

*Comment on Ireneusz Pawel Karolewski –
Constitutionalization of the Common Foreign and
Security Policy of the European Union: Implications of
the Constitutional Treaty*

*By Markus Rau**

Within the ongoing debate on the constitutionalization at the EU level,¹ European foreign policy has gained more and more attention. This is due to the Union's growing relevance and importance as "an actor in the international relations,"² which has also increasingly found its expression at the normative level of the founding documents of the EU. To what extent does the Constitutional Treaty (CT) bring about improvement in the legal regime governing the EU's external activities, thus strengthening the Union's capabilities to, as current Article 2(1) TEU puts it, "assert its identity on the international scene"?³

While Pawel Karolewski presented a rather skeptical view of the further constitutionalization of European foreign policy, I will try to shed a more positive light on the provisions of the CT relating to the Union's external action. In doing so, I would like to begin by taking a short glance at the current state of affairs. For I believe that the perception one has of the present situation necessarily determines what one expects from the changes to be achieved by the CT. And here my first thesis is that: *The current regime governing European foreign policy is better than its reputation.*

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¹ On the various contexts in which the notion of constitutionalization is currently used, see Rainer Wahl, *Konstitutionalisierung - Leitbegriff oder Allerweltsbegriff?*, in *DER WANDEL DES STAATES VOR DEN HERAUSFORDERUNGEN DER GEGENWART - Festschrift für Winfried Brohm zum 70. Geburtstag* 191 (Carl-Eugen Eberle ed., 2002).

² See Christian Tomuschat, *Die Europäische Union als ein Akteur in den internationalen Beziehungen*, in *VERHANDELN FÜR DEN FRIEDEN - LIBER AMICORUM TONO EITEL 799* (Jochen A. Frowein et al. eds., 2003).

³ On the issue of European identity at the international level, see Thomas Bruha and Markus Rau, *Europäische Identitätsbildung: die internationale Dimension*, in *EUROPÄISCHE ÖFFENTLICHKEIT 289* (Claudio Franzius and Ulrich K. Preuß eds., 2004).

It is important to remember in that respect that European foreign policy is not confined to the CFSP but also comprises the external activities of the EC. It is not necessary to go into detail here. Suffice it to mention the pertinent rules relating to the Common Commercial Policy,⁴ environmental policy,⁵ or development cooperation and humanitarian aid,⁶ which are widely seen as operating more or less successfully. As regards the CFSP, we should not be blinded by the EU's political split during the war in Iraq in 2003, which, to be sure, was certainly unfortunate, to say the least.⁷ Rather, my impression is that, leaving aside the Iraq crisis, considerable progress has been achieved over the last years. If you take, for instance, the EU's efforts within the framework of the CFSP to promote respect for democracy and human rights or acceptance of the International Criminal Court (ICC),⁸ one has to acknowledge that the Union as an international player has come quite a long way. To make it more concrete: Just think of the *amicus curiae* brief filed by the EU in the *McCarver* case⁹ before the U.S. Supreme Court,¹⁰ concerning the execution of the death penalty against mentally retarded offenders,¹¹ or the 2001 EU Guidelines on Human Rights Dialogues.¹²

The provisions in the CT relating to foreign policy build upon the progress achieved so far and undertake to cautiously further develop the current system. Even though the merger of the present pillars does not entail a harmonization of

⁴ See Treaty Establishing the European Community, Article 133, Nov. 10, 1997, 1997 O.J. (C 340) 3 [hereinafter TEC].

⁵ Article 174(4) TEC.

⁶ Articles 181 and 181a TEC.

⁷ See Bruha and Rau, *supra* note 3, at 310-311.

⁸ For a detailed analysis of the legal foundations and current activities of the EU in the field of international human rights policy, see Thomas Bruha and Markus Rau, *Bedeutung der Grundrechte der EU für Drittstaaten*, in HANDBUCH DER EUROPÄISCHEN GRUNDRECHTE (Sebastian Heselhaus and Carsten Nowak eds., forthcoming).

⁹ *McCarver v. North Carolina*, 533 U.S. 975 (2001).

¹⁰ Brief for the European Union as Amicus Curiae in *Ernest Paul McCarver v. State of North Carolina*, available at <http://www.eurunion.org/legislat/DeathPenalty/EUActionsUSCases2001.htm>.

¹¹ On this issue, especially against the background of the Supreme Court's later decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), see Lutz Eidam, *Mentally Retarded Offenders and the Death Penalty - The Latest Supreme Court Ruling and Possible European Influences*, 4 GERMAN LAW JOURNAL 491 (2003).

¹² Council of the European Union, *European Guidelines on Human Rights Dialogues*, 13 December 2001.

the different legal instruments and decision-making procedures,¹³ it is to be endorsed that the relevant articles covering the different aspects of EU external policy now are grouped in a single section of the CT. Titel V of Part III consists of 37 more-or-less detailed articles; there probably is no other constitutional document in the world that deals in such depth with foreign policy. This brings me to my second thesis: *At least from a purely formal perspective, the degree of constitutionalization of foreign policy the CT brings about is without precedent in the national legal orders.*

It is interesting to see in that context that the constitutionalization of the Union's external action is not restricted to institutional and procedural aspects, but also comprises substantive issues. Article III-292(1) CT, for example, mandates that the "the Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law." The provision mirrors Article I-3 CT. It is further concretized by Article III-292(2) CT, which builds upon current Article 11(1) TEU, the provision now having general application in all foreign policy fields. Unlike most national constitutions, the CT thus also explicitly makes normative demands on foreign policy and tries to provide for coherence between the Union's internal and external action.¹⁴

When it comes to institutions and procedures, I also believe that from the point of view of political responsibilities, the "double hat" solution foreseen for the new post of the Union Minister for Foreign Affairs may turn out to be problematic.¹⁵ All in all, however, I think that the merger of the present functions of the High

¹³ See, e.g., Daniel Thym, *The Institutional Balance of European Foreign Policy in the Treaty establishing a Constitution for Europe*, WHI-Paper 13/04, 3, available at <http://www.rewi.huberlin.de/WHI/papers/whipapers1304/paper1304.pdf>; Daniel Thym, *Die neue institutionelle Architektur europäischer Außen und Sicherheitspolitik*, 42 ARCHIV DES VÖLKERRECHTS 44, 45-46 (2004).

¹⁴ See Thomas Bruha and Markus Rau, *Verfassungsrechtliche Dimensionen europäischer Außenpolitik*, Sec. III ("Materiell-verfassungsrechtliche Bindungen europäischer Außenpolitik"), in *DIE EUROPÄISCHE UNION IM WANDEL: INNERE VERFASSTHEIT UND ÄUßERE HANDLUNGSFÄHIGKEIT* (Thomas Bruha and Carsten Nowak eds., forthcoming); Bruha and Markus Rau, *supra* note 3, at 313-317. For a discussion of the current constitutional constraints regarding European foreign policy against the background of the Iraq crisis of 2003, see Franz C. Meyer, *Angriffskrieg und europäisches Verfassungsrecht. Zu den rechtlichen Bindungen von Außenpolitik in Europa*, 41 ARCHIV DES VÖLKERRECHTS 394 (2003).

¹⁵ On the Union Foreign Minister, see Thym, *The Institutional Balance*, *supra* note 13, at 14-17; Thym, *Die neue institutionelle Architektur*, *supra* note 13, at 60-64.

Representative for the CFSP, the Commissioner responsible for external relations, and the respective foreign affairs competences of the Council Presidency may help both in ensuring coherence between foreign policy decisions and enabling the Union to speak with one voice, even though I don't feel much sympathy for the *title* of a Union Foreign Minister.

By contrast, I am not sure whether I can follow the argument that both the creation of a separate external service and the European Council President would mean a loss of the Commission's influence on external relations and a stronger intergovernmentalization of European foreign policy. In particular with regard to the CFSP, this seems all the more doubtful as the Commission's role in the second pillar, as opposed to its responsibilities at the EC level, is already a rather reduced according to existing law.¹⁶ One may argue though that the Commission's influence on the CFSP diminishes due to the loss of its right of initiative pursuant to Article III-299(1) CT.¹⁷

As regards the observation that the overall character of the CFSP remains intergovernmental, we probably all agree. Yet, it seems to me that the possibility for the European Council, as foreseen in Article 300(3) CT, to agree by unanimity to extend the use of the qualified majority voting in the field of the CFSP constitutes a promising step forward. Besides, as long as there is no parliamentary control of the CFSP, one might even argue that the unanimity requirement shields the democratic principle. This brings me to my third thesis, which is: *The democratic deficit in European foreign policy is less dramatic than it is often argued.*

Even though generally speaking, I am much in favor of the idea of the foreign affairs power being a combined power, shared both by the executive and the legislative branches,¹⁸ I would just like to remind you that in most national constitutional systems, foreign policy is still seen as a prerogative of the government. To be sure: This is not to totally neglect the problems relating to the lack of parliamentary scrutiny of the Union's external activities. Thus, I believe that the European Parliament's limited role in the adoption of international treaties, for example, will in the long run have to be reconsidered.¹⁹

¹⁶ For further details, see Bruha and Rau, *supra* note 14, at Sec. II ("Kompetenzabgrenzung im Bereich der auswärtigen Gewalt der EU").

¹⁷ See Thym, *Die neue institutionelle Architektur*, *supra* note 13, at 50.

¹⁸ In respect of German constitutional law, see, e.g., Rüdiger Wolfrum, *Kontrolle der auswärtigen Gewalt*, 56 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 39 (1997).

¹⁹ See Meinhard Hilf and Frank Schorkopf, *Das Europäische Parlament in den Außenbeziehungen der Europäischen Union*, 7 EUROPARECHT 185, 200-201 (1999).

To come to an end, the CT is certainly not visionary in character as regards the further constitutionalization of European foreign policy. Yet, and this would be my last thesis: *European foreign policy has never really followed the concept of integration through law.*²⁰ The CT adds a limited number of new tools to be used by the European institutions to strengthen the EU's role in the international arena. It remains to be seen what the Union organs will make out of it.

²⁰ See Hans-Joachim Cremer, *Anmerkungen zur GASP - Eine rechtspolitische Perspektive*, 31 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT 587, 589-590 (2004).

