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**The Convention, the draft
Constitution and External Relations:
Effects and Implications for the EU
and its international role**

by

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This article reviews the likely effects and implications of the draft EU Constitution on external relations. One of the most potentially significant reforms is the suggested adoption by the EU of legal personality. This may well open up the possibility of developing an EU wide diplomatic service, beyond that of the current External Service, to assist the EU Foreign Minister. However the implications of this are far from clear and could have potentially dramatic effects on EU external relations. It is argued that more thought is necessary on consistency and coherence in external relations, especially how the various actors should relate to one another. The potential relationship between the EU Foreign Minister, the European External Action Service and the President of the European Council are of particular relevance. It is also argued that the sections pertaining to defence are likely to be immensely controversial in the forthcoming IGC and should be rethought since the value added of adopting an interim mutual defence commitment is far from evident. It is also less than clear that a solidarity clause for threats emanating from non-state sources, marks a significant advance. Finally, the inclusion of a possible European Armaments, Research and Military Capabilities Agency in the draft constitution is welcome in principle, but it is questioned whether this belongs in the constitution.

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Introduction

The European Council of Laeken stated that the Union ‘has to become more democratic, more transparent and more efficient’.¹ One of the ways of contributing to this general aim was through the simplification and restructuring of the existing treaties. The Convention was, of course, also intended to pave the way for enlargement of the Union to twenty-five and to establish the institutional *modus operandi* to cope with the ten new members. The preparations for enlargement applied to external relations as well as to other areas of EU activity, but the central issues were those that predated the Convention. The questions surrounding the EU’s legal identity, consistency in external relations as a whole, the role of defence, and the general *communautaire* versus intergovernmental thrust of CFSP, had all featured in previous intergovernmental conferences. The imminent enlargement of the Union was a catalyst, but not the specific cause, of the Convention’s recommendations on external relations. In short, the challenge, as identified at Laeken, is how the EU should ‘shoulder its responsibilities in the governance of globalisation’.

The purpose of this contribution is not so much to judge whether the Convention achieved its goals, but to consider the likely effects of the draft Constitution for EU external relations, especially those aspects relating to the Common Foreign and Security Policy (CFSP) and whether the EU is better equipped to meet the Laeken challenge.² It is evident that the constitution is very much in a draft stage, with inconsistencies here and there and details remaining to be worked out, but the basic structure of the constitution has been established. With this in mind, the following examination will consider where there may be problematic elements for EU external relations, where inconsistencies exist between the constituent parts of the constitution and where the main debating points are likely to emerge in the Intergovernmental Conference (IGC). It should be noted that the traditional role of the IGC is to discuss treaty amendments and not to solve every perceived institutional malaise. The

IGC cannot therefore be expected to address all of the problems of EU external relations but it should, at a minimum, establish the basis for sound and consistent decision-making, accompanied by relevant structures and instruments. The extent to which the draft constitution does this will be examined below.

External Relations and the Convention

The Convention members found early agreement that it was ‘important for the EU to be a strong, effective and efficient player on the international scene’. Many also believed that the Union’s performance so far in this area ‘fell short of expectations, especially considering its economic and financial weight’.³ This reflected the common impression that the EU is an economic giant and a political pygmy or, as NATO’s Secretary-General, George Robertson, more accurately put it, a flabby giant. In international institutions, such as the UN, IMF and WTO – it was also agreed that ‘Europe lacks a common voice’.⁴ The Convention deliberations were unavoidably influenced by wider political considerations such as the ‘impression of living in a unipolar world where the U.S. sets the tone’ – notably with regard to the military intervention in Iraq.⁵ The debates surrounding Iraq starkly illustrated the gap between rhetoric and reality in EU external relations and, at times, gave the Convention proceedings an almost surreal quality.

Many of the earlier discussions in the Convention took a well-trodden path revisiting the traditional tensions between those advocating the extension of the Community method, which ‘had worked so well in other aspects of external relations’, and those who ‘drew attention to the specific character of foreign policy, noting that it is much less legislative in nature than many internal policies’.⁶ However, consensus was soon reached on the general observation that ‘properly coordinated’ use of all instruments, political and economic, was central to the Union’s ability to exert its influence on the international scene. The importance of achieving a ‘dynamic foreign policy’ was also recognised. Under the

recommendations made in this regard, the need for unanimity in CFSP came under scrutiny. For some, the extension of QMV to CFSP would permit the EU to respond in a timelier manner and avoid the risk of repeated paralysis. The perceived need for a more pro-active CFSP was also linked to the question of funding with some advocating the desirability of improved resources, both human and financial.

Although there were calls from some quarters for the abolition of the pillar structure, it was apparent that any changes in this regard would be incremental and would not lead to the rapid communitarisation of CFSP or, conversely, any appreciable increase in intergovernmentalism. It was therefore unsurprising that attention quickly focussed on the coordination and representation functions of the High Representative for CFSP and the Commissioner for external relations as the symbols of, respectively, the intergovernmental and communitaire approaches to external relations.

The relatively recent addition of the European Security and Defence Policy (ESDP) to the Union's external relations also made it an obvious subject for debate. In particular, the establishment of a Working Group on Defence drew attention to what had hitherto been a rather taboo subject – defence, or the silent 'd' in ESDP. The fact that it appeared on the agenda may be attributed largely to the changes in the security environment wrought by '9-11'. Again, in a rather predictable manner, the debate revisited historical divisions between those who saw defence as primarily an issue for NATO, and those who saw the development of an autonomous defence capability as a legitimate component of European integration. The reappearance of well-rehearsed positions, albeit in a rapidly changing international security environment, led to suggestions that 'enhanced cooperation' should be extended to security and defence. Concern was also voiced over the lack of interoperability between national armed forces and thus the need for better coordination of research, development and acquisition policies.

The question of legal identity, with which we start, was another issue that was scarcely new and thus not provoked specifically by enlargement.⁷ Of all of the innovations to come out of the Convention, this is perhaps one of the most dramatic for external relations. At the political level it also paves the way for the reinforcement of the common aspects of the pillar structures and gives the Union the basis for the diplomatic representation, which is essential if it is to live up to its (treaty-based) aspiration to be an effective actor on the international scene.

The effects of legal personality

Article 1-6 of the draft Constitution simply states that ‘The Union shall have legal personality’. The Working Group on Legal Identity (with one exception) expressed strong support for the explicit recognition of the Union’s legal personality. However, for some their support was made conditional on the recognition that the conferral of legal personality does not change the intergovernmental character of the second and third pillars, nor must it imply a shift in the political balance between the Member States and the institutions of the Union.⁸ For others the conferral of legal personality was built on the practical observation that the ‘artificial distinction between Communitarian and intergovernmental aspects of foreign policy does not have any longer any real substance’.⁹

What does legal personality mean for the Union? At its most basic, the conferral of legal personality on the Union will supplant the legal personalities of the existing bodies. Agreement on the legal personality of the Union is also a necessary precursor for the merger of the treaties into a single text.¹⁰ However, the specific characters of the intergovernmental pillars (intergovernmental cooperation in criminal matters and CFSP) were left largely unchanged, although the logic of a single legal personality hinted at the anachronistic nature of the pillar structure. Debates in other working groups, notably External Action and Defence, strongly indicated that the retention of the intergovernmental character of the

second and third pillars did not represent a barrier to the assumption of a single legal personality. In terms of effect, the assumption of a single legal personality would, according to most members of the Convention, ‘lead to greater effectiveness in [the Union’s] external relations’.¹¹ This remains to be seen, but at this stage it is worth considering four possible implications of the assumption of legal identity by the Union for external relations.

i) The Union as a subject of international law

The first and most obvious is that the Union would become a subject of international law, alongside the Member States. As a result, the Union would ‘be able to avail itself of all means of international action (right to conclude treaties, right of legation, right to submit claims or to act before an international court or judge, right to become a member of an international organisation or become party to international conventions) as well as to bind the Union internationally’.¹²

The current provisions of the treaties provide for separate representation of the Union and of the Community. The Treaty establishing the European Union (TEU) stated in Article 18(1) that the Presidency shall ‘represent the Union in matters coming within the common foreign and security policy’. It is therefore up to the Presidency to represent the Union in the CFSP area, but up to others (such as the Commissioner for External Relations or even the Commission President) to represent the Union in non-CFSP aspects of external relations, as in relations with the organs of the UN and its specialised agencies.¹³ The following article, 19(1) TEU, states that the Member States shall ‘coordinate their action in international organisations and at international conferences. They shall uphold the common positions in such fora’. Since this stipulation falls within the CFSP title, there is no legal measure to ensure that it is upheld since the European courts do not have jurisdiction. The powers of suasion are therefore political, notably in terms of the pressure that can be exerted by the Presidency. Even with the assumption of legal personality by the EU, the situation is

unlikely to change significantly in terms of jurisdiction of the CFSP/ESDP aspects of external relations.

ii) Representation in International Organisations

The second main effect of the Union's assumption of legal personality will be in how the EU is represented in international organisations. The multiple representations in EU external relations has led to demands on several occasions, based on Kissinger's apocryphal remark, that Europe needs a 'telephone number' or, at least, a clearer identity and voice. The logic of a single legal personality of the Union would point strongly in the direction of the Union being represented by a single delegation in order to uphold effectively its interests. Even in those circumstances where an international organisation is open only to states (such as the International Labour Organisation), Member States are instructed to 'coordinate their action in international organisations and at international conferences. They shall uphold the Union's positions in such fora'.¹⁴ They are also required to keep the Member States, as well as the EU Foreign Minister, informed on matters of common interest if not all of the EU Member States are represented. Those who are members of the UN Security Council will defend the positions and interests of the Union and, for those who sit on the UN Security Council, they shall request that the Minister of Foreign Affairs be asked to present the Union's position.¹⁵

iii) Overseas legation and the European External Action Service

A third, and related, area of potentially significant change is legation overseas. Currently both the Council and the Commission represent the EU in third countries. The former is represented by the diplomatic representation of the country holding the Presidency of the Council. The Community, or more specifically the Commission, is represented by 128 delegations to third countries or international organisations. The delegations are recognised

as having diplomatic status by the host states but, in spite of the common practice of calling them 'EU delegations', their legal identity and thus mandate stems from the Community. Moreover, the delegations are part of the External Service of the Commission and (not yet) that of a common External Action Service of the Union.

The most obvious implication of conferring legal personality on the Union would be that the current delegations would become delegations of the EU, even if the Commission continued to perform the same functions as at present. Under the draft Constitution it is made clear that the Commission 'shall ensure the Union's external representation', but 'with the exception of the common foreign and security policy'.¹⁶ The draft Constitution also states that the 'Union delegations in third countries and to international organisations shall represent the Union' and that the delegations 'operate under the authority of the Union's Minister for Foreign Affairs and in close cooperation with Member State's missions'.¹⁷ This indicates that the Council Secretariat is liable to have a role in the Union delegations reporting to the Union's Foreign Minister, who is responsible for the conduct of CFSP as well as the other aspects of EU external relations.¹⁸ Indeed, reference is made in the draft treaty to the 'establishment of a Joint European External Action Service', to assist the Minister, which would incorporate relevant parts of the 'famille RELEX', the Council and, where relevant, national representation functions.¹⁹

The Working Group on External Action discussed the pros and cons of establishing such a service, replete with a Diplomatic Training Academy, but there has also been evident political opposition (notably to the idea of an academy). Nevertheless, the logic of having an EU Foreign Minister and Union delegations clearly points in the direction of some type of EU diplomatic service. The complexity of deciding upon the relevant design, institutional balance and competences of a European External Action Service should not be underestimated though. The extent of the complexity is hinted at in a half page annex attached to the Draft Constitution in which the Convention 'agrees on the need for the

Council of Ministers and the Commission to agree, without prejudice to the rights of the European Parliament, to establish under the Minister's authority one joint service (European External Action Service) composed of officials from relevant departments of the General Secretariat of the Council of Ministers and of the Commission and staff seconded from national diplomatic services'.²⁰

The precise design of the European External Action Service has to be decided upon. This will involve potentially sensitive decisions about whether the Service will build upon the existing RELEX and External Service in the Commission or whether a new RELEX will be created incorporating other external relations from other Directorates General. The assumption by key Convention players, such as Michel Barnier and António Vitorino, was that the European External Action Service would be built around the 'famille RELEX' (including the current DG RELEX and its External Service, DG Trade; DG Development; DG Enlargement; the EuropeAid Cooperation Office; the European Humanitarian Aid Office; and some external aspect of DG Economic and Financial Affairs).²¹ On the Council side, the Service would incorporate those currently working for the High Representative, including the Policy Unit, the Situation Centre, and the DG-E (External Relations) of the Council Secretariat. This assumption was shared by Guiliano Amato, Elmar Brok and Andrew Duff who wished to see the European External Action Service established as an integral part of the *Commission* administration, but that the administration shall work as mandated by the Council without prejudice to the competences of the Commission.²²

The institutional structure of the External Action Service is likely to lead rather quickly to familiar *communautaire* versus intergovernmental tensions. A 'super RELEX' would not only have the potential for turf battles within the Commission, but would raise questions about how the Council (and national) officials should be streamlined into the Service. It is also possible that the EU Foreign Minister's position, along with the Foreign Affairs Council which is largely outside the purview of the Presidency, may create pressures for a

more autonomous EU foreign service which reflects the special status that many existing national foreign ministries have. Whatever the design, it is also predictable that the European Parliament and public pressure groups will bring up pertinent issues for the design of any such Service, such as accountability, working methods and reporting, intelligence support, financing and so forth.

The list of issues raised above connected with the creation of a European External Action Service makes it all the more worrying that this question has been addressed in only the most perfunctory manner in the draft Constitution. Moreover, the necessary arrangements are supposed to be made ‘within the first year’ after entry into force of the Treaty Establishing the Constitution for Europe. Obviously, the capacity to implement this within the specified period in an effective way will decisively impact upon the potential influence of the EU Foreign Minister. The failure to establish a supportive European External Action Service could severely hobble the EU Foreign Minister. In order to bring about such a service a number of critical questions need to be answered within the confines of the IGC:

- What is the extent of the European External Action Service in terms of the ‘famille RELEX’ (it may be easier to consider what is *not* external relations-related than what is!)?
- How are the institutions, structures and practices of the relevant parts of the Commission and the Council going to be harmonised?
- How will the EU Foreign Minister work with the various components of the Service (which may also include specialised agencies)?
- What relationship will the Service have with the President of the Council?
- What working relationships are desirable with the relevant Ministries (which may go beyond only Foreign Ministries) of the Member States?
- How will the current External Service of the Commission be reorganised into ‘EU embassies’?

- Will the Service incorporate all crisis management components of the current ESDP?

Some more practical considerations, such as the expense of maintaining national representations as well as the increasing European component in national diplomacy, may also point towards greater national involvement in EU delegations (on a seconded basis). The increasing difficulty of identifying where ‘Community’ competence in external relations ends and where that of the Council (CFSP) starts, also points to a greater role for the Council Secretariat in the delegations. Issues such as weapons proliferation, terrorism, or conflict prevention are, by nature, matters of concern for the External Service as well as the Council.²³ In short, the adoption of legal personality by the Union and the practical considerations outlined above will lead to a profoundly different form of external representation emerging.

iv) Concluding international agreements

A fourth, and final, way in which the assumption by the Union of legal personality will make a difference is the conclusion of international agreements. Under the current treaty, Article 24 (TEU) permits the Council to conclude agreements with one or more states or international organisations, for matters falling under CFSP. The treaty also notes that, ‘No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure’. This stipulation does not exonerate the Member State from applying the agreement, but merely allows the necessary adjustments to be made while the agreement applies to the remaining Member States on a provisional basis.

Article 300 of the Treaty establishing the European Community (TEC) specifies the way in which the Community may reach agreements with one or more States or international

organisations. The Article concludes by noting that ‘agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States’. The draft Constitution permits the Union to conclude ‘agreements with one of more third countries or international organisations where the Constitution so provides’, as well as association agreements with one of more third countries or international organisations.²⁴

Under the modified procedures, the Council may not conclude any agreement until the European Parliament has been consulted, with the exception of CFSP agreements. The Council shall act by QMV except when adopting an act in a field in which unanimity is required for the adoption of a Union act, as well as for association agreements and the Union’s accession to the European Convention on the Protection of Human Rights and Fundamental Freedoms. Under the draft Constitution QMV can be used (as at present) when:

- Adopting European decisions on Union actions and positions on the basis of a European decision of the European Council relating to the Union's strategic interests and objectives;
- Adopting a decision on a Union action or position, on a 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;
- Adopting any European decision implementing a Union action or position;
- Adopting a European decision concerning the appointment of a special representative.

The European Council may decide to extend QMV in the Council into areas other than those stipulated above, on the basis of a unanimous decision. However, it is worth noting that the old guarantees falling under Article 24 (TEU) which refers to the possible delay in

applying an agreement due to constitutional procedures, have been removed. Presumably, the (hypothetical) protection that this clause afforded is now provided by the ability of a Member State to make a formal declaration qualifying its wish to abstain from a vote adopting a European decision under CFSP.²⁵ The existing right of any Member State to block the use of QMV for 'vital and stated reasons of national policy' is though retained. So too is the stipulation that QMV shall not apply to 'decisions having military or defence implications'.

The marginal change in the likely use of QMV in the CFSP area introduced by the draft Constitution, along with the retention of appreciable powers by the Council (such as the ability to create new structures, such as a Council of Defence Ministers, or the ability to select the Chair of the Council and the Foreign Minister) opens up the possibility of continuing institutional tensions in external relations. The ability of the Commission to ensure the Union's external representation still has the significant exception of CFSP. As is argued elsewhere, the existing tensions between institutions and their respective mandates are likely to come into sharp relief (if not disagreement) when discussion on the European External Action Service commences.

The framework for international agreements contained in the draft Constitution will operate under a single legal personality, that of the Union, but the practical implications of the *communautaire* procedures and those of the predominantly intergovernmental second pillar mean that some significant differences remain (broadly speaking, replicating those of Article 24 and 38 TEU and Article 300 TEC). The main difference between the respective procedures lies in the role of the European Parliament, which has the right to deliver its opinion or, in certain cases to give its assent, on international agreements that do not relate exclusively to CFSP. The question of exclusivity gives rise to consideration of what may happen in case of mixed agreements (those having both Community and CFSP aspects). The draft Convention is unclear on this point.

Generally, the recommendation that the Union be granted legal personality has many positive aspects to it. Indeed, it is difficult to see how the ‘Union shall uphold and promote its values and interests’ in the wider world if, in fact, what is meant is primarily the Community, plus the intergovernmental aspects.²⁶ However, the practical implications of extending the current External Service into Union delegations, a phrase which appears several times in the draft, needs further attention. The ability of the delegations to represent the Union points to wider representation in the delegations, including Council Secretariat officials for instance, and possibly to the revision of relations between the diplomatic and consular missions of the Member States and the delegations. This also gives rise to the practical question of how to prepare officials for their new, extended tasks.

Decision-making and the telephone number

One of the underlying assumptions of the Convention was that the Union was not as effective as it could be on the international scene. In fact, even before the Convention commenced an active debate was underway about how to streamline decision-making in external relations. In the Convention this soon focussed on the roles of the Council and Commission. Romano Prodi, President of the European Commission, advocated the idea of making the Commission the ‘centre of gravity for policy initiative’ but also one in which it is in ‘control of policy initiative and which identifies and articulates the common interest’.²⁷ Prodi’s fear was that, left to its own, CFSP risked paralysis and domination by a *directoire* of larger Member States. The case for a stronger central executive (the Commission) was thus compelling for Prodi, the European Parliament as well as a number of EU Member States.²⁸ Central to Prodi’s vision was the fusion of the role of the High Representative for CFSP with that of the Commissioner for External Relations, currently held by Chris Patten. The resultant post would assume vice-presidential status in the Commission and would,

purportedly, have the ‘twin legitimacy stemming from the agreement of the Member States and from the EP’s endorsement of the Commission’.²⁹

Under an Anglo-French proposal, backed by Italy and Spain, the role of the Council would be strengthened, thus echoing the struggles of de Gaulle almost three decades before.³⁰ Under the proposal, a Presidency of the Council would be created, replacing the rotating Presidency system or supplementing it. The elected president would replace the role of the High Representative for CFSP and would, theoretically, give the EU an enhanced identity (and answer Kissinger’s apocryphal question of whom to dial when he wants to speak to Europe).

The compromise was to recommend the appointment of an EU Foreign Minister, who shall conduct CFSP, but shall also be one of the Vice-Presidents of the Commission where he shall be responsible for ‘handling external relations and for coordinating other aspects of the Union’s external action’.³¹ In CFSP terms, the Union Foreign Minister will have a number of significant additions to his powers over those of the current High Representative. The most significant is the Minister’s right, shared with the Member States, to make proposals for action to the European Council or the Council. The Union’s Foreign Minister also chairs the Foreign Affairs Council which, unlike the other formats of the Council, shall not be subject to a (revised) rotating Presidency.³²

With the exception of CFSP, the European Commission ensures the Union’s external representation. The new Minister of Foreign Affairs/Vice President will be one of fifteen (voting) Commissioners, and this includes the President. The European Council, deciding by qualified majority vote, appoints the Foreign Minister and the nomination is then subject to a vote of approval by the European Parliament (along with the thirteen Commissioners and the President).

At least on paper the adjustments are eminently sensible. A Union Foreign Minister will have a better overview of EU external relations generally and will be able to ensure greater consistency between the Community and CFSP in external relations. There is though the question of whether one person can assume the inevitably crippling workload, especially when the details of the supporting European External Action Service remain murky. Much of his (or her) ability to carry out the demanding role will inevitably depend upon the complementary emergence of a seasoned and professional EU diplomatic service.³³

The second general concern is whether the collegial nature of the Commission will be compromised, or even damaged, by the presence of the EU Foreign Minister. Although this concern surfaced in the deliberations of the Working Group on External Action, the potential benefits of having a key person with an overview of all of the Union's external action seem to outweigh any potential erosion of the Commission's collegial nature.

A more pressing concern is what relationship the Foreign Minister should establish with the two other persons with a legitimate right to speak about EU external relations. First, the proposed permanent European Council chair, who will be elected for a two and a half year term (renewable once).³⁴ The President of the European Council shall in 'that capacity' and 'at his level', ensure the 'representation of the Union on issues concerning its Common Foreign and Security Policy, without prejudice to the responsibilities of the Minister of Foreign Affairs'.³⁵ The President will prepare, chair and organise the proceedings of the European Council and ensure its decisions are carried out and shall represent the Union on the international scene at the meetings of the heads of State or government. The implication is therefore that the Foreign Minister conducts the day-to-day business pertaining to CFSP. It remains unclear how this division of labour will work out, especially if the President of the European Council is someone of high political profile (such as a former head of state or government) who will be a well-known external relations figure in his (or her) own right.

A further issue in this context is to whom the EU Foreign Minister reports, bearing in mind that the office holder will be appointed by the European Council, on approval of the European Parliament (as Vice-President in the Commission). It would seem that the Foreign Minister should be accountable to the executive (i.e. President of the European Council), but whether this is enough accountability for what has the potential to be a very influential post, remains to be seen. In both cases the proposed positions have engendered criticism, or even opposition, from smaller Member States who see the proposals as an attempt to impose the will of the larger Member States on external relations.

The second potential area of friction is with the President of the Commission. One of the tasks of the President of the Commission is to 'ensure that [the Commission] acts consistently, efficiently and on a collegiate basis'.³⁶ The degree to which the EU Foreign Minister will be able, as a member of the College of Commissioners, to conform to this is unclear. It is also far from clear how the *quid pro quo* for getting the Benelux countries to agree to the idea of a President of the European Council, which was the two-tier Commission of elected and non-elected members, will work in practice. In the case of the European Council President and the EU Foreign Minister it is more than likely that the appointments (at least initially) will come from the larger Member States which, following the pattern of Convention debates, may then leave the Commission as the bastion of the smaller Member States in external relations. In practice, much will presumably depend upon the characters involved and their willingness to let the EU Foreign Minister act as the face (and telephone number) for EU external relations.

The Presidency and external relations: a non-role?

The institutional revisions of the draft Constitution also substantially revise the Presidency. Under the new formulations, the old and problematic General Affairs and External Relations Council is divided into a General Affairs and Legislative Council and a Foreign

Affairs Council. The European Council is responsible for deciding on further formations. The Foreign Affairs Council (FAC) is chaired by the EU Foreign Minister and shall ‘flesh out’ the Union’s external policies, on the basis of strategic guidelines laid down by the European Council. The FAC shall also ensure that its actions are consistent. The broad mandate accorded to the FAC leaves open the question of how security and defence issues are addressed within the Council. The (somewhat baffling) distinctions made at several points in the draft Constitution between foreign and security policy and security and defence policy (see below) opens up two possibilities. Either the FAC will, as is the case at present, address security and defence issues with the EU defence ministers present as required or, the European Council may yet decide to inaugurate a specific Council format meeting as defence ministers.³⁷

A further point of interest with regard to the FAC is that the draft Constitution specifies that, ‘The Presidency of a Council formation, *other than that of Foreign Affairs*, shall be held by Member State representatives within the Council on the basis of equal rotation, for periods of at least a year’.³⁸ This may give rise to two issues. First, under the current arrangements (Article 18 (1-5)) the Presidency represents the Union in matters within the common foreign and security policy, is responsible for the implementation of CFSP and shall, in principle, express the position of the Union in international organisations and international conferences. The assumption of these duties by the EU Foreign Minister will alter the old practice of the ‘troika’ representing the Union in CFSP matters and will make the EU Foreign Minister a very influential figure (possibly too influential for some). It also, by implication, makes it difficult for the Presidency to act in the potentially expansive external relations field which may lead to clashes with the ‘non-Presidency’ FAC since they are responsible, based on guidelines established by the European Council, for ‘fleshing out the Union’s external policies’.³⁹

The second issue that arises is that, currently, the Presidency implements certain CFSP instruments. For instance, démarches are delivered through the country holding the Presidency to third parties. The Foreign Service of the country holding the EU Presidency has other broad, and often demanding, representative functions. Under the draft Constitution it is not clear who assumes the former role of the Presidency regarding its diplomatic representative functions.⁴⁰ Presumably, the Foreign Minister assisted by the European External Action Service, and the delegations thereof, will assume these functions. However, as has been discussed, the precise modalities and structures of the External Action Service have yet to be specified.

The two key institutional adaptations in EU external relations, that of the permanent European Council chair and the EU Foreign Minister, will have the effect of eroding the significance of the Presidency in external relations. Arguably, this is trend already apparent under the Amsterdam and Nice arrangements since there are already a significant number of permanent positions (for example, the High Representative, the Chairs of the EU Military Committee and Military Staff) in the CFSP area. In addition, the EU Military Staff, the Policy Unit and the Situation Centre all report directly to the High Representative. Elsewhere, ECOFIN, Eurogroup and JHA Councils elect their chairmen for two years from amongst their members. The chairmanship of the other Council formations will therefore have to be organised in such a way as to guarantee the greatest possible participation of all the member States on the basis of a strict system of rotation. It will however mean that the Presidency will have even less of a role to play in external relations which, bearing in mind the often considerable portion of the rotating Presidency's conclusions devoted to external relations, is not an insignificant point.

The EU Foreign Minister's role has the potential to be tremendously influential, especially since it combines the current Council and Commission representation in external relations. The Foreign Minister may also provide a public face for EU external relations, which has

sometimes been lost in the cacophony of voices that currently speak for the EU in external relations. The potential for frustration is however still there since it remains to be seen how the President of the European Council defines the responsibility to ensure the ‘external representation of the Union’ on issues concerning CFSP, ‘without prejudice’ to the responsibilities of the EU Foreign Minister. Similar tension may also be evident between the EU Foreign Minister and the President of the Commission and, depending upon the future formulation of the Presidency, it is also unclear whether the Presidency may feel frustrated at the loss of voice in external relations.

New Petersberg tasks and CSDP

The draft constitution makes reference to the common foreign and security policy and the common security and defence policy (CSDP), the latter being an integral part of the former. The wording is nevertheless curious, especially with the appearance of security in the two constituent parts. Nevertheless, for well-worn political reasons it was apparent that the defence aspects of CFSP/ESDP would retain a distinct status in the draft Constitution, with many of the currently distinct procedures, funding arrangements and voting rules being retained. The basic parameters for discussion in the Working Groups on External Action and that on Defence (which met jointly on occasion) was partly introduced by pressing real-world concerns where, somewhat surreally, the actual commitments being undertaken by the EU on the ground had yet to be reflected in the wording of the draft Constitution. The discussions were also guided by the need to introduce more flexibility into CFSP/ESDP whereby groups or coalitions could move ahead with action without obliging all Member States to participate. Finally, the ‘D’ in ESDP had been largely silent and one of the mandates of the Working Group on Defence was to open up discussion on defence, bearing in mind the new range of security challenges exemplified by ‘9-11’.

The first notable modification under CSDP (formerly referred to as ESDP) is the expansion of the Petersberg tasks to include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peacemaking and post-conflict stabilisation.⁴¹ The list goes beyond the existing list found in Article 17 (2) of the TEU which, in turn, reflected the priorities and preoccupations of the WEU when they originally drew up the list in 1992. How does this new elaboration of CSDP tasks help?

In the first place, the tasks reflect those tasks for which both civilian *and* military means might be employed. This is of psychological importance since it moves the Union away from the previous division between the Petersberg tasks and the remaining civilian aspects of crisis management, many of which were not specifically mentioned in the Petersberg tasks but nevertheless took their legitimacy from CFSP's general mandate covering 'all areas of foreign and security policy'. The expanded Petersberg tasks also describe more accurately what the EU is actually doing on the ground as in, for instance in the Former Yugoslav Republic of Macedonia (*Operation Concordia*) or the Democratic Republic of the Congo (*Operation Artemis*). The inclusion of some tasks, such as conflict prevention, under the CFSP heading might have been expected to cause more tension since this was a task that was assumed primarily by the Commission following a major initiative in this area in April 2001. One explanation for the relatively easy expansion of the Petersberg tasks may be that the question of competences, at least on paper, is becoming less relevant with the prospect of an EU Foreign Minister, acting under the authority of the Council and in close and constant contact with the Political and Security Committee, shall 'ensure coordination of the civilian and military aspects' of the above tasks.⁴² The Foreign Minister's dual role, as a Commission Vice-President, suggests that the Commission's legitimate interests in a number of the Petersberg tasks will be represented.

The framing of CSDP in the draft constitution also mentions the civil and military assets which may be used 'on missions *outside* the Union' for peace-keeping, conflict prevention and strengthening international security.⁴³ The exact range of operation of the EU's Rapid Reaction Force had been shrouded in ambiguity, in contrast to the EU Police Missions, developed in the Feira European Council, which were explicitly framed with international support missions in mind. The debate within the Convention was overtaken by events when *Operation Artemis*, which commenced in early June 2003 at the request of the UN Secretary General, already opened up the possibility of using armed EU peacekeepers outside the region.

Beyond this, the CSDP aspects of the Union have been subject to three additional changes that will be explored in turn. The first is the application of structured cooperation to the tasks outlined above. The second innovation is the presence of 'solidarity' and 'mutual defence' clauses. Finally, following the recommendations of the defence working group, a European Armaments, Research and Military Capabilities Agency was also included. In each case the extent to which they mark genuine progress is questioned.

i) Structured Cooperation and CSDP

One of the underlying issues dogging ESDP was its reliance on coalitions of the willing – sometimes merely as *ad hoc* coalitions of EU and other states operating outside the Union's purview (i.e. Lead Nation operations). CSDP does little to change this basic picture, with the likelihood of future operations either being co-ordinated with NATO (using NATO assets with command through the Deputy Supreme Allied Commander Europe), or a framework nation operation with a Member State assuming responsibility for the headquarter and operational command elements but open to other members. Reliance on such coalitions was partly influenced by historical reservations when it came to defence-related issues from Denmark (with its opt-out on all defence-related provisions of the TEU),

as well as the political or constitutional concerns of the neutral or non-aligned EU Member States (Austria, Finland, Ireland and Sweden). More pragmatically, the formation of *ad hoc* coalitions reflected the fact that only a handful of larger Member States has the actual capacity, or will, to provide the framework structures required for Petersberg tasks.

The deliberations in the Convention were increasingly being overtaken by practice as an EU police operation commended in Bosnia-Herzegovina at the beginning of the year; in March the EU assumed a NATO mission in the former Yugoslav Republic of Macedonia; and in June the EU responded to a call from the UN for intervention in the Democratic Republic of the Congo. These admittedly modest, but politically significant missions, may have influenced the debates on enhanced cooperation in external relations and the decision that the ‘Council may entrust the execution of a task, within the Union framework, to a group of Member States in order to maintain the Union’s values and serve its interests’.⁴⁴ As with the existing treaty-based arrangements, any decisions having military or defence implications are subject to unanimous support in the Council. The unanimity stipulation also remains subject to the Amsterdam Treaty’s ‘constructive abstention’ clause.⁴⁵

For CFSP, the Member States who wish to establish enhanced cooperation between themselves address the Council (in other areas it is the Commission). The EU Minister for Foreign Affairs then gives an opinion on whether enhanced cooperation is consistent with the Union’s CFSP and the Commission will ascertain whether the proposed enhanced cooperation is consistent with other Union policies. The execution of the task in question shall be entrusted by the Council to ‘a group of Member States having the necessary capability and the desire to undertake the task’.⁴⁶ Those Member States, in association with the Union Foreign Minister, then agree on the management of the task.

The draft Constitution also permits those (unspecified) Member States ‘which fulfil high military capability criteria to enter into more binding commitments’ and to establish

‘structured cooperation’ for the completion of the modified Petersberg tasks outlined above.⁴⁷ However, the ‘Specific provisions for implementing CSDP’, which appear in Part I of the constitution, and the provisions governing the application of structured cooperation which appear in Part III, differ in some significant ways.⁴⁸ The former stipulates that those Member States who fulfil higher criteria and ‘*which have* made more binding commitments to one another’, may establish structured cooperation within the Union framework. Part III though specifies that those ‘*who wish to* enter into more binding commitments’ may establish structured cooperation. It is therefore unclear whether the cooperation builds upon existing bilateral and multilateral links, or if structured cooperation applies to any coalition of the willing. Furthermore, it is unclear how structured cooperation differs in conceptual and practical terms from enhanced cooperation.

ii) Closer cooperation and the Mutual Defence Clause

The procedures for enhanced cooperation contain one important exception – they do not apply to cooperation in the area of defence.⁴⁹ Under defence ‘closer cooperation’ is provided for whereby, ‘if one of the Member States participating in such cooperation *is* the victim of armed aggression on its territory, the other participating States shall give it aid and assistance by all the means in their power, military or other, in accordance with Article 51 of the United Nations Charter’.⁵⁰ ‘Closer cooperation’ is open to all Member States and provision is made for other Member States to take part.

The Working Group on defence initially discussed threats stemming from non-state entities, especially with the fallout of ‘9-11’ in mind.⁵¹ The ‘solidarity clause’, which applies specifically to this type of threat, is discussed below. However, the discussions on defence also strayed into the area of armed aggression on the territory of one or more Member States. The distinction between the ‘solidarity clause’ and the provisions for closer cooperation on ‘mutual defence’ is therefore reasonably clear; the former applies to terrorist

attacks, natural or man-made disasters, whereas the latter applies to more traditional notions of armed aggression against the territory of a Member State, presumably originating from a state source.

Generally, the determination of a number of EU Member States to move towards a common defence policy and common defence would seem to have been reinforced in the draft Constitution. The original wording of Article 17(1) TEU states that ‘The common foreign and security policy shall include all questions relating to the security of the Union, including the progressive framing of a common defence policy ... which might lead to a common defence should the European Council so decide’. The draft Constitution now reads, ‘The common security and defence policy *shall* include the progressive framing of a common Union defence policy. This *will* lead to a common defence, when the European Council, acting unanimously, so decides’.⁵² How likely is this?

Inevitably, the well-established divisions between ‘Atlanticists’ (primarily the United Kingdom, Portugal, the Netherlands and Spain), the reservations of the neutral and non-aligned (Austria, Finland, Ireland and Sweden – to which should be added Denmark as a special case) and the ‘Europeanists’ (including Belgium, France, Germany and Luxembourg) surfaced in the Convention.

The main objections of the first group, that it would challenge or undermine the role of NATO,⁵³ was partially addressed through the stipulation that, ‘In the execution of closer cooperation on mutual defence, the participating Member States shall work in close cooperation with the North Atlantic Treaty Organisation’.⁵⁴ It is incidentally unclear if the terms ‘common defence’ and ‘mutual defence’, within the same article, are used interchangeably.⁵⁵ The draft Constitution appears to refer to a common defence *in* the EU and a mutual defence *among* a group of Member States. Anyway, the extent to which this may become a direct challenge to NATO was also shared by the EU accession countries, all

of whom are, or are about to become, NATO members. The recent cooperation between the EU and NATO in, for example, the ongoing operations in the Former Yugoslav Republic of Macedonia, may make the Atlantic-oriented EU members even more determined to avoid the perception that the EU is a challenge to NATO. The reassurances in the draft Constitution that the mutual defence clause ‘shall not affect the rights and obligations’ resulting from NATO membership, may not be enough. Moreover, the mutual defence clause comes at a very sensitive time in EU-U.S. relations and it could be perceived as not only an anti NATO stance, but hostile to the U.S. as well.

The neutral and non-aligned countries have a different set of political (and in some cases, like Austria, constitutional) objections. In their cases, the extension of a defence role to the EU may not only cause immense political difficulties for these countries, but may lead to negative knock-on effects for EU support generally in these countries. It is worth noting in this context the immense sensitivity of the Irish to the impression that the EU is being militarised in the first (negative) referendum on the Nice Treaty.

The last group, the Europeanists, has historically wished to see a stronger role for Europe in all aspects of security and defence. The latter would include minimal, or no, dependence upon NATO or the U.S. for Europe’s security and defence. Support for further development of European autonomy in this area was clearly demonstrated by Belgium, France, Germany and Luxembourg after their mini-summit at the end of April 2003.

There is room for compromise amongst all of the views, but in order to reach a settlement (which will not be easy) the following points will need elaborating:

- What is the value added of mutual EU defence versus the common defence currently provided through the modified Brussels Treaty or the Washington Treaty?

- Does ‘closer cooperation’ on mutual defence within the EU replace existing commitments between the WEU full members? If so, what form of supplement to the Constitution would be necessary to replace the Modified Brussels Treaty?⁵⁶
- The precise meanings of ‘armed aggression’ and other forms of aggression, such as ‘terrorist attack’ (see the ‘solidarity clause’ below) are not clear;
- It is ambiguous whether the assistance provided under mutual defence arrangements consist exclusively of national assets, or whether they refer to existing EU arrangements or NATO arrangements (Berlin Plus in particular);
- The mutual defence clause specifies that ‘the participating Member States shall work in close cooperation’ with NATO. Does this mean that the participating states should be members of NATO?
- The mechanisms by which EU institutions work in restricted format (i.e. involving the participating states) is not clear;
- The manner in which non-EU states that may wish to associate themselves with Union actions is not clear.

In order for the mutual defence clause to be annexed to the Constitution in some form or another (since a declaration may be insufficient), the above points will have to be addressed. Nor is this merely an internal process for the IGC to deliberate since it directly impacts on EU relations with other organisations such as the WEU, NATO and the UN.

On the WEU, the thinking of the Working Group on Defence was that the ‘Member States who so wished could share between themselves the obligations laid down in the Brussels Treaty relating to mutual assistance, thus bringing to an end the Western European Union’.⁵⁷ However, the existing stipulations relating to mutual assistance in the WEU context pose some potential challenges for the EU. Article 4 of the Modified Brussels Treaty specifies that ‘Recognising the undesirability of duplicating the military staffs of NATO, the Council and its Agency will rely on the appropriate military authorities of NATO for information

and advice on military matters'. The incorporation of the treaty into a final version of the Constitution establishing the EU would therefore have to consider this. Furthermore, Article V unambiguously confines the obligation to 'provide all the military and other aid and assistance in [the treaty signatories] power' to armed attacks *in Europe*. Even if it is agreed that Article V of the Modified Brussels Treaty is a role model, the specific concerns of the Interparliamentary European Security and Defence Assembly will have to be taken into account.

The second general question arising from the mutual defence clause is that, although it is open to all EU Member States, it is already predicable that some will choose not to associate themselves. What then is the benefit of a mutual defence arrangement that covers only a number of EU Member States? In the hypothetical case of a act of armed aggression on an EU Member State who is not a party to the proposed declaration (but who may be party to NATO's Partnership for Peace or the Euro-Atlantic Partnership Council), what obligations, if any, would arise for the signatories to the declaration?

The final point concerns EU relations with the UN which, especially after the 2003 Iraq conflict, are a sensitive issue. The main concern in this regard is whether a prior UN mandate must exist as the basis for any use of military force by the Union. Some EU Member States adamantly insist that this is a pre-condition – Finland being a prime example. The 'mutual defence' clause is less than specific though about the stage at which the UN may be involved since mention is made of the need to 'inform immediately' the UN of any armed aggression 'and the measures taken as a result'.⁵⁸

The stipulations on mutual or common defence seem likely to remain controversial. The possibility of leaving the mutual defence aspects incomplete and subject to deliberation by the European Council would seem desirable at the moment for two reasons. First, the types of defence falling outside those covered in the 'solidarity clause' are not as urgent since

large-scale aggression against any Member State ‘is now improbable’.⁵⁹ The primary security challenges to the Union remain those of terrorism, proliferation of weapons of mass destruction and those threats emanating from failed states and organised crime. These are the types of challenges that do not depend specifically upon the presence of a ‘mutual defence’ clause in the draft Constitution. Second, and related, given the somewhat peripheral nature of classical defence-related challenges to the enlarged EU, is it worth exacerbating the inevitable tensions that will be caused by the proposed clause? It may be too late to avoid such a debate but, at the very least, a clearer explanation of the value added by the EU if a number of Member States adopted such a clause is necessary.

iii) The European Armaments, Research and Military Capabilities Agency

The draft Constitution recommends the establishment of a European Armaments, Research and Military Capabilities Agency (EARMCA).⁶⁰ The main functions of the agency are outlined in Article III-207. The EARMCA is option to Member States who wish to be a part of it. According to the Working Group on Defence the agency would ‘incorporate, with a European label, closer forms of cooperation which already exist in the armaments fields between certain Member States’.⁶¹ The specific agencies mentioned are OCCAR⁶², LoI⁶³ and WEAG,⁶⁴ all of whose mandates overlap with the proposed agency.

It remains unclear however how the appointment of an agency would significantly improve military capabilities, joint procurement or harmonise operational needs. The agency would probably comprise the same members who currently constitute the membership of the agencies named above but in some cases, such as WEAG which also has Norway and Turkey as participants, it is not clear whether these countries would then be excluded. The logic of coordinating functions currently carried out by OCCAR, LoI and WEAG (to which others could be added, like WEAO or POLARM) is admittedly attractive, but a new agency will not substitute for the apparent lack of political will on the part of the EU Member

States to loosen the often close strings between governments and the key defence contractors. Some of the key defence contractors, such as the United Kingdom, have already indicated their opposition to the proposal.⁶⁵

The EARMCA also gives rise to the question of whether the exclusion of the arms industry from the single market and competition regime should be ended, as has been advocated by some.⁶⁶ The Working Group on Defence recommended that the head of the prospective agency should make recommendations as to what specific rules apply to the armaments sector with a view to a European market which would strengthen the industrial base and optimise military spending, thereby enabling the scope of Article 296 TEC to be specified.⁶⁷ A Joint Franco-German proposal for the Convention on ESDP also recommended the adaptation of Article 296 TEC 'in particular'.⁶⁸

In spite of these recommendations, the essence of Article 296 TEC has been retained and the production of or trade in arms is therefore excluded from the common provisions covering the internal market.⁶⁹ It is therefore unclear whether the retention of Article 296 TEC is compatible with the attainment of the objectives of the EARMCA. Presumably, since the EARMCA is open to those Member States who wish to become members, the blanket incorporation of the defence-industrial sector would be inappropriate. Given the retention of Article 296, EARMCA is little more than a method of trying to implement the current European Capabilities Action Plan (ECAP). At a minimum, Article III-339 (which incorporates Article 296 TEC) should be moved from its current location under 'Common Provisions' and incorporated in the section addressing CSDP.

Conclusions

The draft constitution is exactly that. The intergovernmental conference will hammer out the details, remove parts and fix inconsistencies, of which there are a number. The purpose

of this examination was not to ascertain whether the Convention actually reached a constitution that is any more, or less, readable than the existing treaties. Instead, the purpose was to examine the likely impact of the draft constitution on the EU and external relations.

The first and perhaps most sweeping potential change is the assumption by the EU of legal personality. Not only will this transform the existing External Service, but it will also alter the representation, legation and treaty making abilities of the Union. In addition, it underpins the introduction of European level competence in decision-making in EU external relations, most notably in the case of the EU Foreign Minister. Nevertheless, it is imperative that the issues raised above, with regard to the shape and competences of the proposed European External Action Service, be thought through in a thorough manner. This will be no easy task since it is likely to give rise to sensitive issues of political balance in external relations between the *communautaire* and intergovernmental aspects. It may also give rise to profound struggles within the Commission as the question of how much of the ‘famille RELEX’ should be incorporated into the Service. The success, or failure, of the Member States in their attempts to address these admittedly complex issues will have a direct bearing on the potential effectiveness of the EU Foreign Minister.

The introduction of the Foreign Minister’s post is the second notable feature of the draft Constitution. Although long anticipated, it is far from clear how the holder of this post will associate with the Commission, especially given its collegial nature, and the respective Presidents of the European Council and Commission. The post, which is the result of inevitable compromises, will (on paper) have far more extensive powers than the current High Representative for CFSP, which will include proposing access to not only extensive Community resources but also those of the Member States. The possibility of an immensely influential Foreign Minister who will be, for more purposes, outside the purview of the rotating Presidency, raises the question of whether there will not be the temptation to clip the wings of the holders of the post. The relationship between the Foreign Minister and

the President of the European Council is also likely to be a difficult balance, especially when it comes to defining what is at his or her 'level' and in the posts' 'capacity'.

The structural changes proposed by the Convention in the Draft Constitution may, as indicated, have problematic aspects. It is also worth noting with reference to the Foreign Minister's post that it also has plenty of positive potential, particularly when it comes to policy coordination. The enhanced coordination, which would stem from the extensive oversight of the Foreign Minister, could have positive effects both for horizontal consistence (within and between the EU institutions) as well as vertical consistency (between the EU institutions and the Member States). The latter, in particular, would be enhanced by greater secondment of national diplomats to the European External Action Service.

Taken together, the combined effects of the assumption of legal personality by the Union, the creation of the post of EU Foreign Minister and the supporting European External Action Service, have the potential to much improve the effectiveness of EU external relations. The potentially problematic aspects have been noted but, on balance, this must be greeted as a positive step for EU coordination and consistency in external relations.

There are though a number of disappointments in the draft Constitution stemming from the initial discussions in the Working Groups in the Convention and what actually emerged in the form of the draft Constitution. Four aspects are worth mentioning by way of conclusion.

First, little was accomplished by way of introducing greater openness and accountability into EU external relations. In spite of the fact that the Convention encouraged more use of QMV in CFSP, rather than the traditional reliance on unanimity, there has been little progress in this area with regard to CFSP. The continued presence of national vetoes in the

draft Constitution is confirmation of the reluctance of Member States to introduce further use of QMV to CFSP.

Similarly, little progress has been made with regard to accountability. National governments will continue to wield enormous power, once they have entered into multilateral agreements, with little influence on the part of national parliaments. As it stands, the draft Constitution will do little to change this and it will remain predominantly the governments who make commitments to crisis management operations, sometimes (as was the case with *Operation Concordia* in the Former Yugoslav Republic of Macedonia and *Operation Artemis* in the Democratic Republic of the Congo) without consent of the national legislatures. In what at first appeared to be a constructive measure, it was agreed in a protocol attached to the draft Constitution that the Conference of European Affairs Committees may submit any contribution it deems appropriate for the attention of the European Parliament, the Council of Ministers and the Commission. That Conference may also organise interparliamentary conferences on specific topics, ‘in particular to debate matters of common foreign and security policy and of common security and defence policy’.⁷⁰ However, the following sentence reduces the significance of such contributions when it states that they ‘shall in no way bind national Parliaments or prejudice their positions’.⁷¹

Nor has the European Parliament seen any appreciable increase in its powers of scrutiny over CFSP/ESDP issues. Due to the decrease of influence of the Presidency over external relations, it could even be argued that the European Parliament (EP) has less influence over these aspects of external relations than before. Although the EP has the power to elect the President of the Commission (and approve the EU Foreign Minister) there is little likelihood of exerting further influence through the Commission since the President does not enjoy voting rights in the Council. Again, with the possibility of a more active EU role in crisis management in mind, it is significant that the EP has no influence or powers of

scrutiny – as was made abundantly clear in the case of *Concordia* and *Artemis*. Those changes that were made are of little significance. The obligation of the Presidency to report to the EP after each meeting has little significance for much of external relations (or however much will be assumed by the FAC). The

Second, the ‘solidarity clause’ does not add any obvious value beyond political symbolism. Is it conceivable that in the face of a major terrorist attack, natural or man-made disaster, that EU Member States would not assist if requested to do so? As a device for coordinating inter-pillar coordination it may have merits, but it is unclear why this deserves specific mention in the constitution. Other innovations, such as ‘structured cooperation’ (Art. III 208 (1)) or ‘enhanced cooperation’ (Art. 43) may also prove to be of some merit but, as they stand, they raise a number of issues. On the former, the ‘higher military criteria for military capabilities’ and the nature of the ‘more binding military commitments’ remain vague from a military and political perspective. On the latter, the decision-making procedures, notably the voting rules that apply, remain entirely unclear.

Third, the defence aspects remain deeply problematic. Until the European Council adopts a common defence, the suggestion is for those Member States who so wish to adopt a mutual defence clause (Art. 40(7) and Art III 209). Although provision is made for cooperation with NATO, it remains unclear that the suggested interim arrangements will improve the common defence. Indeed, the potential for friction is higher as this seems almost bound to complicate the Union’s internal dynamics, especially with the sensitivities of the neutral or non-aligned countries in mind, as well as the Atlanticist-oriented members (and future members). Although often neglected from the debate, it is also unclear what effect this proposal may have on the WEU, especially upon the Interparliamentary European Security and Defence Assembly. With regard to the WEU any assumption by the EU, or a group of Member States, of the current Article 5 commitments appearing in the Modified Brussels

Treaty, would have unclear ramifications for the associate members, associate partners and observers.

Finally, the need to rationalise European defence-industrial cooperation has long been recognised. The inclusion of a European Armaments, Research and Military Capabilities Agency in the draft constitution is a useful framework for cooperation that will, hopefully, supersede the existing alphabet soup in this area (OCCAR, LoI, and WEAG). However the underlying problem will remain, which is the general reluctance of the Member States themselves to cooperate and harmonise. None of the existing mechanisms in this area gives tremendous room for optimism. In terms of the draft constitution, it is also unclear why a proposed agency warrants mention in the actual body of the text. If this particular agency is mentioned, could this lead to demand from other agencies for similar recognition?

On paper, the draft Constitution has the potential to transform EU external relations and even, in the rather grandiose wording of the Laeken declaration, to enable the Union to more effectively shoulder its responsibilities in the governance of globalisation. The specific task ahead for the IGC is to reach consensus on a final version of the constitution. As has been indicated, this will not be an easy task and difficult and potentially far-reaching decisions still have to be faced. Paradoxically, one of the potentially most explosive issues that will have to be faced lies in an apparently innocuous declaration attached to the draft Constitution. The debate over the mandate, composition and functioning of the European External Action Service promises to be fascinating, if not pivotal.

Endnotes

¹ *The Future of the EU: Declaration of Laeken*, 15 December 2001.

² The term ‘constitution’ is that used by the Convention when referring to the *Draft Treaty establishing a Constitution for Europe*, presented to the plenary session of the Convention on the future of the EU on 13 June 2003. This version was however amended. The version used here is that of 18 July 2003, CONV 850/03 (hereafter *Draft Convention*).

³ *Summary Report of the Plenary Session*, 11-12 July 2002, CONV 200/02, Brussels, 16 July 2002. Para. 5.

⁴ Hannes Farnleitner and Gerhard Tusek, ‘A Common Foreign Policy for the European Union’, Annex, *Preliminary Draft Constitutional Treaty*, CONV 369/02, 28 October 2002, p.1.

⁵ *Ibid.* Loc cit.

⁶ *Summary Report of the Plenary Session*, 11-12 July 2002, CONV 200/02, Brussels, 16 July 2002, Para. 7-8.

⁷ The European Council in Florence in June 1996 had already called on the next intergovernmental conference to find ways of simplifying the treaties. In addition, Dutch proposals to the 1997 IGC specifically recommended conferring legal personality on the Union.

⁸ See *Observations by Mr. Kenneth Kvist* to the Preliminary draft report submitted by the Chairman at the meeting of 18 July 2002 (SN 03130/02), Brussels, 5 September 2002.

⁹ See Observations by Mr. Panayotis Ioakimidis, alternate member of the Convention, *The Development of the EU’s Common Foreign and Security Policy and Defence Policy*, (SN 03130/02), Brussels, 5 September 2002.

¹⁰ The Constitutional Treaty will technically be an amendment to existing treaties and, as such, the stipulations of Article 48 of the Treaty on European Union apply. In order to be adopted there will have to be agreement at the 2004 Intergovernmental Conference and ratification of the treaty by all Member States.

¹¹ *Summary report on the plenary session*, The European Convention, Brussels 3-4 October 2002, CONV 331/02, Brussels, 11 October 2002, p.3.

¹² *Final Report of Working Group III on Legal Personality*, WG III 16, CONV 305/02, 1 October 2002, Para. 19.

¹³ Article 302, Treaty Establishing the European Community.

¹⁴ *Draft Constitution*, Art. III 206.

¹⁵ *Ibid.* Art. III 206 (2).

¹⁶ *Ibid.* Art. 25 (1).

¹⁷ *Ibid.* Art. III 225.

¹⁸ *Ibid.* Art. 27.

¹⁹ *Draft Constitution*, Vol. I, CONV 797/1/03, 12 June 2003, Article 1-27 (Footnote 1). In the final version of the Draft Constitution (CONV 850/03, 18 July 2003) reference is made to an European External Action Service in the treaty and Annex III.

²⁰ *Ibid.* *Declaration on the Creation of a European External Service*.

²¹ See *Contribution by Mr. Barnier and Mr Vitorino to the Members of the Convention*, “Joint External Action Service”, CONTRIB 375, 30 June 2003, p.4.

²² See Proposal by Amato, Brok and Duff, *Declaration on the Creation of A European External Action Service*, at european-convention.eu.int/Docs/Treaty/pdf/873/Art%20III%20225a%20Amato%20EN.pdf.

²³ As was made clear in Javier Solana’s strategy paper, *A Secure Europe in a Better World*, presented to the European Council, Thessaloniki, 20 June 2003.

²⁴ *Draft Constitution*, Arts. III 225-6.

²⁵ Ibid. Art. III 201 (1).

²⁶ Ibid. Art. 3 (4).

²⁷ Communication from the Commission: *A Project for the European Union*, Commission of the European Union, COM(2002) 247 FINAL, p.13.

²⁸ See *The Common Foreign and Security Policy and enlargement of the European Union*, Briefing No. 30, http://www.europarl.eu.int/enlargement/briefings/30a2_en.htm.

²⁹ Communication from the Commission: *A Project for the European Union*, Commission of the European Union, COM(2002) 247 FINAL, p.14.

³⁰ George Parker, 'France and the UK call for new force at top of EU', *Financial Times*, 16 May 2002.

³¹ *Draft Constitution*, Vol. I, CONV 797/1/03, 12 June 2003, Article 1-27 (1-3).

³² The current General Affairs and External Relations Council will be split into separate entities. The General Affairs and Legislative Council will deal with horizontal issues, including ensuring consistency, and the Foreign Affairs Council will deal with CFSP/ESDP matters.

³³ The initial drafts of the Constitution were not particularly gender sensitive. It was only in the final version (used here) that the references to 'he' were qualified.

³⁴ It should though be noted that the proposal is deeply unpopular with 101 members of the Convention, from 15 governments, petitioning against the creation of such a position. See *Deutsche Welle*, 'The Labour Pains of an EU Constitution', at http://www.dw-world.de/english/0,3367,1430_A_869577_1_A,00.html.

³⁵ *Draft Constitution*, Art. 21 (2).

³⁶ Ibid. Art. 26 (3).

³⁷ As was advocated by several contributors to the Working Group on Defence.

³⁸ *Draft Constitution*, Art. 23 (4) (emphasis added).

³⁹ Ibid. Loc cit.

⁴⁰ The question of Presidency representation is complicated by the fact that the Member State exercising the Presidency is sometimes not represented in a third country, in which case the Presidency is exercised by the next in line. In the case of the 'next in line' not being represented, the Presidency is exercised on a rota basis until representation of either the country holding the Presidency or the next in line are present.

⁴¹ *Draft Constitution*, Art. III 210 (1).

⁴² Ibid. Art. III 210 (2).

⁴³ Ibid. Art. 40 (1).

⁴⁴ Ibid. 40 (5).

⁴⁵ This appears in the draft Constitution as Article III-196, whereby 'When abstaining from a vote, any member of the Council may qualify its abstention by making a formal declaration under the present subparagraph. In that case, it shall not be obliged to apply the European decision, but shall accept that the latter commits the Union ...'

⁴⁶ *Draft Constitution*, Art. III 211 (1).

⁴⁷ Ibid. Art. III 213 (1).

⁴⁸ Ibid. Art. 40(6) and Art. III 213(1).

⁴⁹ Ibid. Art. III 325.

⁵⁰ Art. 40(7). The working of the Article suggests that the type of defence in mind is very much traditional territorial defence, resting upon a response to an actual physical violation of the territory of a Member State. The possibility of the adoption of an EU variant of the U.S. 'pre-emptive' strategy, depends upon the interpretation of Article 51 of the UN Charter by EU Member States. Interpretations of Article 51 vary but generally the current interpretation by the Bush administration, which permits pre-emptive action on the basis of proven threats, counters the practice of the Cold War years where pre-emption was generally not seen as a valid interpretation of the article. Given the differences over the legality of military action in Kosovo and Iraq, it is not clear that there is EU-wide consensus on this either.

⁵¹ See *Final Report of Working Group VIII*, Defence, CONV 461/02, 16 December 2002.

⁵² *Draft Constitution*, Art. 40 (2) (emphasis added).

⁵³ Eleven EU Member States (Germany, Belgium, Denmark, Spain, France, Greece, Italy, Luxembourg, the Netherlands, Portugal and the United Kingdom) are NATO members. All, with the exception of Denmark, are also full members of the WEU.

⁵⁴ *Draft Constitution*, Art. 40 (7).

⁵⁵ The Final Report of the Working Group on Defence, CONV 461/02, Brussels, 16 December 2002, called for a ‘collective defence’ clause, Paras. 61-64.

⁵⁶ This point was made by the WEU Assembly when a resolution argued that if the EU replaces the Modified Brussels Treaty in its entirety, the arrangements ‘must be set out in a Protocol to be appended to the Constitutional Treaty and duly ratified’. See Resolution 115 on Security Policy in an enlarged Europe, Assembly of the Western European Union, The Interparliamentary European Security and Defence Assembly, 49th Session, Strasbourg, 3 June 2003.

⁵⁷ *Final Report of the Working Group VIII – Defence*, CONV 461/02, Brussels, 16 December 2002, Para. 61.

⁵⁸ *Draft Constitution*, Article III 214(3).

⁵⁹ Javier Solana, *A Secure Europe in a Better World*, presented at the European Council, Thessaloniki, S0138/03, 20 June 2003.

⁶⁰ It is not clear why the EARMCA actually appears in the draft constitution since, if incorporated into the final version, it would be the first agency to actually appear at this level.

⁶¹ *Final Report of Working Group VIII – Defence*, WG VIII 22, CONV 461/02, Brussels, 16 December 2002, Section III, Para. 64.

⁶² The Organisation for Joint Armament Cooperation (OCCAR), consisting of France, Germany, Italy and the United Kingdom.

⁶³ The Letter of Intent (LoI) countries consist of France, Germany, Italy, Spain, Sweden and the United Kingdom.

⁶⁴ WEAG is the Western European Union’s group for armaments cooperation between 19 European countries (of which 14 are EU members and 16 NATO members).

⁶⁵ Jean Eaglesham, ‘UK set to spurn plan for EU defence procurement’, *Financial Times*, 9 December 2000.

⁶⁶ See, for example, Convention on the Future of the Union, Information Note, Andrew Duff MEP, 15 February 2002, at <http://www.andrewduffmep.org/Convention/Laeken%20Q%20&%20A.doc>.

⁶⁷ Article 296 TEC exempts Member States from supplying information which may be prejudicial to its national security interests and permits Member States to take all necessary measures to protect the essential interests of its security connected with the production or trade in arms, munitions or war material.

⁶⁸ *Joint Franco-German Proposals for the European Convention on European Security and Defence Policy*, 22 November 2002, reproduced at http://www.dgap.org/english/tip/tip0301/fr_ge_221102.htm.

⁶⁹ *Draft Constitution*, Art. III 342.

⁷⁰ *Protocol on the Role of National Parliaments in the European Union*, CONV 850/03, 18 July 2003, Para. 10.

⁷¹ *Ibid.* Loc cit.