



Justice, only justice shalt thou pursue...(Deut.XVI:20)

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## THE JEAN MONNET PROGRAM

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### Altneuland: The EU Constitution in a Contextual Perspective

Jean Monnet Working Paper 5/04

Wolfgang Wessels

A 'Saut constitutionnel' out of an intergovernmental trap? The provisions of the  
Constitutional Treaty for the Common Foreign, Security and Defence Policy

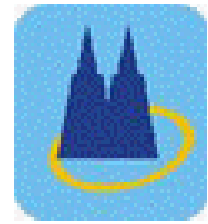
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Wolfgang Wessels, A 'Saut constitutionnel' out of an intergovernmental trap?  
The provisions of the Constitutional Treaty for the Common Foreign, Security and Defence  
Policy, *in* Weiler and Eisgruber, eds., *Altneuland: The EU Constitution in a Contextual  
Perspective*, Jean Monnet Working Paper 5/04,  
[<http://www.jeanmonnetprogram.org/papers/04/040501-17.html>]

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ISSN 1087-2221  
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***A 'Saut constitutionnel' out of an intergovernmental trap?***

***The provisions of the Constitutional Treaty***

***for the Common Foreign, Security and Defence Policy***

Contribution to:

***Altneuland: The Constitution of Europe in an American Perspective***

## **Table of Contents**

Abstract: 11 Theses.....	4
1. The challenge: analysis and assessment of a constitutional cornerstone sui generis	6
2. Expectations and capabilities.....	8
2.1. Ambitious objectives: towards a dual identity.....	8
3.2. Modest allocation of instruments: limited transfers of capabilities.....	10
3.3. Systematic cooperation through self-imposed obligations: more than constitutional prose?.....	11
3. Procedures and Institutions.....	13
3.1. Decision making rules: marginal reformulations.....	13
3.1.1. QMV: The perennial controversy.....	13
3.1.2 Permanent structured cooperation: more opportunities – unclear incentives.....	15
3.2. The institutional architecture: towards personalisation and politicisation ...	17
3.2.1. Familiar Trends.....	17
3.2.2 The Union Minister of Foreign Affairs: high on expectation – low on powers.....	20
3.2.3. The full time President of the European Council: agent or actor?.....	26
4. Conclusions .....	28
4.1. An exit from the intergovernmental trap?.....	28
4.2. Towards a next step in the ratchet fusion?.....	30
<b>List of Graphs</b>	
Graph 1: The Institutional architecture of TCE.....	17
<b>Bibliography.....</b>	<b>32</b>

## Abbreviations

CFSP	-	Common Foreign and Security Policy
Coreper	-	Comité des Représentants Permanents - Committee of Permanent Representatives
CSDP	-	Common Security and Defence Policy
EC	-	European Community
ECB	-	European Central Bank
ECJ	-	European Court of Justice
EDC	-	European Defence Community
EMU	-	Economic and Monetary Union
EP	-	European Parliament
EPC	-	European Political Cooperation
ESDP	-	European Security and Defence Policy
EU	-	European Union
EUMS	-	European Military Staff
IGC	-	Intergovernmental Conference
JCMS	-	Journal of Common Market Studies
OJ	-	Official Journal of the European Union
PPEWU	-	Policy Planning and Early Warning Unit
PSC	-	Political and Security Committee
QMV	-	Qualified Majority Voting
SEA	-	Single European Act
TCE	-	Treaty establishing a Constitution for Europe
TEPSA	-	Trans European Policy Studies Association
TEU	-	Treaty of the European Union
TEU MV	-	Treaty of the European Union (Maastricht Version)
TEU AV	-	Treaty of the European Union (Amsterdam Version)
TEU NV	-	Treaty of the European Union (Nice Version)
UMFA	-	Union Minister for Foreign Affairs
WEU	-	Western European Union
NATO	-	North Atlantic Treaty Organisation
SHAPE	-	Supreme Headquarters Allied Powers Europe

## **Abstract: 10 Theses**

1) Given the "DDS syndrome" the constitutionalisation of foreign, security and defence policy raised and raises specific demands and challenges both for the constitutional architects as for the academic observers.

### **Anatomy and analysis: trends and innovations**

2) Despite extensive reformulation, major provisions document a high degree of continuity:

- a) an unclear and diffuse division of Union and Member State competences: keeping it as a category *sui generis*
- b) in spite of the birth of legal personality: an ongoing life of the former pillar structure in terms of the designed procedures;
- c) limited extension of the Union's resources and instruments: no supranational upgrading
- d) soft obligations for cooperation rules among member states: constitutional prose without sanctions;
- e) a reconfirmation of decision-making rules: "veto rights for ever";
- f) an extension and strengthening of the European Council: constitutionalising the *de facto* role.

3) The text sets ambitious expectations upgrading a mixture of civilian power with (limited) military interventionism towards some kind of state-like qualities of a global actor.

4) The institutional provisions will lead to a high degree of personalisation and politicisation as well as to intensive inter- and intra-institutional power struggles:

- a) The UMFA will improve the external visibility but the role assignments are not matched by respective internal powers.
- b) The ambiguous profile for a full-time European Council Chair will lead to major conflicts with the UMFA and the President of the Commission.

5) The procedural provisions for new forms of flexibility do not offer sufficient incentives for mobilising military resources.

### **Assessment**

6) The provisions reduce some old headaches but create new institutional worries

7) The masters of the constitutional treaty have not achieved a constitutional breakthrough, but moved even more into the intergovernmental trap.

8) The capability/expectation gap has been widened.

### **Next constitutional steps**

9) In cases of high politics, the new provisions will not improve the performance of the EU as a global actor.

**10)** By staying within the intergovernmental trap the provisions have confirmed the in-built need for further reforms.

**11)** After the next crisis, I expect further steps towards a new plateau in a process of ratchet fusion.

## **1. The challenge: analysis and assessment of a constitutional cornerstone sui generis**

Since the early days of the European integration process,<sup>1</sup> it has been one of the fundamental motivations for any construction plan to strengthen the role of Europe as a global actor. All over the Union public opinion has continuously asked for an active role of the EU in the international system<sup>2</sup>.

The constitutional and especially institutional architecture of the “Common Foreign and Security Policy” is thus a cornerstone in the “Treaty establishing a Constitution for Europe” (hereafter TCE or ‘Constitutional Treaty’) which the “Convention for the Future of Europe” presented to the European Council on July 18<sup>th</sup> 2003<sup>3</sup> and which the heads of government have passed, adding partly considerable changes at their summit in Brussels on June 25<sup>th</sup> 2004.<sup>4</sup>

Anatomy, analysis and assessment of the provisions in the CFSP chapter within the “Union’s external Action” (Part III Title V TCE) face, however, considerable challenges, which are related to our understanding of a 'constitution': The core elements constituting texts of such high importance are made up by a transparent allocation of competences, precise rules for taking binding decisions, a sufficient degree of legitimacy based compliance and an adequate control by a third, external institution. Beyond such a formal set of provisions many expect that these 'holy' texts shape some kind of European identity by stimulating "constitutional patriotism"<sup>5</sup> with some kind of vision and mission for a regional and global role of the Union.

In view of such a list we are faced with considerable difficulties both in empirical analysis and in normative argumentation: rules for Foreign, Security and Defence Policy are generally not the optimal subject for such a study as "legalization

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<sup>1</sup> See e.g. Spinelli, *Il manifesto di Ventotene*; Robert Schuman declaration, in: Lipgens 1986: 71, 193-194

<sup>2</sup> See e.g. Eurobarometer 2003; Niedermayer 2003: 52-53

<sup>3</sup> “Draft Treaty establishing a Constitution for Europe”, version handed to the Council Presidency on July 18<sup>th</sup> 2003 (CONV 820/1/03 REV 1, CONV 843/03, CONV 848/03); <http://european-convention.eu.int/docs/Treaty/cv00850.de03.pdf>.

<sup>4</sup> The Treaty articles quoted in this text are based on the ‘Provisional consolidated version of the draft Treaty establishing a Constitution for Europe’ (TCE) agreed on by the Intergovernmental Conference in Brussels from June 25<sup>th</sup> 2004 (CIG 86/04); [ue.eu.int/igcpdf/en/04/cg00/cg00086.en04.pdf](http://ue.eu.int/igcpdf/en/04/cg00/cg00086.en04.pdf).

<sup>5</sup> Habermas 1996



and World Politics”<sup>6</sup> or “Diplomacy by Decrees”<sup>7</sup> raise specific demands due to key features of this policy field. If we assume that actorness in the international system<sup>8</sup> demands *discreet* as well as *discretionary* action and is highly loaded with *sovereignty* symbols (the ‘DDS’ syndrome) our analytical tools lack some conventional properties. For the diplomatic club<sup>9</sup> informality and flexibility behind closed doors are of high value and many activities are short-term concrete actions. Thus the academic ivory tower has more problems to explore, explain and evaluate the workings of this part of the Union’s construction than it has with legislative or budgetary procedures which follow the more transparent and formalized Community method.

The strong link of the CFSP to the notion of national sovereignty makes this policy field a “contested institution”<sup>10</sup>. Thus the constitution has to face a trade-off between shared norms and benefits of common actions compared to costs in terms of losing national sovereignty.

This inbuilt tension is documented by the historical context of the TCE. As well as other "critical junctures"<sup>11</sup> and "milestone decisions"<sup>12</sup> in the history of the EU constitution making process, the work of the Convention and the subsequent IGC were markedly influenced by international events and developments in the time between 9/11 and the Iraq war<sup>13</sup>. The disunity of EU States over their participation in the Iraq War gave rise to fundamental doubts about the existence of a common will to shape the EU into a global actor based on a convergence or even identity of interest.

In view of these challenges and of the self-set goals of both the Convention<sup>14</sup> and the IGC we will have to discuss if and to what extent this text will signal a leap into a

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<sup>6</sup> Goldstein/Kahler/Keohane/Slaughter 2000: 387.

<sup>7</sup> Smith 2001: 104

<sup>8</sup> see Bretherton/Vogler 1999; Ginsberg 2001

<sup>9</sup> see Nuttall 1992, 1997; see also Allen/Wallace 1982

<sup>10</sup> Koenig-Archibugi 2004: 138 -139

<sup>11</sup> see Pierson 1996

<sup>12</sup> see Loth 1996: 98ff.

<sup>13</sup> see e.g. Risse 2003: 564

<sup>14</sup> Giscard d’Estaing/Amato/Dehaene 2003

new constitutional dimension (a 'saut constitutionnel') or if it documents another version of an ever refined intergovernmentalism, which would limit the capability of the EU to play an efficient and effective role in the international system. Have the Masters of the TCE finally agreed to overcome their past and present structural weaknesses or do they again reformulate provisions of soft cooperation without being able to leave the institutional trap they have constructed themselves since the early days of their political cooperation ?

## **2. Expectations and capabilities**

### **2.1. Ambitious objectives: towards a dual identity**

The Convention and the IGC have formulated ambitious goals<sup>15</sup> stressing dimensions of both a "civilian" and a "super power" concept.<sup>16</sup> The text puts forward an almost visionary mission claiming to "advance in the wider world, the principles which have inspired its own creation, development and enlargement" (Art. III-193 (1)) in order to offer "the best chance of pursuing... in awareness of their responsibilities towards future generations and the Earth, the great venture which makes of it a special area of human hope" (Preamble TCE). The formulations of the objectives, as indicators for identity, underline the notion that Member States want and use the EU as an institution setting global norms to promote universal values as a "cosmopolitan community"<sup>17</sup>.

A second notion of the role definition is also prominently formulated. The IGC underlines once more that "the Union's competence...shall cover all areas of foreign policy and all questions relating to the Union's security". (Art. I-15 (1))

With regard to mutual assistance clauses - such as Art. 5 of the NATO-Treaty - the IGC has adopted the present formulations. They foresee a "progressive framing of a common defence policy, which might lead to a common defence" (Art. I-15 (1)); in Art. I-40 (2) this formula seems to increase the political commitment by stating that "this will lead to a common defence". Article I-40 (7) states a principle of mutual "obligation of aid and assistance by all the means in their power" in case of an

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<sup>15</sup> see also Cremona 2003: 1348

<sup>16</sup> Duchêne 1972, Harnisch/Maull 2001, Whitman 1998, Moravcsik 2002

<sup>17</sup> Smith 2003: 197

"armed aggression" on the territory of a member state. A reservation or limitation is added: "This shall not prejudice the specific character of the security and defence policy of certain member states". An additional declaration added to the TCE will further underline the sovereignty to react according to own preferences. The IGC has deleted the Convention's articles on "closer cooperation" (Art. III-214), which had opened unclear procedures towards military assistance for interested Member States. A special solidarity clause (Art. I-42 and Art. III-231) is added for cases of a "terrorist attack" or a "natural or man-made disaster" (Art. I-42 and Art. III-231).

These formulations of the document reflect a broad consensus on a dual identity mixing 'civilian' power concepts with openings towards military interventionism; if we also take other chapters of the TCE – such as the symbols of the Union (Art. I-6a) – the provisions for using military instruments point at an ideational evolution which designs an identity of the EU as an international actor with state-like qualities. Overall the masters of the TCE have set the expectations for the Union's role even higher and more comprehensive than before.

## **2.2. Modest allocation of instruments: limited transfers of capabilities**

In relation to the aspired objectives, the masters of the constitutional treaty have only marginally changed the provisions for the allocation of competences and for legal instruments.

The TCE has created a single “legal personality” (Art. I-6) which raises a set of difficult legal issues about the supremacy of legal orders<sup>18</sup>; as the Court of the European Union shall have no jurisdiction with respect to the articles governing the CFSP (Art. III-282) ambiguities created by this provision cannot be resolved by legal rulings; thus this intended ‘simplification’ of the pre-existing pillar structure will inevitably lead to enduring controversial interpretations.

In the allocation of the “Union’s competence” the CFSP (Art. I-15) was placed between the “Areas of shared competence“ (Art. I-13) and “Areas of supporting, coordinating and complementary action“ (Art. I-16). Such a choice was not inevitable: The IGC might have put the CFSP into the category of shared competence; this arrangement could have been done without pre-empting national sovereignty, as such a type of ‘parallel’ competence is used for development cooperation and humanitarian aid (Art. I-13 (4)); or the text might have allocated the CFSP to the “supporting, coordinating or supplementary action”, as this part of the external action should not harmonize the policy of Member States by “legally binding acts” (Art. I-11). However, the TCE has created – or better – kept the CFSP as a category *sui generis*<sup>19</sup>. This interpretation is reinforced by the provisions earmarking “specific provisions relating to the CFSP” (Art. I-39) and to CSDP (Art. I-40). In contrast to these categories the IGC has allocated the Common Commercial Policy into the “area of exclusive competence” (Art. I-12 (1)) and development policy into the area of “shared competence” (Art. I-13 (3)). Thus behind a unifying façade and some slogans the traditional pillar structure continues to exist both in terms of the legal foundations and the procedures applied.

In view of legal instruments the Constitutional Treaty even reinforces this dividing line; it deliberately excludes the application of European Laws and

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<sup>18</sup> Cremona 2003: 1351

<sup>19</sup> Cremona 2003: 1354

Framework laws (Art. I-39 (7)), which are designed to be legislative acts in other fields. Instead, The Union shall conduct the common foreign and security policy by defining the 'general guidelines', adopting 'European decisions' determining 'actions' and 'positions' to be taken by the Union as well as "strengthening systematic cooperation between Member States in the conduct of policy" (see Art. III-195 (3)). Except for the term 'European decision' the text confirms the now conventional tool box of the CFSP.

For the tasks of the Common Security and Defence policy the Union can resort to "civilian and military means" (Art. III-210 (1)). The instruments for operations remain, however, under national control: "Member States shall make civilian and military capabilities available to the Union" (Art. I-40 (3)). "Expenditure arising from operations having military or defence implications" (Art. III-215 (2)) shall not be charged to the Union budget. What is new, however, is the establishment of "specific procedures for guaranteeing rapid access to appropriations in the Union budget for urgent financing of initiatives in the framework of the common foreign and security policy, and in particular for preparatory activities" for security and defence tasks (Art. III-215 (3)). For preparatory activities which are not financed by the budget, a "start-up fund" shall be established with contributions by Member States decided upon by a qualified majority vote in the Council (Art. III-215 (3)).

Overall, the changes in comparison to the status quo are limited: Provisions for a real transfer of resources to the EU level, if only for a limited scope, as the Monnet-Method proposes, are not intended. The capability side of the EU is extended though not upgraded.

### **2.3. Systematic cooperation through self-imposed obligations: more than constitutional prose?**

In specifying the general obligations of "loyal cooperation" and "mutual respect" between the Union and Member states (Art. I-5 (2)), the text emphasises the obligation of Member States to "actively and unreservedly support the Union's common foreign and security policy in a spirit of loyalty and mutual solidarity" in compliance "with the Unions action ... They shall refrain from action contrary to the

Union's interests or likely to impair its effectiveness" (Art. I-15 (2); see also Art. III-195(2)).

To guarantee the application of these norms for loyal behaviour "the Council of Ministers and the Foreign Minister shall ensure that these principles are complied with" (Art. III-195 (2)). Moreover, "The Union Minister for Foreign Affairs ... shall ensure implementation of the European decisions adopted by the European Council and the Council [of Ministers]" (Art. III-197 (1)). These provisions could be interpreted as a 'watchdog function' for the Foreign Minister<sup>20</sup> as 'guardian' of the rules of the (CFSP) game based on soft cooperation among peers. As opposed to the Commission in other fields of the Union's competence, he/she may, however, not invoke the Court against a Member State. Past diplomatic practice in the 'living constitution' of the present CFSP gives little reason to expect the Union Minister to turn into such a 'moral instance' who would try and succeed to uphold group discipline by 'naming, shaming and blaming' members for non-compliance; neither would different cases of self-coordination among Member States<sup>21</sup> support such a moral persuasion. Thus the new institution is not likely to establish itself as a "third party" which monitors compliance<sup>22</sup>.

The question, thus, remains if and how these principles for appropriate behaviour<sup>23</sup> could turn into guiding norms in real life practice: Will the Member States by (daily) "autonomous voluntary acts" accept "the European constitutional discipline"<sup>24</sup> especially in those areas they perceive to be of vital national interest? Will the legal text lead to a strong peer group pressure to establish a high intra-group discipline?

In case of conflicts, I would expect that the cost/benefit calculation by rational member governments will continue to lead towards non-compliance; they can interpret these formulations differently, and in any case evade those written obligations without sanctions. They are offered 'free rider' opportunities wishing to benefit from the solidarity of others, without having to abide by the common rules;

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<sup>20</sup> see Jopp/Regelsberger 2003: 559; Risse 2003: 570

<sup>21</sup> Meyer 2004; Govecor: [www.govecor.org](http://www.govecor.org)

<sup>22</sup> Goldstein/Kahler/Keohane/Slaughter 2000

<sup>23</sup> see March/Olsen 1989

<sup>24</sup> Weiler 2002: 568

for reasons of short-term self-interest<sup>25</sup> they might alleviate a possible decline of their reputation as “reliable partners”<sup>26</sup> or ‘good Europeans’. It is thus to be expected that the existing and amended provisions will not create a regime sufficiently strong to induce governments and diplomats to translate the constitutional norms into everyday practice. As in the past, the behaviour of Member States will be focused on their perceptions of national interests especially in ‘high-politics’ crises. Thus there is a high risk that these formulations could prove to be no more than constitutional prose, without real relevance for the living constitution.

### **3. Procedures and Institutions**

#### **3.1. Decision making rules: marginal reformulations**

##### **3.1.1. QMV: The perennial controversy**

Despite of intensive controversy in and around the Convention and to a lesser degree in the IGC, the TCE has only marginally amended the rules for decision making (Art. III-201) and has thus failed to achieve a major breakthrough to increase internal efficiency. A Franco-German project had proposed to “make decisions in the field of CFSP generally by qualified majority”<sup>27</sup>. However, this initiative to water down the principle of unanimity met with resistance by a number of representatives especially from governments, above all from the United Kingdom, behind which others did not need to voice their opposition<sup>28</sup>. The deep rift over the participation in the Iraq war generally reduced the propensity to accept majority voting. In view of unclear majorities more and more governments became risk averse; the worry of being outvoted due to low “policy conformity”<sup>29</sup> spread in many capitals. Consequently, the text continues to state that “European decisions ... shall be adopted by the Council of Ministers acting unanimously”(Art. III-201 (1)).

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<sup>25</sup> Hasenclever/Mayer/Rittberger 1997; Keohane 1984; Krasner 1983: 2; Wessels 2000: 72-74

<sup>26</sup> Keohane 1984: 244

<sup>27</sup> Contribution by Joschka Fischer and Dominique de Villepin to the Convention, [own translation] CONV 489/03, <http://register.consilium.eu.int/pdf/de/03/cv00/cv00489de03.pdf>; (German version) or CONV422/02, <http://register.consilium.eu.int/pdf/fr/02/cv00/00422f2.pdf> (French version)

<sup>28</sup> see e.g. Jopp/Regelsberger 2003: 556; Thym 2004: 11

<sup>29</sup> see for the term Koenig–Archibugi 2004: 143

In addition to a small number of complex existing derogations (see Art. III-201 (1) and (2)) the new UMFA is offered a complicated opportunity to put forward a proposal for voting by qualified majority but only on a "specific request" from the European Council (Art. III-201 (2b)).

Also with these limited openings the hurdle is kept high: even after an unanimous decision by the European Council, every Member State can reject a majority vote "for vital and stated reasons of national policy" (Art. III-201 (2)).

In order to support the fundamental concern of nation states, the document reiterates that even these limited possibilities do not apply to "decisions having military or defence implications" (Art. III-201 (4)).

The Convention's proposal for these decision making rules document the victory of diplomats in general and of intergovernmentalist views more specifically: not only have former intergovernmental conferences missed the opportunity for increasing the efficiency of procedures, but so has already the Convention, even in a different composition from that of diplomatic conferences. In case of diverging opinions over external actions of limited scope and minor impact, the Constitutional Treaty might have provided a constitutional option to overrule minority positions of Member State governments.

To a certain extent, the document takes note of such suggestions: through an empowering clause, the European Council "may unanimously adopt a European decision stipulating that the Council of Ministers shall act by a qualified majority" (Art. III-201 (3)) provided though that not a single national parliament does make its opposition known (Art. IV- 7a); generally excluded are again "decisions having military or defence implications" (Art. III-201 (4)). Through such a 'passerelle' the heads of government would circumvent the need to have these revisions formally ratified in each Member State.

In contrast to the basic red line, voting with qualified majorities was extended to the nomination procedures for the fulltime President of the European Council and of the Foreign Minister, which might help to achieve a faster consensus.



### **3.1.2 Permanent structured cooperation: more opportunities – unclear incentives**

With the accession of ten new Member States and the continued use of the unanimity rule, there is – and has been throughout the history of integration – a recurrent debate going on over the possibility for a group of Member States to go ahead inside or outside the EU framework. Catchwords such as “Core Europe”<sup>30</sup>, “Avant-garde”<sup>31</sup> or “centre of gravity”<sup>32</sup> document such reflections on more flexible strategies. On a Franco-German initiative the Amsterdam summit implanted rules of “enhanced cooperation” into the Treaties, and the Nice Treaty extended them to the CFSP pillar. However, these articles have never been used in the living constitution up to 2004. The TCE proposes to reconfirm “enhanced cooperation” (Art. I-43, Art. III-325 (2), Art. III-326 (2)), extending these rules also to CSDP provisions.<sup>33</sup>

However, the text introduces a new variation of flexibility under the label of “permanent structured cooperation” (Art. I-40 (6); Art. III-213) In comparison to the Convention's draft the IGC has markedly reformulated these procedures following a proposal by France, the UK and Germany; it also deleted the procedures of what the Convention had called “closer cooperation” (Art. I-40 (7); Art. III-214 of the Convention's draft)<sup>34</sup>.

Able and willing members can use the procedure of “permanent structured cooperation” (Art. I-40 (6), Art. III-213). As a ‘military Euro-zone’, the offer applies to a list of Member States “whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions” (Art. I-40 (6)). The Council can then entrust this “group of Member States which are willing”<sup>35</sup> with the implementation of a “task” or mission (Art. III-211 (1)).

In contrast to the original text of the Convention the subsequent procedures are more open and transparent also to the non participating members of the EU.

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<sup>30</sup> Schäuble/Lamers 1994

<sup>31</sup> Chirac 2001

<sup>32</sup> Fischer 2001

<sup>33</sup> See Diedrichs/Jopp 2003: 23; Jopp/Regelsberger 2003: 553

<sup>34</sup> Diedrichs/Jopp 2004: 4-5; Jopp/Regelsberger 2003: 552 -556

<sup>35</sup> Jopp/Regelsberger 2003: 552

The TCE thus offers a certain possibility to more engaged members to lock their actions into the EU framework. With these formulas similar to those of the enhanced cooperation, the creation of a special Council with closed doors reserved for just a small circle of a "directoire" of the big three<sup>36</sup> was avoided. However these Treaty provisions do not offer any additional incentives for common actions of willing and able Member States – especially when compared to other possible forms of cooperation outside the TCE; a major issue of debate is, therefore, if the big three will use this new opportunity structure in the future, or if they prefer to coordinate their action outside the EU and without the new UMFA. One useful offer would be the rapid access to appropriations in the EU budget for “urgent financing of initiatives” in the CSDP or the “start-up fund” (Art. III-215 (3)) which has yet to be founded.

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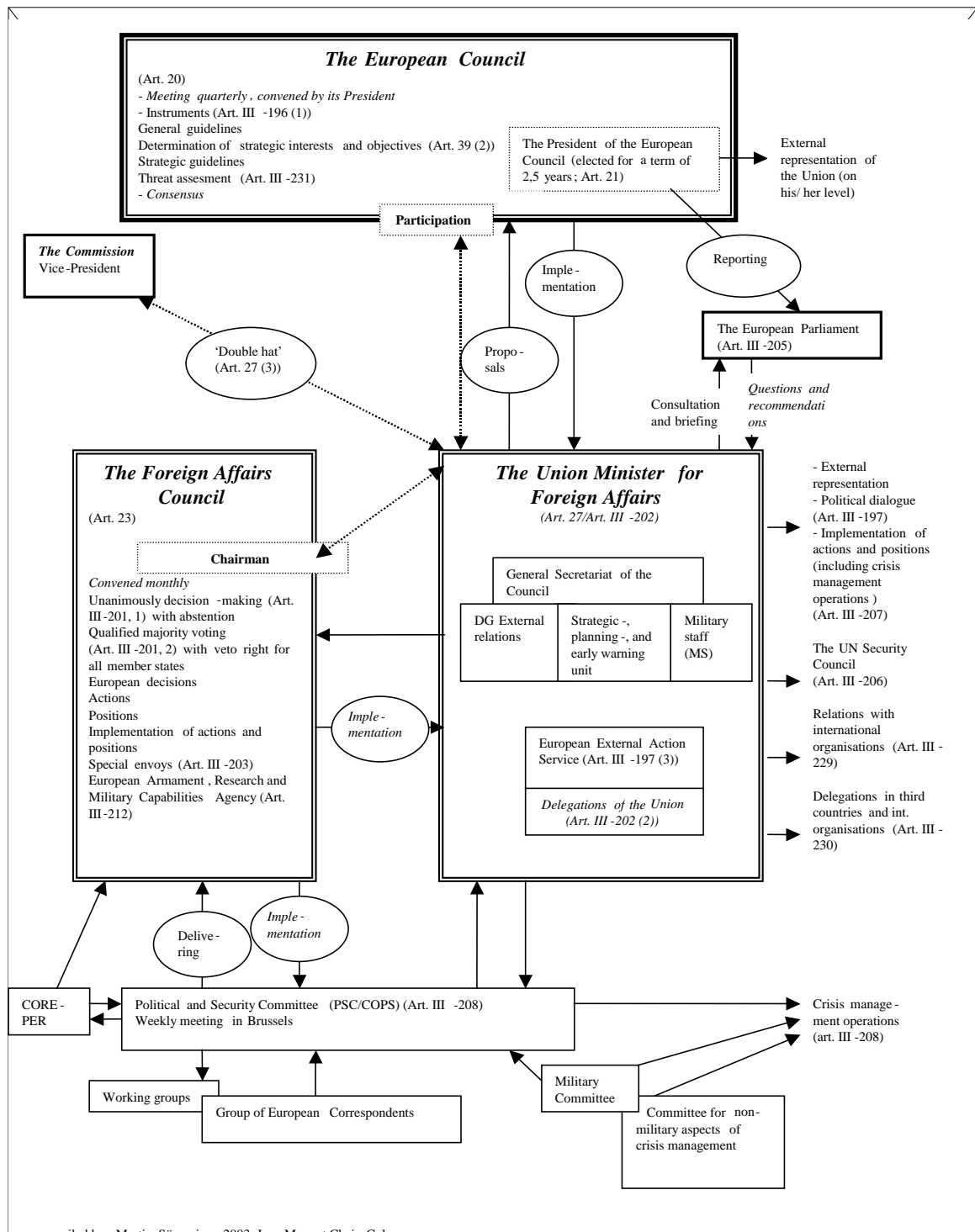
<sup>36</sup> see Winn 2003

### 3.2. The institutional architecture: towards personalisation and politicisation

#### 3.2.1 Familiar trends

The Convention had considerably redesigned the institutional architecture of the CFSP (see graph 1); in major features this work has been reconfirmed by the IGC.

Graph 1: The institutional architecture of the TCE



Overall, the Masters of the Constitutional Treaty have continued some familiar trends, but also introduced major innovations. By tackling old headaches new are created. A 'simplification' of the institutional architecture is difficult to discern.

The TCE reinforces the pivotal role of the European Council for the EU in general (Art. I 20 (1)), for the External Action (Art. III-194(1)) and for the CFSP (Art. III-196 (1)): Thus the European Council is put at the top of the institutional hierarchy for all areas of relevance for the EU's global role. "The European Council shall identify the strategic interests and objectives of the Union" which "shall relate to the [CFSP] and to other areas of the external action of the Union" (Art. III-194 (1)). Based on such a European decision of the European Council "the Council [of Ministers] shall act by qualified majority" (Art. III-201 (2)). This kind of empowerment is not possible if the European Council just defines "general guidelines" for the CFSP (Art. III-196 (1)).

In light of the living practice of the last decades the heads of governments will certainly not restrict themselves to a general role of setting guidelines but they will actively react to external challenges and crises. This kind of behavioural pattern is also supported by its responsibility to "regularly assess the threats facing the Union in order to enable the Union and its Member States to take effective action" (Art. III-231 (3): implementation of the solidarity clause). Its role as the 'highest and final instance' is again documented by being the final arbitrator in cases of a veto in the Council where voting by qualified majority is possible (Art. III- 201 (2))

As to the Council, the TCE envisages the creation of a separate independent Foreign Affairs Council not dealing with "General Affairs" any more. With the UMFA as permanent chairperson, this formation will have a presidency different from the other Council formations (Art. I-23 (6)). A further issue of importance for the Council work is the selection of chairpersons below the Council: will the PSC and the 30 or so working groups in the CFSP area also be chaired by civil servants of the UMFA or by some kind of rotating presidency?<sup>37</sup> The present considerations would give this task to civil servants from the Union Minister.

The Commission as a collegiate body has been removed from the institutional architecture of CFSP. The relevant articles only mention the Foreign Minister, who,

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<sup>37</sup> Jopp/Regelsberger 2003: 560

as Vice President of the Commission, is responsible for respective links. A potential pattern for a division of labour is indicated in the provisions dealing with the general right of initiative for external actions: The documents envisages “joint proposals” by the Foreign Minister and the Commission; the Minister “for the field of common foreign and security policy” and the Commission “for other fields of external action” (Art. III-194 (2)). In assisting “the Council and the Commission [to] ensure consistency” “between the different areas of its external actions and between these and its other policies” (Art. 193 (3)) the UMFA might pursue a ‘catch-all’ strategy (see below); in such a constellation he/she will rule deeply into major areas of the Commission’s external dossiers – including trade and development aid, but also in the external dimension of internal issue-such as environmental affairs.

In terms of administering the EU as global actor, the Commission will lose importance: The “European External Action Service”, which “shall comprise officials from relevant departments of the General Secretariat of the Council of Ministers and of the Commission as well as staff seconded from national diplomatic services”, shall assist the UFMA (Art. III-197 (3) ). The autonomy of the Commission in handling its external relations will be reduced considerably.

For the Commission and its President the ‘double hat’ of the UMFA might imply serious organisational rivalry, which has already been documented by the behind-the-scene struggle over the one or two substitute(s) and potential replacements in case of the Foreign Minister’s absence<sup>38</sup>.

The EP has been kept sidelined. The text has not increased the participatory powers of the EP in the field of CFSP. In replacing the rotating Presidency and the Commission, the Foreign Minister will become the contact person for the EP. Another dialogue partner will be the permanent chair of the European Council, who will present a report to the EP after each session, which is most likely to include CFSP matters (Art. I-21 (2)).

The powers for ratifying international Treaties have also been kept nil: the EP is not even consulted before the adoption of international agreements which “relate exclusively to the common foreign and security policy” (Art. III-227 (6)), whereas

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<sup>38</sup> Jopp/Regelsberger 2003: 560

those consultative powers have been extended to the EP on issues of Common Commercial Policy (Art. III-227 (6b)).

A further, if very limited, offer for some kind of dialogue is put down in the “Protocol on the role of national parliaments in the European Union”, which envisages that “The Conference of European Affairs Committees may ... organise inter-parliamentary conferences on ... matters of common foreign and security policy, including common security and defence policy.” (Title II, Art. 10 of the Protocol). Members of the EP participate in that body. So far COSAC has been a body of marginal importance<sup>39</sup>.

The limits set for the EP as a public forum of secondary importance can be explained by two lines of arguments. The marginal rights of the EP might be taken as an indicator for the singularity of this policy field, which usually demands fast, discrete and discretionary decision-making (the DDS Syndrome). Perhaps more important is a second reason: the Constitutional Treaty does apparently not view the EP as a legitimating factor for this central area of the Union. National Governments and diplomats are perceived to be the only legitimated actors, as they derive their general mandate from domestic sources.

As previously, CFSP matters are excluded from the jurisdiction of the Court of Justice (Art. III-282); again the Convention and the IGC remained in the intergovernmental mood of the previous IGCs: the text might have extended the jurisdiction of the Court to procedural issues – not at least to protect smaller Member States from attempts of the ‘big three’ to establish some kind of *directoire*<sup>40</sup>.

### **3.2.2. The Union Minister of Foreign Affairs: high on expectation – low on powers**

The creation of a ‘Union Minister for Foreign Affairs’ (UMFA) (Art. I-27) stands out as the most central innovation of the proposed institutional architecture. Generally, this ‘double hatted’ figure is assessed as a “major achievement”<sup>41</sup>.

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<sup>39</sup> Maurer/Wessels 2001

<sup>40</sup> Thym 2004: 16

<sup>41</sup> European Commission 2003: 11.

After establishing a small secretariat in the middle of the eighties and creating the function of a “High representative” in the Amsterdam treaty the masters of the constitutional treaty have taken a further step towards founding some kind of strong executive agency. The new feature is that the person is endowed with a ‘double hat’<sup>42</sup> or even with three major functions for the CFSP which are now pursued by three different persons.

The double embedment is clearly apparent in the respective procedures for the election as well as for the removal from office: “The European Council, acting by qualified majority, with the agreement of the President of the Commission, shall appoint the Union Minister for Foreign Affairs.” (Art. I-27 (1)) The same procedure applies for the termination of his mandate. In view of the proposed requirements for a qualified majority vote in the Council (Art. I-24 (1)) the Ministers, after the nomination, will have to secure the support of larger Member states, of which three and another fourth state would possess a blocking minority (Art. I 24 (1)) – if the Federal Republic of Germany were included. But also the pre-elected President of the Commission will be a key player in this process. The provisions for electing the Commission are equally relevant for assessing the accountability of this person. The President, as well as the College including “the Union Minister for Foreign Affairs [...] shall be subject as a body to a vote of approval by the European Parliament.” (Art. I-26 (2)) The Union Minister thus also needs to get backing from the European Parliament. If the two relatively largest groups continue to form some kind of 'grand coalition' within the EP both will try to distribute the posts of the President and this vice president of the Commission among themselves along party lines. This role of the EP extends also to a motion of censure, after which "the members of the Commission shall resign as a body and the Union Minister for Foreign affairs shall resign from the Commission"(Art. III 243)

The UMFA also needs to be aware of the newly extended rights of the Commission President: “A Member of the Commission shall resign if the President

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<sup>42</sup> For the term „double hat“ see the contributions by the delegate of the German government to the Convention, Hans-Peter Glotz (quoted in: Mauer, A.: Jour Fixe Verfassungskonvent, <http://www.swp-berlin.org/produkte/brennpunkte/jour-eu-konvent3druck.htm>, 1. October 2002 and Caspar Einem for the Convention for the future of Europe, CONV 202/02, 1-3, here 1 and the final report of the Convention Working group WG VII – “external action” – (WD 21) and Comments, WD 22-54 of 5. November 2002.

so requests” (Art. I-26 (3)), though the resignation of the UMFA takes place “in accordance with the procedure set out in Art. 27 (1)”, which means that the President of the Commission would need to get support from the European Council. The text does not explain the details of this procedure. Overall, the Foreign Minister is accountable to two bodies for his election and during the execution of his office. Via its powers of control and dismissal vis-à-vis the Commission the EP can also extend its power towards the Union Minister.

The tasks of the Foreign Minister constitute a considerable workload and a broad responsibility. Several functions can be identified: the Union Minister should serve as the external representative of the Union, as initiator and executor of European decisions, as chair of the Council of Foreign Affairs and as ‘guardian’ of the regime of self-coordination (see above) as well as Vice President of the Commission (see for details graph 1).

Also in matters of the CSDP, the Foreign Minister, “acting under the authority of the Council and in close and constant contact with the Political and Security Committee(PSC), shall ensure coordination of the civilian and military aspects of such tasks.” (Art. III-210 (2)) The PSC retains, however, “under the responsibility of the Council and of the Union Minister for Foreign Affairs”, the main tasks of “political control and strategic direction of crisis management operations”. The Committee can also be authorised by the Council of Ministers “to take the relevant measures” (Art. III-208 (2)). Finally, the Foreign Minister is involved in the decision making procedures for the “permanent structured cooperation” (Art. III-213 (2) and (3)).

In addition to this profile as ‘enhanced successor’ to the present ‘High Representative’ (Art. 26 TEU), the draft Constitution gives the Foreign Minister an extended role within the Commission: “The Union Minister for Foreign Affairs shall be one of the Vice-Presidents of the Commission. He or she shall ensure the consistency of the Union's external action” and “he or she shall be responsible within the Commission for responsibilities falling to it in external relations and for coordinating other aspects of the Union's external action”. (Art. I-27 (4))

These formulations of the legal constitution leave a rather large grey area regarding the living constitution of the future: will the UMFA in line with the



overarching guidelines of the European Council and in view of his/her role for implementing a “European Security Strategy” (European Council 2003) ask for a dominating single purpose role within the Commission, i.e. pursue a ‘catch-all’ strategy, or will this person stay within a broader, more differentiated and thus less consistent approach of the Commission as a collegiate body? In one variation of the future division of labour, the Commission (including its President) would be just responsible for ‘internal affairs’, whereas the UMFA (perhaps together with the Chair of the European Council) would take up all functions for ‘external action’. Such a pattern might resemble the political system of France.

It is quite often neglected that his/her job description includes a third major role: the UMFA will be Chair of the Foreign Affairs Council (Art. I -23 (6); Art. I-27 (3)); this office has so far been run by a national foreign minister during its rotating presidency.

A first assessment of the new institution stresses different aspects of a cost-benefit analysis. In relation to the job profile and associated expectations, the actual procedural means and policy instruments at the UMFA’s disposal are limited.

One plus is that the tasks assigned to this position give reason to expect a higher degree of efficiency and effectiveness of the external action of the Union. Compared to the practice of biannual rotation, the continuity of the Union’s external representation will be improved significantly and facilitate the building of relationships of trust with partners in the international system. For the Union’s role in the international system the upgraded ‘face’ and ‘voice’ will be a major asset. To reinforce the ‘hand’ of the EU the UMFA “shall be assisted by a European External Action service”(Art. I 197 (3)), which will comprise officials from the Council’s secretariat, the Commission and from national diplomatic services.

More open to debate is the internal weight of this person. Some masters of the TCE have invested high hopes in this office<sup>43</sup> and anticipate that the UMFA will advance the objectives of the Union through far reaching proposals and activities; however, as President of the Foreign Affairs Council, the main objective of the Union Minister will remain – not least because of the dominant use of unanimity – the forging of consensus among the Member States. In fulfilling these duties, the Foreign

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<sup>43</sup> See among others European Convention 2002; Fischer/de Villepin 2003; Italian IGC Presidency 2003.

Minister will have to reconcile different political interests not only of Member States, but also of Commission departments and relevant interest networks. Also for creating procedural dynamics his/her right to propose a QMV is very indirect: The Council of Ministers decides with a qualified majority, “on proposal which the Minister has put to it following a specific request to him or her from the European Council made on its own initiative or that of the Minister” (Art. III-201 (2b)). With this complicated formula, the Foreign Minister again remains dependent on a preceding unanimous agreement in the European Council. Thus, the Foreign Minister does not receive any special prerogatives as the Commission possesses in other parts of the present TEU and of the future Constitutional Treaty; the Convention and the IGC have thereby denied him an important and powerful instrument, i.e. to exert pressure on colleagues in the Council. The Italian presidency in the IGC had proposed to change this formulation to strengthen the UMFA<sup>44</sup>, but others did not follow.

In both 'home' institutions, the UMFA will have to resort to his/her powers of persuasion. Quite probably, ministerial colleagues will, however, grant only limited national contributions to the strengthening of the EU as a global actor. A significant share of operative resources for external action will still fall under the Commission's competences – such as financial assistance and matters of market access – thus the Foreign Minister will be induced to use this derived potential weight also during his work in the Council.

In sum, the formulations for the 'double hat' create a grey area of vague political responsibility, in which the UMFA might suffer from suspicions by both Council and Commission that this person is a 'Trojan Horse' of the rival institution<sup>45</sup>; this office, however, could also profit from these ambiguities, if the Foreign Minister is able to combine different roles: The UMFA has the opportunity to link multi-layered functions and tasks so as to use a comparative advantage of information and influence from one area to advance positions more easily in another. This influence, however, remains dependent on the goodwill of other players, who could rather easily damage the profile and reputation of this person. In the experimental phase of

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<sup>44</sup> Italian IGC Presidency 2003

<sup>45</sup> Thym 2004: 21

the living constitution, each co-player will 'test', if and how the UMFA will yield to their respective own interests and rights.

Thus the TCE has placed the Foreign Minister in a position of strong inter- and intra-institutional role conflicts. This person has to do justice to a number of demands between differently regulated areas with their associated diverging interests. In the living constitution, the Foreign Minister will be closely controlled by governments in the Council and diplomats in the PSC as well as by the President and the colleagues in the Commission. Moreover, the President of the European Council could interpret his/her own functions in the sense of controlling intensively the European foreign policy as executed by the UMFA (see Art. I-21 (2) and Art. III-197 (1)) (see below).

In order to establish a wide acceptance and forge consensus under these institutional and procedural pressures, the Union Minister will almost certainly have to pursue a cautious 'low-profile' policy. Such an attitude is particularly required in situations of crisis, where national governments might pursue different sets of diverging preferences and interests. The perennial risk when sitting between two or even three institutional chairs, or to bridge two co-existing pillars, is to fall right through them. Based on this set of expectations, the Foreign Minister will only be of limited service to enhance the internal efficiency and external effectiveness of the EU especially in moments of 'high politics', such as the Iraq war.

Of course, we need to discuss if and to what extent this office is more likely to reinforce the intergovernmental or – perhaps by the backdoor – supranational features. The hope of some defenders of this concept was that the new office will render this conventional distinction irrelevant as the 'double hat' might overcome what they perceive as an old and distorting dichotomy.

Most commentators, however, stress the intergovernmental character<sup>46</sup> of the new office. This interpretation of the provisions would see the Foreign Minister strictly as "an agent" of the Member States as "principals"<sup>47</sup>; in turn, however, this office is controlled by several layers of national control to prevent too large an autonomy of the new person in the Common Foreign Security and Defence Policy:

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<sup>46</sup> Dehaene 2002

<sup>47</sup> see for this term e.g. Moravcsik 1993

these fences around his office include the permanent President of the European Council, who “shall ensure its (the European Council’s) proper preparation and continuity” (Art. I-21 (2)), the Foreign Ministers themselves in the Council as well as the PSC and respective working groups of diplomats in Brussels. To understand this multiple construction of institutionalized national ‘voice’ and ‘veto’ as a “credible commitment<sup>48</sup>” from the member states does not seem very plausible.

Other comments – though less prominent at first sight – might view the UMFA as the “agent” of the Commission and indirectly of the EP. From this perspective, the office holder might be forced or induced to use and extend Community instruments as the powers vis-à-vis national counterparts are too limited; thus the UMFA could become an actor or agent of a “cultivated spill over”<sup>49</sup> towards an integrated foreign policy with strong supranational features.

The ambiguous position of this office can thus be characterized as institutional ‘schizophrenia’ or as a valid indicator for a “fusion process”<sup>50</sup>, as this institution will merge pillars with a pooled accountability.

### **3.2.3 The full-time President of the European Council: agent or actor?**

The list of innovations for the institutional architecture has also to include the now full-time Chair of the European Council. In response to the persistent advocacy by its President<sup>51</sup>, however not only according to his concept<sup>52</sup>, the Convention and then the IGC has complemented the existing institutional framework with the office of “the European Council President” (Art. I-21) to be elected for a period of two-and-a-half years by a qualified majority of the European Council. The Constitutional Treaty envisages for “the President of the European Council ... [to] chair it and drive forward its work, ensure its proper preparation ... [and] endeavour to facilitate

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<sup>48</sup> See Moravscik 1993: 512

<sup>49</sup> Tranholm-Mikkelsen 1991

<sup>50</sup> Wessels 2003

<sup>51</sup> Giscard d’Estaing 2003 et al; Preface to the Draft Treaty establishing a Constitution for Europe

<sup>52</sup> for a proposal by Jacques Chirac made in Strasbourg on 6<sup>th</sup> March 2002, see:

[http://europa.eu.int/futurum/documents/speech/sp060302\\_en.pdf](http://europa.eu.int/futurum/documents/speech/sp060302_en.pdf); for a joint statement by Blair and Aznar made in Madrid on 27<sup>th</sup> February 2003, see:

[http://media.ukinspain.com/documents/pdfs/ukspain\\_summit/institutions.pdf](http://media.ukinspain.com/documents/pdfs/ukspain_summit/institutions.pdf); [20<sup>th</sup> April 2004]

cohesion and consensus within the European Council”. Of specific importance for the CFSP is an additional function: “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 powers of the Union Minister for Foreign Affairs.” (Art. I-21 (2)). This formulation clearly sketches out future conflicts between these two offices: the choice of the words “without prejudice to” should immediately invite further reflection, since the acknowledged functional overlaps are not resolved within the Treaty text, but shifted to the realm of every-day practice in the future living constitution.

In light of the importance which the heads of government give to consultations and declarations about foreign and security policy in the daily practice and considering the central role which the TCE again attributes to the European Council in CFSP matters, the President will spend considerable time on the “proper preparation and continuity” of the European Council, also and not least in the area of Foreign and Security policy. If the officeholder links these tasks effectively to the “external representation at his/her level” – i.e. such as in dialogues with the Presidents and heads of governments of third states – the Chair might turn into an actor on its own for CFSP and not just a spokesperson and an agent of the European Council.

As the constitution-led catalogue of written functions is rather unspecified in comparison to that of the Foreign Minister different relational patterns between these offices might be established. In one variation of a future division of labour the President of the European Council would take the responsibility for the ‘higher end’ of “high politics<sup>53</sup>” i.e. that the Chair of the European Council will ‘dine’ with Presidents and heads of government, whereas the UMFA would have to deal with the ‘lower’ end of high politics i.e. this person would have to get ‘hands dirty in tents’ in crisis areas such as on the Balkans and elsewhere.

The repeatedly mentioned possibility of a ‘big’ double hat further adds to the scope of interpreting this new office: According this reading of Article I-21 (3), the President of the European Commission could be elected into that position. Such a fusion of both positions could significantly shift the newly designed institutional

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<sup>53</sup> see for this term the seminal article by Hoffmann 1966

balance – without further Treaty amendments. It remains a matter of speculation which mode of construction – supranational or intergovernmental – such a ‘double hat’ of the top of the institutional architecture would favour.

Overall, given the institutional innovations of the European Council President and the UMFA, but also the strengthening of President of the Commission (see Art. I-26), we would expect that the living constitution will be characterised by an – as yet unknown – personalisation and politicisation, which will – at least in an experimental early phase – lead to a considerable power struggle. The text thus does not necessarily improve the structure and enhance the role of the Union’s institutions. Some old headaches of the CFSP – like e.g. a better external visibility – will have been taken care of, however the therapy used will lead to the creation of new institutional worries.

#### **4. Conclusions: a mixed assessment**

##### **4.1. An exit from the intergovernmental trap ?**

The reading of the legal text points at considerable changes in the wording but will that lead to a better performance in the living constitution after ratification?

A 'saut constitutionnel' is difficult to discern. The provisions for the CFSP do not match the self-praise of the Convention which claims that “it proposes measures to increase the democracy, transparency and efficiency of the European Union”<sup>54</sup>. The ideational cosmos about the EU's role has been incrementally extended, the written constitution has, however, neither provided for the legal instruments, nor the material resources nor for the institutional architecture and procedural dynamics to meet the ambitious self set objectives.

Again, the provisions merely refine the intergovernmental procedures, taking some limited steps towards pooling and merging national and supranational resources; the ongoing tensions and conflicts are clearly documented in the new

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<sup>54</sup> Convention 2003

office of the UMFA; this creation is an ideal type representation of an institutional “fusion”<sup>55</sup> which hides the schizophrenia between two pillars.

Thus based on past experiences we would claim that the CFSP will work more efficiently in the day to day diplomatic business; it will reduce some weaknesses like external visibility, but might create new problems of internal rivalry. The fundamental test however will be the reaction to international crises in conflict constellations of high politics. From the new provisions with their limited impact on national sovereignty we cannot expect that they will make a major difference for the making of a global actor. The title of a ‘Foreign Minister’ will not be sufficient to overcome deep cleavages among Member States. In these cases past experiences induce us to argue that national interest formulations and the internal logics of domestic policy will dominate the soft norms of group discipline as formulated again in the relevant articles of the Constitutional Treaty. Even a strong “identification with Europe in general”<sup>101</sup> will not be sufficient to support a common or even supranational strategy.

All in all, the gap between ambitious goals and allocated capabilities remains wide. Following this reading this analysis expects an output failure already in an early experimental phase of applying the constitutional text, because the soft disciplinary instruments of a weak group pressure will not work against non-compliance: In such a scenario the Constitution would not create, over time, its own “loyalties”<sup>56</sup>, but damage the constitutional authority of the EU – not only with regards to the CFSP. On the other hand, it will also impact on the Union's credibility to “build a common future” (Art.I-1 (1)). Obvious failures in Foreign and Security policy will affect the value of the constitutional text as a common mobilising force. Thus if we assume that the efficiency and effectiveness of the CFSP will only be improved within day-to-day diplomacy, but not in crises of high politics, then the future output legitimacy of the CFSP and thus of the EU in general will not be upgraded either. Under these conditions, the failures of the CFSP chapters might

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<sup>55</sup> Wessels 2004

<sup>101</sup> Koenig–Archibugi 2004: 147

<sup>56</sup> Weiler 2002: 596

have a negative spill-back effect on other parts of the Constitution. The very term of 'constitution' would be damaged, and thus the constitutional 'myth' might be put at risk in a fundamental sense.

To reverse the argument: The successful use of these provisions will be a core factor for creating or reinforcing a 'constitutional moment'<sup>57</sup> leading towards a "constitutional patriotism"<sup>58</sup>. Thus the constitutionalisation process in this policy field has not come to an end – even if the Constitutional Treaty and the revisions of the IGC will have been ratified.

**4.2. Towards a next step in the ratchet fusion?** In view of this analysis and assessment, we expect that the living constitution of the Constitutional Treaty will clearly manifest an 'in-built' need for further reforms. The Constitutional Treaty would then document another step in a ratchet fusion process<sup>59</sup>. The provisions of the TCE would then not design the ultimate plateau; they are part of an evolution along "punctuated equilibria"<sup>60</sup>. This chain of arguments would put the TCE Chapters in a historical and theoretical context: In each IGC the 'Masters of the Treaty' have regularly revised the legal constitution upwards on a ladder with ever refined modes of intergovernmental governance from soft to harder variations; compared to other policy fields like EMU and policies in the field of Justice and Home Affairs Treaty changes (including the Constitutional Treaty) have not yet moved this policy field onto the supranational level. Visions and concepts have evolved though not towards a federal finalité. Member States keep a considerable domain reservée for their foreign and especially defence thinking. National actors are apparently not willing and/or able to follow the Monnet method of transferring *real* sovereignty, even if it is of a *limited* nature. This school of thought expects a recurrent pattern also for the future: a stable set of cooperation on a plateau proves suboptimal in a crisis of high politics; faced with a clear output failure the EU states and especially the heads of government try to remedy this structural weakness by upgrading the provisions for the rules of their regime, which are used more intensively on a higher plateau – but would fail again in the next external shock; none of this upgrading however

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<sup>57</sup> Ackerman 1998: 409.

<sup>58</sup> Habermas 1996

<sup>59</sup> Wessels 2001a

<sup>60</sup> Hay 2002: 161ff.



transgress a crucial threshold: the defence of national sovereignty prevents a bold constitutional leap towards a more effective and efficient Union . In spite of many efforts Member states do not have enough energy to leave the intergovernmental trap. Imperfect as it is, CFSP and its younger relative, the CSDP, will thus remain of high relevance for both the political world as for academic research. Even more than 30 years after its inception as EPC this set up has not reached its final stage, neither as a legal nor as a living constitution. Thus, both constitutional architects, as well as observers from the ivory tower will face considerable tasks which are still ahead, especially in the future.

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