

SPECIAL ISSUE – UNITY OF THE EUROPEAN CONSTITUTION

Constitutionalization of the Common Foreign and Security Policy of the European Union: Implications of the Constitutional Treaty

By Ireneusz Paweł Karolewski*

A. Introduction

Many scholars of European integration have treated the Common Foreign and Security Policy (CFSP) as a specific area of the EU.¹ This is due to the fact that CFSP, and before it the European Political Cooperation (which was a nucleus of CFSP), have remained primarily an intergovernmental framework, although other EC pillars evolved to a much higher supranational degree over the years. For some theorists of European integration it was a clear sign that foreign and security policy would always remain the realm of national governments, which occasionally were willing to coordinate their national interests.² According to the old dictum of Stanley Hoffmann, this area of state activity belongs to so-called “high politics,” meaning that advanced integration in this field, in the sense of a creation of supranational institutions, will never materialize.³ This train of thought, called neorealism in the discipline of International Relations, regards foreign policy as a highly controversial area guarded by national governments. This is so because foreign policy is essential to the survival of states and their citizens. It is also

* Assistant Professor of Political Theory in the Department of Economic and Social Sciences, University of Potsdam, Germany, e-mail: karole@rz.uni-potsdam.de. His research includes constitutional theory, European integration theories, theories of collective identity.

¹ See WOLFGANG WAGNER, DIE KONSTRUKTION EINER EUROPÄISCHEN AÜENPOLITIK - DEUTSCHE, FRANZÖSISCHE UND BRITISCHE ANSÄTZE IM VERGLEICH (2001). For other analytical approaches to CFSP, see also Michael E. Smith, *The Framing of European foreign and security Policy: towards a post-modern policy framework?*, 10 JOURNAL OF EUROPEAN PUBLIC POLICY 556 (2003); Helene Sjursen, *Understanding the Common Foreign and Security Policy: Analytical Building Blocs*, 9 ARENA WORKING PAPER (2003), http://www.arena.uio.no/publications/wp_03_9_sjursen.pdf.

² Wolfgang Wagner, *Why the EU's Common Foreign and Security Policy Will Remain Intergovernmental: A Rationalist Institutional Choice Analysis of European Crisis Management Policy*, 10 JOURNAL OF EUROPEAN PUBLIC POLICY 576 (2003).

³ Stanley Hoffmann, *Obstinate or Obsolete: The Fate of the Nation-State and Case of Western Europe*, 85 DEADALUS 865 (1966).

claimed that sovereign foreign policy is crucial for democracy, since civil and political rights can only be safeguarded by nation-states. Thus, national governments regard the issues of foreign and security policy in terms of relative gains, that is, states define the utility of political decisions with regard to gains of other states (other states should not be allowed to gain more from cooperative arrangements than oneself because they may abuse their lead).⁴ Other areas of external relations that allow for absolute gains (governments are equally interested in asymmetric gains achieved from cooperation, as long as they realize gains), such as trade policy, by definition do not belong to the area of foreign and security policy. In other words, not every area of external relations qualifies as foreign and security policy. With regard to the EU, trade policy is conducted by the Commission because it does not belong to "high politics"; governments do not care enough to keep it within the authority of state. Comparatively, CFSP will always remain a sensitive area of state activity.

In order to test this proposition, one can use the version of the Draft Constitutional Treaty (DCT) drafted by the European Convention (2002-2003) and the final Constitutional Treaty (CT) supplemented and delivered by the Intergovernmental Conference (IGC, October 2003-June 2004)⁵ as a touchstone with regard to the question whether CFSP still shows signs of intergovernmental peculiarity or whether it perhaps developed supranational features contrary to academic expectations. However, it is not the goal of this article to test tenets of neo-realism, but rather to use it as a litmus test of the constitutionalization of CFSP. The assumption of a stable intergovernmental character of CFSP poses a challenge to the concept of the constitutionalization of CFSP.

B. What is Constitutionalization?

Even though the term constitutionalization has been widely used in legal and political debates, no explicit theory of constitutionalization has been developed.

⁴ For the works of the leading neo-realist, see Joseph Grieco, *The Maastricht Treaty. Economic and Monetary Union and the Neo-Realist Research Programme*, 21 REVIEW OF INTERNATIONAL STUDIES 21 (1995).

⁵ The numbering and the wording of the Articles correspond to the final version of the Treaty establishing a Constitution for Europe as delivered by the IGC. I will use the name *Constitutional Treaty* (CT), whenever referring to it. The final document was signed in Rome on 29 October 2004. See Treaty Establishing a Constitution for Europe, 2004 O.J. (C 310) 53. With regard to the earlier version of the Constitutional Treaty, as delivered by the European Convention, I will use the name *Draft Constitutional Treaty* (DCT) to underline that the European Convention has proposed the provisions. The Draft Treaty Establishing a Constitution for Europe was adopted by the European Convention on 13 June and 10 July 2003 and submitted to the President of the European Council in Rome.

Various theories of the constitution as well as constitutionalism exist,⁶ but there has been little scholarly attention to constitutionalization. If considered at all, scholars regard it implicitly as a form of process, through which something becomes a constitution or a part of it. Thus, constitutionalization means simply "transition to constitution." However, this process-oriented definition of constitutionalization does not contain any information on the final product of the process nor on the quality of the process itself. This is so because the final product depends on the expected functions of the constitution, and it is therefore a normative variable. Since constitutionalization is a derivative of the concept of the resulting constitution, it may indicate many things depending on our understanding of what "constitution" is supposed to mean. According to a narrow concept, in which "constitution" means a single document consisting of regulations of political process, constitutionalization would indicate a mere codification or a formal regulation of political process either within a single document or a greater number of documents with a supreme, hard-to-change status. In this sense, the constitutionalization of CFSP could merely mean that this policy field has been integrated into the Constitutional Treaty.

Against this background, I suggest a more ambitious understanding of constitutionalization that draws on a functional understanding of the constitution.⁷ First, if one speaks of a European constitution, the new document must offer some value added to the supranationalism of the policy field in question, since supranational decision-making is *prima facie* of the European Union. There have been a great number of claims that CFSP must be made more supranational,⁸ that is either to *delegate* its field of activity to a supranational institution or to *pool* the decision-making system⁹ by introducing qualified majority voting (QMV). In contrast, the European constitution would only adopt the already existing regulations, whereby it will not differ in its content from previous treaties, even if the regulations concerning a given field have been integrated in a single document

⁶ See, e.g., INTEGRATION DURCH VERFASSUNG (Hans Vorländer ed., 2002), GARY S. SCHAL, VERTRAUEN, VERFASSUNG UND DEMOKRATIE (2004), PETRA DOBNER, KONSTITUTIONALISMUS ALS POLITIKFORM (2002).

⁷ Ireneusz Paweł Karolewski, *Konstytucjonalizacja Unii Europejskiej a jej rozszerzenie na wschód* (Constitutionalization of the European Union and its Eastern Enlargement), 1 NOWA EUROPA 171 (2005).

⁸ Many critics of CFSP saw the reluctance of the member states to permit the delegation of sovereignty to centralized institutions as a main problem and thus the main source of failure of CFSP, which has been diagnosed with an inability to be "[...] an effective international actor, in terms both of its capacity to produce collective decisions and its impact on events". See Christopher Hill, *The Capability-expectations gap, or conceptualising Europe's international role*, 31 JOURNAL OF COMMON MARKET STUDIES 305 (1993). See also Philip H. Gordon, *Europe's Uncommon Foreign Policy*, 22 INTERNATIONAL SECURITY 74 (1997).

⁹ For the conceptualization of delegating versus pooling, see ANDREW MORAVCSIK, THE CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT 67 (1998).

called the Constitutional Treaty. Therefore, *as the initial step* in my approach, I will look at the institutional changes brought about by the European Convention in July 2003¹⁰ and the IGC (October 2003 – June 2004). I argue that CFSP remains largely intergovernmental, which suggests that constitutionalization of this policy field has not been significantly advanced.

Second, constitutions are expected to structure the political process in their role as the supreme law and not just adopt regulations that have existed previously. Thus, if the Constitutional Treaty merely organizes old treaties anew, without adding new substance, it does not deserve the title “constitution.” In order to see how far the Constitutional Treaty newly structures the political process, I shall therefore examine whether there are extra-constitutional developments, which will show the relevance of the constitutional text to the political process. If there are developments that proceed despite the constitution and which are likely to supersede it, one can assume a limited constitutionalization at best. I argue that many developments, particularly in the field of the Common Security and Defense Policy (CSDP), take place outside of the constitutional framework, which suggests that the process of constitutionalization of CSDP is quite limited, as the Constitutional Treaty only integrates some previous developments. Also, constitutions of multinational regimes, consociations or hybrid regimes like the European Union (notions that all evade the nation-state label, however, are associated with statehood) are supposed to promote collective identity.¹¹ This promotion of collective identity can be found for instance in a constitutional obligation to solidarity, which may consist of different mechanisms of distributional justice, but establishes in any case solidarity of collective defense. Therefore, I will discuss the solidarity clause provided for in the Draft Treaty delivered by the European Convention¹² and in addenda proposed by the subsequent IGC. It is also necessary to mention that there seems to be no real solidarity clause in the Constitutional Treaty. However, such a clause should be regarded as a basis for solidarity in the multinational EU. Furthermore, I will discuss the provisions allowing for flexible cooperation in military matters, which might present an even bigger strain on solidarity within the EU. The primary goal

¹⁰ See HEINZ KLEGER ET AL., EUROPÄISCHE VERFASSUNG - ZUM STAND DER EUROPÄISCHEN DEMOKRATIE IM ZUGE DER OSTERWEITERUNG (2004).

¹¹ With regard to the EU, see Jürgen Habermas, *Braucht Europa eine Verfassung? Eine Bemerkung zu Dieter Grimm*, in DIE EINBEZIEHUNG DES ANDEREN (1996). For the general relationship between constitution and identity, see ANDRÉ BRODOCZ, DIE SYMBOLISCHE DIMENSION DER VERFASSUNG (2003).

¹² I will not examine the debates and controversies in the European Convention itself. For this purpose, see DER KONVENT ALS LABOR - TEXTE UND DOKUMENTE ZUM EUROPÄISCHEN VERFASSUNGSPROZESS (Heinz Kleger ed., 2004).

of new provisions and changes brought about by the European Convention was to make CFSP and its subset, CSDP, more efficient.¹³ However the notion of efficiency could conflict with the obligation to solidarity.

Third, constitutionalization implies democratization, since modern constitutions (as opposed to the medieval *Magna Charta Libertatum* that limited royal power) are about democracy. Constitutions are intended to be the institutionalized general will of the people, although they not only express it, but also establish democratic control of the political process. In studies on the transition to democracy, the democratization process seems to be inextricably connected to constitutionalization.¹⁴ This connection also applies conversely. Particularly if one analyzes political systems with that claim to be democracies, as is the case with the EU, constitutionalization can hardly be separated from democratization.¹⁵ Therefore, as the final step, I will proceed to examine the issue of democratic control of CFSP.

C. How Supranational is CFSP?

I. Foreign Minister and European President

The establishment of the post of a Union Minister for Foreign Affairs (Article I-28) is probably the most innovative proposal of the Constitutional Treaty (CT). The Minister will have the responsibility of conducting the Union's common foreign and security policy, covering legislative proposals in that field as well as the supervision of their implementation. The new position merges the roles of High Representative for CFSP with that of the Commissioner for External Relations. The Foreign Minister (FM) will be one of the vice-presidents of the Commission as well as the chairman of the Foreign Affairs Council. The FM is to be appointed by the European Council, acting on qualified majority, with the agreement of the President of the Commission.

¹³ See Simon Duke, *The Convention, the draft Constitution and External Relations: Effects and Implications for the EU and its international role*, EUROPEAN INSTITUTE OF PUBLIC ADMINISTRATION, 2003/W/2 WORKING PAPER (2003), <http://www.eipa.nl/Publications/Summaries/03/WorkingPaper/2003w02.pdf>.

¹⁴ See, e.g., Jon Elster, *Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea*, 71 PUBLIC ADMINISTRATION 169 (1993).

¹⁵ See Erik. O. Eriksen et al., *The Charter of Fundamental Rights in Context*, in THE CHARTERING OF EUROPE: THE EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS AND ITS CONSTITUTIONAL IMPLICATIONS, 17 (Erik O. Eriksen et al. eds., 2003); LARRY SIEDENTOP, DEMOCRACY IN EUROPE (2001).

This means that the FM remains the head of CFSP, even if s/he loses his/her function as a commissioner as a result of the resignation of the entire Commission: a strong intergovernmental tendency of the new post.¹⁶ This tendency is strengthened even further by the new regulations of QMV, according to which a double majority of 55% of the Member States representing at least 65% of the EU population is necessary for a decision to be passed (Article I-25 CT). Particularly the population quorum stipulates that the FM needs the support of large Member States (for example Germany, France and the UK), three of which can practically compose a blocking minority (plus one other, which for example could be the ever "supportive" Luxembourg).

The procedure reflects the ambivalence of the post, the so-called double-hatting, which on the one hand is supposed to guarantee an integration of CFSP having hitherto been sliced between different EU institutions causing incoherence and hence the inability of the EU to make common decisions in that field. On the other hand, one can argue that the double-hatting can destroy the collegial nature of the Commission, since the FM might have conflicting loyalties, and this will rather strengthen the Council. Regarding the implementation of CFSP, the activity of the FM may also involve conflict with the Political and Security Committee, which according to Article III-307 CT monitors the implementation of the agreed policies. Article III-292(3) CT envisages that the FM assists the Council and the Commission in ensuring consistency between different areas of external action, meaning that the huge burden of coordination will fall on the FM, especially when one takes into consideration potential conflicts between Member States. Provisions with regard to the structured cooperation in military matters preprogram those conflicts. The FM will have to fill the gap between those who are involved, for instance, in the so-called structured cooperation and those who are not (Article III-310(1) CT). Nevertheless, the FM will be confronted not only with the daunting task of coordinating national interests of the Member States, but also those of the respective General Directorates of the Commission that fall under an external relations label. In fulfilling his/her tasks, s/he will be mostly dependent on personal ability to convince the Council and Commission to cooperate. Hence, the success of the FM probably will be a strong personal variable, as it is in case of the Commission President, which suggests cycles of European foreign policy rather than linear stability.

Furthermore, the FM will have to play an active role in the sensitive domain of crisis management. Article III-309(2) CT specifies that the FM shall ensure

¹⁶ See Daniel Thym, *Reforming Europe's Common Foreign and Security Policy*, 10 EUROPEAN LAW JOURNAL 5 (2004).

coordination of the civilian and military aspects of such tasks under the authority of the Council. Therefore, the FM will be a position with an extremely heavy workload (being the vice-president of the Commission, conducting administrative duties with the Council and having a demanding travel schedule due to his/her representation tasks), which makes probable that a single person will be unable to do it effectively. The FM also represents the EU in the international organizations and conferences (Article III-296(2) CT), which also includes his/her presence in the UN Security Council (Article III-305(2) CT) as well as his/her being the contact person for the European Parliament for CFSP (Article III-304 CT). In addition, s/he also presides over the Foreign Affairs Council as stated explicitly by the IGC in the supplemented Article I-28 of the Constitutional Treaty.¹⁷ Most likely, it will make more deputies or special representatives necessary, which may in turn create problems of coordination and control. The European External Action Service (EEAS) is to assist the FM. The Council would rule on the structure of the EEAS with the consent of the Commission.¹⁸ However, it is still unclear how diplomatic service of the EEAS will be constructed and how this service will relate to staff outside of it but still working in the area of external relations.¹⁹ Practical constraints make the creation of the EEAS a daunting task because it requires sensitive negotiations between the Commission and the Council on the scope and structure of the service. The creation of the EEAS implies a thorough reorganization of Commission and Council. On the one hand, the EEAS might be organized as a horizontal network of actors within existing services (the Commission's DG Relex, the Council's DGs that work on CFSP and CSDP, and perhaps even Member States' civil services). Yet in this case, it is unclear how the lines of hierarchy could be drawn and whether this would ensure a vertical implementation of policies and thus consistency of CFSP. On the other hand, a EU Ministry of External Relations could be constructed, which would reflect the structure of the national bureaucracies with clear loyalties. However, the creation of a separate external service would mean a loss of the Commission's influence on external relations and a stronger intergovernmentalization of the FM.

In addition, the European Council President will bring about a stronger intergovernmental orientation of CFSP. S/he will replace the current system of rotating presidencies and could potentially assume some of the functions currently fulfilled by the High Representative for CFSP (Article I-22 CT). This rather controversial proposal of the Convention (Article I-21 Draft Constitutional Treaty)

¹⁷ Article I-27 DCT did not contain paragraph 4.

¹⁸ See Declaration 24 on Article III-296 CT concerning EEAS in the Declarations concerning provisions of the Constitution, attached to the Constitutional Treaty.

¹⁹ See DUKE, SUPRA note 13, at 32.

establishes a President who is selected for a period of two and a half years and has both internal and external tasks to fulfill. The President would assume administrative functions with regard to preparing the European Council meetings and to facilitating cooperation, as well as with regard to representing the EU externally. As a result, there is no clear-cut division of labor between the European Council President and the FM. Since the tasks of the President are probably not entirely symbolic, concurrence and possibly even conflict could occur between the FM and the President. The Convention had established the post of the President as a proposal by the national governments mainly as a countermeasure to the increased power of the Commission President following his/her election by the European Parliament, thereby giving much stronger legitimacy to the Commission President than s/he has hitherto enjoyed. However, the post of the European Council President was created as a counterweight to the Commission President, which was supposed to place a stronger intergovernmental element in the institutional system of the EU.²⁰

II. Voting Procedures in CFSP

An intergovernmental orientation of CFSP also has been maintained due to the restrictions of QMV in this field. The Constitutional Treaty stipulates that a greater range of decisions shall fall under the qualified majority voting. At the same time it suggests changes to the mechanism of QMV itself (Article I-25 CT) to be introduced on 1 November 2009, in case the Constitution is ratified (Declaration on Article I-25 attached to CT). Nevertheless, the double majority formula (55% of Member States, representing 65% EU population) does not have much effect on CFSP, where the vote of unanimity will still be the norm. Even though there is a possibility of abstention from a vote, the basic decision-making rules remain unchanged (Article III-300(1) CT). In the event of abstention formally declared by any Member State, the decision is adopted, but it does not apply to the abstaining member. At the same time, the Member State accepts that the Union as such is bound by it, a regulation formulated by the Nice Treaty (Article 23(1) TEU). The respective Member State is also called upon not to take any action against the decision or to impede its application. At the same time, the Member State concerned refrains from any action likely to conflict with the Union's decision. The exemption, allowing for QMV, is envisaged in four cases (for example when adopting any European decision implementing a Union action or appointing a special representative, Article III-300(2) CT), but those are second-order decisions that presuppose a consensus at an earlier stage.

²⁰ See Christopher Hill, *CFSP: Conventions, Constitutions and Consequentiality*, XXXII INTERNATIONAL SPECTATOR No. 4, 75 (2002).

The Member States also retain the right to invoke reasons of vital national interests (the Luxembourg compromise), which may block any decision taken by QMV. In this case, it leads to a conciliation procedure by the FM. If the FM is unsuccessful, the issue is transferred to the European Council (Article III-300(2) CT).

The only modification pointing in the direction of expanding QMV has been brought about by the Convention. It relates to a vague clause, which gives power to the European Council to decide unanimously to switch over to QMV, but it excludes this step in the field of military and defense issues (Article 300(3), Article 300(4) CT). This so-called *passerelle* clause is not likely to drastically change the decision-making process, since it relates only to decisions of secondary importance presupposing as it does unanimity on the switch to QMV. Another supplement has been added by the IGC, on the initiative of the Italian presidency; the supplemented treaty stipulates that it is possible to use QMV in the Council whenever the FM makes a proposal (Article III-300(2b) CT).²¹ However, the change will not be dramatic, since the FM will act under the mandate of the Council in any case.

Despite the fact that the Draft Constitutional Treaty merged the EU and EC Treaties in a single text and created a single EU personality, it seems that the hitherto existent pillar structure of the EU will continue to have an influence on the functioning and further development of CFSP.

D. Extra-constitutional Developments in CFSP?

I. Common Security and Defense Policy

The CSDP, which is a subset of CFSP, also experienced changes in the Draft Constitutional Treaty (DCT). The DCT expands the definition of CSDP tasks established by the Treaty of Nice (Article 17(2) TEU) by modifying the Petersberg tasks²² to include the fight against terrorism. Besides peacekeeping, conflict prevention and peacemaking, which were previously provided for by the Nice Treaty, the new definition of tasks includes joint disarmament operations, military assistance, deployment of combat forces as well as post-conflict stabilization. It moves CSDP in a military direction, since the Petersberg tasks emphasized predominantly civilian and humanitarian reactions by the EU to international crises.

²¹ DCT lacks this provision (Article III-201).

²² Petersberg tasks include, above all, humanitarian and rescue missions. See Martin Ortega, *Petersberg Tasks, and Missions for the EU Military Forces*, WORKING PAPER (2005), INSTITUTE FOR SECURITY STUDIES, PARIS, <HTTP://WWW.ISS-EU.ORG/ESDP/04-MO.PDF>.

Moreover, it describes more accurately the military activity of the EU at present, which means that CSDP has so far evolved outside the constitutional framework only to be caught up by the DCT in 2003. By the same token, one might argue that the DCT as well as the Constitutional Treaty do not structure the political process but rather the political process has defined the structure of the constitution. Since 2003 the EU has been engaged in a number of military operations both in and outside Europe. For instance, in March 2003 it launched a military operation (code-named Concordia) in the Former Yugoslav Republic of Macedonia (FYROM). It followed a NATO operation and continued until December 2003. Concordia included 400 combat personnel with the goal of peacemaking and peacekeeping in response to the ethnic clashes in FYROM. It allowed the implementation of the August 2001 Ohrid Framework Agreement.²³ In addition, in June 2003, the EU launched its first autonomous operation (code-named Artemis), since Concordia utilized NATO resources. It took place in the Democratic Republic of Congo under the leadership of France acting as the EU framework nation providing the command and control capabilities for the planning, launch and management of the operation. It continued until September 2003. One of the main goals of the operation was to disarm the militias in the Congolese town of Bunia. The Framework Nation concept was endorsed in July 2002 outside of the European treaties, which can be regarded as a precursor structure for the CT. The EU military Committee monitored the operation, while the Political and Security Committee exercised political control and strategic direction under the responsibility of the Council. Operation Artemis took place during the debate within the Convention, which was overtaken by the events.

Against this background, one might argue that neither the European treaties nor the Constitutional Treaty itself have given much impetus to the development of CSDP, since CSDP has been evolving outside of the constitutional framework.²⁴ Furthermore, the Constitutional Treaty will probably not even structure the political process in the future. This is due to the fact that the Petersberg list is open-ended, since there is no consensus on whether it might include more demanding crisis management cases similar to NATO's military intervention in the Kosovo crisis.

²³ Ulf Brunnbauer, *The Implementation of the Ohrid Agreement: Ethnic Macedonian Resentments*, 1 JOURNAL ON ETHNOPOLITICS AND MINORITY ISSUES IN EUROPE (2002).

²⁴ Udo Diedrichs and Matthias Jopp, *Flexible Modes of Governance: Making CFSP and ESDP Work*, 2 THE INTERNATIONAL SPECTATOR 15 (2003). See Kathrin Blanck, *Flexible Integration in the Common Foreign and Security Policy*, 61 EUROPAINSTITUT WORKING PAPER (2004), WIRTSCHAFTSUNIVERSITÄT WIEN, [HTTP://FGR.WU-WIEN.AC.AU/INSTITUT/EF/WP/WP61.PDF](http://FGR.WU-WIEN.AC.AU/INSTITUT/EF/WP/WP61.PDF).

Moreover, there are other extra-constitutional developments. In order to guarantee autonomous and better coordinated development of military and defense capabilities of the EU, an armament agency is provided for by the Constitutional Treaty (European Defense Agency, Articles I-41(3) and III-311 CT). The agency has the task of identifying military capability objectives and promoting harmonization in procurement policies. This provision was quite consensual, since benefits of the agency to the Member States are obvious, making military expenditure, particularly in times of budget constraints more efficient. Nevertheless, cooperation with regard to the defense industry is nothing revolutionary. There had been relevant developments in this area before the constitution. For example, Britain, France, Germany and Italy had already set up the Organization for Joint Armaments Cooperation (OCCAR) in 1996, which was tasked with controlling, coordinating and implementing armaments programs and received legal status with the OCCAR Convention in 2001.²⁵ In addition, Britain, France, Germany, Italy, Spain and Sweden, countries with the biggest arms industries, signed in 1998 a Letter of Intent that led to the Framework Agreement in 2000. Moreover, the establishment of the European Armament Agency, not to replace OCCAR, has been debated for a longer period. Hence, one can even speak of an extra- constitutional "weapons procurement process." Apart from this development, there has been further extra-constitutional progress towards the establishment of EU military headquarters (HQ) for ESDP. The debate on this issue came to the fore during the deep EU divisions over the Iraq war, when Belgium, France, Germany and Luxembourg held a meeting in April 2003 to discuss several initiatives to further military integration. The main controversy concerned an autonomous HQ to be located in Tervuren near Brussels, separate from NATO HQ in Mons. In the second half of 2003, an agreement was reached with the aid of Britain that lead to a decision to establish an autonomous EU military planning cell (SHAPE) within NATO supreme military headquarters with the responsibility for planning Europe's operations. There was also agreement over the necessity to prepare the rapid deployment of 1500 combat troops able to be deployed within 10 days to a distance of up to 4000 km for a period of 30 to 120 days. This agreement was later integrated into the Protocol on Permanent Structural Cooperation attached to CT.²⁶

²⁵ See Burkhard Schmitt, *The European Union and Armaments: Getting a Bigger Bang for the Euro*, 63 CHAILLOT PAPERS (2003), INSTITUTE FOR SECURITY STUDIES, PARIS, <HTTP://WWW.ISS-EU.ORG/CHAILLOT/CHAI63E.PDF>.

²⁶ See Protocol on Permanent Structured Cooperation Established by Article I-41(6) and Article III-312 of CT.

II. Solidarity Clause

As mentioned above, solidarity mechanisms are relevant features of constitutions of multinational regimes, consociations or hybrid regimes, particularly if the constitution is supposed to be a framework of reference for collective identity. Nonetheless the idea of mutual security guarantees has been quite controversial in the Convention debates (Articles I-42 and III-231 DCT; Articles I-43 and III-329 CT). The clause relates to states that are victims of terrorist attack or natural and man-made disasters. The implication of this provision is uncertain, particularly since Article III-214 of the DCT, concerning closer cooperation on mutual defense and providing for a quite ambitious establishment of a collective defense system within the EU, has been entirely removed from the CT. In addition, Article I-40(7) of the DCT stating, "if one of the Member States ... is the victim of armed aggression on its territory, the other participating States shall give it aid and assistance by all the means in their power" has been deleted from the CT.²⁷ The remaining Articles on the solidarity clause are extremely vague, making uncertain whether these provisions imply a real military defense guarantee or could be fulfilled by a mere condemnation of the aggression or even solely by a symbolic declaration of aid, especially by the non-NATO countries. Since the Article applies to every member of the EU, it posed a dilemma for the neutral Member States, Austria, Finland, Ireland and Sweden, which realized during the IGC summit in December 2003 that a literal application of the solidarity clause would be inconsistent with their security policies. The Article was given a short-lived supplement in December 2003 with another vague statement saying that the solidarity clause "[...] shall not prejudice the specific character of the security and defense policy of certain Member States". However, even this diluted version has been removed from the Constitutional Treaty.²⁸ Moreover, the declaration on Articles I-43 and III-329 of CT states clearly that "[...] none of the provisions of Articles I-43 and III-329 of the Constitution is intended to affect the right of another Member State to choose the most appropriate means to comply with its own solidarity obligation towards that Member State". Hence, an explicit defense clause is not provided by the supplemented Constitutional Treaty, which may lead to the conclusion that a constitutionalization in CSDP has only a limited range due to the lack of an obligation to solidarity.

²⁷ See Article I-41 CT.

²⁸ Addendum to the Presidency Note, Conference of the Representatives of the Governments of the Member States, CIG 60/03 ADD 1, Brussels, 9 December 2003.

II. Challenge of a "Hard Core"

Provisions of enhanced and structured cooperation, which could leave some EU members outside new institutional arrangements, could further burden the solidarity of CSDP.

The European Convention has proposed some changes with regard to the enhanced cooperation already provided for by the Nice Treaty. According to Article 43 of the TEU eight countries are required to initiate enhanced cooperation, with an exception provided for the second pillar, where the veto option was retained. The Draft Constitutional Treaty provided for a revised clause on enhanced cooperation in CSDP, which had previously been excluded. A condition for initiating the procedure is that enhanced cooperation can be undertaken only by at least one third of the Member States (Article I-43(2) of the DCT and Article I-44 of the Constitutional Treaty). It is hoped that enhanced cooperation would allow flexible solutions of cooperation within CSDP.²⁹ Another innovation in CSDP is a provision concerning 'structured cooperation'. It gives opportunity to some Member States to go ahead with integration of their military capabilities, without the participation of all Member States (Articles I-40(6) and III-213 DCT; Articles I-41(6) and III-312 CT). This provision is controversial, since it was envisaged to further an integration-friendly 'hard core,' similar to the Euro-zone, and to give CSDP some autonomy with regard to NATO. Article III-312 of CT implies that the deliberation and the decision-making process take place only within the group exercising 'structured cooperation', also concerning the enlargement of the group. Furthermore, the provision refers to the possession of higher military capabilities with a perspective of more demanding tasks by the states which wish to accept more binding commitments in CSDP. In the DCT, the EU Council may also ask those countries to carry out crisis management tasks (Article III-213(4) of the DCT). This provision, however, does not reappear in the CT. The IGC summit in December 2003 made the concept of the 'structured cooperation' less vague by the provisions in the Protocol on Permanent Structural Cooperation (established by Article I-41(6) and Article III-312 CT). This Protocol states that the willing Member States are to supply by 2007 combat units with transport and logistical elements capable of deployment within five to thirty days as a condition of their participation.

In sum, the Constitutional Treaty establishes new provisions, which include rules for a 'hard core' in the security and defense field (allowing for more flexibility in cooperation and strengthening large Member States). Those measures embrace the new scope of CSDP, the structured cooperation beyond the so-called Petersberg

²⁹ DIEDRICH AND JOPP, *supra* note 24, at 15.

tasks, ad-hoc coalitions of willing Member States as well as an armaments agency to integrate common military resources and capabilities. However, particularly the provisions of enhanced and structured cooperation could lead to a "hard core," which, in absence of the solidarity clause, could detach the more militarily capable countries from the "inefficient" Member States. In other words, new regulations in CSDP could, on the one hand, improve the efficiency of defense policy, but, on the other hand, these might be a further challenge to the solidarity between Member States, thus showing limitations of the constitutionalization of CFSP.

E. Democratic accountability of CFSP?

I. Limitations of Parliamentary Scrutiny of CFSP

The Draft Constitutional Treaty has given limited powers of scrutiny over CFSP to the Member States' parliaments and to the European Parliament (EP). Since CFSP remains mainly an intergovernmental institution, the power of scrutiny lies primarily with the Member States or national parliaments. This does not mean that CFSP is actually controlled by the parliaments. CFSP has evolved based on multilateral agreements, which means that the respective executive branches gain additional executive powers within their governments. The position of national governments, even if agreed with the parliaments before the diplomatic exchange (as it is for example in the case of Denmark), almost always changes due to the nature of the European negotiations that strive for a compromise based on side-payments and package deals.³⁰ Especially with regard to CSDP, there is a high degree of informal and formal, but extra-constitutional, meetings and agreements, frequently not including all EU Member States. Currently, there are limited mechanisms allowing for a synchronization of national parliaments in order to scrutinize CFSP, since the possibilities of influencing the decision-making in CFSP within the national framework are restricted to a given nation-state. Even in this case, many national parliaments are virtually excluded from decision-making in foreign and defense policy. For instance, most of the national parliaments do not vote on military missions in foreign countries, the mandate of those missions and the budget.³¹

³⁰ See DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS (Peter B. Evans et al. eds., 1993).

³¹ See Willem F. van Eekelen, *The Parliamentary Dimension of Defence Procurement*, 5 OCCASIONAL PAPER, (GENEVA CENTRE FOR THE DEMOCRATIC CONTROL OF ARMED FORCES 2005, [HTTP://WWW.DCAF.CH/PUBLICATIONS/PUBLICATIONS%20NEW/OCCASIONAL_PAPERS/5.PDF](http://WWW.DCAF.CH/PUBLICATIONS/PUBLICATIONS%20NEW/OCCASIONAL_PAPERS/5.PDF)).

Neither the European Convention nor the IGC has introduced significant changes with regard to control and scrutiny of the EP. The EP has no rights of policy initiative or significant scrutiny rights in CFSP. The role of the EP confines itself to the right to information, making recommendations and debating general guidelines for CFSP (Article III-205 of the DCT; Article III-304 CT). The EP can question the European President as well as call the FM and special representatives to appear before Parliament's Foreign and Defense Committee in order to receive information. The only area in which the EP possesses substantial rights is in its role in the 'ordinary legislative procedure' (previously known as co-decision procedure). However, this applies to CFSP only with regard to general foreign policy guidelines and with regard to the approval of CFSP expenditure, whenever it is a part of the EU budget.³² But almost the entire CFSP, and in any case CSDP, is financed by the Member States. Nevertheless, there are some changes brought about by the European Convention that slightly increase EP control of CFSP, although the influence of the EP in this field remains marginal. They include the duty of the European President to report to the EP after each of its meetings in order to increase the regularity of information exchange between EP and the Presidency (Article I-22(2d) CT). In addition, special representatives may provide briefings to the EP (Article III-304(1) of the Constitutional Treaty). Furthermore, the Protocol on the Role of National Parliaments in the European Union to CT (Title II, Article 10) establishes that a conference of Parliamentary Committees for Union Affairs (COSAC) may submit any contribution for the attention of the European Parliament and organize interparliamentary conferences on specific topics, in particular to debate matters on CFSP, including CSDP. However, the contributions are not binding on national parliaments.

II. Alternative Democratic Control Mechanisms in CFSP?

According to the Constitutional Treaty, the EP is also given the power to elect the President of the Commission, and the Commission as a body is responsible to the EP (Article I-20(1) and Article I-26(8) CT). Although the Commission President does not hold any voting rights in CFSP, the European Parliament has gained some political leverage with regard to the Foreign Minister. The IGC summit in December 2003 agreed that the FM should be given full voting rights in the Commission, even on decisions outside CFSP. However, in the event of a censure motion from the European Parliament on the Commission, the FM only resigns his role as a commissioner. The request of the Commission President is not sufficient to obtain the resignation of the FM as is the case with other commissioners. Article I-

³² See Daniel Thym, *Parlamentsfreier Raum? Die Rolle des Europäischen Parlaments in der Gemeinsamen Außen- und Sicherheitspolitik*, Humboldt-Universität zu Berlin, www.whi-berlin.de/EPinderGASP.htm.

28 (1) of CT provides a solution, which stipulates that the FM shall resign on the request of the President of the Commission and in agreement with the European Council, which shows limits to the control of the Parliament over the FM.

Despite these limited changes, the European Convention also included provisions for more involvement of the national parliaments in the formulation of EU policy that have some effect on the parliamentary scrutiny of CFSP. Article 2 of the Protocol on the Role of National Parliaments in the European Union calls for the agendas and results of Council meetings to be distributed to the national parliaments at the same time as they are sent to the governments. Article 4 of the same Protocol demands that "a six-week period shall elapse between a draft European legislative act being made available to national Parliaments in the official languages of the Union and the date when it is placed on a provisional agenda for the Council for its adoption or for adoption of a position under a legislative procedure". This could give more time to the national parliaments to react to the proposals and policies within CFSP, debated and decided in the EU.

An additional possibility of an increased democratic control of CFSP, at least hypothetically, includes the EU referendum provided for in Article I-47 of CT. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal. Nevertheless, due to the nature of CFSP as crisis management under time pressure and discreet diplomatic negotiations, the provision for referendum will not have any substantial value for the democratic control of CFSP.

Both the European Convention and the IGC failed to give to the parliaments (national and European) any substantial power of democratic control over CFSP. Slight modifications can undoubtedly not compensate for the accountability gap in CFSP and especially CSDP, which suffer from an informal and executive-dominated character. One possible explanation for the failure to make substantial changes in this area may be found in the inability of the Convention members to deal with the workload as well as their indolence in lobbying for changes with more significant substance. Two working groups (group on external relations and group on defense) responsible within the Convention for CFSP/CSDP have, surprisingly, not proposed any substantial modifications regarding the possible democratic scrutiny of CFSP.³³ A high degree of confusion among the Convention members is pointed to by another study. According to an analysis of the Vienna

³³ KLEGER, *supra* note 12.

Institute of Higher Studies³⁴, the new system of decision-making, introduced by the Convention, considerably shifted the power relations in the EU on the scale between equality and fairness from 40 points (slightly in favor of small countries) to 80 points (massively in favor of large countries). At the same, the members of the Conventions were completely unaware of the effects of the changes to the decision-making system. This could suggest that the Convention might not be the best means to bring about deep and significant reforms in complex political systems such as the EU is.³⁵ If one takes the still limited democratic accountability of CFSP into account, it is difficult to argue that a real constitutionalization of CFSP took place. CFSP was not even subject to controversy between supranational and intergovernmental actors, since the parliamentarians in the Convention did not take any steps to promote democratic scrutiny of foreign and defense policy. Nor were the national governments interested in giving up their executive powers.

F. Conclusions

The constitutionalization of CFSP is at best limited. At worst, there is a pull of intergovernmentalism in CFSP, if one regards the constitutionalization as a matter of relation between different policy areas. In comparison to other policy fields of the EU, CFSP is more intergovernmental, since other policy fields experienced more progress towards supranationalism. Although there are new linkages established between institutions in the field of CFSP, those seem rather to diminish the role of the Commission, which is the primary locus of supranationalism. The Constitutional Treaty states clearly that the Commission ensures the external representation of the EU *with the exception of CFSP* (Article 25.1 of the DCT). In addition, voting by unanimity prevails in CFSP, whereas it has been expanded in many new policy areas. The FM who coordinates CFSP would also withdraw policy areas from the European Commission and integrate them into CFSP probably claiming the staff of the Commission as a part the EEAS. Moreover, the post of the European President implies not only a competition to the post of FM, causing problems of coordination, but it has also been deliberately conceived as an intergovernmental strengthening of the EU and a counterweight to the President of the Commission. Furthermore, the Constitutional Treaty has not given and will probably not give impetus to new developments in this field, since CSDP has

³⁴ Bernhard Felderer et al, *Draft Constitution: The Double Majority Implies a Massive Transfer of Power to the Large Member States – Is this Intended?* INSTITUTE FOR ADVANCED STUDIES (2003), VIENNA, <HTTP://WWW.IHS.AC.AU/PUBLICATIONS/LIB/FORUM1JUNE2003.PDF>.

³⁵ See Ireneusz Paweł Karolewski, *Convention as a New Method of Decision Making in the Enlarged European Union. How Democratic Can it Really Be?* PAPER PRESENTED AT THE SGIR CONFERENCE “CONSTRUCTING WORLD ORDERS”, THE HAGUE, 9-11 SEPTEMBER 2004; Steven Everts and Daniel Keohane, *The European Convention and EU foreign Policy: Learning from Failure*, 45 SURVIVAL 3 (2003).

already been evolving outside the constitutional framework. Additionally, new provisions for enhanced and structured cooperation could prove to be a burden for solidarity between Member States, particularly in the absence of a solidarity clause. Finally, even though there have been slight modifications in favor of democratic control by national parliaments and the European Parliament these have not been dramatic and will not lead to the democratic scrutiny of CFSP.