

**Conference Report - "The (not so) Common European Foreign and Security Policy" - Max Planck Institute for Comparative Public Law and International Law - Heidelberg, Germany, 19-20 September 2003**

*By Martin Reichard*

2003 was a "landmark year" for European security, despite the widening transatlantic rift over the US-led military intervention in Iraq. The Berlin Plus agreement which allows the European Union to use some of NATO's military assets for its own peacekeeping activities, was finalized in March - just in time for the start of the EU's first peacekeeping operation, "Operation Concordia" in Macedonia. In April, representatives of four EU nations - Germany, France, Belgium and Luxembourg - met in Brussels to discuss plans for an independent Union headquarters for planning future military operations, an idea which sparked fierce criticism in the United States and many other European countries who feared an undermining of NATO. May saw the release of the first drafts of a future European Constitution by the European Convention, containing, *inter alia*, extensive provisions on closer co-operation among some EU member states in defense matters, including collective self-defense which had so far been an exclusive NATO prerogative.

The Union's High Representative for the Common Foreign and Security Policy (CFSP-HR) Javier Solana presented the first official draft of the "European Union Security Strategy" (EUSS) at the European Council of Thessaloniki in June.<sup>1</sup> This paper emphasized the need for active engagement, including military engagement, by the Union in face of humanitarian crises, but with strict adherence to multilateralism and international law. It was a clear response to the United States Security Strategy, issued some ten months previously. The EUSS was finalized in December. In September 2003, the "three big players" concerning European defense questions, Germany, Britain and France, made a first step towards narrowing their differences over defense in the European Union. This development led to a full compromise of

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<sup>1</sup> See Council of the European Union, A Secure Europe in a Better World - European Security Strategy, 1, 14, available at <http://www.iss-eu.org/solana/solanae.pdf>.

positions, which also found broad agreement among the other EU member States, in December 2003.<sup>2</sup>

Seizing on the tide of developments, a small conference titled “The (not so) Common European Security and Defense Policy” was held at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg on 19 and 20 September 2003. Addressed mainly at Ph.D. students, the meeting had been organized by two PhD scholars of the German National Merit Foundation, Annette Simon<sup>3</sup> and Annika Weidemann,<sup>4</sup> and was supported by the German Merit Foundation, the Zeit Foundation and the Haniel Foundation. Panelists from the legal, political science, and military fields discussed future possibilities for European Security.

The conference was opened by a welcoming speech from the Institute’s director Armin von Bogdandy. Stefan Griller,<sup>5</sup> an expert on European law and international trade law, then gave a detailed, albeit sobering, critique of “European Foreign Policy and the Giscard-Constitution.”<sup>6</sup> On the whole, Griller deemed the result of the Convention as confusing, especially the abolition of the pillar structure which had blurred categories without substantial changes in the respective competences. Compared with the state of the law in the European Treaties after Nice, the powers of the European Parliament (EP) were strengthened somewhat, and this was also true to some extent for matters falling under CFSP.<sup>7</sup>

At the same time, however, the “executive arm” consisting of the Member States, also acting through the European Council, had gained more influence in CFSP, among other things by a wide use of unanimity and the exceptional character of qualified majority voting in this area.<sup>8</sup> The Commission’s position was weakened, partly as a result of a confusing amalgam between the President, the European Foreign Minister, and the Commissars with and without voting rights. The right of initiative in CFSP matters was split between the Member States and the European

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<sup>2</sup> See *European Defence Deal to Go Ahead*, FINANCIAL TIMES, Dec. 12, 2003, at 1.

<sup>3</sup> Max Planck Institute for Comparative Public Law and International Law, Heidelberg.

<sup>4</sup> Institute for Security Policy, Kiel University.

<sup>5</sup> Director of the Research Institute for European Affairs, Vienna University of Economics and Business Administration.

<sup>6</sup> The presentation was rendered in the German language.

<sup>7</sup> See Draft Treaty Establishing a Constitution for Europe, arts. I-39, para. 6, III-205, 2003 O.J. (C 169) 3.

<sup>8</sup> See *id.* arts. I-39, paras. 7, 8; III-201, para. 3; III-209, para. 1; III-201, para. 2.

Foreign Minister, with some consultation of the Commission.<sup>9</sup> The Foreign Minister's position was unassailable and thus rendered unaccountable, as he could not be removed by a no-confidence vote against the Commission, being not only a Commission member but also an institution *sui generis*. His competences regarding CFSP were not separated clearly enough from those of the Commission President who also exercised an external representative function.<sup>10</sup> Equipped with such a set of rules, Griller argued, the Union's institutions could be expected to "muddle on" but not more.

Further critical remarks concerned the lack of delivering, in the area of CFSP, on the promise of Thukydides' classical definition of democracy in the preamble, and the fact that external action of the Union was not based on "legal acts of the Union"<sup>11</sup> like action in other policy areas. Concerning the draft's provisions on enhanced cooperation,<sup>12</sup> Griller remarked that such closer defense cooperation by some Member States would still be counted as acting for the Union as a whole. Especially with regard to the important provision regarding collective self-defense,<sup>13</sup> this held "explosive potential." The "artificial separation" of powers for external commerce and foreign policy, unchanged by the draft, was deplorable. Lastly, the generally strong role of the European Council in CFSP matters led to a "usurpation" of other related areas.

Joachim Krause<sup>14</sup> gave a dinner speech on "The (not so) Common European Security and Defense Policy – a Review of a Turbulent Year and a Look at the Crystal Ball." He outlined three main strands of opinion in Europe, one Atlanticist (Britain, Poland and others), one Union-centric (France) and one pragmatic, and mediating (Germany). The eventual direction of a future European foreign and defense policy would settle somewhere between those three poles.

Bernd Martenczuk<sup>15</sup> gave "An Overview of the Legal Bases of ESDP." Starting with the state of the law according to the Treaty of Nice, Martenczuk emphasized the central decision-making role of the Council in ESDP, compared with the marginal

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<sup>9</sup> See *id.* arts. I-39, para. 7; III-200; III-194, para. 2.

<sup>10</sup> See *id.* art. I-21, para. 2.

<sup>11</sup> See *id.* art. I-32.

<sup>12</sup> See *id.* arts. I-40, paras. 5-7; III-210-215; I-43; III-325.

<sup>13</sup> See *id.* art. I-40, para. 7.

<sup>14</sup> Director of the Institute for Security Policy, Kiel University.

<sup>15</sup> Legal Service of the European Commission, Brussels.

position of the Commission, and the complete absence of any influence by the EP and the ECJ on defense-related issues. On the practical side “two-and-a half” peacekeeping missions were (or had been) operational in 2003: the Police Mission (EUPM) in Bosnia (without a military component), “Operation Concordia” in Macedonia, and “Operation Artemis” in Bunia (Democratic Republic of Congo). EU Member States sometimes maintained very different approaches to security policy due to membership in NATO or their neutral status, thus participation in ESDP activities of the Union showed a “variable geometry” within the EU, and was also open to countries from without. For the reason of the constitutional bar in Article 28, paragraph 5 TEU, military activities could not be financed from the Union budget, rather “costs lie where they fall.”

Turning to the new provisions contained in the draft European Constitution, Martenczuk addressed the melting of the CFSP-HR and the External Relations Commissioner into the new European Foreign Minister; essential preservation of the intergovernmental character for CFSP; extension of the Petersberg tasks<sup>16</sup> to include disarmament, military assistance, conflict prevention, stabilization and fight against terrorism; and the strengthened role for the EP<sup>17</sup>. ESDP remained the most intergovernmental of all policy areas of the Union, with a high degree of fragmentation. It was, however, a very viable alternative compared with Member States’ military action outside a Union framework.

Boris Ruge<sup>18</sup> rendered a “National Perspective – Germany and ESDP.” For Germany, the United States was indispensable in order to preserve security in Europe. However, Germany recognized that the United States could not tackle all global security problems on its own without the help of other countries. These two tenets flowed into the German views on the form of the evolving EU-NATO partnership.<sup>19</sup> Conclusion of the Berlin Plus agreement had been crucial for putting this partnership into practice, but it had only become reality after a breakthrough in Greek-Turkish differences. The new defense-related provisions in the draft European Constitution (e.g., the solidarity clause, the extension of the Petersberg tasks) were only possible to be implemented through close French-German cooperation which, Ruge added, was being added to by the efforts to find common ground with the United Kingdom, in a meeting in Berlin which took place at the same time as the conference.

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<sup>16</sup> Currently Article 17 TEU; *see* Draft European Constitution art. III-210.

<sup>17</sup> *See* Draft European Constitution, *supra* note 3, arts. I-40, para. 8.

<sup>18</sup> Deputy Head of the ESDP Division, German Foreign Office, Berlin.

<sup>19</sup> The two premises are also found in the EUSS, *supra* note 1.

Ruge downplayed the importance of the “Tervuren initiative” of last April, envisioning a nucleus of planning infrastructure for independent peacekeeping operations led by the EU. No such future institution – numbering about 60 personnel – could ever match the decades of expertise of NATO’s SHAPE in Belgium which features more than 2,000 personnel. However, he stated that the EU had to have capacity in principle to plan and act autonomously in the field of security, whenever the United States [and thus NATO] chose not to be engaged. Military action by the EU would in any case always be part of a much larger arsenal of measures, including economic, diplomatic, nation-building, civilian police, *etc.*, joined together in the EU’s comprehensive approach to crisis management. NATO’s position as the basis for collective self-defense, moreover, remained a foundation of German foreign policy.

Annalisa Monaco<sup>20</sup> and Klaus Kleffner<sup>21</sup> both gave presentations on the topic “Who takes Care of European Security? EU and NATO: Competition or Cooperation?”. Monaco found the very title unfitting, as the EU-NATO relationship was developing much more into one of complementarity, based on a functional division of labor. Since in the foreseeable future only NATO would be able to engage in high-intensity conflict scenarios, using its 21,000-strong NATO Response Force (NRF) in the making, it would more or less automatically fall to the EU to take on less demanding operations (the “lower end” of the Petersberg tasks) mostly in its own vicinity. The suggestions raised in the framework of the OSCE in mid-2003 for a possible EU intervention in Moldova were another sign of this concentration of the EU on its near abroad. Additionally, Monaco expected the NRF to be used also for Iraq-like unilateral use of force, whereas such action was unthinkable for the Headline Goal Task Force of the EU. As both forces would draw on the same soldiers under the principle of “double hatting,” however, conflicts of use were possible.

Monaco consequently advised that the two organizations should “embark sooner rather than later on a frank debate about the ambitions of the respective forces.” The division of labor would also develop in a geographic sense, Europe for the EU, the rest of the world (*e.g.*, engagements in Afghanistan and Iraq) for NATO or other US-led coalitions of the willing. These were different kinds of missions in different kinds of worlds, reflecting also the different real capabilities of the two organizations. The EU would act whenever the US chose not to become engaged, filling the

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<sup>21</sup> Head of Defense Capabilities Section, Defense Policy and Planning Division, International Staff, NATO HQ Section, NATO HQ, Brussels.

classic role of a “dish-washer.” The official talk of a “strategic partnership” was not reflected by the realities on the ground. Despite their separated roles, however, the EU and NATO would continue to be dependent on each other. They would “sink or swim together.”

Kleffner concentrated on the NATO perspective on European security which, for the post-Cold War era, was encapsulated in two Strategic Concepts of 1991 and 1999. NATO had long experience in military planning for many different, and sometimes simultaneous, kinds of scenarios. He started out with a clarification of the term “European” which, due to overlapping memberships of different organizations, was often used in different contexts. NATO and the EU were very different organizations, not only in terms of their membership. All EU countries, including the neutral ones, however, were part of NATO’s force planning process (Partnership for Peace Planning and Review Process - PARP), either through their NATO membership or through Partnership for Peace (PfP), save for France. This, according to Kleffner, went some way towards explaining the particular French interest in independent EU military headquarters, manifested particularly throughout 2003.

Contrary to the greater part of public opinion, NATO was much more a political organization than a military one, and it was diplomats who took the main decisions there. In its efforts to transform itself into an organization to counter international terrorism and threats presented by proliferating weapons of mass destruction and their means of delivery, NATO had crafted a new role for itself for the second time after the demise of the Soviet Union, in its Prague Ministerial Summit of November 2002. The new threats should be countered by a “deter and disrupt” approach, including preventive action where necessary. One of the means used for this objective would be the NRF now in the making.

For all its new goals, however, NATO had actively supported the EU in its build-up phase for its ESDP, for example by providing military expertise to the EU’s Headline Goal Task Force from the time of the Helsinki Summit (Kleffner himself headed the relevant section for this advice in NATO). With the Berlin Plus agreement of December, NATO had put this cooperation with the EU on a more formal basis. The agreement included the use of “pre-identified” NATO assets by the EU for its peacekeeping operations. Regarding the possibility of the EU taking over the Bosnian SFOR peacekeeping mission from NATO, Kleffner deemed the EU ready and able to do so. Such a take-over was also in NATO’s interest given NATO’s new global role. The fact that the United States had for a long time refused to move on this subject had more to do with the transatlantic tensions over Iraq in 2002 and 2003 than with that country’s long-term strategic interests. In conclusion, Kleffner argued that EU-NATO relations were not about competition but about cooperation. NATO welcomed European efforts at “delivering security,” an area of long experi-

ence to NATO, as long as they did not undermine the Alliance. Lastly, though, “a bit of competition has always helped to improve the quality of endeavors.”

Heiko Borchert,<sup>22</sup> in his presentation titled “The Future of ESDP and the Limits of Intergovernmentalism,” elaborated some institutional and technical reforms necessary for ESDP and CFSP if the EU wanted to fulfill its global role as aspired to in the EUSS. Defense should be handled as a supranational matter by the EU, a necessary accompaniment of policy and resource pooling. Defense should also take a cross-cutting approach wherever it affected or required input from other policy areas, such as development aid. The relationship with the United States should be rebalanced to adequately reflect the differences in policy based on hard or soft power.

In the concluding panel discussion, “Is there a Way from Cacophony to Harmony in ESDP?”, a consensus emerged among all discussants (including the audience) that, in general political terms, an autonomous defense policy for any political entity is very closely linked to full statehood. Applied to the European Union, this recognition would mean that ESDP, if fully realized, holds the potential to give the Union the decisive push in that direction.<sup>23</sup>

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<sup>22</sup> Dr. Heiko Borchert & Co. Consulting & Research; Fellow at the Düsseldorfer Institut für Außen- und Sicherheitspolitik (DIAS), Düsseldorf.

<sup>23</sup> Cf. Joylon Howorth, *European Integration and Defence: The Ultimate Challenge?*, EU INSTITUTE FOR SECURITY STUDIES, Chaillot Paper No.43, (Nov. 2000).