Defence: Old Problems in a New Guise?

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Article 17 ff. EU Treaty; Article I-40 and III-210 ff. Draco[1]

While the Nice Treaty cast a shadow over the Convention's work on the institutions and led to the project's first failure in the Brussels Summit, the war in Iraq cast shadows over the common foreign and security agenda. On the one hand, it proved the extent to which Europe is divided over substantive positions and over the means to act, particularly the resort to war. On the other hand, there is an increased popular sense that Europe should play a role (reflected in Eurobarometer polls, including one especially commissioned by Giscard). Article I-40 of the Draft Constitution on defence reflects that ambition. It remains to be seen whether this facilitates Europe to unite when it comes to giving foreign policy teeth in the form of a real and effective common 'defence' policy.

As with most other provisions of the Constitution, Article I-40 in the main builds on and consolidates the texts as we already have them in the existing Treaties, but at the same time, it innovates.

The old

Already existent are the following key elements:

– the notion of a common defence policy, which would in due course lead to a proper EU system of common defence if the Member States, in accordance with their own constitutional requirements (that is: after due approval of all national parliaments), unanimously agree thereto (cf. Article 17 TEU);

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[1] All references in the text are to the Convention's Draft Constitution of 18 July 2003 (here Draco) unless identified otherwise. The Constitution's provisions have been renumbered upon its conclusion. The final numbering was not yet established at the time of printing.

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- the scope of the defence policy as including humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking;
- a Political and Security Committee to exercise, under the responsibility of the Council, political control and strategic direction of crisis management operations, and to take the relevant decisions concerning the political control and strategic direction of crisis management operations (cf. Article III-208 and Article 25 TEU);
- the notion that existing obligations and policies of certain Member States in NATO are to be respected and that Member States may, amongst themselves, engage in further military co-operation (within the framework of NATO and WEU, says Article 17 TEU, but in practice this limitation has never been observed).

And the new

The novelties partly reside in the text of Article I-40 itself, partly in the elaboration in the Articles III-210 and those following. Some of these novelties are the result of emendations made in the texts after the Naples *conclave* during the Italian presidency of the IGC;[2] these are consolidated in the later documents.

New is that the scope of the common defence policy, apart from the fields already mentioned, extends to joint disarmament operations, military advice and assistance tasks, conflict prevention and post-conflict stabilisation, as is revealed by Article III-210. In addition, all the defence tasks may contribute to the fight against terrorism, including the support of third countries in combating terrorism in their territories, a point that is also related to Article I-42 (the solidarity clause, as elaborated in Article III-231). Article I-40(1) makes it furthermore explicit that the common security and defence policy 'shall provide the Union with an operational capacity drawing on assets civil and military'. This suggests that the intention is not to provide a mere verbal superstructure to what Member States may or may not be doing anyway. On the contrary, it suggests that the EU itself will be the flag under which operations can take place. This might breathe life into the EU legal personality, which has hitherto been absent. But as we shall see, the risk of EU's defence identity to be nipped in the bud is there; it is built into the very provisions of part III.

[2] See CIG 57/01/03 Rev.1.

Mutual defence obligations

Perhaps the most important innovation concerns mutual defence obligations. In paragraph 7 of Article I-40 of the European Constitution, the mutual defence clause, in case of an 'armed aggression on its territory' of a Member State, was restricted exclusively to those Member States participating in 'closer co-operation' – an interesting yardstick of the solidarity between the Member States which, as the preamble has it, are 'to forge a common destiny' in the Union. Luckily, it has been extended to all Member States by the IGC.[3] Nevertheless, the 'obligation of aid and assistance by all the means in their power' is significantly qualified by the addition that 'This shall not prejudice the specific character of the security and defence policy of certain Member States', i.e., the neutral states (Ireland, Sweden, Austria and Finland). They had objected that 'provisions containing formal binding security guarantees would be inconsistent with our security policy or with our constitutional requirements'.[4] The IGC text furthermore stipulates that the obligation of aid and assistance 'shall be consistent with commitments under NATO, which, for those States which are the members of it, remains the foundation of their collective defence and the forum of its implementation'.

Defence tasks; constitutional sensitivities

Not only are the international commitments of neutral and NATO Member States taken into account, but also the constitutional restrictions of the Member States. All their constitutions either expressly stipulate or assume that their armed forces will ultimately act under the supreme authority of the political organs of the Member State. This concerns the famous monopoly of (physical) violence, which the Member States enjoy. The deference to this constitutional fact is apparent from the provisions on the 'operational capacity' on which the EU 'draws', but it needs some constitutional sensitivity to recognize them.

The Council of Ministers shall take decisions by unanimity on the scope, objectives and general conditions of the missions to be undertaken.[5] The civilian and military aspects of such tasks are co-ordinated by the EU Minister for Foreign Affairs under the authority of the Council of Ministers. As at present, the strategic direction and political control of crisis management tasks is exercised by the Political and Security Committee. Concrete missions can take two forms: either the Council requests a group of Member States to fulfil a certain

[3] See CIG 60/03 ADD 1.
[4] See CIG 62/03.
[5] III-210, para. 2.

task, or it is to be fulfilled in the context of the 'permanent structured [defence] co-operation'.

In the first case, the Member States agree amongst themselves (in 'association with' the Union Minister for Foreign Affairs) on the management of the task.[6] This seems, in a manner, to detract from the role attributed to Council and Political and Security Committee in Article III-208 and 210. The emendations to which the Naples conclave of the IGC gave rise, make it abundantly clear that it is the Member States which are then in charge, and they can decide whether or not to inform the Council of the progress made, except when 'the completion of the task involves major consequences or require amendment of the objective, scope and conditions for the task determined in the European decisions [at the basis of the task]'.[7]

In 'the permanent structured [defence] co-operation' – a form of 'enhanced co-operation' which does not bear that name – Member States are to be vetted depending on their military capabilities in accordance with a separate Protocol.[8] Once they are in it, they become part of a kind of integrated structure. Article III-213, as amended during the IGC, makes it absolutely clear that Member States can only at their own request become part of the co-operation and, more importantly, that they can always unilaterally withdraw from it. This makes Member State participation precarious by nature, because, in conformity with national constitutional practice in multi-national operations, any military contingent can at all stages of an operation be withdrawn from the authority of a foreign – here EU – authority. So much for the own operational capacity of the EU which Article I-40 enunciated.

This deference for constitutional sensitivities might also have consequences for the supremacy of EU law, which is stated in Article I-5bis (in the Convention's draft: Article I-10). If EU decisions enjoy primacy, but the execution of such decisions is ultimately a Member State prerogative to be exercised under ultimate Member State authority, what does that tell us about legislative primacy?

Old problems in a new guise?

Non-military or semi-military missions, for instance the European Community (since 2000: Union) Monitor(ing) Mission (ECMM) in former Yugoslavia, have already been undertaken under a presumed EU cover. Academics have

[6] III-211, para. 1.
[7] III-211 as amended, see most recently CIG 76/04 of 13 May 2004.
[8] I-40(6) and III-213, as amended by the IGC presidency; CIG 60/03 ADD 1.

seen in those kind of phenomena the spontaneous growth of legal personality, which the Member States, both in Maastricht and in Amsterdam, have consciously intended to withhold from the EU – which is the crucial difference with the ICJ's *Reparation for Injuries* case, which is often but inappropriately adduced to explain such growth. Even so, after the 1995 NATO bombings of Bosnia, during which members of the ECMM were foolishly (and against the advice of all relevant authorities) sent into the area, to be kidnapped and sustain serious damage as a consequence, the Union refused to acknowledge liability in the absence of legal personality. From this one can conclude that the Member States acting together as European Union under the second pillar, may constitute a political entity that has not been recognized as a legal person by the High Contracting Parties concluding the EU treaty and its amending treaties.

The situation under the Constitution might come to mirror the present one. Though the EU is given legal personality in the Constitution, the question arises of who is acting when it comes to action under Article III-211 and III-213: is it, under either or both of these provisions, the Union or the Member States which act? And what in case of a combined EU/NATO action? The NATO military structure has no legal personality. Is it then the EU or the participating Member States which can be held liable for such combined operations? Behind this legal question looms a political one. The Union may be a legal person, but is it, when acting, also a political entity particularly if some Member States stay out of any relevant co-operation, either occasional or permanent?

Questions for practice and future scholarship

The provisions on EU defence raise some huge constitutional questions. In essence these revolve around the development adumbrated: at first there was no legal personality, but in practice the EU Foreign and Security Policy sometimes suggested a political personality. Under the proposed Constitution, the EU may have legal personality but politically it may not show much of a coherent personality.

- What is the relation between EU power(s) and Member State power(s)? Are we constitutionally beyond 'pooled sovereignty' or still very much at that stage?
- Will the unified legal person of the EU be a unified political entity which is able to act politically and physically?[9]

[9] Cf. the spillovers of NATO and other fora versus neutrality drives and its institutional complications.

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- Where is the monopoly of violence located? Or rather: what is the relation between the EU control over the use of violence and the Member State control over the monopoly of violence?
- What is the relation between legislative and executive primacy? If EU decisions taken in accordance with the Constitution have primacy, does this suffer exception for decisions under Article I-40 and III-210?

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