is reiterated in Art. III-293(2): "The Union Minister for Foreign Affairs, for the area of common foreign and security policy, and the Commission, for other areas of external action, may submit joint proposals to the Council".

The Union Minister for Foreign Affairs has to take into consideration the Political and Security Committee (PSC), made up of representatives at ambassadorial level from all of the member states, that "shall monitor the international situation in the areas covered by the common foreign and security policy" (Article III-307(1)). The Committee will "contribute to the definition of policies" at the request of the Council of Ministers, the Minister for Foreign Affairs or also at its own initiative. In other words, the Minister for Foreign Affairs to an extent shares competences here. However, in crisis management operations (i.e. the Petersberg Tasks as defined in Article III-309(1)) the PSC will exercise "political control and strategic direction" under the responsibility of the Council of Ministers *and* the Union Minister for Foreign Affairs. In fact, as Article III-309(2) delineates, it is the Union Minister for Foreign Affairs who "shall ensure coordination of the civilian and military aspects of such tasks" under the authority of the Council of Ministers "and in close and constant contact with the Political and Security Committee".[51]

The Union Minister for Foreign Affairs is appointed by the European Council in agreement with the President of the Commission, and the "European Council may end his or her term of office by the same procedure" (Article I–28(1)). As far as CFSP and ESDP are concerned, he/she will be responsible only to the European Council. When matters relating to his/her activities in the framework of the Commission are concerned, he/she is subject to "Commission procedures" (Article I-28(4)).

The assent of the European Parliament for the Commission as a whole would include the future Minister for Foreign Affairs, who, after all, is one of the Vice Presidents of the Commission. This is supported by Article I-27(2):
The President, the Union Minister for Foreign Affairs and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament. On the basis of this consent the Commission shall be appointed by the European Council, acting by a qualified majority.

However, it could be argued that parliamentary consent refers only to those functions that the Minister undertakes in the framework of the Commission. In

[51] According to the Nice Treaty (Part I, Art. 25), the Council "may authorise the Committee, for the purpose and for the duration of a crisis management operation, as determined by the Council, to take the relevant decisions concerning the political control and strategic direction of the operation".

all other respects the Minister is responsible to the European Council.[52] Consequently, the Union Minister for Foreign Affairs may lose his/her position not only by the withdrawal of parliamentary consent, but also by forfeiting the support of the European Council.

However, there is a general responsibility towards Parliament in the area of foreign and security policy. Thus, the Minister shall "consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy, including the common security and defence policy" and "ensure that the views of the European Parliament are duly taken into consideration". Parliament must be regularly informed, may ask questions of the Council and the Minister and shall hold a debate twice a year on the common foreign and security policy as well as the common security and defence policy (Article III-304(2)).

International Agreements

Finally, the Union Minister for Foreign Affairs has a role to play whenever the Union concludes international agreements concerning the external relations of the Union. The Union "may conclude an agreement with one or more third countries or international organisations"; such agreements "are binding on the institutions of the Union and on its Member States" (Article III-323). The Commission, or the Minister for Foreign Affairs "where the agreement […] relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a European decision authorising the opening of negotiations" (Article III-325(3)). Remarkably, the European Parliament has to give its consent (a specific number of fields is listed) or at least be consulted in all cases "except where agreements relate exclusively to the common foreign and security policy" (Article III-325(6)). Thus, the Council "shall act by a qualified majority" except "when the agreement covers a field for which unanimity is required" in which case the Council must act unanimously (Article III-325(8)).

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[52] See Jean-Paul Jacqué, *Droit Institutionnel de l'Union Européenne* (Paris: Dalloz, 2003), p. 327.

Conclusions

Is the maintenance of decision-making by unanimity in the area of foreign and security policy a weakness or is it simply a sober reflection of reality? I would argue for the latter, although, from the view of a 'realistic integrationist', it would be a combination of both. Given the present state of the Union with regard to foreign policy – neither is there a sufficient common base nor are the member states willing to give up their prerogatives in this area – majority voting on foreign policy, and even more so on questions about the use of military force, is out of the question. In fact, any extension of qualified majority voting in this area – so often brought forward by integrationists as the golden route to a common foreign policy – is impossible without either fundamental agreement, indeed harmony, on the "strategic interests and objectives" of the member states or a true political union with normal democratic decision-making procedures. For the moment only the first route seems practicable. Indeed, getting members to share perspectives and fostering "ever-increasing convergence", will be the main and most challenging task of the Union Minister for Foreign Affairs. It would be difficult to argue that the new European Security Strategy[53] is already a sufficient basis for common perspectives. But it is a beginning, a first move in the right direction. On balance, under the given circumstances the provisions made by the Constitutional Treaty are what can realistically be expected. This may still be insufficient, but that is a consequence not of the treaty stipulations as such, but of the underlying lack of unity and the desire of member states to maintain their freedom of action in this field.

If a 'constitutional lesson' can be drawn, it is perhaps this: The voting procedures, which include the possibility of 'constructive abstentions', have never been used in the area of foreign and security policy, and it does not seem likely that they will soon be used in critical instances. Either there is

[53] See EU Online, 'A Secure Europe in a Better World', http://ue.eu.int/uedocs/cmsUpload/78367.pdf.

agreement, in which case there is no need for complex voting procedures, or there is no agreement, in which case a vote is avoided in the first place.

However, we do find a number of innovative proposals in the Constitutional Treaty. The most important of these is the introduction of an EU Minister for Foreign Affairs who will be tasked with “conducting” the Union’s common foreign and security policy. The question is whether he or she will be in a position to actually do this: conduct the Union’s foreign policy. But there is little doubt that compared to the High Representative for the CFSP the competences are significantly broadened. While the Minister remains under the intergovernmental authority of the European Council and the Council of Ministers, and everything will ultimately depend on whether agreement can be reached, he or she does have more means to exercise influence. As indicated above, the list is, in fact, quite impressive, beginning with the chair of the Foreign Affairs Council, the authority over a significant number of civil servants, including the EU delegations world-wide, as well as a budget that includes a raft of foreign policy instruments. The Minister for Foreign Affairs can exert pressure within the Council or the Commission concerning, for example, sanctions or trade embargoes. His/her rights of initiative are notable. Being the representative of the European Union in international organisations offers considerable leeway. Presiding over the European Defence Agency – however limited its authority may still be – offers additional scope for influencing the build-up of European military capabilities in coordination with possible threats or tasks to be performed. Finally, for some time to come the most important foreign policy area is likely to be the extension of the Union and its neighbourhood policy. Both offer major challenges in which the Union Minister for Foreign Affairs may develop into one of the most important interlocutors.

Another potentially important change is the creation of various possibilities for groups of states to cooperate militarily. In line with this as well as evident international developments, it seemed logical to broaden the scope of the Petersberg Tasks. Despite limitations, the creation of a European Defence Agency also makes sense. The objective is not only a significant improvement of the military capabilities of the member states in terms of capacity but also in terms of organisation and proficiency. Yet, even the best tools will remain

subject to the ability and skill of utilising them in the framework of clear political objectives and unified leadership.

For all of this to bear fruit, more consultation, an increased willingness to find common positions, indeed ‘political solidarity’ is required. The Constitutional Treaty calls for all of these as well as providing a number of commitments and provisions that may make them easier – and perhaps more probable – to achieve.

Have the procedures been simplified? Not really. Rather, they continue to reflect the desire of the member states to ultimately maintain national control. Are the member states of the European Union in fact creating ever more complex structures to achieve an objective that, if it were really achievable, would not require such complex structures? To an extent this is true, although this can be traced back to the earlier treaties of Maastricht, Amsterdam and Nice. If real union is not in the cards, should we then not be content with achieving as much convergence and coordination as might be necessary to meet the challenges so well spelt out in the European Security Strategy of December 2003? Under the existing circumstances one should grant that the framers of the Constitutional Treaty have made a valiant effort to ease and encourage “ever-increasing convergence” that will remain the *sine qua non* of a common foreign and security policy for some time to come.

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