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BRIDGING THE ACCOUNTABILITY GAP IN  
EUROPEAN SECURITY AND DEFENCE POLICY (ESDP)**

# **The European Convention and Common Foreign and Security Policy: more defence, less scrutiny?**

**Giovanna Bono**

**March 2004**



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## **Executive Summary**

By adopting a multilevel approach to understanding decisions taken in security and defence policies by European member states, the paper argues that the development of the European Security and Defence Policy, the proliferation of ad-hoc coalitions of the willing, and the subcontracting of security tasks from the UN has worsened the challenge of parliamentary accountability in foreign, security and defence policies.

The paper evaluates how the European Convention has sought to bridge the parliamentary accountability gap in Common Foreign and Security Policy (CFSP) and in European Security and Defence Policy (ESDP). The outcomes of the Convention on the future of Europe are not meeting its initial ambition to put foreign, security and defence policy among the priorities for the European Union's constitutional design. CFSP will become more integrated, on an intergovernmental rather than supranational model and under the large states' control. The major innovation is the creation of the position of Foreign Affairs Minister whose autonomy remains still uncertain, especially in his/her relationship with the President of the European Council. ESDP's operational capabilities and scope are both extended while coalitions of the willing are institutionalised and a defence core group could emerge. The contrast remains between a slower integration of CFSP and a faster progress of ESDP.

Given the significance of proposals in ESDP, the new powers proposed by the European Convention to be given to national parliaments and the European Parliament in this policy area are too weak to close the existing parliamentary accountability gap.

## **Introduction**

From the beginning of its work, the European Convention, presided over by Valéry Giscard d'Estaing, has considered that the influence that the European Union exercised internationally – and in particular in the area of the Common Foreign and Security Policy (CFSP) – constituted one of the founding building blocks of the European Constitution and of the political union that it sought to create. The section on 'defence', also known as the European Security and Defence Policy (ESDP), was presented as one of the major areas of negotiations, despite the frustrations that arose because of the Iraqi crisis. Another key task of the convention was to close the democratic legitimacy gap of the European Union.

The aims of this paper are twofold: first to assess how the European Convention has sought to transform the Common Foreign and Security Policy (CFSP) and second, to assess its record in seeking to resolve the democratic legitimacy gap by strengthening parliamentary accountability in this policy area. To answer these questions, the paper is subdivided into three parts. In the first part, I provide an overview of the parliamentary deficits of CFSP and ESDP by relying on a multilevel approach. This approach has been chosen because it is an assumption of the author that decisions taken in CFSP and ESDP cut across the roles of the member states, their relation with the EU and NATO and the UN. In other words, CFSP and ESDP decisions need to be situated in a network of global governance that lies partly outside the decisions taken within the second pillar of the EU. It is argued that the creation of the ESDP in 2000, along with the proliferation of 'ad-hoc coalitions of the willing' since the 1990s and the undermining of the political authority of the UN, as witnessed most explicitly during the Iraqi war in 2003, has made it more difficult for parliaments to scrutinise external security and defence policies.

In the second part, the paper provides an overview of the changes to the workings of the CFSP and ESDP as proposed by the European Convention's Draft Treaty presented on 18 July 2003. It is argued that the changes proposed will not lead to a European security order in which the EU will be fully in charge of controlling its foreign and security policy. On the contrary, the intergovernmental nature of this policy is reaffirmed, despite the merging of the Treaties of the European Communities and those of the European Union in one unique document, which gives the EU a unique legal personality. In fact, although the pillars will be officially abolished, in reality they will continue to have an impact at the political level. While the proposed Treaty clarifies what are the 'competencies' of the Union that are unique and those that are divided with member states, it creates a new status for foreign, security and defence policy. The proposed treaty argues that CFSP/ESDP is a 'competence' of the Union that is neither exclusive nor divided. This level of high ambiguity will make the policy-making process in this area harder to scrutinise. The proposals advanced by the Convention in the area of ESDP will allow a 'hard-core' of member states to deepen their level of cooperation. By introducing a mutual defence clause, a solidarity clause and by widening the definition of security and defence tasks, the ESDP will be transformed significantly.



In the third part, I describe the measures introduced by the Convention to give more powers to national parliaments and the European Parliament in CFSP. In the conclusion, an assessment of the changes in CFSP/ESDP and in parliamentary accountability is provided. Overall, the Draft Constitution's proposals in the foreign, security and defence areas represent a double compromise: in relation to CFSP, between the aspirations of the intergovernmentalist and the supranationalists; between those promoting a Europe of defence and those against it. In the area of parliamentary accountability, given the substantial changes planned for ESDP, the Convention's approach could widen, rather than resolve, the already existing democratic deficit gap. If the proposals are accepted, the executive branches of national governments and ad-hoc coalitions of the willing will increase their powers to take decisions in multilateral security and defence policies while the EP and national parliaments will find that their newly acquired powers to scrutinise such decisions remain too limited.

## **1. Parliamentary scrutiny in CFSP and ESDP: a multilevel approach**

There is a vast amount of literature on the democratic deficit of the EU.<sup>1</sup> However, there has been hardly any analysis of how this democratic deficit applies to the CFSP and ESDP. The exceptions have sought to conceptualise the problem in a variety of ways ranging from a lack of parliamentary scrutiny and administrative accountability to the hypothesis of the existence of "collusive delegation".<sup>2</sup> The discussion has also been restricted to policy-making decisions within the second pillar. However, CFSP and its subset ESDP, are part of a larger set of multilateral decision-making. CFSP is in fact closely connected with decisions taken in NATO, the UN, the OSCE and ad-hoc coalitions of the willing. For this reason this section outlines the challenge of democratic accountability at different levels of policy-making.<sup>3</sup>

For the purpose of this article, the issue of democratic accountability in CFSP and ESDP is limited to an analysis of the role of parliamentary assemblies in scrutinising the policy-making process. The focus on the role of parliamentary assemblies has been chosen because, although Western democracies are, at present, suffering from a process of de-politicisation, they remain one of the key fora for rendering the executive branches of government accountable and for giving citizens the potential to shape policy-decisions. In order to capture the national, regional and international dynamics that shape this policy area, a multilevel approach is used to summarise key findings from this literature. Following this approach, the roles of parliamentary assemblies in scrutinising the EU's external security tasks can be broken down into four levels: the national and the EU/NATO levels, the regional (the interaction with the European Union and NATO); the sub-regional (ad-hoc coalition of the willing) and at the UN level.<sup>4</sup>

## 1.1 The national and the regional level

It is often stated that ultimate power of scrutiny over the CFSP and ESDP lies with national parliaments because the CFSP and ESDP are intergovernmental policies. But this assertion fails to take into account that as soon as national governments enter into a multilateral agreement, they are able to gain extra executive powers over their own national parliaments. As Professor Stelios Stavridis has pointed out, the CFSP is much more than the sum of its parts. Moreover, there are democratic deficits at the national levels.<sup>5</sup> (see below)

The executive branches of government are able to gain extra executive powers over national parliaments because a national position, though it might be agreed in advance in consultation with parliamentarians, is usually modified during diplomatic exchanges with other governments. In the formulation of the ESDP, these exchanges take place in formal and informal meetings at the EU and NATO levels. It also takes place in informal bilateral meetings or through ad-hoc groups of countries.

At the European Council and NATO North Atlantic Council levels, national parliaments are not represented and do not have access to details of discussions. Although some national governments provide information to their own national parliaments on CFSP and ESDP decisions, each national parliament finds it impossible to influence policy making because it is unaware of other member states' positions.<sup>6</sup> In other words, at the EU and NATO levels, national parliaments cannot influence the decision-making process through the powers that the national legislative frameworks have given to them. In addition, there are no mechanisms currently in operation to allow a synchronisation of national parliaments' practices in scrutinising foreign, security and defence policies so that accountability can be exercised at a multilateral level.

The challenge of parliamentary accountability in the EU's external security role at the interaction between the national and EU levels is made more acute by three other issues. First, the development of the ESDP and the new level of cooperation established between the EU and NATO that has resulted from it, has worsened the problem of *administrative accountability* in that it has created many new formal and informal working groups between the two organisations.<sup>7</sup> The national parliaments, along with other regional parliamentary assemblies, are not involved in scrutinising the activities of these working groups and informal meetings.

The EU policy-making process is in fact characterised by a disproportionate influence of the bureaucracy. This is due to well-documented challenges of administrative accountability at the EU level that can be defined as a lack of separation of powers between the executive and legislature.<sup>8</sup>

A similar process of lack of administrative accountability occurs in NATO. Although NATO officials are quick to state that the Western Alliance is an intergovernmental organisation in which power for decisions lies within national governments, the reality is much more complex. While national governments retain the ultimate decision-making powers, the decision-making process takes place in the North Atlantic Council (NAC). At this intergovernmental level, a supranational element is present and is embodied in the work of NATO international staff. The work of NATO international staff is not under sufficient scrutiny from the NAC and national legislatures.

One reason for this lies in the fact that the NAC meets only twice per year, though more often in time of crises. In contrast, NATO international military staff, in cooperation with the Ministries of Defence and Ministries of Foreign Affairs of NATO Member States, by undertaking day-to-day work have more opportunities to develop common outlooks regarding issues. NATO international staff are able to establish transgovernmental coalitions and networks with selected sections of national bureaucracies in order to shape crucial policy-making decisions.<sup>9</sup> Another reason is that, because of the lack of formal voting procedures within the NAC, in times of disagreement, policies are only decided after extensive negotiations in which NATO international staff play a crucial role. An example of this was the suggestion made by NATO Secretary General Lord Robertson in February 2003 to allow the deployment of NATO A-10 planes and Patriot anti-missile batteries to help protect Turkey from a possible attack, despite the Belgian government's disapproval of such decision. NATO international staff were willing to subvert established decision-making policy (based on consensus) in order to go ahead with the operation.<sup>10</sup>

A second reason for the challenge of parliamentary accountability in the interaction between the national and EU levels is the existence of a democratic deficit at the former level. Most national parliaments have weak formal powers of scrutiny over foreign policies and even weaker in the area of defence. For example, a recent survey has examined the formal powers of national parliaments to scrutinise peacekeeping and peace-enforcement operations. The authors Hans Horns and Marlen Urscheler concluded that most parliaments are involved in the decision-making process in foreign, security and defence policies but only a few have powers in *all* essential decision-making aspects. For example, most parliaments do not vote on sending troops abroad, the mandate mission, the rules of engagement, the budget, the chain of command, acceptability of risks for servicemen and the duration of the mission.<sup>11</sup>

A third reason for the failure of national parliaments to oversee CFSP and ESDP lies in the fact that national parliaments have different *methods* of scrutinising decisions in these areas. Moreover there is a lack of synchronisation of procedures, and common standards. This is due to a number of factors ranging from the existence of different executive-legislative traditions to the nature of internal procedures.<sup>12</sup>

In summary, the interaction of social actors at the national and regional levels in the formulation of foreign, security and defence policies is one in which the executive branches of governments have an added advantage over those of national parliaments. The formulation of foreign, security and defence policies at the EU level allows the executive branches of national governments to bypass national parliaments. In addition, the lack of administrative accountability in the EU and NATO makes the entire process of decision-making extremely opaque.

## **1.2 The regional level**

At the regional level, there are two parliamentary assemblies - (the European Parliament [EP], the EU Interim European Security and Defence Assembly)<sup>13</sup>, with the official mandate to scrutinise multilateral decisions in CFSP/ESDP.<sup>14</sup> But in reality all of them have neither the formal powers to fully influence nor properly scrutinise CFSP and ESDP decisions. In the case of the EU Interim European Security and Defence Assembly, its level of scrutiny is limited to asking questions in written and verbal formats.<sup>15</sup>

Similarly, the EP has no rights of policy initiations or significant rights of scrutiny or consultation over the CFSP. In this area, the EP can only make recommendations and oblige the Presidency to listen to its views once decisions have already been taken.<sup>16</sup> The EP can, in fact, only question the holder of the EU's rotating Presidency and call the High Representative for CFSP and Special Representative to appear before Parliament's Foreign and Defense Committee in order to give evidence about their appointment and their mandate. The only area in which the EP can play some substantial role is under the co-decision Community procedures, which apply to general foreign policy guidelines for development cooperation and in the approval of CFSP expenditure that is charged to the budget of the European Communities.<sup>17</sup>

In the area of ESDP, the EP's role is even more restricted.<sup>18</sup> This is due to the fact that although the ESDP was incorporated as part of the CFSP, most of the provisions relating to its operation (e.g. the establishment of the Military Committee and Military Staff, Headline Goal etc) were excluded from the Nice Treaty. In other words, they fall beyond the EP's jurisdiction.<sup>19</sup> So for example, MEPs were not formally or informally consulted on the mandate of Operation Concordia. They were only asked to approve aspects of the financing once the decision had already been taken.<sup>20</sup>

Overall, the EP has no formal powers to initiate legislations in CFSP or scrutinise policy decisions as national parliaments do. For example, the EP has no formal role in shaping the mandate for ESDP military operations, nor does it have any powers to call the Council to account if military operations go totally wrong.

The challenges of parliamentary accountability at the regional level are compounded by the fact that the EP and the EU Interim Security and Defence Assemblies lack legitimacy due to the absence of a developed 'European demo'.<sup>21</sup> The EP cannot provide a link between the domestic and European arenas in scrutinising EU foreign, security and defence policies because it is a 'second class' parliamentary assembly in which party structures, rather than voters, determine who gets elected.<sup>22</sup>

### **1.3 The sub-regional**

Since the end of the Cold War, the European security system has witnessed the proliferation of ad-hoc grouping of countries that come together to resolve specific security challenges. In the early part of the 1990s, the most noticeable was the Contact Group.<sup>23</sup> In the recent development of the ESDP, bilateral agreements have strongly shaped the policy making process, beginning with the St. Malo Declaration, based on an Anglo-French understanding, and more recently, through initiatives taken by France, Germany, Belgium and Luxembourg in mini-summits.<sup>24</sup>

The level of national and regional parliamentary scrutiny is mostly non-existent for *formal* and *informal* decisions taken in bilateral meetings and in ad-hoc formations of countries. This is because there are no established procedures to reveal the details of these discussions to national parliaments and when transcripts of conversations exist they are not immediately made public.

There is also a very complex set of interactions that is developing between the regional frameworks provided by institutions such as NATO and the EU and sub-regional ad-hoc coalitions of countries. For example, the ESDP military operations have also tended to be commanded by a rotating leading nation, which gives the latter potentially more of a say in the decision-making process, especially when an operation faces new circumstances. The current regional parliamentary mechanisms are unable to scrutinise the complexity of the command and control arrangements of these military operations.

### **1.4 The UN level**

Formally, the EU is committed to working within the UN framework to ensure that international democratic norms and laws are respected in its relations with non-EU states and their citizens, especially when the use of military force is planned for. However, the current unravelling of the UN system has given EU Member States the opportunity to widely interpret rules established in the Cold War period.

Throughout the post-war period, there was a consensus that the UN was the key organisation for multilateral military operations and that the principle of national sovereignty was to be respected. Since the end of the Cold War, the UN has been transformed and the principle of national sovereignty has been replaced partly with the principle of 'humanitarian intervention'. The UN is becoming a legitimising institution and is delegating its activities to national, ad-hoc coalitions of countries and regional blocs.<sup>25</sup> Although between 1990 and

2000 the UN has experienced an exponential increase in demands for military interventions, nearly a half of its approved authorisations for such operations have been ‘subcontracted’ to individual states or groups of states.<sup>26</sup> The ESDP’s military operations, Artemis and Concordia, are a form of ‘subcontracting’ of UN duties to a regional ‘ad hoc coalitions of the willing’.

The trend towards the UN delegating the authority to undertake military operations to nation states or ad-hoc coalitions has made the problem of parliamentary accountability of military operations more acute. The UN is in fact losing control over the nature of military operations. Although there are requirements for nation states leading an operation to report back to the UN, the door is open for a group of countries or a regional institution, to take control not only over the technicality of the operation but also its political mandate. An example of this development has been apparent in NATO’s operation over Kosovo and in the delegation to Britain and the United States of the task of monitoring the no-fly zone over Iraq.<sup>27</sup> Given these shortcomings in parliamentary practices, has the European Convention made a difference at any of the levels of analysis identified? Before addressing this question, let us briefly look at the European Convention’s proposal in CFSP and ESDP.

## **2. Transforming CFSP and ESDP**

The changes made to the CFSP and ESDP do not represent a blueprint for a new European security order that gives the EU full control over external security policy. Rather the changes reaffirm the intergovernmental nature of these policy areas. In fact, although the Draft Treaty merges the current EU and EC Treaties in a single text and thus create a single personality, the pillar structure of the EU will continue to have legal and political effects.<sup>28</sup> The Draft Treaty makes a distinction between the Union’s exclusive competence in specific areas and shared competence between the Union and its Member States.<sup>29</sup> The CFSP and ESDP, the latter defined as Common European Security and Defence Policy (CESDP), have a status of their own. In other words, it is a ‘competence’ of the EU but it is neither its own nor shared.<sup>30</sup>

The European Convention was a compromise between the aspirations of intergovernmentalists and federalists. The innovative aspects introduced, the creation of the post of Foreign Minister, as outlined in more detail below, will not automatically result in a ‘communitarisation’ of CFSP and ESDP, as the federalists had hoped. The compromise has meant that the role of the larger Member States has been strengthened and the legal provisions have been introduced for a ‘hard core’ of Member States to emerge in the security and defence field. This development can be seen in the creation of a Chair of the Council and in the six measures that fall under the CESDP. These relate to the definition of the scope of CESDP; the introduction of ‘structured cooperation’, along with the statement that ‘ad-hoc coalitions’ of Member States can act on behalf of the EU in the security and defence field; a new solidarity clause and the creation of an Agency to strengthen common military capabilities.

Since the Draft Treaty is the result of a process of tough negotiations and some of its statements are open to wide interpretation, the next section will discuss the proposals outlined in the final draft submitted on 18 July 2003 while at the same time providing some background to the most controversial points expressed in previous drafts.

## **2.1 A CFSP more integrated but still intergovernmental**

### ***The four institutional reforms***

The transformation of CFSP is essentially of an institutional nature and concerns four issues, (if we exclude the matter of parliamentary control, discussed in a separate section): the Minister of Foreign Affairs, the President of the Council, the formation of the Council and the modality of voting.

### ***The Minister of Foreign Affairs***

A major area of innovation in the Draft Treaty is the role of the Foreign Minister for external affairs with the responsibility of conducting the Union's common foreign and security policy.<sup>31</sup> He or she will merge the roles of Javier Solana, the current High Representative for CFSP, with that of Chris Patten, the commissioner for external relations. As the Draft Treaty states, the Foreign Minister "shall be one of the Vice-Presidents of the Commission. He shall be responsible for handling external relations and for co-ordinating other aspects of the Union's external policy. In exercising these responsibilities within the Commission, and only for these responsibilities, he shall be bound by Commission procedures."<sup>32</sup> Thus, the appointed 'Foreign Minister' will have duties that go beyond the current brief of the High Representative for CFSP. In contrast to current practices, he/she will be able to propose the use of both national resources and Union instruments.<sup>33</sup> He/She will also have access to "Joint European External Action Service", which will be established.<sup>34</sup>

### ***The President of the Council***

The Draft Treaty proposes the election of a European Council Chair, a President figure, who will replace the current system of rotating presidencies and could potentially assume some of the functions currently undertaken by the High Representative for CFSP.<sup>35</sup> The Treaty also includes a proposal, put forward with the strong support of the Belgian and German governments<sup>36</sup>, aimed at strengthening cooperation between the President of the European Council and the President of the Commission.<sup>37</sup> Neither proposal will clarify the hierarchy of powers in the area of foreign policy.

### ***New Council formations***

The Draft Treaty introduces a paragraph that allows some flexibility for the European Council of Ministers to introduce additional Council formations, for example the Council of Defence Ministers that so far has only met informally.<sup>38</sup>

### ***Modality of voting***

Next year the EU will have 25 Member States and there is a general belief that it needs more efficient ways of taking decisions than at present, if it is to avoid gridlock. The Draft Constitution proposes that more decisions will be taken by ‘qualified majority’ and suggests changes to the actual mechanism of QMV itself, to be introduced on 1 November 2009. The complex system outlined in the Nice Treaty will be replaced by a formula of double majority, assumed more readable, namely a majority of member states representing at least 60 per cent of the population of the Union.<sup>39</sup> This ‘double majority’ mechanism will see the threshold increase to two thirds (the criteria for the population remaining at 60 per cent) when the European Council or the Council do not act either on the proposition of the Commission nor on the initiative of the Ministry of Foreign Affairs, a very frequent situation for CFSP today in that the majority of actions and positions arise from the initiative of the Presidency or of Member States.<sup>40</sup>

In addition, the proposed Constitution maintains the restrictions for using qualified majority voting established by the Treaty of Nice for CFSP. The vote of unanimity is presented as the norm – with the possibility of constructive abstention of at least one third of Member States representing two thirds of the population of the Union<sup>41</sup> – and qualified majority as an exemption.<sup>42</sup> This exemption is envisaged in four cases, a list that is much more detailed than the arrangements outlined in the Nice Treaty, but whose philosophy remains the same: it is about decisions taken in a second instance, which follow from the preliminary strategic decisions taken through unanimity by the European Council or the Council.<sup>43</sup> The Member States retain as well the right to invoke ‘reasons of vital national interest’ (a clause known as the Luxembourg compromise), which can block a decision taken by a qualified majority in CFSP and forces a conciliation procedure under the aegis of the Minister of Foreign Affairs, and in the case of failure of transmission of the file from the Council to the European Council.<sup>44</sup> The only modification proposed by the European Convention relates to an elusive clause which gives the power to the Council to extend the vote by a qualified majority, by a decision taken by unanimity, in a number of other cases than those above mentioned, but in which the issue of defence remains explicitly excluded.<sup>45</sup>

### ***The marks of the intergovernmentalists***

The four institutional developments described above will allow a certain ‘deepening’ of CFSP, that is to say a systematisation and its institutionalisation, a tighter linkage with the activities of the European Commission. But these institutional developments undeniably contain an intergovernmental feature in three different ways.

First of all, the fact that the CFSP is neither the sole competence of the Union or a shared competence but a ‘competence’ which has no defined juridical status will prevent the complete harmonisation of instruments and procedures between different policy areas currently under the different pillar structures. This limitation of the role of the Commission is clearly reaffirmed in the draft constitution in which it is stated that: “With the



exception of the common foreign security policy, and other cases provided for in the Constitution, it shall ensure the Union's external representation".<sup>46</sup>

Given the substantial widening of the practice of QMV in many new policy areas, the decisions taken in CFSP to reaffirm the principles currently in operation for the use of QMV represent a victory for 'intergovernmentalists'. Even if, as explained above, a new paragraph has been introduced, it will still require a unanimous vote to be agreed for new rules to be introduced.

Second, in comparison to the acceptance on the part of the Convention of the extension of qualified majority voting in many new domains and policies of the Union, the reaffirmation in CFSP of the method of decision by unanimity, inherited by previous Treaties, represents a victory for intergovernmentalism. Intergovernmentalist practices do not refute either the possibility of some use of qualified majority voting, or developing clauses allowing for the possibility of an extension of qualified majority voting, because the utilisation of such a clause implies a preliminary vote taken by unanimity.

Finally, the inter-governmentalists were also able to contain demands for a deeper synergy of the functions and instruments of the Community<sup>47</sup> and those of the CFSP through discussions about the tasks of the Foreign Minister and the President of the Council. In fact, although the two new posts have been agreed, there remains a number of divergent views with regards to the specific nature of their tasks and the level of resources to which each of them should have access. The language of the "Declaration on the creation of a European external action service",<sup>48</sup> reflects this ambiguity in that it suggests that the Commission and the Council should create such a service but it does not clarify how the new established service is supposed to work together with other services available under the Council's structure. Hence, this proposal presents the danger of maintaining two separate bureaucracies responsible for external relations.

## **2.2 A CESDP more operational and at variable geometry**

The Draft Treaty's articles dealing with CESDP propose changes of a qualitatively different nature than those outlined in CFSP. They have the potential of fundamentally transforming the existing ESDP so as to allow a small group of countries to go ahead in defence matters. Five major changes are discernable which relate to the following issues: the scope of the CESDP, the possibility of a solidarity clause, structured cooperation, ad-hoc coalitions of the willing and the means.

### ***The scope of CESDP***

Under CESDP, the Convention widens the definition of the tasks considered by the ESDP, as established by the Treaty of Nice.<sup>49</sup> It proposes a reformulation of the old 'Petersberg tasks' and expands them to include the fight against terrorism. Apart from calling for peacekeeping, conflict prevention and peace-making tasks, already mentioned in the Nice Treaty, it argues that the definition of tasks should include joint disarmament

operations, military advice and assistance tasks, post-conflict stabilisation. It clarifies that: “All these tasks may contribute to the fight against terrorism including third countries in combating terrorism in their territories”..<sup>50</sup>

### ***Solidarity clause and mutual defence.***

The Constitution includes a Solidarity Clause to support Member States that are victims of terrorist attack or natural or made-made disaster.<sup>51</sup> In addition, it opens the possibility, in a declaration annexed to the constitutions, for a mutual defence clause among member states who wish to do so without prejudging engagements taken in the framework of NATO.<sup>52</sup>

### ***‘Structured cooperation’ in security and defence***

Another key innovation in security and defence is a provision for ‘structured co-operation’<sup>53</sup> that gives the opportunity to some Member States<sup>54</sup> to decide to go ahead and integrate their actions and military means to be put at the disposal of the CESDP, in the framework of the Union, without the direct participation of all Member States. In other words, a group of Member States may decide to undertake any missions defined in the CESDP without the full-participation of all Member States. One can see in this the possibility of a ‘hard-core’ in the area of defence which will not only allow progress to be made in CESDP but, most importantly, will give the CESDP some autonomy in relation to NATO.

For this reason, the principles that govern ‘structured cooperation’ have been subject to intense discussions on two points. On the one hand, the decision-making process for this co-operation implies that the deliberation and decisions only involve the member states that take part in such ‘structured co-operation’. The Minister of European Foreign Affairs will take part in such deliberation and inform the other member states of developments in this type of co-operation.<sup>55</sup> On the other, the eventual enlargement of the group of member states leading structured co-operation will be decided within the framework of deliberation of the Council but through the vote of only those member states who take part in the so-called structured co-operation.<sup>56</sup>

At a theoretical level, these provisions give a green light to initiatives taken by a group of member states to act on behalf of the CESDP, on the image of the project developed by Germany, Belgium, France and Luxembourg at a mini-summit on 29 April 2003. But the Convention has nevertheless considerably limited the value of these provisions by agreeing a last minute amendment that obliges the application to ‘structured co-operation’ of ‘the appropriate provisions relating to enhanced cooperation’.<sup>57</sup> The provisions for ‘enhanced cooperation’ require a high degree of consensus among Member States (at least a majority among them). As a consequence, until today, the provision of enhanced cooperation outlined at first in the Treaties of Amsterdam and Nice for other policies of the Union, has never been utilised.<sup>58</sup>

### ***'Ad-hoc coalition of the willing' acting on behalf of CESDP***

The project of a Constitutional Treaty creates the possibility for the Council to entrust the execution of an ad hoc military mission to a group of Member States, within the framework of the Union, “ in order to protect the Union’s values and serve its interests.”<sup>59</sup> This provision has been less controversial than those for structured co-operation in that it finds its legal basis in Operation Concordia or Operation Artemis, conducted in 2003 by an ‘ad-hoc coalition’ in the name of the Union and under the direction of a ‘Nation Framework’, (in this regard, France acted as the framework nation in these first two military operations).<sup>60</sup>

### ***The means***

Finally, the Draft Treaty calls for the establishment of a European Armament, Research and Military capability agency, after reaffirming the importance of Member States making available to the Union civilian and military capabilities, including the establishment of multinational forces.<sup>61</sup>

## **3. The Role of Parliaments in a ‘Reformed’ CFSP and ESDP**

The Draft Treaty has given very limiting extra powers of scrutiny over CFSP and CESDP to the national parliaments and the EP. In general, and despite the number of parliamentarians who were members of the Convention, the role of the EP in CFSP and ESDP remains confined to information, the ability to ask questions, make recommendations and direct a debate on the general guidelines for CFSP twice a year, taking into account its budgetary role as previously described.<sup>62</sup> Without putting into question these restrictive clauses, the Constitution will nevertheless increase, directly or indirectly, the capacity of democratic control in four areas. The direct measures are:

1. the Presidency is to report to the EP “after each of its meetings”, so as to increase the regularity of the exchanges of information between the EP and the Presidency.<sup>63</sup>
2. special representatives may provide briefings to the EP.<sup>64</sup>
3. the European Affairs Committee (also known as ‘Conference of European Affairs Committees - COSAC’) “may organize interparliamentary conferences on specific topics, in particular to debate matters of common foreign and security policy and of common security and defence policy.”<sup>65</sup>
4. the EP is given the power to elect the President of the Commission, who is directly involved in CFSP decisions, though it does not have voting rights in the Council.<sup>66</sup>

The other two, more indirect measures, are:

1. an increase level of Consultation between national parliaments and the Commission.
2. potential for citizens to call a referendum at EU level.

### **3.1. Consultation with national parliaments**

The Draft Constitution includes proposals to increase the involvement of national parliaments in the formulation of EU policy that might affect oversight of the CFSP. It calls for the agendas and outcomes of Council meetings to be distributed to parliaments at the same time as they are sent to governments. It calls for the Commission to forward consultation documents (green and white papers and communication), directly to Member States' national parliaments. It requests that the Commission send to Member States' national parliaments the annual legislative programme as well as other instruments of legislative planning or policy strategy at the same time as it submits to the EP and to the Council.

To synchronise the policy-making process at the EU and national levels, the Draft Treaty demands that a six-week period should elapse between a legislative proposal being made available by the Commission to the EP, the Council and the Member State's national parliaments and the date when it is placed on a Council agenda for adoption of a position under a legislative procedure. It proposes an exception clause to the principle of the need of agreement within the six-week period in the circumstance of an urgent case.<sup>67</sup>

### **3.2. Possibility to call for EU referendum**

A final major concession to those seeking a stronger level of accountability and legitimacy of the EU has been introduced with Article I-46. This calls for a referendum to be possible when a minimum of one million EU citizens, representing a "significant number of Member States" demand it.<sup>68</sup> However, it is unclear whether this provision can be applied to CFSP and ESDP. The proposal states that the call for a referendum is for "a proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution". This could imply that the issue is purely restricted to a matter of implementation and not broader principles of decision-making, such as whether the Union should have a competence to act in a particular policy area using specific instruments.<sup>69</sup>

## **4. Assessment**

What is the record of the European Convention in strengthening parliamentary accountability in CFSP and ESDP? Given the substantial changes introduced by the Draft Constitution to the ESDP, its failure to give any substantial new powers to national parliaments and the EP or other regional parliamentary assemblies represents a worsening of the EU's pre-existing democratic deficit in this policy area. All measures proposed do not go far enough in bridging the accountability gap in CFSP and ESDP.

For example, the key measures advanced to enhance the role of national parliaments do not officially apply to CFSP and ESDP. The role of national parliaments remains restricted to sending to the Presidents of the EP, the Council and the Commission a reasoned opinion on whether a legislative proposal complies with the principle of subsidiarity.

The proposals on the role of the ‘Conference of European Affairs Committees’, COSAC, do not strengthen the powers of the conference over CFSP and ESDP decisions because the Draft Treaty explicitly states that “contributions from the Conference shall in no way bind national parliaments or prejudice their positions”.<sup>1</sup>

A resolution to the problem of a lack of parliamentary scrutiny in CFSP and ESDP could have been achieved by taking bolder steps at different levels of policy-making. At the regional level it would have involved moving towards a ‘federalist’ model, on the model proposed by J. Fisher, the German Foreign Minister in May 2000, in which the work of a reformed and democratically elected Council would be made accountable to a parliamentary assembly composed of two chambers and bringing together both national parliamentarians and the EP.<sup>2</sup> The two chambers would have the powers to influence and scrutinise decisions taken by the Council in foreign and security policy. For example, they would have the final say in approving budgets for external security operations, including peacekeeping and peace-enforcement and a full say in the approval of any external security operation. At the international level, it would have involved taking measures to transform the UN into an organisation that represents more equally the nation states present in the international system,<sup>3</sup> while safeguarding its political authority over military operations. New reporting procedures and legal requirements could have been formulated to clarify the relationship between the EU, NATO and the UN. Moreover, it would have been necessary to find creative ways to reconnect citizens and civil society with the parliamentary processes at a national, regional and global level. The insertion of the idea of a European-wide referendum was a step in the right direction but it did not go far enough.

The question could be posed why were not even more limited proposals for reform, such as those suggested by the EP Foreign Affairs, Human Rights, Common Security and Defence Policy Committee in February 2003<sup>4</sup>, not included in the European Convention’s Draft Treaty? The answer can partly be found in the position taken by some EU Member States to maintain CFSP and ESDP firmly within an intergovernmental framework and to prevent any steps from being taken to make the EU system more federal. Another part of the answer, as Professor Stelio has suggested,<sup>5</sup> can be located in the failure of the two working groups responsible in the EU Convention for matters dealing with CFSP/ESDP – the working group on external relations (Number VII) and the working group on defence (number VIII) - to make any qualitative proposals in the direction of strengthening parliamentary scrutiny. To a certain extent, it could be argued that it was also the fault of parliamentarians who failed to lobby for deeper changes to enhance the powers of national parliaments and the EP in CFSP and ESDP. Initial results from interviews conducted by the author suggest a high level of confusion among parliamentarians about the overall European project and how parliamentary accountability was to be integrated into the renegotiations of powers between nation states the EU, NATO and UN levels of policy-making. This confusion is a feature of the complexity of ESDP decision-making as it stands today. Among the political parties

represented in the European Parliament there are also deep divisions about the extent to which defence should be a competence of the Union following an intergovernmental or federalist model. Within each political group there are also differences in national tradition about the extent to which the legislature should be involved in decision-making in the area of foreign security and defence policies. These factors add another layer of complexity to the decision about whether and how to enhance parliamentary accountability

## **Conclusions**

The European Convention has produced a double compromise: in relation to CFSP, between the aspirations of the intergovernmentalist and the supranationalists; between those promoting a Europe of defence and those against it. Three general tendencies are a result. First of all, the development represented by the innovative creation of the post of Minister for Foreign Affairs will allow a deepening of CFSP, but it will not automatically result in the 'communitarisation' desired by the federalist. The trend seems to be more towards a deeper rooting of intergovernmentalism. Second, the compromise is leading to a reinforcement of the role of the large Member States, notably due to the function of the President of the European Council and to the proposal in the area of defence, in particular those in favour of a hard core in ESDP (structured co-operation and coalition of the willing). Finally, the Constitution reaffirms the contrast, which has been visible since 1999, between the slow pace of integration in foreign policy and the marked progress made in ESDP.

The Draft Treaty has included a number of provisions to strengthen accountability to EU citizens by allowing for a referendum to take place and has given additional powers to national parliaments to scrutinise the work of the Commission. Despite these proposals, the European Convention has failed to introduce adequate measures to bridge the parliamentary accountability gap in CFSP and ESDP. The EP continues to have no rights of policy initiation in these areas and extremely limited rights of scrutiny of the policy-making process. Given the extensive nature of the new measures proposed by the Draft Treaty, the failure to give new rights of scrutiny to the EP and national parliaments in these policy domains represents a backward step in democratic practices. It reinforces the powers of the executive branches of national governments vis-à-vis those of parliamentary assemblies in foreign, security and defence policies. Ultimately this could have negative consequences for both regional and international security.

## **Notes**

<sup>1</sup> There is a vast amount of literature on the democratic deficit of the EU. See: C. Lord, *Democracy in the European Union* (Sheffield Academic Press, Sheffield, 1998); C. Lord, "Assessing Democracy in a contested polity." *Journal of Common Market Studies* Vol 39, No 4, November 2001, pp 641-661; R. S. Katz, "Models of democracy: elite attitudes and the Democratic Deficit in the European Union." *European Union Politics* Vol 2, No 1, 2001, pp. 53-79. C. Hoskyns and M. Newman, (Ed), *Democratizing the European Union*

(Manchester University Press, Manchester, 2000). D. N. Chrysochoou, *Democracy in the European Union* (I.B. Tauris Publishers, London, 2000).

<sup>2</sup> S. Stelios, 'The Democratic Control of the EU's Foreign and Security Policy after Amsterdam and Nice,' *Current Politics and Economics of Europe*, Vol 10, No 3, 2001, pp 289-311. G. Bono, 'Democratic accountability of military and police cooperation in the EU' in H. Born and H. Hanggi (ed) *Defining the democratic deficit: international security cooperation and the problem of parliamentary accountability* (Ashgate, Aldershot, 2003 forthcoming). M. Koenig-Archibugi, "The Democratic Deficit of the EU Foreign and Security Policy" *International Spectator*, Vol 4, 2002, pp 61-74.

<sup>3</sup> For a review of the methodological issues related to an analysis of the EU's external foreign, security and defence role see: Giovanna Bono: 'Introduction: issues and concepts' in Giovanna Bono and Ståle Ulriksen (ed), *The EU's role in crisis management and peace support*, special issue of the *International Peacekeeping Journal*, forthcoming September/October 2004); Key references are: Michele Knodt and Sebastiaan Princen, 'Introduction: Puzzles and prospects in theorizing the EU's external relations', in Michele Knodt and Sebastiaan Princen (eds), *Understanding the European Union's External Relations*, Routledge: London and New York, pp.1-16; Michael Smith, *The framing of European foreign and security policy: towards a post-modern policy framework?* *Journal of European Public Policy* 10, Vol. 4, August 2003, pp.556-575.

<sup>4</sup> Professor Eric Remacle originally suggested this method of capturing the challenge of democratic accountability in ESDP.

<sup>5</sup> Stavridis, (2001) *op.cit.* pp 196.

<sup>6</sup> C. Gourlay, *Parliamentary oversight of the ESDP: the role of the EP and national parliaments. Working Paper.* (DCAF, Geneva, July 2002).

<sup>7</sup> For example, it has resulted in the establishment of Informal Ministers of Defence Meetings.

<sup>8</sup> Lord (1998). *op.cit.*

<sup>9</sup> A recently documented example is the NATO's decisions to assume peacekeeping tasks in the 1990s: G. Bono, *NATO's peace enforcement tasks and policy communities: 1990-1999.* (Ashgate, Aldershot, 2003).

<sup>10</sup> M. R. Gordon, 'NATO chief win praise from U.S for Turkey role' *International Herald Tribune*, 26 February 2003, p. 5.

<sup>11</sup> H. Born and M. Urscheler, *Democratic Accountability and Parliamentary Oversight of multinational peace support operations* in H. Born and H. Hanggi (ed), *op.cit.*

<sup>12</sup> For an overview of national parliamentary procedures see: WEU Assembly, *National parliamentary scrutiny of intervention abroad by armed forces engaged in international missions* (WEU Assembly, Brussels, 12 November 2001).

<sup>13</sup> In the past, the modified Brussels Treaties defined the status of the WEU Assembly. The Assembly remains in operation because the Brussels Treaties still stand since the EU has not taken over article 5 of the Brussels Treaty, the article that deals with the defence of its members.

<sup>14</sup> There are other two regional parliamentary assemblies: the NATO Parliamentary Assembly and the Parliamentary Assembly of Security and Cooperation in Europe (OSCE) but they do not have any formal powers of scrutiny over the CFSP/ESDP, though there are formal exchanges of information and contacts between the EP and these two assemblies.

<sup>15</sup> C. Lotter, *Die parlamentarische Versammlung der Westeuropäischen Union* (Nomos, Baden Baden, 1997). For the NATO parliamentary assembly: [www.naa.org](http://www.naa.org)

<sup>16</sup> This is done through the use of Parliamentary Procedures Rules, specifically Rule 46, 91 and 92.

<sup>17</sup> R. A. Wessels, *The European Union's Foreign and Security Policy* (Kluwer Law International, Hague and Boston, 1999).

<sup>18</sup> Informally, however, some of the CFSP procedures have been applied to the ESDP.

<sup>19</sup> For an introduction to the role of the EP: J. Corbett and J. Francis et al, *The European Parliament* (John Harper Publishing, London, 2000).

<sup>20</sup> This is the result of a number of interviews undertaken by the author with MEPs who are members of the EP Committee on Foreign Affairs, Human Rights and Common Security and Defence Policy. The interviews were undertaken at the EP in Brussels in March 2003.

<sup>21</sup> P. C. Schmitter, *How to democratize the European Union and why bother?* (Lanham, Rowman and Littlefield publishers, New York, 2000), p.36-44.

<sup>22</sup> *Ibid* p. 6-8.

<sup>23</sup> F. Boidevaix, *Une diplomatie informelle pour l'Europe : le Groupe de Contact Bosnie* (Fondation pour les études de défense, Paris, 1997).

<sup>24</sup> Meeting of Heads of State and Government of Germany, France Luxembourg and Belgium on European Defence. *European Defence Meeting: Conclusion*, Brussels, Egmont Palace, 29 April 2003.

<sup>25</sup> For an overview of the role of the UN in peacekeeping operations see: S. Hill, M Malik et al, *Peacekeeping and the United Nations* (Aldershot, Dartmouth, 1996). For a critique of the transformed UN's role in peacekeeping see: D. Chandler, "The People-Centred Approach to Peace Operations: the New UN Agenda." *International Peacekeeping*, Vol. 8, no 1, Spring 2001, pp. 1-19.

<sup>26</sup> C. Ku and H. K Jacobson, (Ed). *Democratic accountability and the use of force in international law*. (Cambridge University Press, Cambridge. 2002), pp 355-360.

<sup>27</sup> *Ibid*, pp370.

<sup>28</sup> J. Shaw, *What's in a Convention*, Political Science Series No 89, Institute for Advance Studies, Vienna. June 2003, pp22.

<sup>29</sup> The European Convention. *Draft Treaty establishing a Constitution for Europe*. Brussels. Doc. No. CONV 850/03 (Brussels, 18 July 2003). Title III: Union competences. Art. 9 to 13.

<sup>30</sup> *Ibid*. Title III: Union competence. Art. 15.

<sup>31</sup> *Ibid*. Art. I-27, The European Foreign Minister, pp23.

<sup>32</sup> *Ibid*. Art. I-27, para. 3.



<sup>33</sup> *Ibid.* Art. I-40, para. 4. Specific provisions for implementing the common security and defence policy. pp 34.

<sup>34</sup> *Ibid.* Chapter II: CFSP: Art. III-197, para. 3, pp. 157; Plus see Declaration on the creation of a European External Action Service. pp 239.

<sup>35</sup> *Ibid.* Art. 21: The European Council Chair, para. 1, pp 17.

<sup>36</sup> ‘EU-Konvent einigt sich auf Verfassungsentwurf’. *Frankfurter Allgemeine Zeitung*, 13 June 2003. Web version. FAZ.net. and P. Regnier, ‘L’ Europe aura un president choisi pour cinq ans’ *Le Soir*, 14 June 2003, pp3.

<sup>37</sup> The European Convention. (18 July 2003). *op.cit* Art. 21: The European Council Chair. pp. 17. This change to the definition of the role of the President of the European Council was introduced by an amendment of the Presidium on 11 June 2003.

<sup>38</sup> *Ibid*, Art. 23, para. 3: Formations of the Council of Ministers, pp18.

<sup>39</sup> *Ibid.* Art. I-24, para. 1 and 3: Qualified Majority, pp16.

<sup>40</sup> *Ibid*, Art. I-24, para. 2: Qualified Majority, pp16.

<sup>41</sup> *Ibid*, Article III-201, para. 1.

<sup>42</sup> *Ibid*, Article III-201, para. 2.

<sup>43</sup> *Ibid*, line 1

<sup>44</sup> *Ibid*, line 2.

<sup>45</sup> Article III-201, paragraph 3 and 4.

<sup>46</sup> *Ibid.* Art. 25, para. 1: The European Commission, pp. 20. This clarification was introduced by the Praesidium as revised text on 11 June 2003: European Convention. *Draft Constitution Volume II, Draft Text of Part Two, Three and Four. Doc. No CONV811/03.* 11 June 2003, Art. I-21(1), p3.

<sup>47</sup> That is under Pillar I, the instruments and tools that the Commission has at its disposal.

<sup>48</sup> The European Convention (18 July 2003), *op.cit*, Declaration on the creation of a European external action service, p239.

<sup>49</sup> Art. 17 of Nice Treaty Union; European Union. *Treaty of Nice*, European Union.

<sup>50</sup> European Convention (18 July 2003), *Op. cit.* Section 1: the Common Security and Defence Policy. Art. II-210, para. 1, pp162.

<sup>51</sup> *Ibid*, Art. 42: Solidarity Clause, pp. 36; Chapter VIII: Implementing the Solidarity Clause, pp. 177.

<sup>52</sup> *Ibid*, Art. 40, para. 7, pp. 36. and Article III-214.

<sup>53</sup> Article 40, para 6 et Article III-213. The article states “Those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish structured cooperation within the Union framework. Such cooperation shall be governed by the provisions of Article III-213.”

<sup>54</sup> The project planned by the Convention envisages that the list of Member States who will participate in such cooperation will be mentioned in a protocol attached to the Constitution. (Article III-213, para 1).

<sup>55</sup> Article III-213, para. 3. see also The European Convention. *Draft Constitution, Volume II : Draft revised text of Part Two, Three and Four*. 12 June 2003, Art. III – 208, para. 3, pp 124.

<sup>56</sup> Article III –213, para. 2.

<sup>57</sup> Article III-213, para. 5.

<sup>58</sup> On this theme see: Eric Remacle ‘Vers des coopérations renforcées dans la politique européenne de sécurité et de défense?’ in *Mélanges en Hommage à Jean-Victor Louis*, Editions de l’Université de Bruxelles, Bruxelles, 2003.

<sup>59</sup> *Ibid*, Art. 40, para. 5, pp 34. Also see: Section 1: The Common Foreign and Defence Policy, Art. III-211, pp. 162.

<sup>60</sup> For an analysis of these two operations see one article on Concordia by Catriona Mace and another on Artemis by Ståle Ulriksen et al in: Giovanna Bono and Ståle Ulriksen (ed), forthcoming September/October 2004) *op.cit*.

<sup>61</sup> *Ibid*, Art. 40, para. 3, pp. 33-34.

<sup>62</sup> Article III-205

<sup>63</sup> *Ibid*, Art. 21, para. 2. Title IV: The Union’s Institutions: the European Council Chair, pp. 17. Also see Chapter II: CFSP, Art. III 205, pp. 160.

<sup>64</sup> *Ibid*, Chapter II: CFSP, Art. III-205, para. 1, pp. 160.

<sup>65</sup> *Ibid*, “Protocol on the role of national parliaments in the European Union, para. 9-10, pp. 228.

<sup>66</sup> *Ibid*, Art. I-19, para. 1: the European Parliament, pp. 15.

<sup>67</sup> *Ibid*, Protocol on the role of national parliaments in the European Union., pp. 226.

<sup>68</sup> *Ibid*, Art. 46, para. 4, pp. 39.

<sup>69</sup> *Ibid*.

<sup>70</sup> *Ibid*, Protocol on the role of national parliaments in the European Union, para. 10.

<sup>71</sup> J. Fischer, *From Confederacy to Federation - Thoughts on the finality of European integration*. Speech at the Humboldt University in Berlin. Berlin: German foreign Office, 12 May 2000)

<sup>72</sup> D. Held and D. Archibugi, *Cosmopolitan Democracy: an agenda for a New World Order* (Polity Press, Cambridge, 1996, pp 121-162).

<sup>73</sup> European Parliament. Foreign Affairs, Human Rights, Common Security and Defence Policy Committee. (5 February 2003,) *Draft Report on the New European security and Defence architecture – priorities and deficiencies*. EP, Brussels. Provisional 2002/2165 (INI)

<sup>74</sup> S. Stavridis, *The CFSP/ESDP, parliamentary accountability, and the ‘Future of Europe’ Convention debate*. Institut Universitari D’ Estudis Europeus, Barcelona, March 2003, pp 4-5.