

## External Action of the European Union After the Constitutional Setback

Magdalena Martín & Isabel Lirola\*

Union external action after Constitutional setback – Status under international law – Perspective of democracy and leadership – Pillar structure – Substance and ambition of Union's foreign action.

### INTRODUCTION

One of the key issues for the Union's future is its external action capacity. The challenge set by the Laeken Declaration for the European Union to assume its responsibility in the governance of globalization has yet to be answered. While the Constitutional Treaty intends or intended to address the matter, its rejection reflects, among other things, European citizens' doubts about the capacity of the Union and its member states to deal with the predicaments of contemporary international society.<sup>1</sup> Now what remains of the good intentions after the Treaty's rejection?

The Union's weakness at the international level is built into the current division of powers between the European Union and the European Community on matters of external action. This division is between external relations, which fall under the community scope, and Common Foreign and Security Policy (CFSP), which remains within the intergovernmental sphere of action. Certainly, the Constitutional Treaty removed this distinction in superficial form. However, even during the initial period of constitutional optimism, the question was whether the changes of its Title V implied a reinvention of the Union's external action, or whether it was mostly a case of 'the same old song'.<sup>2</sup>

After the setback suffered by the Constitutional Treaty, and regardless of what may happen in the future, the question is still pertinent, although from a different

\* Tenured Lecturers of Public International Law in the Universities of Málaga and Santiago de Compostela, Spain. This research has been partially financed by project 2005/PX007 of the Xunta de Galicia, Spain.

<sup>1</sup> 'What now? Editorial Comments', 42 *CML Rev* (2005) p. 905-911 at p. 909.

<sup>2</sup> See M. Cremona, 'The Draft Constitutional Treaty: External Relations and External Action' 40 *CML Rev* (2003) p. 1347-1366 at p. 1366.

perspective. Given the current state of affairs, a new reading of the Constitution's provisions on the Union's external action appears to be even more appropriate if we want to identify those aspects that should be revised and, especially, those others that are worthy of being salvaged.

Our initial assumption is that Title V of the Constitutional Treaty does not necessarily imply a rupture. Its innovations, some of which are significant, clearly have been built on the legislation currently in force. Following a tradition in the European construction process, they, too, are based on already existing foundations. One essential element of continuity is precisely the preservation of the differences between intergovernmental and community modes of action, by means of the Common Foreign and Security Policy's special features.

This remaining dichotomy still may be the key to any attempt at restructuring the Union's external action.<sup>3</sup> If the integration process has not attained the necessary degree of political maturity to overcome the intergovernmental nature of the Union's Foreign and Security Policy, the effectiveness of any change, with or without a Constitution, will still be determined by two factors. First, is the community or intergovernmental inclination of the modifications required. Second, and closely linked to the first, are the problems that are inherent in maintaining two operational schemes (intergovernmental and community), which respond to different logics. Based on these premises, our analysis will focus on elements of the Constitutional Treaty that may contribute to providing the European Union's external action with a degree of unity. To put it simply: one should try to read one of the Union's crucial weaknesses as a source of possible strength.

## LEGAL PERSONALITY FOR THE EUROPEAN UNION

The Constitutional Treaty undertakes to re-establish the current European Community and European Union and create a new Union. One of the main distinguishing elements of this new entity is the express attribution of legal personality (I-7). Nevertheless, in order to comprehend the changes that this may entail, it is necessary to reflect on two matters: the Union is and remains an international organization, and it is a subject of international law.

### *The Union is still an international organisation*

The Constitution does not include a definition of the European Union as such. Nevertheless, an analysis of Part I, where the core elements of the European politi-

<sup>3</sup> I. Pawel Karolewski, 'Constitutionalization of the Common Foreign and Security Policy of the European Union: Implications of the Constitutional Treaty', 6 *German Law Journal* (2005) p. 1649-1666 at p. 1650.

cal model are given, allows one to conclude that, although endowed with multiple original characteristics, the 'new Union' is still an international organization, based on the principle of the attribution of competences.<sup>4</sup>

Consequently, from an international perspective, the disappearance of the current European Community and European Union is a case of succession of international organizations, which should not give rise to any third party reaction. The succession of the new Union to the international rights and obligations of the Community/Union is resolved in a highly general manner. '...acts of the institutions (...) adopted on the basis of the treaties (...) and 'the other components of the *acquis* of the Community and the Union (...)', are deemed to be maintained to the extent that they have not been repealed, annulled or amended (IV-438(3)). There is no mention even of third parties, so the automatic nature of the succession is taken for granted.

Nevertheless, one element should be stressed due to its eventual consequences at the international level. For the first time, the values and principles that must govern the Union's external action have been expressed in an orderly and explicit manner (I-3(4) and III-292). In other words, the ideology governing the Union's relations with the rest of the world has been set out expressly. This facilitates its recognition by third parties and enables responses and reactions at a political level, such as the formation of new alliances, the termination of certain pre-existing relations, etc. Apart from the practical aspect of affirming and promoting these values and principles, this contributes to the provision of unity and coherence to the different areas of the Union's internal and external action in circumstances putting these to the test.<sup>5</sup> This is true even if it is understood that no commitment to international principles or to the defence of multilateralism can work miracles without the political will of the member states or the help of circumstances.

### *The Union is a subject of international law*

The second matter to be considered is based on the intended attribution of international legal personality to the Union, which, from a technical perspective, is achieved in an extraordinarily concise manner (I-7) and in terms that are practically identical to those used in Article 282 EC. Along the same line of continuity, not all manifestations of the Union's international legal personality are mentioned in Title V of the Constitution. Reference is only made to the *ius contrahendi* and the right to maintain diplomatic relations with other subjects of international law (states and international organizations). Indeed, both capacities are to be signifi-

<sup>4</sup> See M. Cremona, 'The Union as a Global Actor: Roles, Models and Identity', 41 *CML Rev* (2004) p. 553-573 at p. 570.

<sup>5</sup> *Ibid.*, p. 568.

cantly affected by single international personality, and by the modifications of the Union's institutional system. As we shall see when dealing with the Union's external representation, these modifications reinforce the possibility of the Union having a single voice at the international level.

The Union's relations with other international organizations are also affected by this new scenario where it, as a single subject of international law, will be able to participate.<sup>6</sup> Nevertheless, in our opinion, the consequences of this change in circumstances will not be as far-reaching as could be expected. The division between the Union's foreign policy and external relations is maintained, and the element of innovation goes no further than projecting onto this division the institutional changes in the external representation of the Union, which result from incorporating the figures of the Minister of Foreign Affairs and the Union's delegations (III-327, 328 and 305). The limited scope of these reforms, coupled with the lack of criteria governing the joint participation of the Union and the member states in international organizations, leads us to think that there will be no reduction in the diversity of formulas of participation developed up until now between the Community and the Union. Once again, the most convenient solution for the Union's interests will be determined case by case, through experience.

With regard to other manifestations of the Union's legal personality, paradoxically, Title V of the Constitution does not refer to the Union's international responsibility, or to its participation in dispute settlement mechanisms.<sup>7</sup> This silence is conspicuous, as these two dimensions are relevant for the Union's Common Security and Defence Policy (CSDP) and the commitment to multilateralism expressed in the Constitutional Treaty. If these omissions are not addressed in the future, the Union's position will have to be deduced from the Constitution's general reference to principles of international law (III-292), from international practice concerning international organizations and from current practice regarding the European Community.

There are no special provisions either regarding the procedure for the European Union's accession to other international organizations, which is understood to be the same as the procedure envisaged for the conclusion of international agreements (III-325). However, this article only refers specifically to the accession of the European Union to the ECHR, but not to possible accessions to other international organizations.<sup>8</sup> Although becoming a member of an international organization depends on the requirements that the organization establishes (among which state status is usually included), in this sense, the reaffirmation of the Union

<sup>6</sup> See I. Govaere et al., 'In-Between Seats: The Participation of the European Union in International Organizations', 9 *European Foreign Affairs Review* (2004) p. 161-162.

<sup>7</sup> In spite of these being mentioned in the Final Report of Working Group III on Legal Personality, CONV 305/02, p. 6.

<sup>8</sup> See Govaere et al., *supra* n. 6, p. 183-184.

as a subject of international law will improve its position in any eventual negotiations aimed at inducing a given organization to modify its constituent treaty or its internal regulations to enable the Union to have full membership.

In sum, the Constitutional Treaty intends to create a new subject in international law that is different from the member states and the current Community and Union. This new entity, however, like the previous ones, is governed by international law and is obliged to respect the structural principles that make up the international legal order. This recognition as a single international subject is worthy of a positive valuation, as it overcomes the jurisdictional and functional Community/Union division and, consequently, one of the obstacles that currently affect the unity and coherence of the Union's external action.

#### DOES CHANGING THE INSTITUTIONS IMPLY CHANGING POLICIES?

As already mentioned above, one of the stated objectives of the European Constitution was to reinforce the presence of the Union as an international player. In order to do so, the Constitutional Treaty incorporated a process of reforms with two principal lines of action aimed, on the one hand, at overcoming the classic problem of the limited democratization of the foreign policy and the European Parliament's scant level of participation, and, on the other hand, at partially renovating its institutional structure, through the strengthening of personal leadership.

##### *The inability to overcome the limited democratization of the foreign policy*

In general terms, the European Constitution tackles the recurrent democratic deficit problem by reaffirming the principle of representative democracy (I-46) and by attempting to increase citizen participation in the European Union, both directly and through the European Parliament.<sup>9</sup> Given that in the area of Union foreign policy the democratic shortfall brings about a marked predominance of the institutions, which are assimilated with the executive power,<sup>10</sup> the Constitutional Treaty has attempted to overcome this situation by devising a more equitable participation of the different institutions in the drafting and implementation of the CFSP and, especially, by strengthening the role of the European Parliament.<sup>11</sup>

<sup>9</sup> B. Crum, 'Tailoring Representative Democracy to the European Union: Does the European Constitution Reduce the Democratic Deficit', 11 *European Law Journal* (2005) p. 452-467.

<sup>10</sup> B. Crum, 'Legislative-Executive Relations in the EU', 41 *Journal of Common Market Studies* (2003), p. 375-395; G. Bermann, 'Executive power in the new European Constitution', 3 *International Journal of Constitutional Law* (2005) p. 440-447.

<sup>11</sup> I. Pernice and D. Thym, 'A new Institutional Balance for European Foreign Policy', 7 *European Foreign Affairs Review* (2002) p. 369-400; D. Thym, 'The Institutional Balance of European

In line with the constitutional provisions, the weight of the future CFSP will rest on a triangular structure, comprising:

- (a) The European Council, which will determine the strategic interests of the Union and its objectives (I-40(2)) and define the general orientation of the Union's foreign policy (III-295(1));
- (b) The Council, which will define the strategic lines (I-40(2)) and will adopt the European decisions that may be necessary for their application (III-295(2)) and;
- (c) The Minister of Foreign Affairs, who will contribute to the formulation of foreign policy along with its implementation, while at the same time representing and expressing the Union's position in all international matters (I-40(4) and III-296).

In this new institutional layout, the European Constitution only stipulates, fairly ambiguously, that the Parliament shall be periodically consulted on the principal aspects and the fundamental options of the foreign policy, and shall be kept informed of its evolution (I-40(8)).

Despite this limited role, the Parliament retains its traditional powers of addressing requests and recommendations to the Council and of holding debates twice a year on the progress made in the field (III-304). The Constitution also significantly increases its participation in the procedure for ratifying international agreements (III-325), such as those dealing with association agreements, the accession of new members and the accession of the EU to the European Convention on Human Rights, which require its consent. This participation, however, is not required for the conclusion of those agreements that relate exclusively to foreign policy (III-325(6)). Similarly, the European Constitution continues to insist on the need to strengthen links with the National Parliaments, as envisaged in the 'Protocol on the mission of the National Parliaments in the EU' in which the authority for organizing inter-parliamentary conferences for debating European foreign policy and defence issues is conferred on the Conference of European Affairs Committees (COSAC).<sup>12</sup>

Lastly, it is necessary to bear in mind that both the plenary of the European Parliament and the Committee on Foreign Affairs have been expressing their positions, often critical, on the most significant aspects of foreign policy and have been promoting European citizenship, while exercising considerable influence on

Foreign Policy in the Treaty establishing a Constitution for Europe' (Berlin, Walter Hallstein Institut 2004) document 13/04.

<sup>12</sup> G. Gourlay, 'Parliamentary oversight of ESDP: the role of the Parliaments and of the EP', *Conference Paper*, 4<sup>th</sup> Workshop on Strengthening Parliamentary oversight of international military co-operation and institutions, Brussels, 12-14 July 2002.

the rest of the institutions on important topics such as defence or human rights.<sup>13</sup>

Nevertheless, and in spite of all of the above, the European Parliament has been relegated to a supporting role in Union foreign policy, as it is still absent from the decision-making process and is only a passive receiver of *ex post facto* information from the Ministry of Foreign Affairs. Viewed in conjunction with the absence of any direct participation of the public in foreign policy, it is beyond dispute that the democratization of the Union foreign policy continues to form part of the unfinished business, even with the Constitutional Treaty.<sup>14</sup>

*The partial renovation of the CFSP's institutional structure through the strengthening of personal leadership*

The second group of modifications contained in the Constitutional Treaty and which relate to the reform of the CFSP's institutional structure links up with the idea that foreign policy is a policy for the initiated. Countering this requires strengthening the prominence of single-person organs and individual leadership. While the equivalent of the *ius representationis omnimodae* has, up until now, been the responsibility of the High Representative of the Common Foreign and Security Policy, the European Constitution has opted for attributing the responsibility for the external representation of the Union to two new offices: the President of the European Council (I-22(2)) and the Minister of Foreign Affairs (III-296(2)).

The establishment of a Presidency indicates that the consolidation of the European Council within the Union's institutional layout is aimed at instituting a new leadership through the effective programming of the new institution's short-term agenda (up to five years). In reality, this is probably, first of all, a case of bolstering the perception of the Union around the world, which would explain the need for the external election at the highest level of the President of the European Council, as well as the prohibition of a dual mandate (I-22).<sup>15</sup>

The most significant shortcomings of this new institution are connected with its constitutional vagueness, which leaves the door open to overlapping competences and potential conflicts between the President of the Commission and the future Minister of Foreign Affairs. Much will depend on the ability and capacity of the

<sup>13</sup> 'European Parliament Resolution on the Annual Report on Human Rights in the World 2004 and the European Union's policy on the matter (2004/2151(INI))', A6-0086/2005, 28 April 2005.

<sup>14</sup> E. Barbé and E. Zapater, 'External Action and the Role of the European Parliament: Still Pending', 1 *CFSP Forum* (2003), p. 3-4; E. Barbé, 'The Evolution of the CFSP Institutions; Where does Democratic Accountability Stand?', 39 *The International Spectator* (2004) p. 47-60; S. Stavridis, 'The CFSP/ESDP, Parliamentary Accountability and the 'Future of Europe' Convention Debate', *Working Paper* n. 42 (Barcelona, Institut Universitari D'Estudis Europeus 2003).

<sup>15</sup> J.W. Sap, 'The European President', 1 *EuConst* (2005) p. 47-51.

persons chosen to hold the office. Apart from this, the institution of foreign minister has at least two serious deficiencies.<sup>16</sup>

Firstly, there is a risk that the office of Minister of Foreign Affairs will lack real autonomy, due to its dual functionality (member of the Council, over which it presides in matters of Foreign Affairs, and simultaneously Vice-President of the Commission, elected by a different procedure from the rest of the Commissioners) and secondly, the fact that it will be strongly dependent on the other institutions. An example is the difficulty encountered in securing the dismissal or resignation of the Minister of Foreign Affairs. Theoretically, in the case of a successful vote of no confidence against the Commission, the Minister of Foreign Affairs would have to resign, given his position as commissioner and Vice-President, but he could continue as the head of foreign policy, since he is a member of the Council. The opposite situation also could arise; that is, the Parliament could use the vote of no confidence to express its rejection of the Minister of Foreign Affairs as the highest authority of the CFSP, thereby entailing the fall *en bloc* of a blameless Commission.

The positive side of linking the foreign minister in multiple ways to the other institutions is the fact that this may provide the office with a certain degree of invulnerability. This is because it is difficult to imagine the President of the Commission calling for the resignation of a Vice-President of the same political level, or the European Council permitting or requesting the removal from office of a Vice-President of the Commission, who may then have become one of the driving forces behind community integration. In consequence, everything will depend on the foreign minister's ability to wear 'both hats' as member of Council and Vice-President of the Commission, according to need, without giving either of the institutions the sensation of sleeping with the enemy.

Secondly, in order to deal with the multiplicity and complexity of the functions with which he/she has been entrusted, the minister would clearly need the working capacity of a superman/woman. The position involves running the already existing structures supporting external action, such as the Political and Security Committee. In addition, there is the implementation of the planned European External Action Service (III-296(3) and the Declaration on the Creation of a European External Action Service). This would not only benefit the foreign minister, but also would offer cover and support to the President of the Council and the Commission itself.<sup>17</sup>

<sup>16</sup> B. Crowe, 'The Foreign Minister of Europe' (The Foreign Policy Centre, 2005), <[www.fpc.org.uk](http://www.fpc.org.uk)>; C. Hill, 'A Foreign Minister without a Foreign Ministry –or with too many?', 1 *CSFP Forum* (2003), p. 1-2.

<sup>17</sup> S. Duke, 'Preparing for European Diplomacy', 40 *Journal of Common Market Studies* (2002) p. 849-870; S. Griller, 'External Relations', in B. De Witte (ed.), *Ten Reflections on the Constitutional Treaty for Europe* (Florence, EUI-Robert Schuman Center 2003) p. 153.



In fact, the opening of diplomatic Union delegations under the authority of the Minister of Foreign Affairs would help to overcome the problems which arise at present from the current dual Commission-Council representation.<sup>18</sup> However, given that the existence of these delegations does not imply the disappearance of member states' diplomatic representations nor their substitution by a single European Union embassy, part of the problems would remain. As pointed out in the Constitution itself (I-5, III-306 and III-328(2)), these problems will have to be overcome by means of mutual cooperation and complementing actions.

To conclude: regardless of the fate of the European Constitution, there are a number of institutional reforms that deserve to be salvaged from possible failure. The office of the Minister of Foreign Affairs, for which there is a clear personal and functional continuity in connection with the current High Representative of the CFSP, certainly comes to mind. A redesigning of its formal link with the Council and the Commission by way of an inter-institutional agreement is all that would be needed.

The President of the European Council also could be saved. Nevertheless and prior to these new arrangements, the problems of possible overlapping of functions with other entities should be solved. This to avoid that the new presidency should affect the community element and alter the balance of the current institutional system, especially by affecting the figure of the President of the Commission.

Finally, it would also seem feasible to maintain the opening of diplomatic delegations of the Union and even the Foreign Action Service, which could be set up through action under the present Union Treaty. All these reforms would undoubtedly contribute to the Union becoming a more substantial actor with greater presence in the international arena.

#### WILL ALTERING THE PILLAR STRUCTURE REALLY LEAD TO UNITY IN THE UNION'S FOREIGN ACTION?

One of the major novelties of the Constitutional Treaty is its suppression of the pillar structure and the unification of all the Union policies in Part III ('The Policies and Functioning of the Union'), including foreign policy. The immediate consequence of this unification is the formal disappearance of the current division between the position of general external relations and foreign policy, as the Consti-

<sup>18</sup> E. Barbé and L. Mestres, 'The new EU's External Action: A significant step forward towards the EU's single voice', *Working Paper* n. 56 (Barcelona, Institut Universitari D'Estudis Europeus 2004).

tution treats them jointly in Title V of the aforementioned Part III, along with the rest of the matters covered by the Union's external action.

This new and formally unitary structure, however, does not abolish the singularity of the Union foreign policy field, which continues to be dominated by an intergovernmental *modus operandi*. In spite of establishing a single system of competences for the entire Union, the Constitution distinguishes the CFSP from the rest of the categories of Union competences (I-16 and III-308).<sup>19</sup> This special nature of the Common Foreign and Security Policy is reflected in the nature of the acts to be adopted under it. The Constitutional Treaty regulates CFSP acts in accordance with three parameters. Firstly, it has explicitly excluded the so-called legislative acts from the field (I-40(6)), although they are used in other external action areas (such as the Common Commercial Policy or development co-operation). Secondly, from a formal perspective, it has unified all foreign policy acts into a 'European decisions' category.<sup>20</sup> Thirdly, their adoption procedure clearly falls within intergovernmental procedures, given that:

- The European Parliament is excluded, except for the aforementioned obligation of consultation and information and to 'duly take into consideration' its opinions;
- They are generally passed unanimously, although the cases allowing for qualified majority have been extended;
- The right of constructive abstention is recognized for individual member states, switching to a veto when these represent at least one third of the member states together accounting for one third of the population of the Union (Art. III-300).

These very procedural peculiarities, which point towards intergovernmental procedures, are also present in the adoption procedure for international agreements that refer 'exclusively to the Common Foreign and Security Policy', both in the negotiation aspect and also in the total exclusion of the European Parliament from the process (III-325(6)).

<sup>19</sup> On the difficulties arising from the consideration of the CFSP as a shared competence or as an area of co-ordinating action, see Cremona, *supra* n. 2, p. 1353-1354; A. Hable, 'The European Constitution: Changes in the Reform of Competences with a Particular Focus on the External Dimension', *Working Paper* (Wien, EuropaInstitut-WirtschaftsUniversität 2005), <[fgr.wu-wien.ac.at/institut/ef/wplist.html](http://fgr.wu-wien.ac.at/institut/ef/wplist.html)>, p. 25-26.

<sup>20</sup> Nevertheless, the substantial differences between the acts of the CFSP still remain, and it is possible to distinguish between decisions of the Council 'where the international situation requires operational action' (II-297) from those 'which shall define the approach of the Union to a particular matter' (III-298). On the problems to which this situation may give rise, see Cremona, *supra* n. 2, p. 1357-1358.

Nevertheless, and in spite of all the intergovernmental procedures, the CFSP agreements will be placed on the same level as the rest of the agreements signed by the Union. Once the Council has adopted unanimously the European decision of signing the agreement and it has come into force, it will be 'binding on the institutions of the Union and on its member states' (III-323(2)). The possibility, currently opened in Article 24 EU Treaty, for a member state to require previous ratification at a national level in order to agree to be bound to a CFSP agreement has been eliminated.

The peculiarities of form that distinguished the legal acts and agreements of foreign policy from acts of secondary legislation and from international agreements carried out by the European Community have disappeared and differences are apparently only maintained at a procedural level. However, this formal equality does not imply that CFSP acts have the same effect as the rest of the Union's legal acts. The examination of two connected issues, namely, the applicability of primacy and the scope of the Court's jurisdictional control of foreign policy acts, reveals the specificity of these acts.

With regard to primacy, the wording of Article I-6 is clear when it affirms the primacy of the 'Constitution and Law adopted by the institutions', with no exception for foreign policy acts. Article III-376, however, excludes the foreign policy almost totally from the jurisdiction of the Court of Justice. One new and notable exception to this is made in favour of individual appeals against decisions in the field, as will be discussed below. A comparative reading of these provisions reveals that the scope of primacy is ambiguous.<sup>21</sup> In principle, admitting the primacy of CFSP acts would seem to be consistent with the unconditional tone of Article I-6 insofar as it reflects the constitutional aim of unity of the entire Union legal system. However, a reading in the light of the entire constitutional instrument presents arguments that make it possible to support conflicting opinions.<sup>22</sup>

Firstly, Article I-6 has been the subject of a Declaration pointing out that 'The Conference notes that Article I-6 reflects existing case-law of the Court of Justice of the European Communities and of the Court of First Instance'. This Declaration can be interpreted to mean that the Constitutional Treaty does no more than 'codify', i.e., establish primacy in the terms already laid out in the jurisprudence of the Court (jurisprudence that in the case of the CFSP is non-existent, due to the lack of jurisdiction over the second pillar), but would not authorize its extension into new areas. Nevertheless, the aforementioned Declaration could also be construed as not only permitting a 'codification', but also a 'modification' of the scope

<sup>21</sup> A. Dashwood, 'The Relationship Between the Member States and the European Union/European Community', 41 *CML Rev* (2004) p. 376-380.

<sup>22</sup> An interesting debate on these matters appears in the Select Committee of the House of Lords on the European Union, 'The Future Role of the European Court of Justice', 6<sup>th</sup> Report, 14 March 2004, <[www.publications.parliament.uk/pa/ld200304/ldselect/ldcom/47/47.pdf](http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcom/47/47.pdf)>.

of the principle of primacy, which would entail the extension of the Court of Justice's jurisprudence to the Union foreign policy.<sup>23</sup>

Secondly, since Article I-6 is one of the provisions over which the Court has jurisdiction, in the end, it would be up to this institution to evaluate the scope of primacy for foreign policy acts. Nevertheless, the Court's response to a possible extension of primacy to the acts of the CFSP most probably would be negative, because of the low probability that such acts would fulfil the direct effect requirements. Even in the hypothetical case that they were capable of producing direct effect, the national court in which an individual attempted to enforce them would have no recourse to the European Court of Justice for it to pronounce on primacy.<sup>24</sup> In consequence, the Constitution's primacy proclamation is not deemed to affect the CFSP, given that it has been excluded in a general manner from the application of the jurisdictional mechanisms that guarantee its application in the rest of the Union's legal system.

The exclusion of the legal acts of foreign policy from the jurisdiction of the Court of Justice also poses problems with regard to the control of these acts. More specifically, the Court has no control over the compatibility of CFSP decisions with the rest of the text of the Constitution, including the aims and principles in Article III-292. The only exception is the aforementioned legality review of decisions which provide for restrictive measures against natural or legal persons (III-376). This provision extends the control of the Court to restrictive measures against individuals under the new conditions for individual appeal (III-365). This is an important step forward insofar as at present only Community acts adopted in the application of a foreign policy act can be controlled.<sup>25</sup> In other cases, including those that may be capable of affecting individuals' fundamental rights, the Court of Justice will only be able to control the legal basis of the CFSP act and verify that it does not affect the exercise of other Union competences via Article III-308, as at present under Article 47 EU Treaty.<sup>26</sup>

<sup>23</sup> As suggested by J.H. Reestman, 'Primacy of Union Law', 1 *EuConst* (2005) p. 105-106.

<sup>24</sup> See 'Editorial Comments. The CFSP under the EU Constitutional Treaty – Issues of depillarization', 42 *CML Rev* (2005) p. 326-328.

<sup>25</sup> A number of actions for annulment have been decided and are currently pending in the European Court of Justice against restrictive measures aimed at legal or natural persons in the matter of terrorism. These cases can be monitored at <[www.statewatch.org/terrorlists/listschallenges.html](http://www.statewatch.org/terrorlists/listschallenges.html)>. Nevertheless, neither is the application of Article III-376 free of doubt, insofar as it is not clear how the European Court of Justice will interpret the criteria for individuals bringing the action for annulment that are established in Article III-365(4), see T. Corthaut, 'An Effective Remedy for All? Paradoxes and Controversies in Respect of Judicial Protection in the Field of the CFSP under the European Constitution?', 12 *Tilburg Foreign Law Review* (2004) p. 110-144; A. Hinarejos-Parga, 'Judicial Review and Common Foreign and Security Policy under the Constitution', 1 July 2005, <[www.lse.ac.uk/Depts/intrel/EFPC/Papers](http://www.lse.ac.uk/Depts/intrel/EFPC/Papers)>.

<sup>26</sup> See Case T-338/02, *SEGI Association, Aritz Zubimendi Izaga and Aritz Galarraga v. Council*, Order of the Second Chamber of the Court of First Instance of the European Communities of 7 June 2004, (under appeal, Case C-355-04 P).

With regard to foreign policy agreements, prior control of their constitutionality will be possible at the request of a member state, the European Parliament, the Council or the Commission. If the Court of Justice's opinion is adverse, the agreement cannot enter into force without Treaty change (III-325(11)). This is an extension of Article 300 EU. On the other hand, no jurisdictional control mechanisms are envisaged for the non-compliance of member states with these agreements. Thus, we may reach the paradoxical result that the consequences of member states being bound by the agreements signed by the Union will depend on the competences used for the agreement (foreign policy or other external relations).

In sum, eliminating the pillar structure and setting up one single system of Union acts is not enough to attain the normative unity of the Union. In order to do so, and even if the special procedural features of the foreign policy were maintained, it would be necessary to accept, with all the related consequences, that CFSP legal acts should have the same effect as all other Union acts (including primacy and jurisdictional control). Otherwise, instead of bringing simplicity and clarity, the changes would probably increase confusion.

#### DOES CHANGING PRIMARY LEGISLATION INCREASE EU EFFICIENCY? REFORMS AND PROGRESS IN THE AREA OF DEFENCE

Along with the objective of endowing the Union with the necessary means for playing a relevant role at international level, the Constitutional Treaty would create an important reform of the provisions concerning security and defence. These new provisions are intended to allow the formation of an operational Common Security and Defence Policy. Its introduction has not necessarily been linked to the passing of legal reforms.<sup>27</sup> As is well-known, the pre-constitutional development of the defence policy began at the European Council of Laeken in December 2001 and underwent a significant inflection subsequent to the acceptance by the European Council of Brussels in December 2003 of the so-called *Solana Document* entitled 'A secure Europe in a better world. European security strategy'.<sup>28</sup> This document contains the programmatic principles that have inspired the re-founding of the CSDP and which the European Constitution has subsequently made its own (see Article III-292).

The international situation described in that document has in fact led to Union awareness that, on the one hand, world leadership cannot be measured solely in terms of military superiority as there is also the need to exercise a certain degree of

<sup>27</sup> 'European Union Security and Defence', *Chaillot Paper* n. 75 (Institute for Security Studies, 2005), <[www.iss-eu.org/chaillot/cha75e.pdf](http://www.iss-eu.org/chaillot/cha75e.pdf)>, 7 June 2005.

<sup>28</sup> 'A secure Europe in a better world. European Security Strategy', 12 Dec. 2003, <<http://ue.eu.int/uedocs/cmsUpload/78367.pdf>>.

moral authority. On the other hand, status as a civil power is not incompatible with an increase in military power, especially in order to counteract US hegemony and to strengthen the Union's autonomy in international crises. On the basis of these two considerations, the most pertinent modifications to the CSDP, which to a great degree entail no more than the codification of previous extra-constitutional advances, would concern the Petersberg tasks, the mutual defence and solidarity clauses and the defence agency.

A wider scope for the Petersberg missions is only a *de iure* reform, as the European Union has in effect already been carrying out many of these missions, e.g., prevention and stabilization of conflicts. It is not even an innovation that they can be linked to the fight against terrorism, although now they can be put into operation in third party states.<sup>29</sup>

The planning and implementation of both civil and military missions is still an intergovernmental matter, which falls within the responsibility of the Council, although co-ordination will belong to the foreign minister, with the support of the Political and Security Committee. The downside is that this increase in the Union's capacities has not been accompanied by a strengthening of democratic controls, since the European Constitution has simply extended to this area the duty of prior consultation and provision of *a posteriori* information to the European Parliament, obligations already provided for on a general basis for foreign policy (I-41 and III-304). This situation increases the democratic deficit. Not only is the Parliament unable to control military operations that are financed with national contributions, which frequently also avoid the supervision of national parliaments,<sup>30</sup> but there also would be the possibility of creating parallel funds to defray the preparation costs for missions in which the Union participates and for which both the Council and foreign minister are exclusively responsible (III-313(3)).

The inclusion of mutual defence (I-41(7)) and solidarity (I-43) clauses represents an attempt at strengthening European identity by establishing collective action mechanisms. Nevertheless, the novelty is still only relative, as the solidarity clause merely includes measures for the fight against terrorism that the member states have been applying since the terrorist attacks of 11 March 2004 in Madrid. Moreover, both clauses have been drafted in terms that are too vague and generic and contain at least two important flaws. Firstly, they are based on a somewhat artificial division, which takes into consideration the subtle difference that, in practice, may exist between mutual defence and solidarity in the case of a terrorist

<sup>29</sup> M. Ortega, 'Petersberg Tasks and Missions for the EU Military Forces', *Working Paper* (Institute for Security Studies, Paris 2005), <<http://www.iss-eu.org>>, May 2005.

<sup>30</sup> W.F. Van Eekelen, 'The Parliamentary Dimension of Defence Procurement', *Occasional Paper* no. 5 (DCAF, Geneva 2005), <[www.dcaf.ch](http://www.dcaf.ch)>.

attack. Secondly, due to the problem of distinguishing between both types of clauses, it would have been advisable to have required compliance with Article 51 of the UN Charter (envisaged for the setting in motion of the mutual defence clause) also for the use of the solidarity clause. In any case, what we can confirm is that the fight, not the war, against terrorism, in practice, is acting as a catalyst in defining the CSDP.<sup>31</sup>

Along with the maintenance of constructive abstention (III-300), the European Constitution has increased the range of variable configurations for foreign policy in order to respond to the many different political wills and capacities of the member states of the Union. To this end, new co-operation mechanisms have been envisaged, which respond to the same philosophy that encouraged the creation of Schengen or the Eurozone, but that only fit into the CSDP framework and do not require the participation of a minimum number of countries.<sup>32</sup>

Concerning the premise of maximum flexibility, and in accordance with the criteria envisaged in Protocol 23, the Constitution permits those member states with military capacity to create permanent co-operation structures. In order to do so, the contributions that each state is able to offer are assessed following which they are required to develop the defensive capabilities to which the Union may resort for carrying out certain missions or programmes. In spite of its permanent nature, the list of participants in this co-operation will vary. Each state can decide freely and individually on its incorporation into or withdrawal from the structured co-operation, and the Council may suspend the participation of a member state due to an evident incapacity of assuming the agreed commitments. In any case, the annual contributions of each member state and the progress made in this mode of co-operation will be assessed by the European Defence Agency.

Apart from technical considerations, these new formulas for flexibility in the defence policy leave a number of questions unanswered. Firstly, there is the difficulty of fitting the principle of primacy into this area.<sup>33</sup> Secondly, there is the problem of determining which subject is internationally responsible for operations of the Union when entrusted to a group of member states or to another international organization. This is the more interesting question in view of the constitutional recognition of the Union's legal personality. Finally, it is necessary

<sup>31</sup> A. Biava, 'L'Union européenne, acteur global? Potentialités et limites de la PESC et de la PESD', (Institut européen de l'Université de Geneve, 2005), <[www.unige.ch/ieug/BIAVA.pdf](http://www.unige.ch/ieug/BIAVA.pdf)>, p. 129.

<sup>32</sup> A. Missiroli, 'Avanzar con cuidado: el Tratado Constitucional y más allá', in N. Gnesotto (ed.), *EU Security and Defence Policy. The first five years (1999-2004)* (Paris, Institute for Security Studies 2004), <[www.iss-eu.org](http://www.iss-eu.org)>.

<sup>33</sup> See Reestman, *supra* n. 23, p. 106; M. Kumm and V. Ferrelles, 'The primacy clause of the constitutional treaty and the future of constitutional conflict in the European Union', 3 *International Journal of Constitutional Law* (2005) p. 473-492.

to consider how the new provisions are able to contribute to increasing the efficiency of the Union defence policy when they actually increase the differences between the military and defensive capabilities of member states and thus prevent the solidarity they are aimed to strengthen.

The European Defence Agency is perhaps the clearest example that the constitutional reforms in the defence policy, to a great degree, merely have codified already existing advances. The establishment of this agency had in fact been suggested in the aforementioned *Solana Document*, although it only actually took off in 2004, due to a Common Action of the Council, which enabled the Agency to start operating on 1 January 2005 without depending on the outcome of the Constitutional ratification process (1-41(3) and III-311).<sup>34</sup>

In spite of the criticism regarding its principal objectives, there is no doubt that the European Defence Agency will play a fundamental role.<sup>35</sup> The assumption of international responsibilities along with the Union's acceptance of new international peace-keeping and security missions and the fight against terrorism probably will have a human cost, but most certainly will require spending more, and above all in a better way, in order to ensure that the necessary investment in defence will result in a superior military capability. For these reasons, it will need to foster a 'European security culture'.

In sum, the development in defence policy would appear to suggest two points for reflection, one specific and the other general. The first is that, in political terms, the objective is not for the Union to transform its status as a civil power into one as a military power but rather to ensure that it acquires sufficient capabilities for deploying a 'policy of responsibility' in international peacekeeping and security. The second is that reforming primary legislation is not an essential requirement for advancement. The Common Security and Defence Policy is a good example that timing, formal obstacles and constitutional difficulties are of little importance when there is the political will and the need to progress in certain fields of European integration.

<sup>34</sup> Common Action 2004/551/CFSP, of the Council, 12 July 2004, regarding the establishment of the European Defence Agency, *OJ* [2004] L 245/17. The activities and progress noted since its creation can be monitored via its official website <[www.eda.eu.int](http://www.eda.eu.int)>, June 2005.

<sup>35</sup> B. Schmitt, 'The European Union and Armaments. Getting a Bigger Bang for the Euro' (Paris, Institute for Security Studies 2003), *Chaillot Paper* no. 63 <[www.iss-eu.org](http://www.iss-eu.org)>, June 2005; 'Defence Procurement in the European Union. The current debate', *Report of an EUISS Task Force* (Paris, Institute for Security Studies 2005), <[www.iss-eu.org](http://www.iss-eu.org)>.



## CONCLUSION

If one of the main unresolved matters in the European construction is the building of an efficient, coherent external action, the modifications introduced by the Constitutional Treaty demonstrate that there is a will to change. The aim of our analysis of Title V has been to highlight that, even though there are elements of continuity that indicate the maintenance of foreign policy as a camouflaged inter-governmental pillar, now there are also provisions useful in strengthening the Union's international presence by means of unity in its external action.

In our opinion, the elements that remain still suggest the need to strengthen the democratic component of the CFSP and the CSDP, and to search for suitable formulas for integrating the competences and acts of the CFSP into the Union's external action. As for the new contributions, some of them, such as the institutional modifications aimed at strengthening the Union's representation or the progress in the CSDP, could be incorporated or are in fact already present in the current legal framework. On the other hand, others, such as the express recognition of the Union's legal personality or the reference to the values and principles of its external action, still require the modification of the Treaties in order to be fully effective.

In any case, and in spite of the standby situation of the Constitutional Treaty, we still believe that there are political and legal reasons for defending the advisability of the Constitution's entry into force. However, even if this does not come about, we firmly believe that the European Union is sufficiently mature and has sufficient force to ensure that progress made in foreign policy and defence policy can continue through other options. There is nothing new under the sun. Once again, the European political class is faced with the challenge of showing Union citizens that the Union has the ability to accept its responsibilities in the 'governance' of globalization.

