

The State of the European Union

Constitution –
Identity, Democracy, Transparency, Decisiveness
and Prospects of Foreign and Security Policy
in post Afghanistan and Iraq Wars Era

by
Michael W. PLETSCH

Table of Contents	2
Preface: The study's objective and method	18
Chapter I	20
A. Introduction	20
B. Twenty theses: the state of the European Union	24
Chapter II	38
The European Union under construction	
A. Introduction:	38
The Nature of the EU – a “sui generis actor” according to the Founding Treaty on EU and to its dynamic development	
B. The European Union's dynamic development creating a unique entity “sui generis”	39
<i>I. The European Union's basic motive to perform the dynamics of stages in a process of creating an ever closer Union</i>	39
<i>II. Milestones of a stepwise dynamic development of the EC integration, History and Institutions</i>	40
1. Introduction: The dynamic, evolutive character of the European Union as developed in the history of the European Union, creating a unique entity “sui generis”	40
2. History of the European Union: from the Monnet-method to the European Union	42
3. Survey on the milestones in the history of the European Union	47
<i>III. The Treaties shaping the European Union</i>	63
1. Treaty establishing the European Economic Community, the Treaty of Rome	63
2. Single European Act (SEA)	64
3. Treaty on European Union (TEU)	64

<i>IV. Identity shaping essentials of the European Union, the structure of the European Union</i>	66
1. Identity shaping essentials	66
2. the organization , created by the member States, the “finalite” of the EU is kept open, Article 1 Treaty on EU	66
3. the Treaty’s <i>objectives</i> and major successes	67
3.1 general on the European Union and European Community’s Treaty objectives	67
3.2 integration and cooperation : two different models to implement the Union’s objectives	70
4. EU Treaty architecture of the three pillars	73
5. Major successes of European integration method	75
a) completing the internal market	76
b) the EU budget’s identity shaping role, assisting regional infrastructure programs, stabilising cohesion within the EU	
c) creating the third level within the European Union: Europe of the Regions, the “Committee of the Regions”	77
d) achieving the single currency “Euro”	
e) enlarging the EU to the “Europe of the Twentyseven”	78
f) consensus on imperatives of making decision-making more effective	
g) promoting democracy throughout Europe, but diluting forces of extreme nationalism at stake	79
6. EU institutions under the Maastricht Treaty on EU- TEU- and under the TEU consolidated version(2002)- structure and power of the institutions	80
6.1 The Commission	83
6.2 The Council	88
6.3 The European Parliament (EP)	95
6.4. The European Council	99
6.5 The Court of Justice	100
<i>V. Deficiencies : the situation after the signing of the Nice Treaty</i>	102
1. Introduction: The enlargement issue and the European Union’s deficiencies in democracy, transparency and decisiveness in the Union’s political and institutional structure	102
2. the issue of enlargement	106
3. the issue of reforms: the EU attempting to improve identity and decisiveness	106
3.1 amendment procedures laid down in the Treaties	106
3.2 the question of extensive reform of the Treaties	107
3.3 Until the 1980s little use of the provisions for reforming the Treaties	107

3.4	European Parliament's approval of the "Draft Treaty on European Union", February 14, 1984	108
3.5	the Single European Act, 1986	108
3.6	the second phase of the reform process, the <i>Treaty of Maastricht</i>, 1992	109
3.7	the Intergovernmental Conference 1996/97 to prepare the basics for the Treaty of Amsterdam, 1997.	109
3.8	The Amsterdam and Nice Treaty unsatisfactory on the institutional front	110
4.	Conclusion	111
VI.	<i>Activities to establish a Constitution for Europe to overcome the Union's mess of tensions between deepening and enlarging the Union</i>	111
1.	The Laeken Declaration	111
2.	The drawing up of a draft Treaty establishing a Constitution for Europe by the Convention for the future of Europe	113
2.1	Introduction	113
2.2	The draft Constitution	113
2.2 1	Definition and objectives of the Union, membership	114
2.2 2	A single legal personality and the conduct of a Common Foreign and Security Policy including a Common Security and Defence Policy	115
2.2 3	Distributing exclusive and shared competences between the European Union and the Member States	117
2.2 4	Creating one institutional framework for the Union's institutions	118
2.2 5	Principle of attributed, limited powers; transparency of decision-making	119
2.2 6	The European Parliament	119
2.2 7	The Council of Ministers	120
2.2 8	The Commission	120
2.2 9	Conclusion	121
3.	The Intergovernmental Conference debating the draft Treaty establishing a Constitution for Europe	122
4.	The Treaty establishing a Constitution for Europe	122
4.1	the Constitution and simplification of the European construction: one single institutional framework	123
4.2	Commission, recognition of its different missions	124
4.3	Institutional framework: Parliament and Council	
4.4	Main institutional innovations within the Council	
4.5	The European Council	
4.6	Composition of the institutions	
4.7	Qualified majority for decision-making in the Council: Strengthening the Union's decisiveness by striking the balance between sovereign equality of each Member State and the democratic legitimacy by proportionate weighting the votes:	
4.8	The Union's newly acquired single legal personality	125
4.9	Achievements in the area of freedom, security and justice, and in the field of common foreign and security policy	

4.10 Economic, taxation, social policies	126
4.11 Increased democracy and transparency ?.	126
5. Conclusion:	126
5.1 The situation after the failing French and Dutch votes on ratification	
5.2 leaving the impasse through focussing on identity shaping essentials	128
` transparency, democracy, decisiveness ` not necessarily presented	
in a Treaty labelled “ Constitution “	
Chapter III	129
The identity issue and the formal text called “Constitution”	
A. Introduction	129
B. Basics of nation states Constitutions and mutual interdependencies between	131
the national constitutional systems of the EU Member States and the existing	
political and legal order of the EU	
<i>I. The comparative approach to the basics of national constitutional laws.:</i>	131
the functional role of nation states’ constitutions and the functional role	
of the EU’s legal and political order	
<i>II. Notion of nation state constitution and the functional role of main national</i>	132
<i>constitutional systems of the EU Member States</i>	
1. Germany	132
2. Great Britain	133
3. Spain	133
4. Sweden:	134
5. Conclusion on the functional role of main national constitutional systems	135
of the EU Member States	
C. The constitutional quality of the political and legal system of the European	135
Union on the basis of the Founding Treaties on EU/EC.	
The EU’s constitutional essentials, not depending on a formal text	
called “Constitution” .	
<i>I. Introduction: The nature and development of European Union law:</i>	135
The nature of the secondary law of the EU as developed under the TEU’s 1 st	
pillar, the Treaty establishing the European Community-TEC- provisions	
<i>II. General characteristics of the European Community’s primary and</i>	135
<i>Secondary law</i>	
<i>III. European Community law special characteristics, its main features as</i>	136
<i>constitutional principles in EC law :</i>	
1. Constitutional transfer of power from the Member States to the Community	136

1.1 Introduction	136
1.2 National Constitutions contain “ gateway “ clauses to open the national law to the European Union law	137
1.2.1. France	137
1.2.2 Germany	138
1.2.3 Italy	139
1.2.4 The United Kingdom	140
1.2.5 Conclusion	141
2. Basic provisions of the Treaty establishing the European Community: constitutional principles and their functional role in EC primary law and as case law crafted by the Court of Justice	141
2.1 Constitutional principles of attributed, limited powers, subsidiarity and effectiveness of Community law in the EC Treaty: they manifest the “sui generis “ nature of the EC	141
2.2 Functional role of the Community’s law according to the caselaw of the Court of Justice	142
3. Conclusion: pleading for the integrative approach using constitutional essentials to be incorporated in a new Treaty :	145
3.1 national constitutions` clauses transferring parts of national sovereignty to a common “pooling “	145
3.2 Establishing a formal text called “constitution” and risking the sustainable constitutional development of the existing integrated duality of EU-level and nation state level as basic elements of <i>one</i> emerging European constitutional order	146
3.3 The identity issue: maintaining and improving the legitimacy <i>acquis</i> of the current Treaty on EU by <i>integrative</i> approach. Constitutional essentials count more than the formal aspect	149
Chapter IV	151
The identity issue: legitimacy compliance needed for any text to avoid gradual disintegration of the Union	
A. Identity shaping essentials of the European Union ? Factors contributing to the permanent process of European identity building. – form, levels and substance	151
1. Definition of the European Union’s identity shaping essentials	151

2.Factors contributing to identity shaping essentials	151
3. Identity and legitimacy compliance needed for any text to avoid gradual disintegration of the Union :	155
B. The identity issue of the European Union, „, constitution“ and the idea of Europe	158
<i>I. Introduction : the identity issue, legal and living constitution, “sui generis” nature of the EU/EC and the secondary law, principle of attributed powers</i>	
1. The identity issue , the EU as a “sui generis “ collectivity, the European Union’s final design, its “finalité “ kept open in a dynamic process of creating an “ever closing Union among the peoples of Europe “	
2. The legal resources: the EC primary and secondary law	160
3. Identity and the principle of attributed powers	161
<i>II. The identity issue and the constitutional quality of the Founding Treaties on EU/EC</i>	162
tensions between the <i>legal</i> constitution de lege lata of the existing EU/EC-Treaty and the <i>living</i> constitution,the reality of nation states’ recurring to national resources: the limits of the legal, institutional approach to finding the EU/EC’s identity	
<i>III. European identity and the idea of Europe</i>	165
A comprehensive approach to the EU/EC’s identity shaping essentials: reflecting heterogenous varieties of identities in Europe and one common heritage of basic values ?	
1. Identity indicators	165
2. The idea of Europe: an indefinite idea ?	166
3. The idea of Europe: identity shaping principles and values of universal nature,identity shaping elements of manifold varieties in culture, history, geography, languages, national and regional identities	167
3.1 Europe’s identity shaping values and principles: centuries old heritage and of no exclusive, but universal character	167
3.2 European concept and USA concept of basic values	
4. single EU Member States’ European concepts substantially differ from each	172

other: in strategy of why and how to make use of the shaping of a European identity	
5. Europe of the Regions – contribute to identity shaping	173
6. In sum:	173
Europe is presenting a variety of identity shaping elements of manifold varieties in history, geography and culture, as well as in national and regional identities	
<i>IV. Conclusion on the European Union's identity and perspectives for overcoming the ratification deadlock of the EU's Treaty establishing a Constitution for Europe</i>	174
1. The European Union's identity shaping essentials a cluster of attributes layed down in the constitutional orders of the Founding Treaties on EU/EC and in the Treaty on Constitution: own objectives, tasks, institutions, competences, powers The Union's potential to contribute to security, peace, stability.	
2. EU in crisis.	175
3. reforming the democracy, transparency and decisiveness of the European Union would increase legitimacy and facilitate the ratification chances	176
Chapter V	177
The Union and Democracy	
The constitutional quality of the European Union – essentials and perspectives for improving the enlarged EU's <i>democracy</i> incorporated in a concise text of a fusion Treaty of the existing Treaties on European Union and European Community	
A. Introduction	177
<i>I. Political decision required for alternatives in case of definite ratification failure of the current Treaty establishing a constitution for Europe</i>	177
<i>II. Constitutional quality essentials of the European Union – subject to reforms and constituent elements of a fusion model – to increase democracy, transparency and efficiency of the European Union</i>	178
B. Increasing democracy, democratic legitimacy of the European Union	179
<i>I. The Treaty on European Union calls for enhancing further the</i>	179

democratic and efficient functioning of the Union institutions

1. Introduction	179
2. Democratic improvement: enlarged legislative powers of the European Parliament	180
3. The European Parliament's right to consultation before the conclusion of international agreements	181
4. Supervision, monitoring: new power of the European Parliament	182
5. Controlling the Commission	183
6. Despite improvements of the Union's democratic quality through introduction of codecision legislative power of the European Parliament a democratic gap still exists	185
<i>II. The role of national Parliaments: filling the Union's democratic gap ?</i>	186
Openness of government and the right of national parliaments to timely and comprehensive information ; national Parliaments and the principle of subsidiarity	
1. More than a decade's combat for the right of national Parliaments to information on Union legislation	186
1.1 National Parliaments shall be informed <i>before European laws are adopted in ordinary legislative procedure</i>	189
1.2 National Parliaments shall be informed <i>before extension of majority voting in a given case</i>	189
1.3 National Parliaments participate in evaluation of implementing the area of freedom, security and justice	189
2. National Parliaments and the principle of subsidiarity	190
3. Flexibility clause and national Parliaments	191
4. National Parliaments participation in the Union's acts in fields of intergovernmental cooperation ?	192
5. National Parliaments notified of Union Membership application	192
<i>III. Comment on the Constitution Treaty's democracy related provisions: do they help to increase the Union's democratic legitimacy through giving national Parliaments a better say as before and necessary?</i>	193
1. European Parliament's co-decision legislative power under the Constitution Treaty provisions may be left unchanged and extended to replace cooperation procedures	193
2. Participation of national Parliaments	193

3. The European Parliament can act as an helpful agent, a catalyst for national Parliaments	194
4. The European Parliament's right to consultation before the conclusion of International agreements	195
5. Supervision, monitoring: right to petition and holding inquiries	196
6. Controlling the Commission: strengthening the democratic legitimacy of the European Union	197

Chapter VI **198**

The Union and Transparency

The constitutional quality of the European Union – essentials and perspectives for improving the enlarged EU's *transparency* incorporated in a concise text of a fusion Treaty of the existing Treaties on European Union and European Community

<i>I. Introduction: the interdependencies of transparency, democratic accountability , acceptability and legitimacy of the European Union</i>	198
<i>II. Principle of Openness of European governance by Union legislation</i>	199
1. The Principle of subsidiarity in all Founding Treaties on EU and in the Treaty establishing a Constitution for Europe	199
1.1 Introduction: subsidiarity of Union action ensures the Union's acceptability and legitimacy	199
1.2 The principle of subsidiarity under the EU's founding Treaty and Treaty on Constitution	200
a) General Definition	200
b) Ensuring the effectiveness of the principle of subsidiarity	202
1.3 Conclusion, making the principle of subsidiarity effective: through holding public subsidiarity admissibility debates in the national Parliaments, in the European Parliament and in the Council in addition to the right of information	205
2. Enhancing the Union's legitimacy through transparency of the decision-making process of Union Institutions:	209

2.1 Citizens' right of access to information on Union Institutions' documents	209
2.2 The Union institutions meeting in public- European Parliament, Council of Ministers	212
3. Enhancing the Union's legitimacy through transparency of the Union's legislation: process of Union Institutions: the right of national parliaments to timely and comprehensive information	212
4. Enhancing the Union's legitimacy through transparency of the decision-making process: the openness of consultation within the Council	216
5. Alternative Treaty and Simplification of the Treaty text	217

Chapter VII 220

The Union and Efficiency, Decisiveness

Constitutional quality shaping essential: *Efficiency* of the European Union, focussing on the issue of improving the decision-making within the Council

A. Introduction	220
B. Improving the Union's efficiency through clarity of the decision-making procedures and through institutional adjustments	221

I. The dynamic process of developing the enlarged Union's efficiency of decision-making aiming at balancing the Union's enlargement and cohesion, decisiveness – from the 1996/97 IGC to the Nice Treaty on EU and the Constitution Treaty

1. The Intergovernmental Conference 1996/97 and efficiency of decision-making in the Council: the system of weighted votes, limits of extrapolation	221
1.1 The Council's decisiveness and the system of weighted votes facing the 1996/97 Intergovernmental Conference	221
1.2 The 1996/97 Intergovernmental Conference in search of alternatives to extrapolating the existing system of weighted votes	224
1.21 <i>Allocating extra votes to the larger countries</i>	224
1.22 <i>Introduction of the double key option</i>	224
2. The Intergovernmental Conference 1996/97 and different national concepts of the correlation between deepening and enlarging the European Union under the Community's law on the principle of effectiveness	225

3. The Nice Treaty to deal with the institutional reform “leftover”: reinforcing the Council’s decisiveness and giving larger countries greater voting strength and raising the blocking minority threshold in a Union of the Twentyseven	228
4. Efficiency of decision-making: alternative, flexible forms of cooperation between the Union’s Member States within the Union’s Treaty institutional system in order to strengthen the Union’s decisiveness	230
4.1 Integration and cooperation : flexibility through multiple speed integration and variable geometry discussed at the 1996/97 IGC	230
4.2 The 1996/97 IGC and differentiated cooperation in the field of Common Foreign and Security Policy and Justice and Home Affairs and the 1996/97 IGC	233
4.3 From “ closer cooperation “ to “enhanced cooperation” under the Amsterdam Treaty on European Union, the Nice Treaty on EU and the Treaty establishing a Constitution for Europe	236
a)The Amsterdam Treaty on EU , under title V, Articles 11, 17	236
b) “ <i>Enhanced Cooperation</i> “ under the Nice Treaty on European Union, Article 43	238
c) The Treaty establishing a Constitution for Europe- TCE- chapter III, Article 43, “enhanced cooperation	240
 <i>II. Comment on the criteria related to differentiated integration through multiple-speed integration and to differentiated cooperation, enhanced cooperation as guiding-line for a merger Treaty</i>	 242

Chapter VIII **244**
**Constitutional quality shaping essential:
Efficiency of the European Union, focussing on the issue of
improving the**

**■ decision-making within the Council in the field of European
Foreign, Security and Defence Policy**

**The European Union: speaking with one voice? The legal constitution for
stronger external action by the European Union in the field of European
Foreign, Security and Defence Policy**

I. Extending the qualified majority voting namely on deciding on joint **244**

positions and joint actions in the field of Common Foreign and Security Policy : the response to challenges in international security

1. The state of international security challenging the European Union to speak with one voice	244
2. The provisions of the Treaty on European Union concerning the Common Foreign and Security Policy (CFSP) - from European Political Cooperation – EPC - to CFSP	246
2.1 Experience of unanimous decision-making within the second pillar of the Treaty on European Union : blocking the European Union acting with one voice	246
2.2 The dynamic process from European Political Cooperation – EPC - to Treaty provisions on CFSP extending the scope beyond mere economic issues to be implemented by new instruments: common positions and joint actions	247
3. Evaluation of CFSP and CSDP de lege lata: <i>the Member States prepared to translate political will into joint positions and joint actions ?</i>	249
3.1 The situation before the Intergovernmental Conference 1996/97	249
3.2 The IGC 1996/97 considering ways to a more effective CFSP through increasing the effectiveness of decision-making as essential of the EU's constitutional quality	253
3.21 Alternatives to the consensus rule? Institutional attempts to increase the effectiveness of decision-making in the field of Common Foreign and Security Policy- CFSP-	253
3.22 Decision-making on matters of a Common Defence Policy de lege lata	256
3.22 Unimity, consultation and qualified majority decision-making in the field of a Common Foreign and Security Policy under the Treaty establishing a Constitution for Europe - TCE-	257
Comment:obligation to practice solidarity and consultation before taking action is no innovation, it is a clarification of the current Treaty obligations	260
3.24 Efficiency of the EU's external action: Speaking for the European Union with one voice in the field of a Common Foreign and Security Policy: The Troika	262
Chapter IX	264
The living constitution and the European Union's external role	
The European Union's 21st Century design for international security and cooperation ?	

**Constitutional quality shaping essential:
Efficiency of the European Union, focussing on the issue of
improving the**

**■ decision-making within the Council in the field of Common
Foreign, Security and Defence Policy**

A. Introduction	264
B. The world security situation, global world order after September 11	266
<i>I. The notion „ international security and cooperation „</i>	266
1. Article 51 of the Charter of the United Nations : the right of individual or collective self- defence and the notion „ international security „	266
2. Strategic doctrine’s definition of ` threats ` and the notion „ international security „	267
3. Kinds of threats , new dangers threatening international security in 2002	268
<i>II. The Sept. 11 terrorist attacks and the impact on the world security situation and on global world order</i>	269
Introductory remark on the use of the terms „ world security situation „ and global world order	
1. The Sept. terrorists’ attacks :	269
A traditional threat or a new kind of threats reaffirming or changing the notion of „ international security “ ?	
1.1 Terrorist attacks : a new phenomenon ?	269
1.2 Terrorists’ threats in recent times , before Sept. 11	270
2. What did not change since the terrorist attacks of Sept. 11 , is the basic national and international security situation : lack of traditional margin of safety	270
2.1 The global world order before Sept. 11	271
2.2 The role of international security and the global World order after Sept. 11 : Hopes for collective security and multilateralism cooperation ?	271
2.21 The strategic impact that the Sept. 11 attacks do have on the national and	272

	international security	
2. 22	Strategic doctrine , collective security and alliance policy after Sept. 11	273
3.	US-led coalition building : NATO`s and EU`s response	274
3. 1	Invocation of Article 5 Washington Treaty: demonstrating the principle of collective defence by NATO	274
3.11	Statement by the Secretary General of NATO Lord Robertson,Sept. 11, Brussels,NATO Press Release , PR/CP(2001)121	275
3.12	Sept. 12: Invocation of Article 5 Washington Treaty	275
3.13	Invocation of Article 5 confirmed , Oct. 02, 2001 what does Article 5 mean ?	277
3. 2	NATO implementing invocation of Article 5	277
3. 3	The European Union`s response to Sept. 11	278
3.3 1	Individual European Governments immediately made their statements of solidarity and the EU collectivity of EU Member States	278
3.3 2	The EU`s – as Union - response to Sept. 11 , A bunch of measures going beyond merely military matters :	278
	<i>III. The limited role of the EU as organization reflecting the US- led warfare against the Taliban and AL Qaeda network of international terrorism and US led warfare on Iraq :</i>	279
	a „ war in the computer age „, a military breakthrough in the US reliance on foreign military bases and the impact on US Alliance policy : US unilateralism ?	
1.	The Taliban being deposed : The Afghan model a possible template for American military action against Iraq or other terrorist-supporting states ?	279
2.	New US military strategy of using new configuration of forces causing the early military success in Afghanistan : the „ war in the computer age „	281
3.	US military success backing peacekeeping in Afghanistan . Peacekeeping and reconstruction a matter of international security and credibility , international legitimacy	282
4.	How to win the peace in Afghanistan and in Iraq ? US military troops exposed to guerilla assaults in Iraq : Iraq`s reconstruction at stake , political and economic stability of the region at risk, dangers to international security and global world	283

C. Collective international security policy facing security dilemmata	284
issues after Sept.11:	
the revival of the nation states' behaviour and the impact on	
the United Nations', NATO's and the European Union's role in	
international security and cooperation	
I. <i>Security dilemma : US military unilateralism – danger of splitting</i>	284
<i>the anti-terrorist alliance ?</i> Growing technological gap in armament and	
the US military strategy's impact on the US Alliance policy risking a volatility	
of US alliance policy moving from multilateral cooperation to US military	
unilateralism and back again	
1. US military unilateralism through a growing <i>technological gap</i> in weapons	286
- risking a split anti-terrorist alliance	
1.1 The US lead in military technologies risks a split alliance.	
New dangers to multilateralism through scientific research on biological	
weapons ?	
1.2 Fears about US unilateralism – a blueprint for global governance in the	287
21 st century ?	
2. US military unilateralism through <i>new US military strategy</i>- impact on	288
US Alliance policy risking a split alliance	
2.1 The US military strategy's success in Afghanistan and the impact	288
on the US Alliance policy - bypassing NATO ?	
2.2 US alliance policy at stake - uncertainties about extending the fight	289
against terrorism	
II. <i>Affecting the Union's interests:</i>	290
<i>Security dilemmata, revival of nation states and consistency</i>	
<i>of coalition-building</i>	
1. The anti-terror coalition in the case of Afghanistan:	290
revival of the nation state behavior	
1.1 Nation states joining the anti-terror coalition in self-defence	290
1.2 Anti-terror coalition of nation –states : the European Union	291
experienced its own limits	

2. The war on Iraq coalition : the Iraq coalition of nation-states Assuming to act in prevention and self-defence. USA and the case of Great Britain's joining the war outside the European Union's policy making framework : The EU again experienced its own limits	292
3. Security dilemma : consistency of coalition building - Western values and Islamic world clashing ?	293
3.1 Security dilemma – coexistence of people with different world views ?	294
3.2 Security dilemma : conflict between fighting against terrorist extremists and different perceptions of worldwide US dominating powers	295
3.3 Security dilemma : consistency of the anti terror coalition and the role of the Israeli – Palestinian conflict	297
3.4 Security dilemma : long-term fight against terrorists and the danger of abusing the basic principles, losing legitimacy	298
3.41 Security dilemma : Consistency in the anti terror fight and the ambiguity of the term „ terrorism „	299
3.42 Security dilemma : Security issues ,emergency terrorists' attacks prevention conflicting with the rules of international law (treatment of Taliban and AL Qaeda detainees in Guantanamo; Iraqi prisoners tortured in Abu Ghraib,Iraq)	300
4. Security dilemma : winning the war and winning the peace	301
4.1 winning the war on Taliban and winning the peace for reconstruction in Afghanistan	301
4.2 winning the war on Saddam Hussein and winning the peace for reconstruction in Iraq	302
D. Conclusion and perspectives for the Union how to contribute to international security and cooperation and assist to reconstruction in Afghanistan and Iraq.	303
General Conclusion	305
Bibliography	309
	- 325

Preface: The study's objective and method

The author is Seniore Lecturer and Lawyer in Public and Private Law on Economics, European Integration Law and International Law on Contracts, Berlin, Germany.

The present study is the extended, deepened and actualized version of the lecture "The European Union's 21st Century Design in International Security and Cooperation" the author has held at the International University Bremen and at the Otto-von-Guericke University of Magdeburg, Germany, in 2002 – 2004.

The author owes his 35 years of experience in European Integration Politics and Law to serving in the Commission of the European Community, in the German Foreign Office and in the German public administration where he participated in designing the German position on the Maastricht and Amsterdam Treaty establishing the European Union.

It is this study's method to apply the lesson taken from the dynamically gradual stages in European integration history to the evaluation of current issues challenging the European Union.

The Treaty establishing a Constitution for Europe failed-until now- entire ratification. It is still not clear how to overcome the present deadlock, whether

- through political intervention by establishing a new Treaty text labelled "Constitution" and, by doing so, again risking misunderstandings to invest a new order, a static order similar to the static nature of nation state's Constitution, or
- through a short, concise Treaty merging the existing Founding Treaties on European Union and European Community along the traditional line of the dynamic, gradual evolvement of the European integration and cooperation.

Whatever form of a text will actually turn out, the enlarged European Union's identity and legitimacy is the crucial issue: how to further develop the Union's constitutional essentials – democracy, transparency and decisiveness-, essentials to be incorporated in a new Treaty text.

The study's method of applying the lesson taken from European integration history is exemplified in chapter IX also, applying the findings to the Union's role played in the field of the Common Foreign and Security Policy focussing on the Union's experience made in the years 2001-2003 after the September 11 attacks and on the current crucial issue of international security and cooperation politics of how to overcome the deadlock in Iraq and the serious prospect of another deadlock in Afghanistan.

This study undertakes to describe the dynamic nature of the stepwise, gradual development of the European integration through further improving the constitutional quality essentials under the Founding Treaties. The European integration has owed its successes to the Monnet method of integration, gradually, dynamically developing the European Community and the European Union as an ever closer Union among the peoples of Europe, but intentionally keeping open the exact final design of the Union,

its “finalité”, and just due to this openness facilitating the integration policy. The openness about the Union’s final design helped to avoid the revitalization of, in some Member States, still existing misunderstandings concerning the nature of the European Union, still believing that any federal or quasi federal nature of the European Union would be synonymous with “central state “ or would lead the Union to become a European Superstate.

The Monnet integration method, therefore, also experienced its limits, facing a dilemma of how to continue the successful integration process without giving a clear final design of the European Union. The more the EU enlarged with now twentyseven members, the more the doubts about the Union’s identity, namely its decisiveness, increased ,and thus the Union’s need of legitimacy increased requiring broad democratic approval by the European citizens. The European citizens’ broad approval, however, requires the citizens to understand the nature of the European Union. This does not necessarily mean to present a final design of the Union to the citizens.

Surely, a European identity feeling would be difficult to develop and maintain if the citizens are facing a integration method only. Establishing a constitution can be taken as political signal giving an European identity building political impulse. But establishing a Constitution can also be taken as an act of political intervention, it can be misunderstood, in the view of the citizens, as a final design of the European Union.

A final design of the European Union, if undertaken at the wrong time, may risk to raise misunderstandings about the European Union’s legal and political nature. The European identity is still being shaped, still having to sharpen a common conviction of an European Union which is balancing liberal economic market policy and social responsibility and solidarity policy as well to cope with the globalization challenges. The European identity shaping is still ongoing, there does not yet exist a Europeanwide common conviction of the constituting common basic objectives and values concerning the basic correlation between economic liberties and social responsibilities and solidarity. Presenting a legal document formally called “constitution”, may give the impression of establishing a static nature of the European Union, thus confusing the dynamic nature of the European identity shaping which is still “under construction” and successful just due to the openness of the Union’s final design. And abandoning that traditional openness through establishing a Constitution for Europe may just contradict the Constitution’s intention and even blockade the European Union to further deepen and develop democracy, transparency and decisiveness.

The study’s method of applying the lesson taken from European integration history to current issues of European Union’s policy will be further exemplified by focussing on the Union’s role played in the field of the Common Foreign and Security Policy in the years 2001-2003 after the September 11 attacks. After the European Union as organization had been bypassed by the EU’s Member States joining the wars in Afghanistan and in Iraq, it is the current crucial issue of international security and cooperation politics of how to overcome the deadlock in Iraq and the serious prospect of another deadlock in Afghanistan through the European Union’s contributions to multilateral actions determined to help winning the peace in Afghanistan and Iraq focussing on civil reconstruction beyond merely military actions.

Chapter I

A. Introduction

1. On 1 January 2007, the European Union took in two new Member States: Bulgaria and Rumania.. The European Union and its 27 Member States will face several most important challenges and decisions in the year 2007 and the years ahead:

- The issue of how to improve, if possible through overcoming the ratification deadlock of the Treaty establishing a Constitution for Europe after ratification had failed in France and in the Netherlands, the effectiveness, the decisiveness of the European Union's policies and institutions within the enlarged European Union of the Twentyseven in order to effectively cope with the challenges of globalization and worldwide risks to international security: to be safe e.g. from international terrorism, religiously misguided fanaticisms, risks for energy supply , risks for climate change;
- Preparing further accessions of new Member States, namely States from Southern-Central Europe like Croatia:
- The new design of a Neighbourship Policy as the EU has got and will get new neighbours in the course of new Memberships.

After the EU's enlargement of the Twentyseven, there is urgency acknowledged to implement institutional reforms in order to maintain the EU's cohesion and capacity for decisive action. The central provisions of the Treaty on the Constitution of the European Union were and still are meant to deepen the Union, to strengthen the decisiveness and effectiveness as well as the democratic legitimacy of the enlarged EU. For, the political leaders in the EU and experts at EU affairs do basically agree that the existing Nice Treaty on European Union was and still is no sufficient legal and political framework to satisfy the requirements to help the European Union of then 25 and now 27 or even more Member States to respond to future challenges in a world of permanent modernization and globalization .

The EU, however, is in a severe crisis. The constitution must be ratified in 27 countries, some of which, including France and the Netherlands had held popular referenda: where exactly the constitution failed to get the acceptance through ratification according to the respective national constitutional procedures. On 29 May 2005 the French electorate had voted against ratification of the European Constitution. On 1 June 2005 Dutch voters also voted against ratifying the European Constitution.

It is still an open question of how to overcome that deadlock. The constitution's passage is still far from being guaranteed. The European Union's Heads of State or Government Spring Summit on 8-9 March 2007 has been focussing on a different issue: new reduction caps of CO2 emissions to combat global warming. The German EU presidency which is in charge during the first half of 2007 is reported to plan to present to the European Council meeting next 21-22 June 2007 a schedule for deciding how to resolve the deadlock, the final decision is planned under the presidency of Portugal or Slovenia, at a time, actually, between the French Presidential elections which are to take place in April/May 2007 elections and the elections to the European Parliament to be held in 2009.

The so-called “Berlin Declaration” planned for the special meeting of the Heads of State or Government on March 25, marking the 50th anniversary of the Treaty of Rome, signed on March 25, 1957, is meant by the German Presidency to send out a positive message of unity but without giving any detailed information on how to overcome the deadlock constitutional issue. There is not a text of draft of the Berlin Declaration yet at the time of publishing the present study. The German Presidency is reported to draft it after the Spring Summit on 8-9 March., and it is also reported, anyway, to suggest that the Berlin Declaration will boil down to the “lowest common denominator”. The Berlin Declaration will therefore have to wait to be examined later in the course of further developments of the constitutional issue.

In view of the continuing uncertainties about the Constitution, there is, therefore, much academic and political discussion on alternatives in case of definite failure of the Treaty on Constitution to get all ratifications completed and necessary for entering into force.

The failure of the Treaty on Constitution to get the approval in the French and Dutch plebiscites was held due, partly, to a lack of transparency the French and Dutch voters were missing in terms of how to understand the EU’s Constitution. The document of the Treaty constitution is long and, to many, bafflingly complex, it actually emerged not as an exactly pretty document itself—it runs over 200 pages. And in addition to this technical aspect, an even more substantial feeling of scepticism is held responsible for the negative French and Dutch votings: a widespread feeling in the EU, that due to the present and future extent of the EU’s enlargement, the citizens in the European Union are uncertain about the Union’s identity and legitimacy.

No doubt, the Draft Treaty on EU Constitution was the final result of a long standing public debate on the emerging of a European Constitution. But the discussion about the future EU constitution was a discussion between elitarian Members of the Convent. In the view of the people within in the EU, the functional role of the EU’s Constitution still kept on being unclear: Would the EU Constitution be a genuine new political and legal instrument to create a EU Superstate ? If so, critics of the EU’s Constitution saw reason enough to fight against it.

Or was and still is the EU’s Constitution no instrument to create a EU Superstate, and nothing else but the written text as a better sum up of what already exists : a reviewed Founding Treaty on EU(Nice),already having constitutional quality, but lacking transparency and having difficulty in enhancing legitimacy, having difficulty in convincing the European people about the objectives, policies and powers of the EU ?

In view of the political timetable as set up by the Presidential elections in France in April,May 2007, as well as by the elections to the European Parliament to be held in 2009, it is important in the first instance for the German Presidency during the first half of the year 2007 to reach reliable consent for a plan to carry out the institutional reforms necessary for the enlarged EU: the deepening of the EU by strengthening its decision- making procedures as to the existing number of Member countries, and by improving its capacities before any further new enlargements: the identity and the effectiveness issue of the European Union as the focal points the Treaty establishing a Constitution for Europe was expected to contribute to improve the Union’s democracy, transparency and efficiency.

The attempts at drawing up and establishing a Constitution for Europe is not a new stage in the process of fulfilling the idea of European integration. The future oriented dynamism of developing Europe’s identity should not make forget that Europe’s identity shaping basic principles of liberty, respect for human rights, fundamental freedoms and equality, of

tolerance and of the rule of law had been developed in Europe's past during the European Centuries of the enlightenment and fighting for civil rights and democracy, whereas the period of peace and consent for unity building in Europe is lasting a relatively short period of time since the end of the Second World War, with fortunately only one exception of the war in southeast Europe, in the former Yugoslavia. The process of European integration can, therefore, not be viewed as an isolated process caused exclusively by World War II.

in southeast Europe, in the former Yugoslavia.¹ And the endeavors of establishing a Constitution for Europe are another stage in the dynamic process of European integration to make the enlarged Union work proving effectiveness and efficiency.

As to the peoples' needs of effectiveness and efficiency in European integration, the European Union of twentyseven Memberstates is not functioning optimally. Politically, people within the European Union feel disoriented about the objectives and the benefits of the European Union. This had turned out by the negative votes in the French and Dutch plebiscites on the Treaty Establishing a Constitution for Europe (The European Constitution):

- Reasons for the rejection are believed to include fears about national sovereignty and national identity, the increasing amount of EU legislation, the pace of enlargement and the single currency.
- The rejection of an EU Treaty by two founding members of the EU is unprecedented and has caused a crisis among EU leaders on how to proceed.
- There has been disagreement over whether the ratification process should continue or be suspended.
- The Constitution cannot come into force unless all 27 Member States ratify it, but various scenarios for the future of the EU have been proposed.
- It is possible that some parts of the Constitution and other, more general reforms, may be implemented without the Constitution.
- The European Council, which will meet in June 2007, will consider how to proceed.

Further progress with European integration and cooperation requires improvements in order to restore public confidence in the EU. The currently pending blockade of the ratification procedure on the Draft Treaty on EU Constitution can be overcome if the European Union's legitimacy and identity crisis is resolved. **Resolving the crisis requires thorough response to the identity issue of the European Union:**

The European citizen can identify himself with an European Union if, in his view, the real 'state' of the European Union reflects a Constitution that guarantees the citizens' security, the protection of his fundamental rights and his economic and social healthy life and wealth if the

1: McCormick, John. (1999). Understanding the European Union. St. Martin's Press. Ch 2.

following requirements are met:

- legitimacy, democracy, respect for the rule of law and protection of fundamental rights
- more transparency (openness) of the Union's powers and decision-making including subsidiarity,
- more decisiveness and efficiency of the EU's external and internal political actions
- a more dynamic common foreign and security policy.

Notwithstanding the outcome of the pending Treaty on the Constitution might be, **measures have to be prepared aiming at incorporating constitutional quality essentials of the EU in a concise document, not depending on whether this document will be called constitution or** whether it will be a fusion of the existing Nice Treaties on European Union and European Community, but, at any rate, a document which has to be much more concise than the present text of the Treaty establishing a Constitution for Europe as well as the text of the Nice Treaty on European Union. Both texts are not accessible, not legible for the public : a fact which basically impedes the necessary public acceptance of any document which wants to be called and appreciated as identity shaping "Constitution". The substance of this document should bring about:

- greater transparency of the basic values and objectives of the EU
- a better division of responsibilities between the EU and its Member States, and
- an increase in the democratic legitimacy of an improved, more efficient decision-making of the Union's institutions' legislator, the Council and the European Parliament.

These elements of necessary improvements aiming at raising the EU's level of political acceptance within the EU are focussing on ways in which what might be called the "**constitutional quality**" of the European Union can be improved, even if the formal instrument, the current Treaty establishing a Constitution for Europe , might under no circumstances enter into force, but the substance of which must "survive" for the sake of the **future of the peoples** in Europe, and not primarily for the sake of the future of institutions in Europe. For, one should not forget that the founding Treaty on European Union is a legal instrument establishing with constitutional quality

"... a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. ", Article 1 Treaty on European Union. 2

it is a stage in the process of creating an ever closer union among the **peoples** of Europe and not a union among the states or institutions in Europe. If and how this could be managed, primarily through strengthening the identity and the acceptance of the European Union in the view of the European citizens: that is the present crucial question of life for the European Union.

For, as there is and will be even still greater diversity within the enlarged Union, **getting people's acceptance, there must be restored transparency about the basics of the EU, marking the EU's identity, the basic orientation to help the European citizen to identify himself with the EU through establishing transparency about the basics of the European integration:**

- **the basic emotions, desires and needs, the motives that were and are causing the European integration as stages in the process of an ever closer union among the peoples of Europe**
- **the basic values, objectives, principles and main instruments of the European Union giving the citizen in Europe the feeling: he is safe within the EU and thanks to the EU: as a living cooperative relationship between the mutually influencing and depending working levels of the EU, the nation states and the regional and local levels, working together to cope effectively with the people's needs.**

The European Union's enlargement has caused the discussion about deepening and/or widening the Union, and thus has caused the discussion about the Union's identity which was and still is seen to be at stake if the enlarged Union is left without strengthening its decisiveness for internal action and for external action abroad and thus risking the Union's cohesion.

Successfully examining the perspectives and the extent of establishing a "Constitution" needs a realistic approach to the political and legal nature of the European Union, to the existing political and legal rules on the dynamic process of European integration. For, the endeavors of establishing a Constitution for Europe are another stage in the dynamic process of European integration to make the enlarged Union work. These endeavors are reflecting continuity in the traditionally proven dynamism of European integration trying to respond to the functional needs of effectiveness in the realization of the objectives and in the fulfilment of the Union's tasks according to the basic legal principle of effectiveness as laid down in the already existing Treaty on European Union which includes even quite a number of basic legal principles having constitutional quality ruling the European integration.

As regards the establishing of a "Constitution", for understanding these endeavors as a stage in the dynamic process of European integration, we turn, in the following chapter, to answering the question of "what is the European Union"? What are the dynamics of European integration as developed in history? But, before starting chapter I, we find the twenty theses covering the findings of the chapters II – IX.

B. Twenty Theses on the State of the Union and the Union's prospects

20 Theses:

1. Overcoming the present deadlock of the Treaty establishing a Constitution for Europe requires the method of applying the lesson taken from the process of dynamically gradual stages in European integration history to current challenges and to the prospects of further reforming the enlarged European Union. Reforming the enlarged European Union means strengthening the Union's constitutional quality essentials – democracy, transparency and decisiveness – through a short, concise Treaty merging the existing Founding Treaties on European Union and

European Community along the traditional line of the dynamic, gradual development of the European integration and cooperation. A political intervention through establishing a Constitution contradicts the intention of the Constitution's authors to increase the Union's legitimacy. A text labelled "constitution" risks misunderstanding that a Constitution would establish a new and namely static static order like a nation state's constitution .

2. The identity issue of the European Union: key-opener to the pending issue of the Treaty establishing a Constitution for Europe and to the constitutional quality essentials

The enlargement of the European Union –now the Union of the Twentyseven- had rightly once been conceived that enlargement before being implemented should be preceded by a fundamental reform of the way in which the EU institutions operate, being democratically accountable, transparent, with a view to both the efficiency and decisiveness of the Union in its various policy fields . A deepening of the European Union, not in the sense of adding new policy powers but of maintaining the Union's capacity to act effectively, both inwardly and outwardly, close to the European citizen: that had been considered to be necessary, constituting the common consent reached among the Union's Member States after the Maastricht Treaty on European Union had entered into force and when the Copenhagen summit of the Union's Heads of State and Government had given perspectives for Central and Eastern European Countries to accede to the Union.

The Member States, however, did not what they had promised:they did not deepen the European Union before enlargement, they were not ready to make the Union more efficient. The Member States had lost their basic momentum: they did not take the chance given by the IGC which had been supposed to make sufficient progress to achieve reforms of the decision-making namely in the Council of the European Union.

Nor did the Amsterdam Treaty on European Union, nor did the Nice Treaty on European Union make comprehensive contributions to the needs of the Union's democratic accountability, transparency and both decisiveness and efficiency.

The Member States even failed the entire ratification of the Treaty establishing a Constitution for Europe and thus failed to take the chance of deepening the Union first by strengthening the Union's democratic accountability and decisiveness before enlarging when the Union became the Union of the Twentyfive on January 1st 2005. Now, the Union being a Union of the Twentyseven, since January 1st, 2007, it is facing the challenge to rescue the essentials of the Treaty on Constitution.. And it is still not clear how and when the essentials of the Treaty on Constitution can be rescued, whether by a concise amendment to the Treaty on Constitution or by amendment to the existing Treaty on EU. Both options have a chance of being accepted by the public in the European Union if the text is concise enough, avoiding being labelled "constitution" and if consisting of constitutional quality essentials only, by drawing up:

- **the objectives of the Union (raison d'Étre): anchor of stability for the peoples in the Union: security, peace and wealth in Europe**
- **safeguarding fundamental rights and the rule of law**
- **basic tasks and instruments**
- **guided by basic principles : democracy, transparency and efficiency**
- **institutions, basic tasks**
- **procedures subject to implementing European laws(regulations)**

throughout a newly run procedure of an Intergovernmental Conference. An Intergovernmental Conference will have to ensure a professional political approach accompanied by public debate close to the citizen in the Member States:

to present a new legal framework that reflects the respect for democratic accountability and efficiency of a European Union which is close to the citizens: ratification procedures will be successful if a European public will be encouraged to accompany the discussions of experts and to realize if and why the citizens of Europe can identify with the European Union.

For, the key opener to solutions of the pending constitution issue is the identity issue of the European Union. The label “constitution” is no primary issue. Approval of any new text requires a picture of the Union which is clear and acceptable to millions of voters, a challenge which appears nearly impossible to respond to.

Supposed the French and Dutch votes on the same text that already failed ratification, a new text presented to the European public and electorate, a successful, transparent and concise text does not necessarily have to show the label “Constitution”. A new text is to be ratified by the entire number of the Union’s Member States. Ratification by all Member States will probably be impossible if a Treaty’s text presents hundreds of pages again as the current Treaties on Constitution and on European Union and European Community do. Hopeful prospects of ratification by all national electorates may have a new text that is giving a clear picture of the Union’s identity. Clear identity shaping features are only those which can easily be recognized by the European public and not by experts only. The primary issue, therefore, is the identity issue, identity shaping essentials of the Union’s transparency, democracy and decisiveness.

For, the term „ identity „ of the European Union is used here as a complex of special features that are marking and distinguishing the European Union as an entity from other institutions or collectivities of states and from the single Member State of the Union. Identity shaping features of the European Union may appear from a variety of different points of view: cultural ones, or political, geographic or legal ones. I am talking about the European Union’s identity shaping features from a legal point of view:

the identity of the European Union is shaped by the EU’s own, specific “merits” as they are attributed by the Founding Treaties establishing the European Union and the European Community: as own organisation, endowed with own objectives, own institutions, own powers and an own, autonomous legal order which is independent from the national legal orders of the Member States.

These specific, identity shaping features of the European Union are closely interconnected with the c o n c e p t of national identity and sovereignty .

3. The nation -state and the European Union are shaped by basic constituent elements : Constitutional law and sovereignty of the nation- state, as well Founding Treaties on European Union and European Community having constitutional quality.

Constitutional law and sovereignty are basic features of the nation -state to legitimate the exercise of legislative power and to ensure democratic accountability needed for any exercise of legislative power also in post – Westphalian times : the European nation -states are the sovereign Contracting Parties of the Treaty on European Union.

National sovereignty is marked by a renewed emphasis on interdependence and on collective action, marking a dialectical relationship between the actors and the system, between the nation-states and the EU institutional collectivity.

Sovereignty still exists in modern times of globalization and nowadays interdependence of states seeking to ensure their national interests within a network of a sort of co-existence between

- a national core of sovereignty and
- a commonly shared and jointly implemented sovereignty_ implemented by all the other EU Member States or by a limited number of Member States.

The objective, the functional role of the concept of sovereignty within the EU as the concept of a positively joint exercise of sovereignty is to reconcile the dialectics of different aspects of

sovereignty within the multi-level governance EU structure of separate, but not separable levels of interdependencies between national level and EU level, attempting at satisfying the national sovereign's interest in

- good, namely effective governance on national level and on Union level, and in
- making democratic parliamentary control effective, accountable.

4. Democratic accountability is understood here as the control of governance by a set of procedures, the control of governance which guarantees the participation of those who are governed by collectively binding decisions. **Democratic accountability increases legitimacy.**

Legitimacy means a generalized degree of trust of the addressees of these decisions towards the political system as it is, in legal terms, shaped by the policies to implement the Treaty on the Union, the Treaty on European Union as the legal incorporation of common values and common objectives, institutions and binding rules of a constitutional quality.

As made evident by the French and Dutch refusal of ratification of the Draft establishing a Constitution for Europe, electorates in Member States of the European Union tend to doubt about the European Union's legitimacy.

Independently from the current Constitution Treaty's ratification outcome:

Legitimacy strengthening identity shaping essentials have priority, the formal aspect, the legal frame is less important.

What counts for legitimacy through acceptability of any text is the reasonable and legitimate objective to maintain and improve what has been achieved by European integration until now by strengthening:

- democracy, transparency and decisiveness of the European Union

European identity shaping needs legitimacy of EU governance through the legal and through the living constitution implemented on the basis of the current Founding Treaties

on European Union, open to public debate and convincing if **meeting the requirements of exactly these constitutional quality essentials.**

5. The repercussions of European integration on national policymaking and the repercussions of national policymaking on European integration require clear and explicit constitutional law. National constitutional law has to lay the constitutional basics for a transfer of national core competencies to the European level. The objective of this transfer of national, mainly legislative powers is a joint exercise of powers creating an autonomous legal order directly affecting the powers of the national legislature, the Parliament.

6. The Treaty on European Union (consolidated version after the Nice Treaty on European Union) concluded as a treaty under international law, is the European legal framework for further stages in the “ process of creating an ever closer Union among the peoples of Europe”.

The exact legal pattern and nature of the future European Union (the “finalité”) is kept open.

7. Under the legal and the living constitution of the European Union: the Treaties establishing the European Union and the European Community, the **legal entity endowed with own institutions and own legislative powers is the European Community.** The founding Treaty establishing the European Community – TEC -, the first pillar under the common roof established by the Treaty establishing the European Union- TEU-, is the legal framework to further develop the European integration. **Integration is the mode of cooperation between the Member States to achieve common objectives through implementing explicitly and implicitly attributed powers.**

8. The European Community-EC- has, gradually, evolved in a dynamic process, evolved from what many believed to be a purely intergovernmental international organization governed by public international law into a quasi-federal, “sui generis “ entity with an autonomous legal order.

The legal order of the EC is a body of rules which had not been created by one single stroke on the basis of one single constituting act in the sense of a national constitution. The **legal order of the EC** has **gradually developed** from coordinating national policies to establishing common rules on the internal market and the common monetary policy and the single European currency. The EC’s legal order **plays a dynamic functional role** of promoting and safeguarding the dynamic political evolutive character of the European Community.

It is that special dynamic evolutive dimension as well as the different levels of density of the legal order of the EC which make the EC law substantially differ from the more static character of national constitutions and legal systems of the E

9. The nature of the EC is marked by the nature of the EC Treaty’s primary and secondary law. The founding Treaty on EC, the primary EC law, has constitutional quality. The Treaty’s constitutional essentials as constitutional principles in EC law have been crafted out as case law by the European Court of Justice.

The case law crafted constitutional principles in the EC law: effectiveness of Community law,

direct effect, primacy of EC law, principle of effectiveness Article 10 EC Treaty, principle of subsidiarity, principle of attributed powers (the EC's powers are attributed by the Treaty, the EC has no state-like „competence-competence“.

10. EC jurisdiction is further emanating from a joint national sovereignty consent to the use, within the Council, of implied Treaty powers, Article 308 EC Treaty (ex Article 235), which is limited to creating new competences filling Treaty gaps in order to implement one of the Treaty objectives but without creating new Treaty objectives.

The growth of EC powers is based on the consensus among the Member States to do a broad reading of treaty-based delegations of powers (art. 133, art. 94 harmonization of national laws directly impeding the establishing and functioning of the common market), find implied delegations in the text of the treaty (e.g. the ERTA case) and to use article 308 as an elastic implied powers clause

Individual member state discretion in the Council to expand or limit the scope of EC powers was officially narrowed with the reform of the Treaty of Rome by the Single European Act in 1986 and the change of the Council Rules of Procedure (majority voting).

11. Based on the dynamic and evolutive EC law **the EC developed in a stepwise dynamic, evolutive manner and thus shaping the exercise of national sovereignty :**

The nations of Europe remain and wish to preserve their independence. The old exclusiveness, however, of the Nation State and of its old concept of external as well as internal sovereignty is weakened, as a sense of a common destiny became aware of the realities of common problems ranging across national borders and which cannot find solutions by national measures any more (international competitiveness, environmental protection, global warming, cross-bordering international crime, international terrorism).

The European Union's Member States develop **European integration and cooperation** in the present shape of the EC and of the Common Foreign and Security Policy and Home Affairs and Justice Cooperation under the 2nd and 3rd pillar of the Treaty on European Union. They share their national sovereignties through decisions made within the Union's institutions and according to the Treaties' provisions: in order to keep their ability to cope with the new tensions of the social and political life in Europe:

In the EU sets of interconnected social and economic problems call for management by actors operating in different policy-making contexts. Treating sovereign Member States as independently acting unified actors vis a vis the EC or within its institutions would not reflect the pluralism of modern states nor their way of behaving at EU/EC level.

The European Union has contributed to a re-definition of collective identity, to altering the link between sovereignty and territory and to a re-distribution of responsibility for public policy across different levels of government, thus shaping a dynamic multi-level common identity and sovereignty sharing :

'Multi-level system' identity indicates that the EU includes its member states in an interdependent encompassing system while, as the nature of the EC law demonstrates, at the same time, national political, economic or legal systems continue to exist.

12. The EC Treaty's constitutional principle of **EC effectiveness and national sovereignty** are marking a **dialectic interdependence between the Member State and the level of a**

joint sovereignty share pattern of the Community. Diversity and unity are indicators of the dialectic interdependence between national Member State level and the level of jointly exercised sovereignty: **the core identity shaping feature of the EC.**

Sovereignty and the status of being EC Member State means basically that the equal participation of all members in the decision-making is an essential principle of the European Community.

The principle of sovereignty of the Member State basically precludes any institutional development which would recognise the preeminence of some members. This principle, however, does not exclude solutions (weighting of votes, extension of majority voting in the EU's Council) elaborated in view of the enlargement of the EU. Reforms are meant to ensure the effectiveness of the *acquis communautaire* and the decisiveness of the decision-making procedures of the Council and of the Commission.

Maintaining the decisiveness of the EC institutional structures and maintaining the effectiveness of the EC within the enlarged Union of the Twentyseven is of vital interest just for the sake of the modern understanding of national sovereignty to find solutions to political challenges: they can be met by common action only, namely in the field of the EC's external role interconnected with the Union's Common Foreign and Security Policy.

13. Maintaining the decisiveness and efficiency of decision-making of the EU institutions in the enlarged Union requires alternative, flexible forms of cooperation between the Union's Member States within the Union's Treaty institutional system without undermining the cohesion of the Union. As opting for divergent objectives increases the risk of the gradual disintegration of the Union as a whole, variable geometry should preferably and primarily be avoided. Multiple-speed integration allowing the same common objective for all Member States, but the speed at which the common objective is achieved individually by each Member State varies and covers the two **new forms of closer cooperation and enhanced cooperation** also:

- differentiated integration must be compatible with the objectives of the Treaty on European Union;
- each Member State must be free to participate if it can and wants to meet the requirements for the fast track;
- differentiated integration must not undermine the Community legal order or, in principle, impair the cohesion of the internal market;
- Member States which elect to opt out must not be allowed to oppose the formation of a leading group which does meet the above-mentioned criteria.

Differentiated integration and cooperation in an enlarged European Union is not a minor issue of institutional design for the EU but has to do with basic questions of large-scale politics which emerge due to a large variation in territorial and functional units and a strong coupling of these units. **On an even more abstract level, it has to do with the vital need of balancing national identity and collective identity facing necessary unity as well as diversity of EU governance.**

14. Unanimity among still sovereign Member States of the European Union in matters of Foreign and Security Policy does not hamper the Union to be a decisive external actor

The Member States' obligation under the Constitution Treaty to practice solidarity and consultation before taking single Member State action is no innovation, it is a clarification of the current Treaty obligations. The obligation to inform and consult one another within the Union's Council before undertaking single States' action should be incorporated in any new text in case of the Constitution Treaty's final entire failure of ratification.

The enlarged European Union is in need of being a decisive external actor to respond to modern challenges to international security and to safeguard interests common to all Member States. The Union's potential of being a decisive external actor depends on the legal basis created by the Treaty on European Union and on the political willingness of the Union's Member States to cooperate within the Union's institutions. The Treaty on European Union offers the legal provisions to make the Union an external actor. The political willingness of the Member States to cooperate within the Union's institutions, however, is subject to crucial tests of the Union's management of the Common Foreign and Security Policy in the realities of the Union's living constitution:

facing the crucial task of balancing national rights of nation state's sovereignty and collective interests and identity.

Achieving the decisiveness of the enlarged European Union in the field of Common Foreign and Security Policy including Defence Policy under the legal constitution of the Treaty establishing the European Union and under the pending Treaty establishing a Constitution for Europe is **subject to provisions on unanimity voting** in the Council of Ministers and in the European Council, on the one hand, and subject to the Member States' legal obligation to develop mutual political solidarity among Member States, on the other.

The Treaty on Constitution confirms the principle established by the Treaties on EU that decisions having defence implications are kept off from majority voting. The legal situation remains unchanged: the sovereignty of the Member States is upheld by unanimous decision on matters with defence implications, which are matters of life and death and not subject to majority voting.

This may hamper decisive action of the European Union as organisation. But, on the other hand, the Treaty on Constitution does not set free the Member States from their obligation to develop "mutual political solidarity among Member States, the identification of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States' actions.", Article 39 1st paragraph, emanating from the constitutional principle of effectiveness, Article 10 Treaty establishing the European Community, and confirmed by Article 3 2nd subparagraph and Article 16 Treaty on EU:

"The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies."
And:

"Article 16: Member States shall inform and consult one another within the Council on any matter of foreign and security policy of general interest in order to ensure that the Union's influence is exerted as effectively as possible by means of concerted and convergent action."

No innovation, introduced by the Treaty on Constitution – compared to the Treaties on European Union-, but a clarification is what the principle of solidarity exactly expects Member States to do before undertaking any action on the international scene: to consult one another within the Union’s European Council and the Council of Ministers (Article 39 5th paragraph Treaty on Constitution).

This clarification meant to strengthen the Union’s decisiveness in the field of Common Foreign and Security Policy should be secured and be incorporated in any new text or in the current Treaty on European Union, if the efforts made to revive the pending Treaty establishing a Constitution for Europe turn out to fail. The Union strongly needs legal backing by such precise Treaty provision on consultation within the Union’s institutions before Member States undertake single action on the international scene. The incorporation in a Treaty would enhance the Member States’ public awareness to obviously comply or not to comply with explicit Treaty rules. That may help to further prevent similar acts of violating the rules of solidarity as proven in the course of coalition building before starting the wars in Afghanistan and Iraq, demonstrated by the case study on the **living constitution and the EU’s external role in chapter IX of the present study.**

15. The decisiveness of the European Union’s Common Foreign and Security Policy faces the expectation gap between the Union’s legal constitution and living constitution

The clarification made by the (Constitution) Treaty’s explicit formula of the obligation to consult before acting is the result of the experience the European Union has made. Member States of the Union joined the two US led coalitions waging the wars on the Taliban and Al Qaida in Afghanistan and on the Iraq.

According to the findings made in chapter IX of the present study, in both cases the Member States of the European Union participated without informing and consulting one another within the Council before taking action and thus violating the binding explicit Article 16 Treaty on EU ruling to inform and consult one another on such a matter of foreign and security policy “of general interest“ before undertaking action.

16. Starting and waging the wars in Afghanistan and in Iraq without consulting within the Union’s Council before undertaking action severely affected the Union’s interests to assert its values on the international scene:

This is the European Union’s chance to contribute to influence the further policy making in international security politics especially to influence

- **the strategies on winning the peace in Afghanistan and in Iraq, and , actually, to influence**
- **any further political decision-making on extending anti –terror actions to other potential war theatres , e.g. Iran.**

The European Union will have that chance if the EU Member States considering to join an international coalition use the EU’s institutional framework of enhanced cooperation in the field of the Common Foreign and Security Cooperation including Defence Cooperation for common actions that are not limited to military actions only: the whole range of EU’s instruments available for contributions to civil reconstruction.

For, what the European Union, beyond purely military contributions and beyond technical and financial assistance to civil reconstruction, can contribute to international security is a political know-how of high political and practical value: after the experiences made in World War II, the basic and well practiced idea of cooperation : to show countries like the shattered Iraq how to overcome the disastrous situation starting from zero, after having cleared who are the internal and external actors willing to cooperate for civil reconstruction:

- by designing and constructing the cooperation of different nationalities through
- safeguarding the identities of different nationalities and
- establishing a Community, a federation by

- pooling parts of sovereignties and

- jointly exercising them
- to achieve common objectives
- through common institutions and decisions
- according to common rules
- agreed upon on the basis of equality and solidarity.

What the European Union can contribute- in terms of high political added value -is the experience that international security cannot be achieved against each other, but through cooperation only :

The European Union developed common political objectives and instruments enabling the single Member Country to safeguard and promote its national interests within a Community of Member Countries that respect national identities within a variety of political, economic, social, diplomatic and military Policies that are implemented by interdependent and complementary cooperation of Union level and Member States' levels : practicing a combined system of integration and cooperation, thus balancing the needs of national sovereignty and common objectives that can better be achieved by the Community than by single nation state action, and with respect for democratic accountability.

17. The European Union is in a dilemma between EU efficiency and the constitutional law claiming democracy

The concept of a positively joint multi-level exercise of sovereignty - thus marking collective EU identity- has a functional role to ensure the efficient running of the EU . The concept of a positively joint multi-level exercise of sovereignty contributes to reconciling the dialectics of different aspects of sovereignty within the multi-level governance EU structures of non separable interdependencies between national level and EU level, reconciling

- the national Sovereign's interest to ensure, on EU level, good, namely effective governance to meet the needs of the individuals through efficiently running EU institutions which may present a **dilemma between EU efficiency and gaps in democratic control on EU level**,

- whereas the national Sovereign's interest may also seek to ensure, on national level the democratic accountability of governance in EU matters by **making democratic parliamentary control more effective on national level.**

From the post Westphalian modern concept of sovereignty and identity, asking for a full parliamentarization of the EU – making the European Parliament the primary legislator under democratic control of a European electorate in direct elections to the European Parliament and giving the European Parliament the right to initiate EU legislation, the latter of which the Treaty establishing a Constitution for Europe rightly avoids- would appear to be unfeasible, at least premature :

The reasons why a full parliamentarization of the EU would appear unfeasible, at least premature are political and structural ones: National models of democracy developed in the national context cannot be simply transferred to the European Union, at least not by pure intervention through intergovernmental consent without considering the lack of a cross-bordering European public and of a common European awareness. A political strategy of democratic intervention based on such a transfer would not necessarily lead to a more democratic EU and would not lead to an increase in its legitimacy nor to an increase in its efficiency .

The EU is aspiring to some new form of democratic system which carves up legitimacy on its own, on the basis of a Constitution for the EU. A Constitution in the way of a formal text called “constitution” would raise wrong ideas about the nature of the European Union, while the current Treaty on European Union contains a complex system of provisions on constitutional quality essentials without labelling the Treaty on European Union “Constitution”.

Democracy and identity building cannot simply be installed by political intervention through an intergovernmental act called “Constitution” for Europe:

-Democracy and identity are linked to particular social preconditions which are only partially existent in the EU and which cannot be created by political intervention .The decision of the Heads of State or Government , July 2003, to adopt the Convention's draft Treaty establishing a Constitution for Europe had to be submitted for approval by national Parliaments or national referenda : this is meant by „ political intervention „.

Democracy requires the existence of a collective identity which does - not yet - exist on the level of the European Union's institutions.

But for the time being **what counts is that the EU has to work on established notions of democratic legitimacy through showing the national electorates why they can identify with the EU, making the EU idea more transparent, democratic and efficient in a concise text,** recalling the common:

- basic values all EU members are committed to ,
- interest in shaping an „ ever closer Union among the peoples of Europe”
- fundamental rights protected by the Union
- objectives, competences, powers of the EU including the European Community

contained in a basic document that might be called „ Constitution of the European Union „, but should not be called “Constitution”. It is preferable to merge the current Treaty establi-

shing the European Union, the Treaty establishing the European Community and the Treaty establishing a Constitution for Europe in a single, concise document containing the constitutional quality essentials only, mentioned above, while detailed implementing provisions should be subject to subsequent implementing agreements.

18. The national gateway to democratic European Union Governance are the national Constitutions of EU Member States

The Member State's national constitutions do more or less explicitly contain clauses which allow the national legislature to transfer national legislative powers to the European Union. Those national constitution clauses opening a transfer of national powers have to be in accordance with basic principles of national constitutional law, namely with the principle of democracy.

Any transfer of national legislative powers to the EC level for a joint exercise has to respect basic principles of national constitutional law, namely with the principle of democracy,

The supranationalism established in the first pillar of the Union Treaty is *provisional*. National sovereignties are delegated rather than surrendered. Such a delegation of sovereignties is acceptable, as long as the criteria of the Constitution are upheld, criteria, as they once were set up by the 1993 verdict (*BVerfGE*, 17, 155-213) of the German Constitutional Court:

The joint use of competences transferred to the European Community (the 1st pillar of the Treaty on EU, the pillar allowing EC legislation) must be *marginal* in relation to the functioning of the Member State democracy as a whole, and the uses to which these competences are put at the European level must be *predictable*. The delegation of national sovereignty must also be *revocable*; that is, the national authorities must retain the prerogative to re-assume the powers delegated if the criteria of marginality and predictability are not met.

The German Constitutional Court deemed these three criteria to have been met, and so concluded that the ratification of the Treaty was consistent with the demands for democratic accountability laid down in the Basic Law.

Applying that basic idea to a merger Treaty containing constitutional provisions meant to improve the European Union's identity, namely its decisiveness, making the decision-making of the EU's Council of a Union of the Twentyseven more transparent, more democratic and more efficient:

it means that such a merger Treaty would not be a major shift of powers between national and Union level. The joint use of competences transferred to the EU/EC (the 1st pillar) would remain marginal in relation to the functioning of the Member States' democracy as a whole, predictable and the delegation of national sovereignty remains revocable. A merger Treaty would thus comply with the national constitutions' general demands for democratic accountability.

19. The identity and legitimacy issue: Increasing the European Union's democratic quality should accept the proposal made by the Treaty establishing a Constitution: improving the information of national Parliaments on planned European Community legislation.

Due to the Community's legal effect on the national legislature and government, the EU/EC needs legitimacy within the Member States: public debates and political control if and to what extent belonging to the Union is in the people's interest. The parliamentary character of the national EU governance system, in the sense of a decisive say for political representatives who are directly legitimated, does suffer. The national ministers in the Council (and de facto often bureaucrats in the working groups) are the crucial decision-makers at the EU level, not a legislature that can be held accountable in general elections. The practice of the EU/EC Council's decision-making is not transparent enough to ensure democratic accountability. National governments regularly interact with the other governments in the EC Council of Ministers, they would participate in package deals and in the relevant political give-and-take across issue areas – which is in practice outside effective control of other national actors, namely the national Parliament. The national ministers as well as their administrations will join the common practice of showering EU related informations on the Members of national Parliaments hoping for their weakening by an overload of information.

An effective democratic procedure has to be established on a level which, in the realities of the EU, guarantees the participation of those who are the addressees of EC legislation (identity building democratic participation): this is to strengthen the national level of democratic accountability procedures through improved information of national Parliaments on planned EC legislative acts before the Council adopts EC laws. National Parliaments control their own Governments' members voting in the Council. **Improved democratic participation of national Parliaments is an identity shaping element enhancing public awareness of EU matters in the Member States: The direct elected Members of the national Parliament can be held responsible by their voters in EU matters. This makes a greater say for the Parliament, the still national Sovereign, in EU governance to be an imperative.**

An assessment of the effectiveness of the national Parliaments' rights of control in EU governance matters shows that the legal control powers of the national Parliament are hardly to be exercised in every day EU politics.

Attempting to find effective compensation measures in practice in order to strengthen the democratic accountability of national Governments' EU governance, as a consequence for constitutional law policy making, this is an issue of making effective a greater say of the national Parliament in influencing and controlling the Government's voting in the Council. An EU Treaty provision cannot organize an effectively running and cooperative working relationship between national parliament and government which reconciles

- the government's needs of efficient representation of national interests on the level of the EU institutions, and
- the claims of the Constitution to seek to democratic accountability of EU governance.

A merger EU Treaty, however, can provide for improved communication ties between EU Commission and Council to inform national Parliaments on planned legislative acts before the Council and the European Parliament decide.

20. In sum, an European identity is substantially shaped through transparent, democratic and efficient European governance. Sovereignty in the post Westphalian concept of the nation State's identity is representing a compromise between

- the independent pursuit of national interests and
- their redefinition as shared interests

to be pursued through common policies to be decided and implemented through integration and cooperation within the institutions of the European Union according to the provisions of the legal "constitution" and – in the living constitution -with respect for the identity shaping

- common values and basic principles,
 - respect for human dignity, fundamental rights and the rule of law,
 - common objectives to be achieved
 - through common policies and institutions acting
 - with transparency, democracy and efficiency.
-

Chapter II

The European Union under construction

A. Introduction:

The Nature of the EU – a “sui generis actor” according to the Founding Treaty on EU and to its dynamic development

Preliminary remark :

In this study the terms “EC” and “EU” are used in accordance with the explanation in *Note on Post-Maastricht Terminology*.³

C.M.L.R. 4, 4-7(1994). Consequently, the terms EU and Union generally apply to the European political entity created by the Maastricht Treaty in the shape of the Nice Treaty on European Union, whereas the terms EC and Community generally refer to the legal entity or first pillar in the EU under the treaty on EU architecture. .

The basic question about sovereignty in modern times of internationalization and European integration is : what is exactly the meaning of national sovereignty in times of globalization and nowadays´ interdependence of all States: does national autonomy still exist ?

The answer will be given by looking at the nature of the EU law, For, there exists a mutually influencing correlation between national law and EU law, legitimated and limited by national law, as well as the exercising of attributed EU powers is marking the extent of national sovereignty. To clarify the correlation existing between the legal order of the EU and the national law, we need to know:

What is the legal effect of legal acts of the EC on the Member State´s sovereignty ? What is the EU and its legal order about ?

Are there any needs and, if so, any criteria for opening the national Constitution to the modern forms of multi-level shared sovereignty within the EU ?

The Founding Treaty on EU, called the primary EU law, and the secondary law as created on the basis of primary law, compose the legal order of the EU. The primary law is a body of rules which had not been created by one single stroke: its existence is not based on one single constituting act in the sense of one constitutional form in the sense of a national constitution .We realize a specific, dynamic development of the primary law of the EU.as well as a dynamic development of the EU/EC´s secondary law.

3: Common Market Law Review, C.M.L.R. 4, 4-7(1994).

It is the special, dynamic dimension of the EU's legal order which makes the EU law substantially differ from the more static character of the national legal systems of the EU Member States including the more static character of national constitutions :

The dynamic development of the legal order of the EU is to be understood as being closely interconnected , correlated with the dynamic character of the development of the EU as such, as legal entity,collectivity of the EU Member States.

The legal nature of this collectivity of the EU Member States, i.e. its constitutional quality, depends on the specific provisions of the Founding Treaty on EU. In order to understand the legal nature of the EU, its constitutional quality,we will **analyse the nature of the EU primary and secondary law ,on the basis of Treaty provisions and rulings of the Court(the European Court of Justice). We,first, make a survey of the EU's history, the basic lines of the stepwise dynamic development of the EU integration, the dynamic evolutive development of its institutional structures and its impact on the preservation of national sovereignty. The outlining of the dynamic development of the EU will help to better understand the dynamics of the EU law and the specifics of a constitutional quality of the EU which is a specific stage in the process of creating an ever closer union among the peoples of Europe(Article 1 Treaty on European Union).**

B. The European Union's dynamic development creating a unique entity "sui generis"

I. The European Union's basic motive to perform the dynamics of stages in a process of creating an ever closer Union

The European Union is the European nation states' common answer to challenges they had been facing together, they are facing and they will be facing:

Sovereignty in the sense of the post-Westphalian nation State has been changed , reshaped , adjusted to modern challenges to the nation State's power :

preventing wars in Europe, world-wide crisis prevention(Kongo), world-wide crisis-management, Bosnia and Kosovo,globalisation and competitiveness , terrorists'attacks, war on Iraq, war in Afghanistan, global warming, safe energy supplies, proliferation of nuclear weapons, Israel-Palestine conflict, famine,droughts,civil wars and poorness in Africa, flows of refugees, decline in birth-rates, maintaining economic growth and sustainable schemes of social security: these topics on the common agenda demonstrate that no single country can provide all the political, economic , social and military means necessary to prevent or manage crisis .

Therefore , neither the nation State nor the Union are the solo player in the European structure.The European Union as the common shape of both the Nation state and their common actions of shared common exercise of sovereignty is the modern adequate respond to challenges which are beyond reach of individual and independent nation State influence .

Therefore, the collectivity of the EU's Member States composing the EU has developed the dynamics of gradually building the EU :

II. Milestones of a stepwise dynamic development of the EC integration, History and Institutions

. 1. Introduction: The dynamic, evolutive character of the European Union as developed in the history of the European Union, creating a unique entity "sui generis"

The European Community has evolved from what many believed to be a purely intergovernmental organization governed by public international law into a quasi-federal entity with an autonomous legal order.

The European Union, which came into being on November 1, 1993, was the result of decades of evolution, of a dynamic process of gradual advancing - and the EU is certainly not the last word in European political and economic integration. It can be understood only as part of a historical process which began during World War II and which is continuing, without drawing a final design of itself if we look at Article 1 of the Treaty on European Union which is called "a new stage in the process of creating an ever closer Union among the peoples of Europe", while leaving the final design, the "finalité" of the Union, open -for good reasons of political wisdom.

The major theme in the following history survey is that the **European Union has , in a dynamic stepwise approach, developed into a unique entity, which cannot be evaluated by conventional analysis., but which has to be evaluated on its own merits** that are proved by the will and actions taken by the European States gradually building the Union and expressing their will through negotiating, making joint agreements and signing Treaties creating the common European law they are voluntarily submitted to.

The main characteristic feature of the EU, starting with the EC , from its beginning on , had been and still is its dynamic character , its dynamic evolutive character :

As one decisive step had been reached, new tasks were undertaken, new stages in the process of creating an ever closer Union among the peoples of Europe. So did, for example, the Maastricht Treaty set up the scenario of the stepwise implementation of creating one single European currency , the EURO , in the course of the 1990's .

To understand the European Union's nature , it is, due to specific characteristics , better to avoid all the familiar descriptions of national or international law . **It is a common set of special features of the EC which has formed the very specific nature of the EC and which transcends a mere intergovernmental co-operation between the EC member States , and which may show an analogy in a comparison with the features of a federal State , but which is not a federal State .**

If, for example we hold the EU to the standard of a nation-state (even a decentralised one like Belgium, Canada, or the United States), we always will be disappointed. But if we recognize it as a unique and largely successful effort at democracy building by sovereign states without

historical precedent, we will realize, weaknesses and whatever the EU does, however, it actually is done to advance national security objectives of the peoples of Europe and international security objectives of stability and peace.

The basic philosophy of the European Union as a *sui generis* entity is: The nations of Europe remain and wish to preserve their independence. The old exclusiveness, however, of the Nation State and of its old concept of external as well as internal sovereignty is weakened, while a sense of a common destiny was appearing being aware of the realities of common problems ranging across national borders and which cannot find solutions by national measures any more.

The common spirit, so much hoped for by the founders of the European Communities, has not extinguished national egoism. The need, however, to co-operate for the common benefit of all has found recognition.

In the period of growing and far-reaching effects of the globalization limiting the economic and political effectiveness of national politics, it is due to the EC that against strong temptations for protectionist practices and national separatism, the EC could maintain the open market and withstand disruptive tendencies, namely by strong EC competition law measures against distortions of competition.

It was and still is, however, not easy to understand the European Union's nature: few Europeans fully understand it either.

The European Union is one of the least understood, least recognized success stories in post-World War II history.

It is a great experiment in building democracy and the free market, an experiment carried out by former enemies who have gone to war three times in little over one hundred years. Bad news always tends to be "good" news to attract the public's attention. The success story of the European Union is good news, if it works well, it is no topic on the top of the agenda of daily public interest, and it appears even to be taken for granted that its growing strength and maturity as a jointly working of a collectivity of 27 states with 493 million inhabitants are in the best interests of the peoples of Europe and international stability, of world peace and economic progress.

There are no precedents for what is being done by the European Union:

It is not a regional organization like the Organization of American States, nor a purely economic entity like the former General Agreement on Tariffs and Trade, the World Trade Organization-WTO-, nor an international organization like the United Nations. It is not a customs union, nor is it a classical nation-state. It is a *sui generis* supranational organization of nation states in which these states have pooled parts of national sovereignty for joint exercise of common powers in many areas, while retaining full sovereignty in others.

The EU evolved by fits and starts. It has sped forward at times and, at other times, has seemed to stand motionless. But it has never gone backwards, never dismantled its institutions, never given up its prerogatives. Contained within the greater Union, national enmities that have millenium-long histories have been laid to rest.

The European Union is now an essential partner in securing political and economic interests: the interests of liberty, democracy, respect for human rights and fundamental freedoms, the rule of law and the interests of the free market in the post-Cold War world.

2. History of the European Union: from the Monnet-method to the European Union

Many historic strands came together to create the European Union. Limiting the prospects for violent conflict dominated the thinking of Europe's post-war elites. Today, a war waged in Western Europe is beyond imagination, the basic drive for European integration, however, is firmly held despite obstacles. Following the collapse of the Soviet Union, the European Union has undertaken to deepen integration by making the enlarged Union an anchor of stability to work efficiently and to respond to modern worldwide challenges which are common to all Member States of the European Union.

The European integration had earlier beginnings than World War II. During 19th Century, the notion of European integration had support from various thinkers, philosophers and leaders.⁴ After the devastation of World War I and with the failed League of Nations, there was much pleading for bringing the peoples of Europe together under a supranational structure.⁵ In 1929, France explicitly suggested "organizing Europe" towards an eventual system of Federal Union.⁶ France and Germany The French Foreign Minister, Aristide Briand, and the German Foreign Minister, Gustav Stresemann had made a joint effort to define a plan for a European union.⁷ Unfortunately, this proposal could not keep Europe from plunging into World War II. During World War II, the United Kingdom intensively argued in favor of a European union understanding it as the best course of action by which the war could be brought to an end as well as Europe's decline.⁸ In 1939, when the hostilities began, the United Kingdom had called for a supranational peace keeping force.⁹ The United Kingdom tried to promote the idea of establishing a full and "indissoluble union" with France.¹⁰ Britain's Prime Minister Winston Churchill made an ambiguous statement that "the mass of Europe, once united, once federalized or partly federalized, once continentally self-conscious, would constitute an organism beyond compare ... We see nothing but good and hope in a richer, freer, more contented European commonalty."¹¹

In 1944, in London, the exiled governments of Belgium, Luxembourg, and the Netherlands signed a treaty creating a customs union - Benelux - which they pledged to implement once their countries were restored. After the war, in 1946, it was in his *famous speech, held at Zurich University*, that *Winston Churchill called France and Germany* to close cooperation in order *to be the core of developing the European unification*. This call had a great echo leading, in 1948, to a Congress of Europe held in The Hague which issued a call for a European Parliament, economic and political union, a human rights charter, and a European

4: McCormick, John. (1999). *Understanding the European Union*. St. Martin's Press. Ch 2.

5: Young European Federalists. (2003, March 12). *File 1: What Federalism Is*. Retrieved October 29, 2003, from <http://www.jef-europe.net/federalism/archives/000928.html>

6: *ibid.* supra, note 5.

7.: *ibid.*

8: *ibid.*

9.: *ibid.*

10: *ibid.*

11.: *ibid.*

Court of Justice. The United States also made a major contribution to integration by announcing, in June 1947, the Marshall Plan, proposing assistance for the economic revival of Europe, and by insisting that Marshall Plan aid be administered by a pan-European institution - which grew into the *Organisation for European Economic Cooperation* - OEEC - , set up in April 1948. And, continuing that European momentum, the *Council of Europe* was set up under the Treaty of Strasbourg in *May 1949*. Uncompromising national Governments soon affected the operability of the Council of Europe.¹² Efforts made to achieve European integration might have lost momentum, if the federalist movement had not continued to struggle with enthusiasm for the idea of European integration.¹³

Quite idealistic, at least at those times, appeared the Federalists' approach to making proposals on methods to achieve European integration by drafting a comprehensive federal constitution and structure. For, France made additional proposals, pragmatic ones, by supporting a union of common markets:¹⁴

This idea led to the creation of the European Coal and Steel Community (ECSC).

On April 18, 1951, the treaty establishing the ECSC, initiated by a Franco-German agreement, was signed by France, Germany, Italy, Belgium, the Netherlands, and Luxembourg.¹⁵

The EU claims as its own birthday, however, May 9, 1950, the day when the French Foreign Minister Robert Schuman had announced that France and Germany would place their coal and steel production under an independent common high authority, and that other European countries could join them. **According to the Schuman Declaration,**

"the pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe... By pooling basic production and by instituting a new High Authority, whose decisions will bind France, Germany, and other Member States, this proposal will lead to the realisation of the first **concrete foundation of a European federation indispensable to the preservation of peace.**"¹⁶

The Schuman Declaration was the brain child of Jean Monnet, Schuman's counsellor, a visionary who was literally sketching out his *political* plan for post-war European reconciliation and integration during a German bombardment.

The Monnet-method: Monnet's approach was and is called 'functionalist', but it was, actually, highly political. The ECSC, though it manifested itself as an instrument that had been given the functional role to rationalize and modernize the production of coal and steel among all Member States, had firmly been rooted in a *political* concept of integration. ¹⁷

¹²: Federalists, *ibid.*, supra, note 5.

¹³: *ibid.*

¹⁴: *ibid.*

¹⁵: *ibid.*

¹⁶: Ashgate, B. Lucarelli. (1999). *The origins and evolution of the single market in Europe*. Burlington, VT: Ashgate Publishing Company, p. 1.

¹⁷: Cohen, Elie. (2001). Monetary sovereignty, domestic policies, and intergovernmental accords. In Anand Menon & Vincent Wright (Eds.), *From the nation state to Europe?* New York: Oxford University Press, Inc., p. 19.

For, Jean Monnet, the political visionary, believed that European unification won't be created by one single stroke, but by, as he called it by, the solidarity of the facts. What he meant by "functionalist" is that the institutions of his European Coal and Steel Community would gradually be applied to an increasing range of industrial sectors, and that *political* integration would naturally follow in a sort of development automatically deriving from economic facts and leading to political unification. It is, therefore, right to say that, from its very beginning, the ECSC was the concept of a long term project, to eventually lead to the ultimate goal of a federal-political union.¹⁸

The ECSC with the economic task of reviving the coal and steel industry had faced the increasing significance of oil and nuclear power in the world economy.¹⁹

It was, however, the political success of the ECSC that it managed to establish the basic political objective of European integration: cooperation of Member States to achieve stability, security, peace, protection of fundamental rights, economic and social wealth through the Monnet method of integration by pooling and jointly exercising, through a supranational authority, parts of previously national sovereign powers within common institutions establishing a common legal order which is a new legal order in international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields.

Robert Schuman and Jean Monnet anticipated with anxiety the dangers of lacking in harmony that arise with the collision of individual nation State interests and the objectives of the collective.²⁰ To remedy this, the *founding Treaty establishing the ECSC created an independent structure which had been limited by the attribution of specific powers* :

creating an autonomous, independent nature of the ECSC's legal order, differently from other instruments under international law. The ECSC's own, autonomous specific legal order is characterized by an own independent organ and its respective competences and legislative powers. Furthermore, the Member States have, themselves, through a transfer of parts of their own national sovereign rights to the Community renounced the exercise of that part of their transferred national sovereign rights, while, at the same time, conferring the power to exercise these respective rights upon the Community: The claim to be directly applicable throughout the Community without a legal act of transformation by a national Parliament and to have supremacy over conflicting national law is inherent to the autonomous character of the ECSC's common legal order.

This objective and the Monnet method of European integration as designed by and implemented on the basis of the Treaty establishing the ECSC are the features of what had constituted, for the first time in European history, the unprecedented and unique *supranational* European integration in a limited area of politics to serve common interests.²¹

¹⁸: Cohen, *ibid.*, supra, note 17.

¹⁹: *ibid.*

²⁰: Fransen, Frederic J. (2001). *Supranational politics of Jean Monnet: Ideas and origins of the European Community*. Westport, CT: Greenwood Publishing Group, p. 87.)

²¹: Wiarda, Howard, J. (Ed.). (2001). *European politics in the age of globalization*. New York West/Wadsworth Publishing, p.1)

And, thus, beyond its primarily merely economic functional role in matters of steel and coal, but which were in previous times economic matters of most cherished interests of nation state's sovereignty, the ECSC had proved a political role by successfully contributing as predecessor to establishing a new stage in the process of creating the *political* design of an ever closer union among the peoples of Europe: the ECSC had successfully indicated the approach of the European Economic Community-EEC-. In 1957, the six ECSC Member States negotiated two new proposals known collectively as the Treaties of Rome.²²

In so far, the ECSC had, as a forerunner, with its common policy and with the successfully operating through the High Authority, the predecessor of the future Commission, been laying the *political foundations* for developing the European Union that exists today. It is, therefore, no surprise that with the 2001 expiration of the ECSC treaty, there emerged greater efforts within EU Member States to establish a Constitution for Europe recalling the roots of the process of European integration through developing an European Union capable of responding to the common challenges.²³

The first one of the Treaties of Rome, the Treaty on European Economic Community (EEC), constituted the legal framework for the establishment of a customs union and a common internal market to encourage the free movement of goods, persons, services and capital.

According to the Treaty on EEC, the EEC's objective was

“to promote throughout the community a harmonious development of economic activity, a continuous and balanced expansion, an increase in stability, an accelerated increase in the standard of living, and closer relations between member states.”²⁴ (24ibid.)

The second treaty established the European Atomic Energy Community (Euratom) which intended to set up European cooperation to promote the scientific research and technological development and the civil use of nuclear energy.

Milestones, since the six ECSC Member States had signed in 1957 the Treaties of Rome, included a 1970 decision to begin European Political Cooperation; the 1987 Single European Act which instituted the 1993 Internal Market and increased the use of majority voting; and the 1992 signing of the Maastricht Treaty on European Union confirmed the will of the EU Member States to

“*continue the process of creating an ever closer union among the peoples of Europe*” as it had been stipulated before by the Treaty on European Community (preamble of the Consolidated Version of the Treaty on European Community, ²⁵

²²: Wyatt, Derrick (Ed.) (2002). Rudden and Wyatt's EU treaties and legislation. Cambridge: Oxford University Press.

²³: Meny, Yves. (2001). National squares and European circle: The challenge of Adjustment. In Anand Menon & Vincent Wright, *From the nation state to Europe*. New York: Oxford University Press, Inc., p. 29.)

²⁴: Meny, ibid.

²⁵: in Official Journal of the European Communities, December 24, 2002, C 325/33(39).

So did the Amsterdam and Nice Treaties on European Union, 1997 and 2000.

In 2004, the Member States did a next decisive step of dynamically, gradually building European integration: alongside enlargement of the Union and alongside drafting and ratifying the European Constitution, 10 new Member States joined the European Union, followed by Bulgaria and Rumania, making the European Union the “Europe of the Twentyseven”, January 01, 2007. **26**

The enlargement of the European Union is presenting an enormous challenge to the Union, as it continues to struggle with the process of integration, trying to deal with vital reforms to make the enlarged Union work, formulating a European Defence Identity, and combating transnational crime which are issues subject to the Union’s endeavors of drawing up and ratifying a Constitution for Europe.

For, the citizens of the Member States view the results as inefficient, undemocratic, and in need of structural reform.²⁷ The European Union has become the stability anchor for securing peace and prosperity in Europe for over half a century. But the legitimacy building acceptance of the European Union cannot count on this fact only in the view of European citizens. The value of the Union’s peace keeping contribution remains underappreciated. Strengthening the Union’s acceptability and closeness to the citizens in Europe appears to be the strongest motivation for the drawing up and efforts to ratify the Treaty establishing a Constitution for Europe.

Investigating the European Union’s institutional and constitutional history, starting from the Treaties that shape the European Union, will help to understand the “state” of the Union.

26: Europa. *European governments online: European Union Member States*. Retrieved October 15, 2003, from http://europa.eu.int/abc/governments/index_en.htm#members

27: Centre for European Reform. (2003, June 24). *The CER guide to the draft EU constitution. Briefing Notes*. London: Author, pp. 1-6. Also available online at http://europa.eu.int/futurum/documents/other/oth010603_4_en.pdf.

3. Survey on the milestones in the history of the European Union, dynamic stepwise development of European integration

May 1945

The end of the Second World War with victory for the Allies over Germany and Italy.

June 1947

The Marshall Plan was announced, proposing financial assistance for the economic revival of Europe. This was coordinated by the Organisation for European Economic Cooperation (OEEC), set up in April 1948.

March 1948

North Atlantic Treaty signed between Belgium, France, Luxembourg, the Netherlands, and the United Kingdom (the Brussels Treaty) on economic, cultural, and social cooperation and collective self-defence. The Berlin Blockade by the USSR started three months later.

April 1949

The North Atlantic Treaty Organisation Treaty was signed in Washington, to include other European countries, the United States and Canada.

May 1949

The Council of Europe was set up under the Treaty of Strasbourg.

May 1950

Robert Schumann, the French Foreign Minister gave a speech inspired by Jean Monnet in which he spoke of pooling the iron and steel resources of France and Germany to establish the foundations of peace. It is worth looking at the career of Jean Monnet, an administrator with vision about Europe.

April, 18, 1951 "Europe of the Six "

The European Coal and Steel Community (ECSC) was set up by the Treaty of Paris by 'the Six' (Belgium, France, Germany, Italy, Luxembourg, Netherlands).

From the outset their objective extends beyond the creation of a common market for coal and steel. The Treaty establishing the ECSC states that the six countries are resolved "to create, by establishing an economic community, the basis for a broader and

deeper community among peoples long divided by bloody conflicts."

The ECSC takes up its work in 1952.

May 1952

The Six signed the European Defence Community (EDC) Treaty.

July 1952

The ECSC Treaty entered into force. Jean Monnet was the President of the High Authority established under the Treaty. Paul-Henri Spaak was the leader of the Common Assembly.

June 1955

The Foreign Ministers of the Six agreed to aim at economic integration of their countries at a meeting in Messina (Italy). Paul-Henry Spaak, the Belgian Foreign Minister, led an intergovernmental committee to draft a report (approved May 1956). The Spaak Report proposed the creation of a common market with free circulation of people, goods, capital and services in open competition, as well as a European Community for Nuclear Energy.

March 25, 1957

With the **signing of the "Treaties of Rome"** the six ECSC countries establish the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM).

January 1, 1958

The EEC and EURATOM take up their work . First President of the Commission: the German Walter Hallstein.

The Treaty establishing the EEC extends common policy to further sectors of the economy, e.g. to agriculture, law on competition, and foreign trade.

The member countries decide to form a common market, i.e. an internal market, within twelve years.

- Creation of a parliamentary assembly (official designation as of 1986: "European Parliament").

May 1960

The Stockholm Convention established the European Free Trade Association (EFTA) among Austria, Denmark, Norway, Portugal, Sweden, Switzerland, and the United Kingdom ('the Seven')

December 1960

The Organisation for European Economic Co-operation (OEEC) became the Organisation for Economic Co-operation and Development (OECD).

July and August 1961

Ireland, Denmark and the United Kingdom applied for membership of the European Communities. Norway applied in April 1962

January 1963

General de Gaulle, President of the French Republic, cast doubt on the United Kingdom's application for membership of the EEC, leading to suspension of negotiations with all the applicant countries.

July 1963

An Association Agreement was signed between the Community and 17 African States in Yaoundé, Cameroon. The Yaoundé Convention entered into force in June 1964 and was renegotiated in 1969. It was superseded by the Lomé Convention in 1975.

April 1965

A Treaty (the Merger Treaty) merging the executives of the Communities (Commissions of the EEC and Euratom and the High Authority of the ECSC) was signed in Brussels. It entered into force on 1 July 1967.

July 1965

France broke off negotiations on financing the common agricultural policy. By recalling its Permanent Representative and refusing to take part in the Council Meetings, the French government under President de Gaulle precipitated the '**empty chair crisis**', stalemating the implementation of Community policy.

January 1966

The 'Luxembourg Compromise' (retention of the unanimity requirement for very important national interests) was agreed, and France resumed its place in the Council.

May 1967

The United Kingdom re-applied to join the Community, followed later by the Republic of Ireland and Denmark and Norway. General de Gaulle ('La France, c'est moi') was still reluctant to accept British accession.

July 1, 1967

The organs of the ECSC, EEC, and EURATOM are merged in the "European Communities" ("EC"). The Commission of the European Communities takes up its work in Brussels.

July 1, 1968

Customs union entered into force ahead of schedule imports and exports between EC countries are duty-free. The Common Customs Tariff (or Common External Tariff) replaced national customs duties in trade with the rest of the world.

December 1969

The Hague Summit decided to adopt definitive (rather than transitional) arrangements for the financing of the common agricultural policy, for the creation of Community 'own resources' and to strengthen Parliament's budgetary powers.

April 1970

The Council decided on a gradual introduction of an 'ownresources' system whereby the Community would receive all customs duties on products imported from non-member countries, all levies on agricultural imports and resources derived from value-added tax.

June 1970

Negotiations with the four prospective Member States opened in Luxembourg.

October 1970

The Member States approved the Davignon Report on political co-operation. The objective was for Europe to speak with a single voice on all major international problems.

March 1972

Denmark, Ireland, Norway and the United Kingdom signed Treaties of accession to the European Communities.

March 21, 1972

Establishment of the European Currency Snake, a first step in the direction of monetary union. The currency 'snake' was set up in pursuance of the Council's resolution to establish the first stage of economic and monetary union (EMU). The Six agreed to limit the margin of fluctuation between their currencies to 2.25%.

May 1972

A vast majority in a referendum in the **Republic of Ireland voted in favour of accession to the EEC.**

September 1972

A majority of the population in **Norway voted against accession** in their referendum.

October 1972

A referendum in **Denmark was in favour of accession. The Norwegian Government decided not to proceed with accession.**

The **United Kingdom proceeded to ratify the Accession Treaty** without having first having held a referendum.

January, 1, 1973 "Europe of the Nine "

Denmark, Ireland and the United Kingdom joined the European Communities.

The Community Free Trade Agreement with Austria, Switzerland, Portugal and Sweden came into force.

April 1974

After a change of Government in the **United Kingdom**, the British Secretary of State for Foreign and Commonwealth Affairs made a statement to the Council on their **new policy on the Community**. He **called for major changes in the Common Agricultural Policy (CAP)**, and **'fairer methods of financing the Community budget'**.

A **Joint declaration** on the state of the Community was submitted to the Council by the **Presidents of the Council and of the Commission**. They **recognised the need for an improved decision-making process**.

December 1974

The Paris summit (the Community's Heads of State or of Government) decided to hold meetings three times a year as the 'European Council'. They approved the holding of direct elections to the European Parliament, and agreed to set up the European Regional Development Fund.

February 1975

The EEC and the 46 African, Caribbean and Pacific countries (ACP) signed, in Lomé, Togo, a Convention (Lomé I) to replace the Yaoundé Convention.

March 1975

Harold Wilson, the British Prime Minister, stated in the House of Commons that the UK Government would recommend the British people to vote in favour of the United Kingdom's continued membership of the Community in the forthcoming referendum on that issue.

The European University Institute in Florence was officially established.

April 1975

British House of Commons voted in favour of the United Kingdom staying in the Community.

June 1975

The British referendum. **67.2% of voters were in favour of the United Kingdom's remaining a member of the Community.**

Greece formally applied to join the European Communities.

July 1975

The European Council called for a report on direct universal suffrage for elections to the European Parliament.

June 1976

The Parliament discussed and voted on a motion of censure against the Commission concerning the manner in which the Parliament had been consulted on a specific matter. The motion, the first to be put to a vote, was defeated by 109 votes to 18, with 4 abstentions.

July 1976

The European Council meeting in Brussels agreed on the number and distribution of seats in the Parliament to be elected by direct universal suffrage in 1979. The Council designated Roy Jenkins (later Lord Jenkins of Hillhead) as President of the Commission. The new Commission under his Presidency took office in January 1977.

Formal opening of negotiations for the admission of Greece to the Community.

November 1976

The Council decided that Member States would extend fishing limits to 200 miles off their North Sea and North Atlantic coasts from 1 January 1977, marking the beginnings of the common fisheries policy.

March 1977

Portugal formally applied for membership of the Communities.

April 1977

The European Parliament, the Council and the Commission signed a joint declaration on the respect of fundamental rights.

July 1977

Spain formally applied to join the European Communities.

October 1977

The Court of Auditors of the European Communities held its inaugural meeting. It replaced separate audit boards for the different communities.

July 1978

At a meeting of the **European Council** under the German Presidency held in Bremen, an **agreement is reached on a common strategy to achieve a higher rate of economic growth in order to reduce unemployment, together with plan setting up a European Monetary System (EMS).**

October 1978

Denmark, Ireland and the United Kingdom became signatories to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

December 1978

The European Council established the European Monetary System based on a European currency unit (the ECU), entering into effect January 1, 1979

March 1979

Jean Monnet died.

April 1979

The Commission adopted a memorandum on the accession of the European Communities to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

May 1979

The acts relating to Greece's accession to the Communities are signed in Athens, Greece.

June, 7/10, 1979

The first elections to the European Parliament by direct universal suffrage are held.

September 1979

The Community and its Member States sign a Council of Europe Convention on Conservation of European Wildlife and Natural Habitats. This is one of the earliest environmental initiatives of the Communities.

October 1980

The **second African, Caribbean, Pacific (ACP)-EEC Convention is signed in Lomé, Togo. (Lomé II) to replace the original fiveyear agreement (Lomé I). By this time there are 58 ACP states and the number steadily increases.**

January,1, 1981” Europe of the TEN “

Greece became the tenth member of the European Communities. The first Greek MEPs were elected in October.

February 1982

In a **consultative referendum, Greenland, which became a member of the European Community as part of Denmark, opted to withdraw from the Community. It is the only country to have done so, although as its citizens are citizens of Denmark they retain EC citizenship by virtue of that.** It actually left in February 1985, although it remained as an associated country and territory (OCTS): see Part IV of the EC Treaty, Arts 182-188. Art 188 deals specifically with Greenland.

February 1984

The draft **Treaty on the establishment of the European Union (the Spinelli draft) was passed by the European Parliament by a large majority.**

June 1984

The **second universal suffrage direct elections to the European Parliament were held.**

December 1984

The **third ACP-EEC Convention was signed in Lomé** by the 10 Member States of the Community and their 65 partners of the African, Caribbean and Pacific (ACP) States. It came into force in May 1986.

January 1985

The first burgundy **‘European passports’ were issued in most of the Member States. Border controls had been becoming less significant in Continental European countries.**

The **new Commission took office with Jacques Delors**, a former French Finance Minister, as its President.

June 1985

Accession Treaties with Spain and Portugal signed.

The Commission sent to the European Council a **White Paper entitled Completing the Internal Market. The Council approved the White Paper.**

The **Schengen Agreement on the elimination of border controls was signed by Belgium, Germany, France, Luxembourg and the Netherlands in Schengen (Luxembourg).**

December 1985

At a European Council held in Luxembourg, the Ten agreed to amend the Treaty of Rome and to revitalise the process of European integration by drawing up a **Single European Act.**

January, 1, 1986 “ Europe of the Twelve “
Spain and Portugal joined the Communities.

February 1986

The *Single European Act* modifying the Treaty of Rome is signed in Luxembourg and The Hague. This is designed to bring about the completion of the Internal Market by 1993.

May 1986

The European flag, adopted by Community institutions, was run up for the first time in front of the Berlaymont building (the former headquarters of the European Commission in Brussels) to the sounds of the European anthem.

December 1986

-A European Council held in London under the British Presidency examined the fight against terrorism, illegal immigration and drug trafficking.
-In June, under the Dutch Presidency, the Parliament, the Council and the Commission had signed a Joint Declaration against Racism and Xenophobia.

July 1987

The *Single European Act* entered into force.

October 1987

The European Council adopted a decision establishing a *Court of First Instance of the European Communities*.

April 1988

The Delors Committee presented the report on economic and monetary union. The Parliament adopted the Declaration of Fundamental Rights and Freedoms.

November, 9, 1989

The Berlin Wall opened and the German Democratic Republic opened its borders. This signalled the end of Communist domination of Eastern Europe.

December 1989

The Heads of State or Government of 11 of the Member States adopted the *Charter of Fundamental Social Rights of Workers*. The United Kingdom did not.

The new (fourth) African Caribbean Pacific (ACP) – European Economic Community Convention between the Twelve and the 69 ACP countries was signed in Lomé, Togo. It entered into force in September 1991.

An agreement on trade and commercial and economic cooperation between the Community and the Soviet Union was signed in Brussels.

April 1990

A Special European Council held in Dublin agreed to a common approach on German unification and on Community relations with Central and Eastern European countries

May 1990

An Agreement establishing the European Bank for Reconstruction and Development (EBRD) to provide financial support to Central and Eastern Europe countries was signed in Paris.

June 1990

The Schengen Agreement on the elimination of border checks was signed by the Benelux countries, France and Germany. Italy signed in November.

The EEC and EFTA started formal negotiations for the creation of the European Economic Area (EEA).

A European Council in Dublin confirmed the need to open two Intergovernmental Conferences, one on Economic and Monetary Union and the other on the aspects of Political Union, and to hold them in parallel.

July 1990

The first stage of the Economic and Monetary Union (EMU) came into force (liberalisation of capital transactions, strengthening of economic policy coordination among the member states).

Cyprus and Malta formally applied to join the Communities.

3 October 1990

Germany was (re)unified.

November 1990

At the Conference on Security and Cooperation in Europe (CSCE) in Paris, 34 Heads of State or Government signed a Charter for a new Europe.

December 1990

The two Intergovernmental Conferences, on Economic and Monetary Union, and on Political Union, were launched at the European Council in Rome.

April 1991

The European Bank for Reconstruction and Development was inaugurated in London.

July 1991

Sweden formally applied to join the Communities,

February, 07, 1992

The Treaty on European Union was signed at Maastricht by the Foreign and Finance Ministers of the Member States. Cooperation in further policy areas was agreed on e.g. foreign and security policy, development assistance, justice and home

affairs, health, consumer protection, etc.. Economic and monetary union as well as political union are to be realised by the year 1999.

Three pillar Treaty architecture: 1st pillar: Treaty on European Community(EC),
2nd pillar: Common Foreign and Security Policy, 3rd pillar: Cooperation in fields of Justice and Home Affairs

March 1992

Finland formally applied to join the Communities.

May 1992

Switzerland formally applied to join the European Communities.

June 1992

In a referendum in Denmark, the people voted against the ratification of the Treaty on the European Union.

In a referendum in Ireland the vote was in favour of the ratification of the Treaty on the European Union.

September 1992

In the French referendum on the Maastricht Treaty the people voted by a small majority in favour of ratification.

November 1992

Norway formally applied to join the European Communities.

December 1992

In a referendum in Switzerland, the people vote against the ratification of the Agreement establishing a European Economic Area. Switzerland had and continues to have a strong sense of neutrality as well as independence and seems content to continue this stance.

January, 1, 1993

Completion of the EC internal market (the EC is an economic area in which the free movement of persons, goods, services and capital is guaranteed).

May 1993

In a second referendum, the Danish people vote in favour of the Treaty on Union. Perhaps slightly embarrassing for the Danish government was the fact that Denmark was President of the Council for the first six months of 1993.

June 1993

A European Council is held in Copenhagen, Denmark. The Council instructs the Commission to prepare a White Paper on long-term strategy to promote growth, competitiveness and employment; it confirms that accession of Austria, Finland, Sweden and Norway is to be accomplished by 1995 and it **assures associated countries of Central and Eastern**

Europe that they will become full members as soon as they satisfy the requisite political and economic conditions.

August 1993

The United Kingdom ratified the Treaty on European Union (there was no referendum in the United Kingdom). Many other member States had ratified by then, mostly without holding a referendum.

November, 1, 1993

All ratification procedures having been accomplished, the Maastricht **Treaty on European Union came into force.**

December 1993

The Council and the Commission reached agreement on a code of conduct governing public access to official documents.

The Council concluded an agreement creating the European Economic Area. This came into force in January 1994.

January, 1, 1994

The **second phase of economic and monetary union came into effect.** The member states work to satisfy the criteria established for acceptance into EMU (price and monetary stability, interest rates, budget discipline).

The **European Monetary Institute (EMI) is established in Frankfurt** am Main to make preparations for the establishment of the European Central Bank.

March 1994

The **Committee of the Regions, set up by the Treaty on the European Union, holds inaugural session.**

At an informal **meeting of Foreign Ministers in Ioannina a compromise decision was adopted on rules for qualified majority decision-making** in preparation for the enlargement of the European Union..

Hungary formally applied to join the European Union.

April 1994

Poland formally applied to join the European Union.

June 1994

A referendum is held in Austria, with the majority is in favour of accession to the European Union.

July 1994

Jacques Santer was chosen to **succeed Jacques Delors** as President of the Commission.

October 1994

A referendum in Finland was in favour of accession to the European Union.

November 1994

The referendum in Sweden, in favour of accession to the European Union.

The Norwegian referendum rejected, for the second time, accession to the European Union.

January, 1, 1995 “Europe of the Fifteen “

Austria, Finland and Sweden became members of the European Union.

March, 26, 1995

The **Convention on the Application of the Schengen Agreement goes into effect** in relations between the Federal Republic of Germany, France, Belgium, Luxembourg, the Netherlands, Spain and Portugal.

In 1995 Italy, Greece, Austria, Denmark, Finland, and Sweden acceded to the convention. It does not go into effect immediately for the three Scandinavian countries. Their full participation, including the complete elimination of internal border checks is determined by the other parties to the convention on the basis of a unanimous decision after an assessment procedure. Schengen cooperation agreements were concluded with the non-EU members of the Nordic Passport Union (Norway and Iceland) in 1996.

April 1995

Liechtenstein ratifies its accession to the European Economic Area by referendum and in May is a participant in the EEA.

May 1995

The Commission adopts a **Green Paper on the practical arrangements for the introduction of the single currency.**

June 1995

Romania applied to join the European Union.

Slovakia applied to join the European Union.

July 1995

The Member States signed the Europol Convention for police co-operation.

October 1995

Latvia formally applied to join the European Union.

November 1995

Estonia formally applied to join the European Union.

December 1995

Lithuania formally applied to join the European Union.

1996/97

An **intergovernmental conference negotiates on further amendments to the**

Maastricht Treaty on European Union needed to make the enlarged EU work

March 1996

The Commission adopted a decision on urgent measures to be taken for protection against BSE (Bovine Spongiform Encephalopathy) by imposing a world-wide export ban on British beef and beef products.

June 1996

Slovenia formally applied to join the European Union.

July 1997

The Commission presented the “Agenda 2000 - for a stronger and wider Europe” and its opinions on the applications of 10 Central European countries.

October, 2, 1997

The Ministers for Foreign Affairs of the Member States of the European Union **signed the Treaty of Amsterdam, amending the Maastricht Treaty on EU by provisions** on further reforming EU institutions such as closer cooperation in the area of justice and home affairs and closer cooperation in Common Foreign and Security Policy. The rights of the European Parliament to take part in legislative decision-making are expanded. But **the Amsterdam Treaty on EU has unresolved “leftovers”** as regards reforming the **decision-making in the Council (the issue of weighed votes** to balance the sovereign equality of each Member State, one country/one vote and, in the interest of large countries, the proportionality of the population in the EU)

March 1998

The Commission recommended that 11 Member States should adopt the Euro on 1 January 1999.

March, 31, 1998

Beginning of **accession negotiations with Hungary, Poland, Estonia, the Czech Republic, Slovenia and Cyprus.** (“Luxembourg Group”)

May, 2, 1998:

The **Heads of State and Government decide that European Monetary Union will begin on 1 January 1999 with 11 member countries** (Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, , Portugal, and Spain).

June 1998

Establishment of the European Central Bank.

January, 1, 1999

The third stage of European Monetary Union begins: **introduction of the Euro**

as a means of payment in cashless transactions: Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, The Netherlands, Portugal and Spain adopted the Euro as their official currency.

Later in the month, **Jacques Santer, President of the European Commission, called for Parliament's confidence after serious allegations had been made about financial corruption in the Commission by certain of its members.**

March 1999

The **collective resignation of the Commission members followed the report by the Committee of Independent Experts on the allegations regarding fraud, mismanagement and nepotism in the Commission.** The French Commissioner Edith

Cresson was seen as especially tainted. **Romano Prodi was agreed as the new President of the Commission, some of the former members also returning.**

March, 24/25, 1999.

At a Special European Council in Berlin the **Member States approve the "Agenda 2000" package on the reform of EU internal policies.**

May, 1, 1999

The **Amsterdam Treaty entered into force after ratification by all the Member States.**

The President of the European Court of Justice presented a number of proposals and ideas on the future of the jurisdictional system of the European Union.

September 1999

The European Parliament approved the new Commission.

December 1999

A **European Council in Helsinki decided to open accession negotiations with Romania, Slovakia, Latvia, Lithuania, Bulgaria and Malta and to recognise Turkey as an applicant country.**

It **agreed to call an Intergovernmental Conference to revise the Treaties in February 2000 to resolve the "Amsterdam Treaty on EU leftovers"**

February, 15, 2000:

Beginning of accession negotiations with Bulgaria, Latvia, Lithuania, Malta, Romania, Slovakia. ("Helsinki Group")

March 2000

The Commission adopted a White Paper on its reform.

September 2000

Denmark holds a referendum on the adoption of the Euro —
with much publicised television debate on ‘Euro eller Kroner’.
Denmark’s referendum votes against the “Euro”

December, 7-10, 2000:

:At the Nice European Council the fifteen Heads of State and government agreed on the **draft of a treaty spelling out the reforms needed to create the prerequisites for later enlargement.**

June, 2001:

Ireland’s referendum votes against the Nice Treaty on European Union(54% voting against, 34% of the electorate participating)

15 –16 December, 15/16, 2001:

At the Laeken European Council the fifteen Heads of State and Government agreed on the **European Convention to draft on the Future of the European Union**

January, 1, 2002

The **“Euro “** is the **common and single European currency replacing the national currencies , except Sweden , Denmark, United Kingdom**

February, 28, 2002:

The **European Convention** started work on **drafting the Treaty establishing a Constitution for Europe**

October 2002:

Ireland’s referendum votes for the Nice Treaty on European Union(63 % voting for, nearly 50% of the electorate participating)

July, 10, 2003:

end of Convention’s work, reached consensus on a draft treaty establishing a Constitution for Europe.

December 2003:

The draft was submitted to an **Intergovernmental Conference** composed of representatives of the governments of the present and future Member States.

May, 01, 2004 “ Europe of the Twentyfive “

Estonia, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, Czech Republic, Hungary and Cyprus join the EU

18 June, 18, 2004:

The European Council Heads of State and Government reached **final agreement on the text of the Treaty establishing a Constitution for Europe**

October,29,2004:

In Rome: the Heads of State and Government signed the European Constitution, requiring the ratification by the entire number of Member States in order to enter into force

November 2004:

Lithuania, the EU Member State ratifies the European Constitution ,followed by:

December 2004:

Hungary ratifies the European Constitution

February 2005:

Slovenia and Spain ratify the European Constitution, followed by:

April 2005:

Italy and Greece ratify

May 2005:

Slovakia, Belgium, Austria and Germany ratify the European Constitution

May,29,2005:

France, by referendum, rejects ratification of the Constitution by 55% of the participating voters, 70% of the entitled voters were participating

June,01, 2005:

the Netherlands , by referendum, rejects ratification by more than 61 % of the participating voters, 63% of the entitled voters were participating

2007- “ Europe of the Twentyseven”

January,01,2007:

Bulgaria and Rumania join.

January,01, 2007:

Germany’s EU Presidency starts, expected to draw up a schedule for finding solutions to save the European Constitution.

February 05/06, 2007:

The European Union delegation, headed by the troika, is holding negotiations in Moscow on Russia’s participation in the European Energy Charta, on Middle East issues and on Iran’s nuclear policy. In Kiev holding talks on closer ties between the EU and Ukraine. The Troika composed of the German Foreign Minister (President of the Council), the High Representative for the Common Foreign and Security Policy of the EU,Solana, and, in Moscow, the Commissioner for Foreign Affairs,Mrs. Ferrero-Waldner.

March, 08/09,2007:

Summet of the European Council,Brussels, on the EU’s new commitments to reduce CO2 emissions to combat global warming.

III. The Treaties shaping the European Union

The outlining of the dynamic development of the EU as outlined above will help to better understand the dynamics of the EU law established on the basis of the Founding Treaties on European Union and on the Community(primary law) and the specifics of the Founding Treaties` constitutional quality assigned to the European Union as a specific stage in the process of creating an ever closer union among the peoples of Europe(Article 1 Treaty on European Union).

1. Treaty establishing the European Economic Community, the Treaty of Rome

Following the first years of successful operating the ECSC, the European Heads of State and Governments of the ECSC six Member States made the next step in pooling parts of national powers determined to further liberalize the European markets and to strengthen trade and investment. Six countries – Germany, France, Italy, the Netherlands, Belgium and Luxembourg – signed the Treaty of Rome on March 25, 1957.1958, founding the European Economic Community (EEC).

The EEC’s basic functional motivation was clearly to reduce barriers to trade, through creating an internal market and a customs union.. Aiming at achieving common political objectives beyond technically sounding market and trade issues, the Treaty ,however, had attributed to the collectivity of Member States integrative powers to establish a common legal order limited by the objectives, tasks and competences as attributed by the Treaty.**28**

Many political leaders at that time had therefore the common ambition of creating a united Europe. Walter Hallstein, the first EEC Commission president, and author of the book “ Der unvollendete Bundesstaat” predicted:

“We are not integrating economies, we are integrating politics.”**29**

The EEC had great success in the economic field. By the early 1960’s, most internal trade barriers in the EEC area were substantially reduced, and trade amongst members had multiplied several fold. Ahead of schedule, on *July,01, 1968* the Customs union entered into force: imports and exports between EC countries are duty-free. The Common Customs Tariff (or Common External Tariff) replaced national customs duties in trade with the rest of the world. “Its greatest single achievement was the accelerated elimination of tariffs and quotas and the application of a common schedule of external duties over a period of nine instead of twelve years.”**30** Most internal trade barriers in the EEC area were substantially reduced, the leftovers of trade barriers were subject to the Internal Market that entered into force on

28: Nugent, Neill. (1994). *The Government and Politics of the European Union* (3 rd ed.). Durham:Duke University Press, p. 44.

29 Wiarda, *supra*, note 21.

30: Gillingham, John. (2003). *European integration 1950-2003: Superstate or new market economy?* New York: Cambridge University Press, p. 53.)

January 01,1993, as scheduled by the Single European Act 1986. And trade amongst members had multiplied several fold. The European Economic Community,thus, constituted the world's largest and most successful trading block.

2. Single European Act (SEA)

In February 1986,in Luxembourg and the Hague, the six Heads of State and Government of the EEC signed the Single European Act (SEA).³¹(31: Wyatt, *supra*, note 20.) The *Single European Act* modified the Treaty of Rome to initiate the completion of the Internal Market as a truly open market by 1993. The SEA is the legal basis for implementing 79 specific actions on completing trade liberalization through the removal of internal barriers,still existing between the EEC Member States, to the free movement of people, goods, services, and capital.³² The SEA Treaty provisions set up binding rules for the EEC Member States to harmonize their product safety standards and consumer protection laws, reform customs and immigration controls, and eliminate excise taxes. The SEA replaced unanimity voting in the Council by establishing majority voting on Community legislation removing trade barriers, thus attempting to facilitate decision making in the Council. The SEA can be regarded as the forerunner of comprehensive endeavors undertaken by the Intergovernmental Conference held in 1996/97 to reform the institutions and the decision-making to make the enlarged European Union work.The SEA can, therefore, be regarded as a significant stage in the EC integration process since the Treaty of Rome- another stage of many stages in the dynamic process of European integration.

3. Treaty on European Union (TEU)

The collapse of the Soviet Union, the reunification of Germany and the new democracies in Central and Eastern Europe wishing to accede to Western organisations like the European Community and NATO dramatically changed the strategic situation in Europe. Demonstrating Europe's ambitious response to the challenges arising from the new strategic situation in Europe, the Minister for Foreign Affairs and the Ministers for Economic Affairs or Finance of the Member States signed the Treaty on European Union – TEU -in Maastricht on *February, 07,1992*. ³³

By the Maastricht TEU, the Member States “ establish among themselves a European Union, hereinafter called ‘the Union’. This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen.” ³⁴. The Treaty three pillars architecture is putting under one umbrella-structure the “ European Communities, supplemented by the policies and forms of cooperation established by this Treaty”: Cooperation was agreed on a Common Foreign

³¹: Wyatt, *supra*, note 22.

³²: *ibid*.

³³: TREATY ON EUROPEAN UNION (Official Journal of the European Communities, 92/C 191/01))

³⁴: Article A TEU

and Security Policy, the TEU's 2nd pillar, as well as Justice and Home Affairs, the Treaty's 3rd pillar. .. Economic and monetary union was to be realised by the year 1999. The Maastricht TEU had, as one of its best achievements, the establishing of the Economic and Monetary Union.

The TEU can be regarded as a starting point, as a bridging Treaty the major provisions of which were explicitly stipulating the expectation of future amendments through subsequent Intergovernmental Conferences. The TEU demonstrates the pragmatism of the Member States seeking to interconnect the new stages of the process of integration and cooperation made in principle with a binding schedule for reconsidering and, if possible, resolving the "leftovers" and thus completing the Amsterdam Treaty on European Union, signed 1997,³⁵ and the Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities .³⁶ For, it is since the Maastricht TEU, that the EU is still trying to better balance deepening and enlarging the Union:

Namely since the 1996/1997 Intergovernmental Conference, preparing the Amsterdam Treaty on EU, the EU was and ever since then is preparing the reform of the institutions to improve the efficiency of the decision –making process within an enlarged EU. Reforming the institutions was meant by the IGC as an essential step that should have to be taken ahead of enlargement to 25 members. The Amsterdam Treaty on EU , however, fell short of reforming the institutions: issues remained unresolved. The so-called "left-overs" of the Amsterdam Treaty on EU described what, in the view of the IGC preparing the Draft Amsterdam Treaty on EU, was necessary to agree upon institutional reforms to help the EU to find an efficient response to the common challenges which would be caused by enlargement. Institutional reforms were expected to make the substantial contribution to the European Union's transparency, democracy and decisiveness.

Even the Nice Treaty (2001) on European Union did fail to complete the Amsterdam "leftovers".

35: Consolidated Version of the Treaty on European Union, in: Official Journal of the European Communities, December 24, 2002, C 325/5.

36: Official Journal of the European Communities, March 10, 2001, (2001/C 80/01).

IV. Identity shaping essentials of the European Union, the structure of the European Union, major successes, deficiencies and intricacies

The Treaty on European has established a unique ,unprecedented entity, collectivity of Member States in the history of cooperation between nation states pooling and jointly exercising parts of their national sovereign powers and making law binding themselves without further acts of national legislation to make the common law directly applicable throughout the community. This European Union cannot be understood but by a thorough look at the intentions of the Member States which are declared by the provisions of the Treaty on European and by which the Member States have expressed the constitutional quality of their common objectives, tasks, institutions and powers thus presenting the constitutional quality essentials or which can also be called the identity shaping essentials of the European Union. They are presenting what can be described as the European Union's own "merits".They are the one to understand the nature of the European Union as a sui generis nature as designed by and developed on the basis of the founding Treaty on European Union attributing powers to the Union and limiting at the same time the range of objectives and powers of jointly exercising common rights which previously were individual nation states'sovereign rights. And this means that no comparison to any other entity working under international law appears to be appropriate to determine the European Union's legal and political nature, but by the Union Treaty's own "merits"only, its identity shaping essentials.

1. Identity shaping essentials of the European Union

The identification of identity shaping essentials of the EU needs identification of the specifics of the EU's constitutional quality as attributed by the Founding Treaty on European Union and reflecting the dynamic construction of the EU alongside the dynamic development of the EU. The identity shaping essentials of the EU's construction are the following:

- 1. the organization , created by the member States**
- 2. own objectives and basic principles**
- 3. own institutions to implement the Treaty objectives**
- 4. endowed with own tasks and powers as conferred upon by the Founding Treaties to realize the objectives,and with**
- 5. an autonomous legal order to rule the relations between the Union and its member states and their individuals**

In order to identify these identity shaping elements, we look at basic provisions of the Treaty on EU, starting with the provision on

- 2. The organization , created by the member States, the final design is not yet defined, the "finalite" of the EU is kept open**

Reading the Article 1:

“

– AIM : Article 1 (ex Article A)

By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called "the Union".

This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty. Its task shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples.³⁷

Article 1 shows that the exact legal pattern, the exact legal design of the present EU as well as of the future EU does not exist yet.. The Treaty on EU is the legal framework for new stages “in the process of creating an ever closer Union among the peoples of Europe”. The text does not state any precise pattern of what might be meant by “an ever closer Union among the peoples of Europe”. This formula is leaving behind any disputes on whether a final design of the Union should be a federal one, related to a form of government in which a Union of States shall have to recognize a central authority while retaining certain own nation states’ powers of government, or whether “federal” means to recognize a central authority of a sort of a central state without no nation states’ powers left. The text of Article 1, however, until the sovereign nation states might decide on a final design of the Union, for the time being, however, does state the dynamic mode of the EU’s approach: the EU is performing “a new stage in the process of creating an ever closer Union of the peoples”, and not yet a Union of States, but a Union of the peoples of Europe whatever final shape of government the Union might develop.

3. The Treaty’s Objectives and major successes

3.1 General on the European Union and European Community’s Treaty objectives

When the European Communities came into existence in 1957 on the basis of the Roman Treaties, it was the result of the political aim of developing cooperative ties between France and Germany setting as its objectives a close-knit European structure by a stepwise ever closer European integration hoping for the economies to develop as an automatic operation of self - motion towards a political unification of Europe (Monnet / Schuman - approach). .

³⁷:TEU,consolidated version, of the Treaty on European Union, Official Journal of the European Communities ,Deember 24,2002, C 325/5(11).

The Community's "task", better said: the objective of the Community is, according to Article 2 Treaty establishing the European Community-TEC-,**38**

by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4,

to promote throughout the Community

- a harmonious, balanced and sustainable development of economic activities,
- a high level of employment and of social protection,
- equality between men and women,
- sustainable and non inflationary growth,
- a high degree of competitiveness and convergence of economic performance,
- a high level of protection and improvement of the quality of the environment,
- the raising of the standard of living and quality of life, and
- economic and social cohesion and solidarity among Member States. ,,

The TEC's use of the term "task" in Article 2 is misleading to a wrong understanding of what the Member States meant by stipulating Article 2. Their desired purpose, the objective, and not the "task" was the achievement of the different goals called in detail in Article 2, by establishing a Common Market and an Economic and Monetary Union and by implementing policies, the Common Market e.g. not serving as an end in itself, not being the desired purpose, not being the objective of the Community, but the Common Market being a piece of work, a needed instrument, a task in order to help to achieve what the TEC is wrongly calling "task", but meaning "the objectives" as they are stipulated. It is, therefore, advisable, to read the term "task" as used in Article 2 TEC, but to actually understand this term as "objective" of the Community.

Then, after the "Eurosclerosis" period of stagnation in Community integration politics, caused by the national and Community budget constraints after the economic recession of the early 1970's, the belief in an automatic course of economic integration towards political integration faded. So that, after 10 years' stagnation, the dynamic of European integration got an **political impetus** to accelerate the setting up of the **Internal Market - abolishing barriers to the free circulation of goods, services persons and capital flows -on the basis of the European Single Act on 1987, initiated by the former President of the Commission, Jacques Delors, and his White Paper on creating the Internal Market. The European Single Act enhanced, as well, the stepwise creation of the Monetary Union on the basis of the 1992 Maastricht Treaty on European Union :**

38: Consolidated Version of the Treaty establishing the European Community, Official Journal of the European Communities, December 24, 2002, C 325/40, compare: Treaty of AMSTERDAM Amending The Treaty on European Union, The Treaties establishing The European Communities and related acts,; November 10, 1997, Official Journal C 340).

The TEU's Objectives :

The Treaty on the Union's objectives are , according to Article 2 **39**

“The Union shall set itself the following objectives:

- to **promote economic and social progress** and a high level of employment and to achieve balanced and sustainable development, **in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union**, ultimately including a single currency in accordance with the provisions of this Treaty;
- to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence, in accordance with the provisions of Article 17,
- to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union,
- to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime,
- to maintain in full the *acquis communautaire* and build on it with a view to considering to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community.”

While the last paragraph of Article 2 TEU stipulates one of the essential provisions constituting constitutional quality by stating that “The objectives of the Union shall be achieved as provided in this Treaty:” This is the principle of attributed limited powers which are transferred by the Member States to the one and the only extent of being explicitly and implied attributed and at the same time excluding any general comprehensive power of a nation state like self-generating competence-competence :

“The **objectives of the Union shall be achieved as provided in this Treaty** and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 5 of the Treaty establishing the European Community.” **40**

39: Official Journal of the European Communities, December 24.2002, C 325/10.

40: Official Journal of the European Communities, December 24.2002, C 325/11.

3.2 Integration and cooperation : two different models to implement the objectives of the Union's objectives

The Treaty establishing the ECSC had, basically, introduced the supranational principle of integration through attributing and jointly exercising parts of national sovereign rights through a Special Council of Ministers **41** setting common binding rules, and through a supranational authority, the High Authority, the predecessor of the European Commission, **40** (40: Article 7 of the Treaty establishing the ECSC) .) setting common binding rules.

The institutional structure of the European integration has been adjusted since the beginning of the ECSC in 1951. In 1967, the merger Treaty melted the different institutions of the ECSC and of the Roman Treaty on EEC into one Commission, one Council of Ministers and one parliamentary Assembly and one Court of Justice acting for the three existing Communities: the ECSC, EEC and EURATOM.

Article G of the Maastricht Treaty on European Union **42** amended the 1957 Treaty establishing the *European Economic Community* with a view to *establishing the European Community*:

“ Article G

The Treaty establishing the European Economic Community shall be amended in accordance with the provisions of this Article, in order to establish a European Community.

A. Throughout the Treaty:

- 1) The term ‘European Economic Community’ shall be replaced by the term ‘European Community’”

The institutional structure had become, through the Maastricht Treaty on EU, **one frame covering**

- **the integration method of Community policies to be implemented**, on the basis of the Treaty establishing the European Community (the first pillar of the Treaty on the EU) through the European Community, by a common set of institutional common rules and common laws having uniform and direct applicability in the Member States and being endowed with the supremacy over national law, on the one hand, and
- **the intergovernmental method of cooperation** between the Member States operating outside the policy scope of the Treaty establishing the European Community: the objectives of the Union **explicitly encompass political dimension for the first time , covering the issues of the TEU's second and third pillar , to be implemented by forms of - political , intergovernmental – cooperation**, but inside the institutional framework of coordination within the Council acting as the joint meeting of the representatives of the Member States:

41: Article 7 of the Treaty establishing the ECSC.

42 TREATY ON EUROPEAN UNION. Official Journal of the European Communities, 92/C191/01.

The Union is forming one frame, or one roof of “a single institutional framework”, by Article A last paragraph Maastricht Treaty on European Union, stating that the Union is based on

- the European Communities and supplemented by
- the policies and forms of cooperation established by the Treaty on European Union:

“The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty. Its task shall be to organize, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples.”

The **one frame of the institutional structure** is called “**a single institutional framework**” by Article C of the Maastricht Treaty on European Union, maintained by Article 3 consolidated version of the Treaty on EU.⁴³

The **functional role of the “single framework”** is to cover the two different methods of cooperation between the Member States: the *integration method and the intergovernmental method of cooperation*. These methods are referred to by the Articles A, B and C of the Maastricht TEU (Articles 1, 2 and 3 TEU consolidated version):

Article B is setting the **Union’s objectives** as

“to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty;”

while *at the same time setting the objectives subject to policies and forms of cooperation outside the Community scope* :

“to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence;”, and

“to develop close cooperation on justice and home affairs;”

Article B, maintained by Article 2 TEU consolidated version (2002) is entrusting these two methods of integration and intergovernmental policies and forms cooperation to perform *under the common commitment*:

“to maintain in full the ‘acquis communautaire’ and build on it with a view to considering, through the procedure referred to in Article N(2), to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community”.

43: TREATY ON EUROPEAN UNION. Official Journal of the European Communities (92/C 191/01, and Official Journal of the European Communities, December 24, 2002/C 325/5(C 325/11/.

Consequently, in conformity with Article B, it is up to Article C, maintained by Article 3 TEU consolidated version (2002) to bridge the two different methods of integration and cooperation by setting up one common roof, a single institutional framework endowed with the functional role to ensure consistency and continuity of the activities carried out to attain the Union's objectives "while respecting and building upon" of what has already been achieved through the European Community's method of integration: the "acquis communautaire":

"Article 3 (ex Article C)

The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the 'acquis communautaire'.

The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such consistency. They shall ensure the implementation of these policies, each in accordance with its respective powers. "

Article B and C of the Maastricht Treaty, Articles 2 and 3 TEU consolidated version (2002), can, therefore, be regarded as Treaty provisions that incorporate the Member States' common intention to admit that there exists a tension between the supranational component of the European Union's structure, which is the European Community, on the one hand, and the intergovernmental method, on the other, to perform common European objectives.

At the same time, these Treaty provisions incorporate the Member States' common pragmatic intention to "ensure effectiveness of the mechanisms and the institutions of the Community" and, therefore, to make an effective use of the tension existing between the two methods of cooperation for the common objectives' sake to ensure the consistency and the continuity of the activities combining the two different methods of the Member States' cooperation to form a coherent whole: representing the two levelled system of interconnected separate but jointly acting levels of nation state responsibility and Union responsibility, thus ensuring the consistency and the strength arising from the forces of the dialectics emerging from the two levelled system of the interacting national and supranational Union levels of performing common policies.

Applying these two models of implementing the EU's objectives, today, the EU has a number of functions of fundamentally political significance for European stability :

Internally, the European Union serves to bind the European sovereign Member States together in offering a stable framework - composed of independently acting institutions on the basis of an autonomous legal order of the Community - for

1) the EU member States to deepen the degree of integration which makes themselves dependable on each other

- within a multi-level system of sharing interconnected sovereignty interdependencies between

-- the nation State level of exercising the States' sovereign powers , on the one hand , and

--the Community(=the 1st pillar of the Treaty architecture) level share of jointly exercised powers, on the other .

2) young democracies (new Member States and applicant countries for accession to the EU) to be assisted in developing and prospering .

Externally, the European Union contributed and contributes to a profound stabilisation process in Europe , through its pulling power , its means and resources - both the political and economic ones - in the form of the Europe Agreements , which incorporate extended association agreements with future members of the EU .

The main challenge for the EU today is how to handle the delicate compromise of the consolidated (Nice, Amsterdam and Maastricht) Treaty on EU of being able to enlarge at the same time as continuing to integrate in depth - while striving with the impacts of globalisation challenges to the economic and technological competitiveness.

The **crucial question** is whether the combined use of the two models of integration and intergovernmental cooperation will help to respond to the challenges the EU is facing by deepening and enlarging nearly at the same time –requiring reinforcing the decisiveness of the EU's institutions' decision-making within the Union of the Twentyseven, this issue will be deepened when discussing the perspectives of the essentials guiding the pending Constitution.

4. EU Treaty architecture of the three pillars in detail

The Treaty on the Union building the roof to cover the three pillars do support and reinforce each other in building a comprehensive multi-level interdependence framework for European integration and European cooperation implemented by the nation States and their commonly shared sovereignties as common players in the European structure .

There is, until now, **no legal definition of the European Union** –no wonder: the European Union still is on track to be established, step-by-step.

It is, however , the **EC, the first pillar** under the common roof established by the Treaty on the European Union , which is **the existing body with a clearly designed legal personality** and structure to further develop the European integration on the legal basis of the EC Treaty, by its explicitly attributed as well with its implied attributed powers which are transferred from the member States to the EC .

The legal basis, the scope of action and the limits of the EC's activities are clearly discernible :

The Treaty on the Union enlarges the scope of EC actions supporting and supplementing Member States' actions while fully respecting the responsibility of the Member States , e.g

in the field of managing structural Funds of the EC, implementing the EC's Regional Development Fund regulation is closely interconnected with the national powers of funding the modernization of economy related regional basic facilities, services and installations needed for regional communities, municipalities, to be established and maintained in Member States.

As to the newly attributed dimension of enlarged scope of community action : Title VII - Economic and monetary policy, economic policy is still a national competence , but subject to Community coordination , while monetary policy is a central Community competence:

Economic policy: The Member States remain responsible for the conduct of their economic policies , Articles 4 and 98 Treaty on EC – TEC- (ex Article 102 lit. a Rome Treaty on EEC) **44**, but bound to coordinate, Art. 99 par. 3 EC Treaty.

4.1 Monetary policy - central Community competence

Title VII of the TEC establishes the European Monetary Union , attributing to the Community the competence for monetary policy , thus setting rules of a new centralised European competence which is , in legal terms , different from the Treaty provisions ruling the 'coordination of the still nationally conducted economic policies . The European Community's competence for monetary policy is ruling a core power which is one of the traditionally innermost parts of nation states' sovereign powers which are, through the revolutionary shift of power made by the Member States through the Maastricht Treaty on European Union, it transferred to the Community level of jointly exercising the powers according to the decision-making rules and procedures as provided for by the TEC.

Except the introduction of TEU provisions on developing a Common Foreign and Security Policy and on cooperation in Home and Justice Affairs, the transfer of power in the field of monetary policy is a genuinely revolutionary stage in the process of the consistently dynamic development of European integration:

According to Article 105 paragraph 1 TEC, the **primary objective** of the European System of Central Bank is

“ to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Community with a view to contributing to the achievement of the objectives of the Community as laid down in Article 2. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 4. “

44: Consolidated version of the Treaty establishing the European Community, in : Official Journal of the European Communities, December 24, 2002, C 325/33(41,71), compare: Maastricht TEU, (97/C 340/03).

As to the basic tasks to be carried out through the ESCB, it is since the third stage of the stepwise introduction of the single European currency, within which the Community has assumed - for common exercise - the national competences of the Member States for :

- **the full range of the monetary policy of the Community,**
- **the conduct of foreign exchange operations,**
- **for holding and managing the official foreign reserves of the Member States and**
- **promoting the smooth operation of payment systems according to Article 105 EC Treaty . Article 105 paragraph 2 TECC:.**

5. Major successes of the Community integration method:

Peacemaking and peacekeeping procedures.

The Maastricht Treaty on EU that entered into force on November 1,1993, as well as the succeeding versions of the Amsterdam and Nice Treaty on EU, can be called a magnificent achievement. But the Treaty on EU was also a treaty that proved very difficult to sell to the European publics in the referenda which were held on it.

Part of the problem is the Treaty's complexity, similar to the Constitution's complexity. Within the EU Treaty's 300-plus pages are articles on such diverse subjects as human rights, parliamentary procedures, public health, and economic convergence. It is also a compromise treaty which fully satisfied neither those who wanted stronger centralized EU institutions, nor those who wanted to turn more decision-making power back to the member states.

But the Treaty on EU has proved to turn out more achievements than drawbacks. The most significant achievements within Maastricht, Amsterdam and Nice Treaty turned out to be :

- (1) Internal market freedoms, benefits from greater opportunities to market efficiently throughout Europe due to Common rules of law;
- (2) Common budget's redistributive role: stabilising cohesion within the EU, structural and cohesion funds: identity shaping role of infrastructural projects financed by EU funds with increasing public notice of the EU's contribution;
- (3) Creating Europe of the Regions:
- (4) Monetary Union, Euro,
- (5) Enlarging the EU
- (6) Imperatives of making the enlarged EU's decision-making more efficient
- (7) Promoting democracy throughout Europe
- (8) Developing a common foreign and security policy
- (9) Developing the EU as an area of freedom, security and justice, through cooperation in justice and home affairs
- (10) Introduction of European Union citizenship

The Union's identity shaping role of following major successes of the EU:

a) Major success: completing the internal market

There are many accomplishments that bear witness to the viability of the European Union. In 1985, after a period of economic stagnation and much soul-searching, the Community moved forward decisively to complete the single internal market for goods and services originally envisioned in the Treaty of Rome.

A bold constitutional measure, the Single European Act, made it easier to pass legislation through majority voting, paving the way for tough new measures against trade barriers among member states.

The Single European Act was joined by the 1985 White Paper, which set out nearly three hundred measures necessary to remove by the end of 1992 all internal barriers to the free flow of goods, people, capital and services among the member states of the Community.

The „1992,, internal market program is now nearly complete; 98 % of the measures originally outlined are in place; and member states have adopted more than 90% of the legislation needed to make these measures law throughout the European Union.

While implementation delays mean that the program is less complete than it may appear, it is nevertheless a stunning accomplishment, overcoming decades of political tradition and local prejudice, to open a large and rich market to all European economic actors.

Companies, EU companies as well as companies from outside the EU benefit from greater opportunities to market efficiently throughout Europe.

Early fears had vanished that the 1992 program would create a „Fortress Europe,, — open on the inside but closed to foreign trade. Apart from specific areas such as audiovisual services, the EU is clearly more open to trade today than it was fifteen years ago.

b) The EU budget's identity shaping role, assisting regional infrastructure programs, stabilising cohesion within the EU

Another notable aspect of EU viability is the **member states' contribution of a significant and growing amount of their own resources to a common budget.** This budget had grown 15 percent in real terms each year since 1960, and now stands over 100 billion Euro.

By financing common programs, especially in the areas of agriculture, now under 40% of the EU's budget, joint scientific research and technological development programs, 4%, and foreign assistance (2 %), the budget substitutes for member state expenditures; harmonises many member state programs; and redistributes resources from richer to poorer member states.

This redistributive role of the budget helps reduce differences in per capita income in the member states, thereby promoting a key EU goal: „cohesion” and helping to shape the EU's identity by raising the public's attention to the EU's contributions to modernizing programs in Member States.

Indeed, almost a third of the budget is devoted to the Structural and Cohesion Funds, which finance infrastructure projects in regions where per capita income is less than 70 percent of

the community average, support areas affected by industrial decline, train the unemployed, and help develop rural areas.

In part as a result of these programs, EU member states like Ireland, Spain, and Portugal had increased their per capita income relative to that of the other member states since 1980.

c) **Creating the third level within the European Union: Europe of the Regions, the “Committee of the Regions”**

The Amsterdam Treaty on EU had established the “Committee of the Regions”, Article 198 lit. a Treaty establishing the European Community **45**) a whole new level of political representation and governance within the EU: that of the regions (Flanders, Scotland, Catalonia, Bavaria, and others), the “Europe of the Regions”. This new level had been created in addition to the existing two levels of the EU and of the Member States. It is consistent with the nature of the European Union in which decisions should be taken “as openly as possible and as closely possible to the citizen”, as stipulated in **Article 1 of the Treaty on European Union:**

“This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.” **46**

And the Committee of the Regions is a new level of governance within the EU which is as well closely interconnected with the EU’s programmes of assistance given to regional infrastructure projects managed by national programs. These programmes work with close cooperation between the national, regional and EU levels, and they have the side effect of shaping the EU’s identity in the peoples’ minds by making the people aware of the EU’s helpful activities to support interregional cooperation for industrial and technological innovations to increase the regions capabilities of improving their competitiveness and thus of contributing to overcome one of the basic problems of tackling with unemployment within the European Union.

45:Article 198 lit.a ,in: Treaty on European Union, Official Journal of the European Communities, July 29, 1992, C 191; Article 263 (ex Article 198 a)consolidated version of the Treaty establishing the European Community, December 24,2002, C 325/ 33 (138).

46: consolidated version of the Treaty on European Union, December 24,2002, C 325/10.

d) Achieving the single currency “Euro”

The European Union had taken a number of important steps to implement, by January 1, 1999, the ambitious goal of Economic and Monetary Union. As called for under the Maastricht Treaty on EU, stage II of Economic and Monetary Union began on January 1, 1994, when the European Monetary Institute (EMI), the precursor of the European Central Bank, was established. The EMI had to strengthen coordination of member-state monetary policies until monetary union was realized.

The EMI also prepared the numerous practical steps that had to be taken to produce the common monetary policy and the single currency “Euro”.

e) Enlarging the EU to the “Europe of the Twentyseven”

Another clear sign of good health- the Union has almost continually been involved in the process of enlarging :

Six countries signed the original Coal and Steel Community and EEC treaties: France, Germany, Italy, Belgium, Luxembourg, and the Netherlands. The United Kingdom-UK- was invited to participate in both, but declined. In 1961, the UK reversed its policy and announced its intention to join the Communities, but was then blocked by Charles de Gaulle for eight years.

In 1969, negotiations began- with the UK, Ireland, Denmark and Norway. The former three joined the Communities in 1972; the Norwegian public voted „no,, in a referendum.

Greece applied in 1975 and joined in 1981,

Spain and Portugal applied in 1977 and joined in 1986, “Europe of the Twelve”.

Sweden , Finland and Austria joined on January 1 , 1995, "Europe of the Fifteen"

Estonia, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, Czech Republic, Hungary and Cyprus joined on May 01, 2004, "Europe of the Twentyfive", and

Bulgaria and Rumania joined on January 01, 2007, "Europe of the “Twentyseven”.

f) Imperatives of making decision-making more effective:

Another success closely connected with the EU’s enlargement is the growing awareness of the imperatives of more efficient decision-making in the enlarged European Union

In close connection with the EU’s enlargement, there is a broadly shared common feeling in the Member States and within the EU’s institutions that decision-making in the institutions of the enlarged EU has to be made more effective. The Maastricht Treaty on European Union left many issues of how to make an enlarged European Union work unresolved and committed the EU member states to hold another conference- called Intergovernmental Conference - in 1996. The Amsterdam Treaty as a „bridging Treaty „ had left majority voting issues concerning voting in the Council of an enlarged EU still unresolved and committed the EU member states to hold the conference at Nice in December 2000 on institutional

adjustment .. There is broad consensus throughout the EU that the Nice Treaty's adjustments were not convincing, so that preparing a Constitution started.

g) Promoting democracy throughout Europe, but diluting forces of extreme nationalism at stake

Beyond economic issues, another great success of the EU is that it has not only fostered democracy in its internal procedures. It has **strengthened democratic roots throughout Europe.**

Greece, Spain, and Portugal, which suffered dictatorships for varying periods in the years after World War II, had been reinforced in their commitment to liberty by inclusion in the Union.

One of the great success stories of the post-war period is the growth of a flourishing, stable democratic order in Germany from the ashes of the Third Reich. In substantial part, this has been the story of Germany's integration into a larger community of like-minded countries, of the direction of its great energies and resources into the building of the common democratic and free market enterprise that the EU represents.

The EU has been **effective in defusing tensions within its member states. By fostering cohesive action, it has diluted forces of extreme nationalism that could threaten peace and stability and the old balance-of-power attitudes that were once the way of European politics.** The present day's crucial question is, however, whether the European Union will keep up its strength for consistently and effectively diluting forces of extreme nationalism among the growing number of young generation if major parts of the young generation is increasingly left with deficiencies in education, left without hope and perspectives, left behind as the defeated in the worldwide combat of competitiveness.

The role that the EU has played in **fundamentally changing the historic relationship between France and Germany is another proud achievement.** These two former enemies had fought three great wars in the past 120 years, twice involving the United States. Today their economies are inextricably bound together. A fourth war is inconceivable: Indeed, Franco-German cooperation is an essential link that binds the EU together.

France and Germany stand for the European method of integration and cooperation, channelling and balancing divergent national interests until the emerging of common positions called to be European.

What made and makes the European method attractive to Member States as well as to non-Member States is the convincing model of the Union of States that do respect the sovereign rights of any Member State no matter if big or small:

there is no imperial domination of any Member State, no conceivable majority of other Member States over minorities of Member States. Any convincing call for unanimous voting for the sake of vital national interest in a given case is, since the famous Luxembourg compromise in March 1966 to end the French policy of the "empty chair", being respected by the majority of Member States. It was exactly that European model of practising democracy and of the respect for the rule of law as principles governing the conduct of their relations, that made and makes the EU attractive to other democracies.

It is the model of integration and intergovernmental cooperation, the balancing of individual national positions and of the collectivity's position in due respect for the national sovereignty, that made the EU attractive namely to formerly communist countries under the

dominating imperial power of the former Soviet Union. Recurring to claim national vital interests to obstruct a majority voting decision can, however, be a drawback for the Union's decisiveness and effectiveness, on the other hand. The latter –negative- aspect of the still alive principle of nation state's sovereignty and claim for equal treatment – one country, one vote – can be detrimental for the cohesion of the enlarged European Union. To prevent this negative effect is one of the focal leftovers of the Intergovernmental Conference 1996/96 and of the Amsterdam and Nice TEU and subject to the endeavors to find a viable solution to ensure the enlarged Union's decisiveness and effectiveness in the course of the discussion about the Constitution's standstill.

Of course, the EU had not been alone in constructing throughout Western Europe successful barriers against communism and fascism:

NATO has been of immense importance as have been the Bretton Woods institutions. But the EU was and still is an integral and increasingly significant factor in the lasting success story. More and more frequently the EU offered and continues to offer to non-member states and to International Organizations a common address for decision-making on a broad range of issues of common interest for practical economic reasons – and, to a growing extent, for political, foreign policy and security reasons as well as for reasons of technical and financial cooperation with developing countries.

The EU is, e.g., the United States' largest trading and investment partner, bigger than Canada or Japan. The EU and the USA have a broadly balanced and diversified trade relationship worth nearly \$300 billion per year.

The EU is the biggest foreign investor in the USA — over one half of all foreign investments by EU investors is in the United States and over forty percent of all U.S. investment abroad is in EU countries. This broad range of mutual interests is the fact oriented background for the political will to strengthen the EU-USA relationship for the sake of common strategic interests, as the German EU President, Chancellor Merkel, announced on January 03, 2007, on the eve of her visit to the US President Bush.

6. EU institutions under the Maastricht TEU and the TEU consolidated version(2002)

The institutions of the European Union are, according to Article 5 of the consolidated version of the Treaty on European Union – TEU -:

The European Council, the European Parliament, the Council, the Commission, the Court of Justice and the Court of Auditors.

In addition, the Treaty establishing the European Community, is stipulating the institutions: the Economic and Social Committee, Article 257 TEC, the Committee of the Regions, Article 263 TEC and the European Investment Bank, Article 266 TEC. 47)

47: Article 5 TEU (ex Article E Maastricht TEU) Treaty on European Union, consolidated version, Official Journal of the European Communities, December 24, 2002, C 325/11; Article E Maastricht TEU, 92/C 191/01); Articles 257, 263 and 266 TEC, C 325/33 (136, 138, 139).

Identity shaping essentials of the EU are the institutions that are acting for the EU and legally binding the EU according to the principle of attributed but limited powers, attributed by the Treaty on EU ruling the objectives, tasks, institutions and legal instruments to implement the objectives and tasks of the EU through the instruments of the secondary law.

Related to institutions, the principle of attributed powers which are attributed , by the Founding Treaty on EU, to the European Union, and thus limited:

« The objectives of the Union shall be achieved *as provided in this Treaty* and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 5 of the Treaty establishing the European Community.», Article 2 Treaty on European Union 48

And Article 5 of the Treaty establishing the European Community states :

“Article 5 (ex Article 3b)

“ The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.”, Article 5 (ex-Article 3 b) Treaty establishing the European Community. **49**

And as far as **powers are attributed**, by the Founding Treaty on EU, **to the institutions** acting for the Union, the **principle of attributed powers** is stipulated as follows:

Article 5 (ex-Article E) Treaty on European Union:

“Article5 (ex Article E)

The European Parliament, the Council, the Commission, the Court of Justice and the Court of Auditor shall exercise their powers under the conditions and for the purposes provided for, on the one hand, by the provisions of the Treaties establishing the European Communities and of the subsequent Treaties and Acts modifying and supplementing them and, on the other hand, by the other provisions of this Treaty.”⁵⁰

48: consolidated version of the Treaty establishing the European Union, Official Journal of the European Communities, December 24,2002, C 325/11)

49: Consolidated version of the Treaty establishing the European Community,in: Official Journal of the European Communities, December 24,2002, C 325/33 (41); compare Amsterdam Treaty consolidated version of the Treaty establishing the European European Community, Official Journal of the European Communities, 1997, 97/C 340/03.

50:Official Journal of the European Communities C 325/11.

“Each institution shall act within the limits of the powers conferred upon it by this Treaty.” Article 7 (ex-Article 4) of the Treaty establishing the European Community,⁵¹

The EU’s institutional structure and the power of the institutions:

Looked at from a legal point of view the EU has three distinguishing characteristics:

.-First, the content of the EU is a **common internal political and legal order**, not just a treaty among states. The legal sources on which EU authority rests are not only

- the founding treaties, the EU’s primary law, but also
- the EU’s secondary legislation created on the basis of the founding treaties and written and published with approximately over 100.000 pages of legislation, and
- general legal principles, including human rights protection, developed by the European Court of Justice.

EU legislation applies to individuals and companies just as much as domestic legislation, in fact it takes priority over domestic legislation.

• Second, the **EU has highly developed instruments, institutions** such as the Commission, which exercise autonomous rights and can undertake and enforce obligations on their own authority. And it initiates legislation which is negotiated and adopted by the Council throughout a legislation procedure of co-decision divided between the Council and the European Parliament.

.No other organization, with the exception of sovereign states themselves, has this deep a structure.

Because the EU goes so deep and does so much, so routinely, it is easy to take for granted just how effective it is.

The impression one gets is that the EU is carrying on decision-making in almost the full range of areas in which one would expect any government to be engaged. More than half of the environmental legislation dealt with by national parliaments was not national legislation, it was and is **EU legislation created by the Member States within the institutions that are acting under the EU Treaty on the EU. Maintaining the institutional structure is of vital interest for ensuring that the European Union’s further develops in security, stability and democratic accountability, supposed, nevertheless, the Union’s identity shaping essentials will be strengthened: democracy, transparency and efficiency-**

⁵¹:Treaty establishing the European Community, Consolidated version of the Treaty establishing the European Community, December 24,2002, C 325/33 (42); compare:consolidated version of the Treaty establishing the European Community, Amsterdam Treaty on EU, 1997, 7/C 340/03.

Institutions, in detail

The institutional structure of the European Union is composed of a number of major institutions. The consolidated version of the Treaty on European Union

6.1 The Commission

The **Commission**, headquartered in Brussels, plays a central role as the executive institution within the institutional structure of the European Union.

The definitely “supranational” component of the European Union’s structure is the Commission, which is endowed with the powers

- to initiate and to implement the Council’s and the Parliament’s legislation
- implement the rules which the Council lays down, Article 202 TEC,
- to make regulations and issue directives, take decisions, make recommendations or deliver opinions, Article 249 TEC, and
- monitor the respect for the European Union’s law, Article 211 (ex-Article 155), Article 202 TEC, **52)**
-

The Commission’s supranational character is owed to its explicitly and implied attributed powers to act and decide independently from any directives from individual Member States, Article 213 paragraph 2:

“2. The Members of the Commission shall, in the general interest of the Community, be completely independent in the performance of their duties.

In the performance of these duties, they shall neither seek nor take instructions from any government or from any other body. They shall refrain from any action incompatible with their duties. Each Member State undertakes to respect this principle and not to seek to influence the Members of the Commission in the performance of their tasks.”

The Commission’s supranational independent character is confirmed by Article 218 paragraph 1 TEC as well, stating that “ 1. The Council and the Commission shall consult each other and shall settle by common accord their methods of cooperation. “

One of the Commission’s basic characteristics which basically differs from other institutions of the EU, because the Commission does not share it with other institutions, is its chief - power : it alone has the competence to propose EU legislation, Articles 251 and 252 TEC.

The Commission also implements EU laws and monitors its implementation and enforces them: it ensures that the member states are carrying out their obligations, taking them before the Court of Justice when necessary, Article 226 TEC.

The Commission also manages the finances of the European Union. **53)**

52: Official Journal of the European Communities, December 24, 2002, C 325/33 (119, 117); compare: Amsterdam consolidated version of the Treaty establishing the European Community, 1997 (97/C 340/03) ;Wiarda, *supra*, note 21.

53: *ibid.*, *supra*, note 21.

The Commission consists of 20 members, under the 2002 consolidated version of the Treaty establishing the European Community. Article 213 paragraph 1, subject to subsequent amendment scheduled to enter into force on January 01, 2005, and subsequently, when the Union would consist of 27 Member States on January 01, 2007, according to the provisions of the Protocol on the Enlargement of the European Union.

The Members of the Commission are appointed for a period of five years. Their term of office is renewable, Article 214 paragraph 1 TEC.

The governments of the Member States nominate by common accord the person they intend to appoint as President of the Commission; the nomination is to be approved by the European Parliament., Article 214 paragraph 2 TEC.

The governments of the Member States nominate, by common accord with the nominee for President, the other persons whom they intend to appoint as Members of the Commission, Article 214 paragraph 2 TEC.

The President and the other Members of the Commission thus nominated are subject as a body to a vote of approval by the European Parliament. After approval by the European Parliament, the President and the other Members of the Commission are appointed by common accord of the governments of the Member States., Article 214 paragraph 2 TEC.

The Commission is an institution acting on the basis of collegiality and headed by its President.

“The Commission shall work under the political guidance of its President, who shall decide on its internal organisation in order to ensure that it acts consistently, efficiently and on the basis of collegiality.”, Article 217 paragraph 1 TEC.

Article 217 TEC had been amended by the Nice Treaty on EU, strengthening the functional role of the President . **54)**

The responsibilities incumbent upon the Commission are structured for assorted fields of policies (such as external relations, industries, environmental protection, energy competition policy, agriculture, trade) and allocated among its Members by its President. The President may reshuffle the allocation of those responsibilities during the Commission's term of office. The Members of the Commission shall carry out the duties devolved upon them by the President under his authority, Article 217 paragraph 2 TEC

The Commissioners are heading General Directorates, a bureaucracy of nearly 16.000 civil servants **55)**

54: Official Journal of the European Communities, March 10, 2001, C 80/01 (21).

55: Salmon, Trevor C. (1996). European Union structures and institutions and their powers. In Philippe Barbour (Ed.), *The European Union handbook*. Fitzroy Dearborn Publishers.

The Commissioners can be compared with a national Government's members of the Cabinet, or with an American President's Cabinet Secretaries.

As to the **number of the Members of the Commission**, under the consolidated version of the (2002) Treaty establishing the European Community, the Commission must include at least one national of each of the Member States, but may not include more than two Members having the nationality of the same State, Article 213 paragraph 1 TEC.

The issue of the number of the Members of the Commission had already been discussed in the light namely of the needs in an enlarged Community throughout the negotiation on the Maastricht Treaty on European Union, finalizing the

“ DECLARATION on the number of members of the Commission and of the European Parliament

The Conference agrees that the Member States will examine the questions relating to the number of members of the Commission and the number of members of the European Parliament no later than at the end of 1992, with a view to reaching an agreement which will permit the establishment of the necessary legal basis for fixing the number of members of the European Parliament in good time for the 1994 elections. The decisions will be taken in the light, inter alia, of the need to establish the overall size of the European Parliament in an enlarged Community. “ **56**

The largest countries: Germany, the United Kingdom, France, Italy and Spain nominated two Commissioners until the Nice Treaty on EU entered into force. **57**

The European Commission was streamlined, with **the larger Member States renouncing their right to two commissioners on 1 January 2005** in a Union of the Twentyfive, and with the **introduction of a rotation system in a Union of the Twentyseven on 1 January 2007**:

According to the “Protocol on the enlargement of the European Union “, annexed to the Treaty on European Union and to the Treaties establishing the European Communities, Article 4 provisions concerning the Commission, paragraph 1 states that on 1 January 2005, after the accession of ten new Member States on 1 May 2004,

” The Commission shall include one national from each of the Member States”: which means 25 Commissioners, one national from each of the 25 Member States.

56: Treaty on European Union, Official Journal of the European Communities, 1992, (92/C 191/01).

57::Treaty of Nice, amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Official Journal of the European Communities, March 10, 2001, C80/01.

And Article 4 second paragraph states that “When the Union consists of 27 Member States,..”, on 1 January 2007:

“The number of Members of the Commission shall be less than the number of Member States. The *Members of the Commission shall be chosen according to a rotation system based on the principle of equality*, the implementing arrangements for which shall be adopted by the Council, acting unanimously.

The number of Members of the Commission shall be set by the Council, acting unanimously. **58)**

In theory, the larger countries’ advantage they enjoyed *de lege lata* ante the Nice Treaty to nominate two Commissioners, was not a matter of strengthened influential power of the respective Member State affecting the course of decisions within the Commission. For, each Commissioner must seriously renounce to depend on national interests and pledge to be committed to the interests of the European Union as a whole, Article 213 paragraph 2 TEC.

The exercise of these independent powers, however, is quite often facing conflicts when individual Commissioners are choosing sides when they appear to follow national wishes to oppose legislative initiatives of the Commission destined to strengthen e.g. environmental protection against alleged national interests representing the interests of the industries concerned as recently, on February 07-08, 2007, has been demonstrated when the Commission’s intention to launch Community legislation on reducing the CO₂ emission caused by vehicles from 160 g/km down to 130 g/km was under discussion throughout the EU.

The Commission negotiates for the Union in its areas of responsibilities, such as trade. The Member of the Commission, who is heading the Commission’s delegation in negotiations with third countries or with International Organizations, has to consider and to reflect the views of the EU member states. While negotiating, the representative of the Commission is at the same time trying to cobble together a common position among the 27 member states: -no easy task. But it is nevertheless impressive and helpful that the third countries have one interlocutor with whom to deal, who speaks for the European Union. Since the Treaties of Maastricht and Amsterdam, the Commission is representing the EU on an increasing range of issues including such areas as the environment, transportation, and development cooperation.

The Commission’s competence to represent the EU in negotiations with third states and organizations, however, has been reduced following the Amsterdam Treaty: the Presidency of the Council represents the Union in matters coming within the Common Foreign and Security Policy- CFSP-. The Presidency has to express the position of the Union in international organisations and international conferences. The Presidency is assisted by the Secretary-General of the Council, Mr. Solana, exercising the function of the High Representative for the CFSP. The Commissioner responsible for the EU’s external relations performed on the basis of the European Community objectives and tasks (the 1st pillar of the TEU) is to be fully associated

58: following the Nice Treaty consolidated version of the Treaty establishing the European Community, Official Journal of the European Communities, December 24, 2002, C 325/ 33 (163, 165, 166).

in CFSP-related tasks, so that the Council, represented by the Secretary-General exercising the function of the High Commissioner for the CFSP are held thus to be **practicing a division of work ensuring the consistency between the integration and the cooperation matters of the EU's external relations:**

As to the Council's and the Commission's joint responsibility for ensuring consistency, Article 3 Treaty on EU states what is meant by "ensuring consistency":

“Article 3

The Union shall be served by a single institutional framework which shall *ensure the consistency and the continuity of the activities carried out in order to attain its objectives* while respecting and building upon the *acquis communautaire*.

The Union shall *in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies.*

The Council and the Commission shall be responsible for ensuring such consistency and shall cooperate to this end. They shall ensure the implementation of these policies, each in accordance with its respective powers.” **59**

Article 18 of the Treaty on EU stipulates:**60**

“

1. The Presidency shall represent the Union in matters coming within the common foreign and security policy.

2. The Presidency shall be responsible for the implementation of decisions taken under this title; in that capacity it shall in principle express the position of the Union in international organisations and international conferences.

3. The Presidency shall be assisted by the Secretary-General of the Council who shall exercise the function of High Representative for the common foreign and security policy.

4. The Commission shall be fully associated in the tasks referred to in paragraphs 1 and 2. The Presidency shall be assisted in those tasks if need be by the next Member State to hold the Presidency.”

And Article 24 TEU, amended by the Treaty of Nice, does provide the Council with the Commission's assistance to open negotiations to conclude an agreement with one or more States or international organisations. **According to Article 27 TEU the Commission**

“

shall be fully associated with the work carried out in the common foreign and security policy field.“

59: consolidated – after the – Nice Treaty on EU had been signed in 2001- version of the Treaty on EU, Official Journal of the European Communities, December 24, 2002, C 325/5 (11).

60 consolidated version of the Treaty on EU, Official Journal of the European Communities, December 24, 2002, C 325/5 (16).

And cooperative ties between the Council and the Commission are required for operating “enhanced cooperation “ under Article 27 a TEU : calling upon the Member States operating enhanced cooperation on Common Foreign and Security Policy matters to respect:

“..

- the principles, objectives, general guidelines and *consistency of the common foreign and security policy* and the decisions taken within the framework of that policy,
- the *powers of the European Community*, and
- consistency between all the Union's policies and its external activities.* “ **61**

The Commission plays other roles as well. It effectively serves as the EU’s antitrust authority

It has independent authority to provide funds in emergency situations both inside the EU and to third countries: for example, the Commission has sent emergency aid to affected areas following recent warfares in Afghanistan and Africa.

The Commission also proposed the Delors White Paper - a detailed program for dealing with Europe’s recession and unemployment, although it was and is up to the member states to implement the program.

The Commission plays an equally important planning and coordinating role beyond economic issues ,eg. in health issues ; it released an outline for a coordinated EU international strategy towards AIDS.

And as to the priority field of energy policy, the Commission released in March 2006 the Energy Green Paper for a European strategy for sustainable, competitive and secure energy including tackling with climate change and commitment to coherent external energy importing policy. And one of the priority activities of the Commission run at the present time is to convince Russia to ratify the European Energy Charta and to reassure the European Union that there are no further doubts about Russia’s commitment to ensure the secure gas and oil supplies destined to Member States of the European Union.

6.2 The Council

The prime decision-making body within the EU is the **Council. 62**

The Council consists of a representative of each Member State at ministerial level, authorised to commit the government of that Member State, Article 203 TEC:

61: Article 27 a TEU, Official Journal of the European Communities, December 24,2002, C 325/20.

62: Article 202 TEC, consolidated version of the Treaty establishing the European Community, Official Journal of the European Communities, December 24,2002, C 325/33 (117).

The Council is endowed with the task to ensure that the objectives set out in the Treaty establishing the European Community are attained, Article 202 TEC. The Council, according to Article 202 TEC,

- has to ensure coordination of the general economic policies of the Member States;
- has power to take decisions;
- confers on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down.

The Council meets when convened by its President on his own initiative or at the request of one of its members or of the Commission, Article 204 TEC..

Its sessions are held in varying compositions of multiple committees of national ministers according to the specific agenda and item under consideration..

The Council's **legislative function** is to **jointly adopt European Community legislation and budget, together with the European Parliament, Article 249 TEC. 63**

As the Council is the Union's institution destined to be the common forum where the Member State's present national interests to be discussed and negotiated within and decided by this institution, it is exactly this institution which is legitimated to let different national interests clash and to channel them through a common procedure of negotiating and finding consent. 64

And that is, in the view of the method of integration, meant to be an institutionalized procedure to automatically direct differing national interests along a channel of common procedural rules, a set of established methods for conducting common policies: being the forum to fight for national interests, but committed to the common objective to reach consent to any given item on the common agenda.

Once, after consent has been reached by unanimous voting or qualified majority-voting, the result of the negotiations is the European Union Council's decision and this final agreement can be called the "European" solution. Attaching the label "European solution" to the final agreement the Member States have achieved reminds the fact that it the final agreement is often enough the common denominator as the smallest one that appeared to be reachable in a given item on the Council's agenda the discussion of which has reflected diverging national positions on the issue.

Achieving a common denominator even though it might be regarded as the smallest possible one is not to be underestimated: In the course of the process of negotiating it is the successful and stabilizing effect of the European way of confronting and channelling within the Council and according to common procedures of presenting and negotiating, different national views and interests and to attempt at finding the common denominator to mark the common European position. It is this European way of

63: TEC, consolidated version, Official Journal of the European Communities, December 24, 2002, C 325/33 (132).

64: *ibid.*supra.note 63.

common policy making which is an attractive basic characteristic distinguishing attribute of the European Union setting example serving as a pattern of cooperation instead of hostile confrontation for stabilizing relations between States in other parts of the World.

Each Member State in turn holds the office of President for a term of six months rotating in a sequence as decided by the Council acting unanimously, Article 203 TEC.

The Presidency is influential and enjoys not a merely formal status. The quality of and the extent to what the Presidency is using its political steering function is demonstrated through influencing the Council's agenda, and through coordinating the preparation and the exchange of national positions on issues in the field of the Common Foreign and Security Policy and Justice and Home Affairs . It is up to each country in chair to use the Presidency as the chance for its own country as well as a chance for the European Union as a whole to act as the one visible and the one audible voice of the European Union in the field of international relations. **This political potential of the Presidency if it is used inevitably increases competitive and cooperative communication between the Council and the Commission on matters of how to secure consistency in conducting the Union's comprehensive external relations,** as Article 27 TEU states that

“

the Commission shall be fully associated with the work carried out in the common foreign and security policy field.“

And cooperative ties between the Council and the Commission are required for operating “enhanced cooperation “ under Article 27 a TEU : calling upon the Member States operating enhanced cooperation on Common Foreign and Security Policy matters to respect:

“..

—the principles, objectives, general guidelines and *consistency of the common foreign and security policy* and the decisions taken within the framework of that policy,
—the *powers of the European Community*, and
—*consistency between all the Union's policies and its external activities.* “ **65**

The Council meets more than at least twice a year. The importance of the sheer frequency that the Council meets should not be underestimated. The leading Council, the General Affairs Council - which is made up of member-state foreign ministers –has been meeting in Brussels more than 10 times during November and December of last year alone. The Council members see each other literally more often than they sometimes see their own government's ministers.

65:Article 27 a TEU, Official Journal of the European Communities, December 24,2002, C 325/20

Including the other Council policy areas - agriculture, fisheries, environmental, and others, the EU Council met over 100 times in 2006. This has installed a habit of cooperation that is pushing European integration forward. The governments have become accustomed to instinctively dealing with problems at the EU level.

The Council's meetings are prepared by the Committee of Permanent Representatives of the Member States (COREPER), Article 207 paragraph 1 TEC.

The COREPER members as far as the Ambassadors are meeting, are high ranking diplomats representing their national Ministries for Foreign Affairs. The COREPER is meeting regularly to discuss the Commission's legislative initiatives, proposals for new laws and policies, and to negotiate different positions held between Member States. The COREPER is, basically, keeping off public awareness. The COREPER is despite or just because of this special skill, one of the most powerful institutions working within the institutional structure of the European Union. For, once the COREPER has reached consent, this item is put on the Council's agenda as an "**A-point**", which is signalling the Council's members, the Ministers, that, in the Council's session, they can easily decide with speed and efficiency. **66 (66:** see Lieshout, R. Elgar Edward. (1999). The struggle for the organization of Europe: The foundations of the European Union.)

The Council is assisted by a General Secretariat, under the responsibility of a Secretary-General, High Representative for the common foreign and security policy, who shall be assisted by a Deputy Secretary-General responsible for the running of the General Secretariat. The Secretary-General and the Deputy Secretary-General are appointed by the Council acting unanimously. Article 207 paragraph 2 TEC.

Voted on proposals from the Commission, once adopted by the Council and published by the Official Journal of the European Community, the EU legislation then takes effect. Unlike international organizations, the EU's big states' votes count for more than small states' votes - through a complex system of

- **straight majority vote** on a limited number of issues, mainly matters concerning the removal of barriers to the Internal Market through harmonization of national laws
- **qualified majority voting**, required for most other matters
- **unanimous voting** required for sensitive, politically crucial issues, reflecting national interests claimed as vital interests.

66: see Lieshout, R. Elgar Edward. (1999). The struggle for the organization of Europe: The foundations of the European Union.

Before the European Union enlarged from the Fifteen to the EU of the Twentyfive on May 01, 2004, the **Council´s voting procedures where the Council was required by a qualified majority, the votes of its members were weighed according to Article 205 2nd paragraph TEC: 67)**

Belgium 5
 Denmark 3
 Germany 10
 Greece 5
 Spain 8
 France 10
 Ireland 3
 Italy 10
 Luxembourg 2
 Netherlands 5
 Austria 4
 Portugal 5
 Finland 3
 Sweden 4
 United Kingdom 10.

Before the “Twentyseven “ enlargement of the European Union and before the Nice Treaty on EU entered into force, for their adoption, acts of the Council required at least:

- 62 votes** in favour where the Treaty on European Community required them to be adopted on a proposal from the Commission,
- 62 votes** in favour, **cast by at least 10 members, in other cases.**

Before the Nice Treaty on EU, each Member State had been assigned the number of votes as quoted above and roughly in proportion to the population of that Member State. Out of the total of the 87 votes were 62 votes required for voting on matters requiring “qualified majority voting” in the Council. The **consequence of “qualified majority voting”** was that, unlike international organizations and unique, **EU Member States could be outvoted on most types of legislation.** This was **the case just for larger countries:**

- **qualified majority voting was meant to be a compromise in favor of larger Member States claiming that a weighting of votes should reflect their larger populations by a proportionally larger vote than the vote of smaller States.**
 - **Qualified majority voting, however, favored smaller states** because at least one small Member State was required to vote joining a number of large States to reach the required 62 votes. Whereas a group of small States needed at least one large State to reach the required 62 votes. E.g., even if large Member States like France or Germany voted against a proposal from the Commission - say on qualifications for architects - they still were bound if the other Council members voted „yes,,
-

Article 205 TEC had been amended, on 1 January 2005, in accordance with the “ Protocol on the enlargement of the European Union “ **68** According to the Protocol’s Article 3 “Provisions concerning the weighting of votes in the Council “ **the votes are weighted as follows:**

“ .Where the Council is required to act by a qualified majority, the votes of its members shall be weighted as follows:

Belgium 12
Denmark 7
Germany 29
Greece 12
Spain 27
France 29
Ireland 7
Italy 29
Luxembourg 4
Netherlands 13
Austria 10
Portugal 12
Finland 7
Sweden 10
United Kingdom 29“

The votes in the Council are weighted under the Nice Treaty on European Union, according to the “20. Declaration on the enlargement of the European Union “, attached to the Nice Treaty on EU, corresponding to the following table “ **for an enlarged Union of 27 Member States “ with the accession of Bulgaria and Rumania on January 01, 2007**

“THE WEIGHTING OF VOTES IN THE COUNCIL

Members of the Council/Weighted votes (weighted vote before Twentyseven enlargement)

Germany 29 (10)
United Kingdom 29 (10)
France 29 (10)
Italy 29 (10)
Spain 27 (8)
Poland 27
Romania 14
Netherlands 13 (5)
Greece 12 (5)
Czech Republic 12
Belgium 12 (5)
Hungary 12
Portugal 12 (5)
Sweden 10 (4)
Bulgaria 10
Austria 10 (4)
Slovakia 7
Denmark 7 (3)
Finland 7 (3)
Ireland 7 (3)
Lithuania 7

68: Official Journal of the European Communities, December 24, 2002, C 325/33 (163, 164, 165 .

Latvia 4
 Slovenia 4
 Estonia 4
 Cyprus 4
 Luxembourg 4 (2)
 Malta 3
Total 345

Acts of the Council, for their adoption under the Nice Treaty, require :

“

Acts of the Council shall require for their adoption at least 258 votes in favour, cast by a majority of members, where this Treaty requires them to be adopted on a proposal from the Commission. In other cases, for their adoption acts of the Council shall require at least 258 votes in favour cast by at least two-thirds of the members. When a decision is to be adopted by the Council by a qualified majority, a member of the Council may request verification that the Member States constituting the qualified majority represent at least 62 % of the total population of the Union. If that condition is shown not to have been met, the decision in question shall not be adopted. “ **69**

“Thresholds” had been set up according to the “Declaration on **the qualified majority threshold** and the **number of votes for a blocking minority in an enlarged Union**”:

“Insofar as all the candidate countries listed in the Declaration on the enlargement of the European Union have not yet acceded to the Union when the new vote weightings take effect (1 January 2005), the *threshold for a qualified majority will move*, according to the pace of accessions, from a percentage below the current one **to a maximum of 73,4 %**. When all the candidate countries mentioned above have acceded, the blocking minority, in a Union of 27, will be raised to 91 votes, and the qualified majority threshold resulting from the table given in the Declaration on enlargement of the European Union will be automatically adjusted accordingly.” **70**

Since Maastricht, the Council had become even more important as the **center for decision-making on the EU’s Common Foreign and Security Policy and Police and Judicial Cooperation in Criminal Matters** , Articles 11, 13, 14, 15, 23 on CFSP; Articles 29 and 34 paragraph 2 on JCCM , Treaty on European Union, **71**

When the EU sets policy on Somalia, on the Democratic Republic of Congo or towards Israel-Palestine or Iraq, it is now, since the accession of Bulgaria and Rumania (January 01,2007) set by the twentyseven foreign ministers, plus the Commission, in the Council.

The Council had also taken up „third pillar,, issues such as coordination of immigration, refugee, and asylum policy; and the fight against terrorism, organised crime, and drug trafficking.

69:Treaty of Nice amending the Treaty on European Union, The Treaties establishing the European Communities and certain related acts,2001, Official Journal of the European Communities, March 10, 2001, C 80/01 (80, 82,83).

70:ibid. C 80/01 (85).

71:consolidated version,Official Journal of the European Communities, December 24,2002, C 325/13- 21; C 325/21- 24).

6.3 The European Parliament (EP)

In addition to the Commission and the Council, the European Union has a Parliament. The European Parliament consists of “representatives of the peoples of the States brought together in the Community” ,

“ The number of Members of the European Parliament shall not exceed 732. “,Article 189 TEC.**71**

The Parliament is considered the Union’s most democratic institution, because,at present, it is the only directly elected institution in the European Union:

the representatives in the European Parliament of the peoples are “ elected by direct universal suffrage.”,Article 190 paragraph 1 TEC **72**

The number of representatives elected in each Member State is distributed among the Member States according to Article 190 2nd paragraph TEC, correspondingly to their populations.**73**

Belgium 25

Denmark 16

Germany 99

Greece 25

Spain 64

France 87

Ireland 15

Italy 87

Luxembourg 6

Netherlands 31

Austria 21

Portugal 25

Finland 16

Sweden 22

United Kingdom 87.

In the event of amendments to this paragraph,the number of representatives elected in each Member State must ensure appropriate representation of the peoples of the States brought together in the Community.”

Article 190 2nd paragraph TEC had been amended,on 1 January 2004,in accordance with the “Protocol on the enlargement of the European Union “:

71:consolidated version of the Treaty establishing the European Community, Official Journal of the European Communities, December 24,2002,C 325/33 (113).

72: *ibid.*, *supra*,note 71,C 325/33 (114).

73: Article 190 paragraph 2 TEC;Wiarda, *supra*, note 21.

The Protocol's Article 2 "Provisions concerning the European Parliament" distributes the number of representatives elected in each Member State as follows:

"On 1 January 2004 and with effect from the start of the 2004 to 2009 term, in Article 190(2) of the Treaty establishing the European Community and in Article 108(2) of the Treaty establishing the European Atomic Energy Community, the first subparagraph shall be replaced by the following:

'The number of representatives elected in each Member State shall be as follows:

Belgium 22

Denmark 13

Germany 99

Greece 22

Spain 50

France 72

Ireland 12

Italy 72

Luxembourg 6

Netherlands 25

Austria 17

Portugal 22

Finland 13

Sweden 18

United Kingdom 72'. **74**

The total number of representatives in the European Parliament for the 2004 to 2009 term is equal to the number of representatives specified in Article 190(2) of the Treaty establishing the European Community plus the number of representatives of the new Member States resulting from the accession treaties signed by 1 January 2004 at the latest, Article 2 "provisions concerning the European Parliament" of the "Protocol on the enlargement of the European Union", **75**

The distribution of the number of representatives elected in each Member State for an enlarged Union of 27 Member States- with the accession of Bulgaria and Romania on 1 January 2007, is - under the Treaty establishing the European Community, consolidated version December 24, 2002, following the Nice Treaty on European Union, according to Article 190 second paragraph TEC and the "**Declaration on the enlargement of the European Union**", attached to the Nice Treaty on EU, **76** - as follows:

74: *ibid.*, supra, note 71, C 325/33 (163).

75: *ibid.*, C 325/33 (163).

76: *ibid.*, supra, note 69, C 80/01 (80, 81),

EU of the Twentyseven:

Germany	99	unchanged
United Kingdom	72	(87) before Twentyseven enlargement
France	72	(87) before Twentyseven enlargement
Italy	50	(87)
Spain	50	(64)
Poland	50	accession 2004
Romania	33	
Netherlands	25	(31) before Twentyseven enlargement
Greece	22	(25)
Belgium	22	(25)
Portugal	22	(25)
Hungary	20	accession 2004
Czech Republic	20	accession 2004
Sweden	18	(22) before Twentyseven enlargement
Bulgaria	17	accession 2007
Austria	17	(21) before Twentyseven enlargement
Slovakia	13	accession 2004
Denmark	13	(16) before Twentyseven enlargement
Finland	13	(16) before Twentyseven enlargement
Ireland	12	(15) before Twentyseven enlargement
Lithuania	12	accession 2004
Latvia	8	accession 2004
Slovenia	7	accession 2004
Estonia	6	accession 2004
Cyprus	6	accession 2004
Luxembourg	6	unchanged
Malta	5	

Total 732

The direct elections to the European Parliament are held without political parties at European level, though already (**Maastricht Treaty**) **ex-Article 138 a** and (**Amsterdam**) **Article 191** of the consolidated version of the Treaty establishing the European Community had underlined the importance of political parties at European level which do not exist yet:

“

Political parties at European level are important as a factor for integration within the Union. They contribute to forming a European awareness and to expressing the political will of the citizens of the Union.” **77)**

Setting a signal towards organizing political parties at European level, the Nice Treaty on European Union had added a second paragraph in Article 191 TEC:

77:Article 191 TEC consolidated version of the Treaty establishing the European Community, Official Journal of the European Communities,1997, **C 340/03**.

“The Council, acting in accordance with the procedure referred to in Article 251, shall lay down the regulations governing political parties at European level and in particular the rules regarding their funding.” **78**

Over the years the European Parliament’s prerogatives have increased steadily , most notably by the Single European Act of 1986 and by the Amsterdam Treaty:

The European Parliament and the Council jointly adopt European legislation and budget, Articles 249, 251 , 252 **79**) . The Amsterdam Treaty on EU gave the European Parliament the right to a second reading of decisions taken by the Council of Ministers by a qualified majority on matters related to the single market, social policy, economic and social „cohesion,, and the community’s research program:Parliamentary amendments (or rejection) would have to stand unless modified by the Council of Ministers within three months of the second reading.

In addition to the **Parliament’s co-decision role in the European Community’s legislation**, the European Parliament contributes **an advisory and consultative role to the decision-making of the Union’s Council and Commission**. The Parliament votes on the accession of new Member States and on the European Community’s agreements concluded with non-Member countries.

The Parliament’s powers,however, still are significantly less than those of the Commission and the Council. The Parliament cannot introduce or enact laws, nor can it raise revenue independently.

The Parliament’s role in **deciding the Community budget** was expanded in 1994 fall by an inter-institutional agreement giving the Parliament more control over non-agricultural spending and, for the first time, the right to suggest changes in agricultural spending as well.

Although the Parliament does not have the right to initiate legislation, the Parliament’s political influence should not be underestimated. Its political weight in influencing public opinion in Europe much depends on the Parliament’s and its leading Members of Parliament authority acquired through professional contributions to the dialogue held between the institutions and held on public fora for discussions on European matters. For, since the Maastricht Treaty the European Parliament is able to confer more closely with the Council on legislation, it can amend new laws and has a definitive veto.

78: Article 191 2nd paragraph TEC, consolidated version of the Treaty establishing the European Community,Official Journal of the European Communities, December 24,2002, C 325/33 (115).

79: ibid,supra,note 78, C 325/33 (132, 133, 134).

Also since Maastricht, the Parliament has gained the right to **approve or disapprove the members of the Commission as a body**: it has a limited function of supervising the Commission which may lead to the Commission's resigning as a body:

“

Article 201 (ex Article 144)

If a motion of censure on the activities of the Commission is tabled before it, the European Parliament shall not vote thereon until at least three days after the motion has been tabled and only by open vote.

If the motion of censure is carried by a two-thirds majority of the votes cast, representing a majority of the Members of the European Parliament, the Members of the Commission shall resign as a body. They shall continue to deal with current business until they are replaced in accordance with Article 214. In this case, the term of office of the Members of the Commission appointed to replace them shall expire on the date on which the term of office of the Members of the Commission obliged to resign as a body would have expired.”

The European Parliament also appoints the European ombudsman to inspect operations. **80**

6.4. The European Council

The Heads of State or Government of the Member States of the European Communities established the European Council in 1974, nearly twenty years before they signed the Maastricht Treaty establishing the European Union in 1992. The European Council was established “ to provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof. “, Article D Maastricht Treaty on EU, **81** left unchanged by Article 4 Amsterdam Treaty and Nice Treaty on European Union **82**

The European Council is composed of the Heads of State or Government of the Member States and of the President of the Commission. **83** (**83: ibid.**) They are assisted by the Ministers for Foreign Affairs of the Member States and by a Member of the Commission. The European Council shall meet at least twice a year, under the chairmanship of the Head of State or of Government of the Member State which holds the Presidency of the Council. Items are put on the European Council's agenda to define the Union's long-term strategic objectives.

80: Salmon, Trevor C. (1996). *European Union structures and institutions and their powers*. In Philippe Barbour (Ed.), *The European Union handbook*. Fitzroy Dearborn Publishers.

81: Official Journal of the European Communities, July 29, 1992, C 191.

82: Official Journal of the European Communities, December 24, 2002, C 325/5 (11);
Salmon, Trevor, (1996). ;ibid.,supra,note 80.

83: ibid.,supra,note 82.

The European Council is basically an intergovernmental conference rather than a formal Union's institution. It is, however, or just because of its outstanding political role of demonstrating the nation states' sovereignty ruling the Founding Treaties, ruling the Union's destiny, that the European Council is the supreme and most powerful "institution" in the European Union's decision-making system to ensure the political momentum whenever

needed: expression of the Member States cooperative approach to stabilize the fruitful tensions between the integration method and the intergovernmental method of cooperation within the multilevelled system of the Union's institutions and decision-making procedures and the nation state level of sovereign Member States.

6.5 The Court of Justice

The **Court of Justice** is provided for by Articles 5 and 35 Treaty on EU-TEU_84 and by Article 220 Treaty on European Community- TEC-, **including the Court of First Instance of the European Communities**, as provided for by Article 47 of the Protocol on the Statute of the Court of Justice (2001) 85) The European Union's Court of Justice is not to be confused with the European Court of Human Rights in Strasbourg .

The Court of Justice is one of the lesser-known institutions of the EU. But it plays a fundamentally important role and has its own influence over the development of the EU: the Court has substantially contributed to deepening the European Union through its basically constitutional rulings on the principle of effectiveness in Community law and ensuring the Member States comply with the Court's decisions and not to undermine Community regulations and directives.

Separate from all other European Union courts and national courts, it has no jurisdiction over the interpretation and application of national laws.

The Court's role is to enforce the Founding Treaty on EU, the primary source of EU law. It does this by ruling on disputes between

- the institutions of the EU , Article 230 second paragraph: The Court of Justice has "jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers."

84: consolidated version of the Treaty establishing the European Union, Official Journal of the European Communities, December 24, 2002, C 325/5 (11, 24)

85: *ibid*, C 325/33 (122 and 167 (177)).

- Member States, Article 227 first paragraph TEC: “A Member State which considers that another Member State has failed to fulfil an obligation under this Treaty may bring the matter before the Court of Justice.”
- the Commission and Member States, Article 226 TEC : if the Commission considers that a Member State has failed to fulfil an obligation under the TEC ,the Commission may bring the matter before the Court of Justice. And Article 228: If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.
- Individuals, corporations and the EU, Article 230 4th paragraph TEC: “Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.”
- in addition, the member state courts are obliged to refer cases to the European Court when interpretation of EU legislation is in question, by giving preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under the TEU and on the validity and interpretation of the measures implementing them, Article 35 first paragraph TEU.

The Court including the Court of First Instance of the Communities decide up to 300 cases each year’ but the Court’s influence goes further than these because its decisions bind the member states in dealing with all similar cases.

The **development of EU law by the Court** is a fascinating subject in itself. Just to give a flavor of what the Court has achieved over the years, I would mention three landmark decisions:

- In 1963, in “van Gend en Loos,, the Court decided that EU legislation applies directly to individuals, not just to the member states to carry out.
- In 1964, in „Costa,, - a case brought by one Italian over a \$2.80 electric bill, the Court declared that, in case of conflict, EU law prevails over member state law.
- And in 1992, in „Francovich,, the Court decided that member states are financially liable to individuals for their failure properly to enforce EU legislation: „Francovich,, will have tremendous impact on making sure that member states carry out their EU obligations.

(More detailed see below under 6.)

The record of compliance by the member states with European Court decisions is extremely good :the few problems involve slowness rather than defiance.

Even in cases in which the member state governments have strong disagreement with the Court’s rulings, they yield to them, probably because they know that to undermine the Court’s authority would threaten the EU’s foundations. Does the Court dare to make controversial decisions? In 1991, a UK court, under instruction from the European Court in Luxembourg in dealing with a case involving Spanish fishermen, issued an injunction against an act of Parliament - for the first time in British history.

A more intensive discussion of the nature and development of EU law will follow under:

V. Deficiencies : the situation after the signing of the Nice Treaty

1. Introduction: The enlargement issue and the European Union's deficiencies in democracy, transparency and decisiveness in the Union's political and institutional structure

The deficiencies that exist in the political structure of the European Union are obvious. The Article 1 TEU, since Maastricht, Amsterdam and the Nice TEU continuously describes the Treaty on EU to be a new stage in the process of creating an 'ever closer union among the peoples of Europe'. And political leaders never forget solemnly to declare their commitments to the European integration. The European Union, however, does not enjoy popular support at an all time high level. Within the European Union, among countless individuals, among experts and political leaders, there is much critical comment on the EU as politically distant from the citizen, not functioning efficiently, politically and administratively.⁸⁶

The future of the European Union is the vital issue of the common future of the citizens in the European Union. Opinion polls consistently show that the Union citizens are severely concerned about employment, maintaining peace and security in Europe, and fighting organized crime and drug trafficking.⁸⁷

The common future of the citizens in a safe and wealthy EU requires a political decision-making system ensuring a balance between the two opposed levels of integration and intergovernmental cooperation, a balance which allows to channel diverging national interests for the emerging of transparent, democratic and efficient political decision-making. But it does not exist.

88)

The European Union's policy-making and decision-making is a process which is open to more than one interpretation and does internally display a lack of consistency. An EC regulation or directive is initiated by the Commission, the European Parliament may want amendments, and the Council has the final say, the Council approves or disapproves. And as far as law-making under the EC Treaty (the 1st pillar under the roof of the TEU) is concerned, the European Council is an institution set outside the institutional structure and decision-making procedures as ruled by the EC Treaty. The European Council may choose to disregard the EC-level institutions and enact policies which may completely expose this EC process to danger.

Sudden crisis often cast a shadow over the EU's institutions agenda which is full of unresolved items.⁸⁹ The Member States' representatives are lost in arguing in attempts to bargain package –deals during Council sessions in the pursuit of victories the representatives at Cabinet Minister level may present to the TV's in their home countries.⁹⁰⁾

86: Calleo, David P. (2001). *Rethinking Europe's Future*. Princeton: Princeton University Press.

87: Grabbe, Heather. *Policy brief: Preparing the EU for 2004*. London: Centre for European Reform.

88: Nectoux, Francois. (1996). *The politics of European integration after Maastricht*. In Philippe Barbour (Ed.), *The European Union handbook*. Fitzroy Dearborn Publishers.

89: *ibid.*

90: *ibid.*

Employment, social security , maintaining peace and security in Europe, and fighting organized crime and drug trafficking are issues causing much political distress for Heads of State or Government who often are reluctant to go beyond statements of mere commonplace.

Most items put on the Council's agenda require quite an amount of political, institutional and financial inputs in fields of policies that does not arouse most people's interest.

. 91)

New policies do not meet with general acceptance of new policies. The main political institutions have not established a framework for smoothly and efficiently running relationships amongst themselves. 92

Continuously held discussions about the European Union's "democratic deficits" are weakening the Union's legitimacy, as the European Parliament is the only directly elected institution in the Union, but it is not a genuine legislative body; and the Council is the legislator, but this institution is not held responsible in direct elections to the Council, as its Members, national Governments' members are directly elected and responsible to their national electorate. 93) Within the Union's institutions transparent debates are lacking. National Governments being subject to the regular checks and balances in matters of national policies debated and decided in the national institutions of their home country. But as far as European matters are debated and decided within the European Union's institutions, regular checks and balances sdo not exist at Union level. 94)

European Community regulations and /or directives are regularly used to be invoked by national governments to triumph over or to reject proposals put to a vote by the parliamentary opposition at home, which does not strengthen the Union's legitimacy. 94) (94: *ibid.*)

The Union's Common Foreign and Security Policy is conducted without a clear and decisive institutional framework to develop foreign policy objectives, or to declare a common interest and to decide on a common position and common action as coherent response to common challenges. 95)

There is no proper proportion to the respective numbers of the Member States' population regarding the voting strength in the Council. As the Presidency of the Council is rotating in a six months' turn, the emphasis given to specifics put on the Council's agenda differs every six months as a new Presidency shows the ambition to advance political issues that often enough cannot be resolved within a period of six months' time. 96

The Presidency being currently in office, however, uses a new procedure destined to ensure stability and continuity in planning and implementing the Council's

91: Nectoux, Francois. (1996). The politics of European integration after Maastricht. In Philippe Barbour (Ed.), *The European Union handbook*. Fitzroy Dearborn Publishers.

92: Nectoux, supra, note 91.

93: Calleo, *ibid.*, supra note 86.
Press.

94: *ibid.*, supra, note 86.

95: Calleo, *supra*, note 86.

96: Nectoux, *supra*, note 91)

agenda: the current Presidency is used to meet with the outgoing Presidency, as well as with the incoming Presidency: the “Troika “. So did the current President of the Council “General Affairs”, the German Minister for Foreign Affairs, Walter Steinmeier, when he negotiated in Moscow and Kiev heading the European Union’s Troika delegation.

In general practice, the “Troika”has not yet fully achieved stabilizing the Council agenda nor strengthening the Union’s diplomacy’s effectiveness.

The European Union’s political leaders have been aware of these deficiencies. As noted above, they had addressed the deficiencies early after the Maastricht Treaty on EU entered into force, opening the preparations for holding the Intergovernmental Conference 1996/97 destined to find solutions to amend the TEU in order to make the enlarged Union work. As noted above, the Amsterdam Treaty on EU had leftovers, it left unresolved mainly issues of how to improve the efficiency of the Council’s decision-making. **97**

The Nice Treaty on EU had achieved some improvements, but, in the end, is suffering from deficiencies, too **98**:

The European Commission was,as noted above, streamlined, with the larger Member States renouncing their right to two commissioners on 1 January 2005 in a Union of the Twentyfive, and with the introduction of a rotation system in a Union of the Twentyseven on 1 January 2007. **99**

The Nice Treaty , as noted above, also redistributed the number of representatives elected in each Member State for the European Parliament and re-weighted the votes in the Council to provide for a more proportionate distribution, Articles 2 and 3 of the “Protocol on the enlargement of the European Union”. **100**

The votes of the larger Member States in the Council, however, in a traditional compromise, tripled while those of smaller members doubled.

The Nice Treaty also extended qualified majority voting (QMV), and it also raised the threshold for passage. **101**

97: Calleo, *supra*, note 86.

98:Official Journal of the European Communities, March 10,2001, C80/01.

99:following the Nice Treaty consolidated version of the Treaty establishing the European Community,Official Journal of the European Communities, December 24,2002, C 325/ 33 (163, 165, 166).

100: Treaty of Nice, “Declaration on the enlargement of the European Union”, Official Journal of the European Cmmnities, March 10,2001, C 80/80 (81,82);consolidated version of the Treaty establishing the European Coummunity- TEC-,Official Journal of the European Community, December 24,2002, C 325/ 33 (163, 164,165).

101: *ibid.*,*supra* note 100.

The qualified majority threshold referred to in the second subparagraph of Article 205(2) of the Treaty establishing the European Community, expressed in votes does not exceed the threshold resulting from the table in the Declaration on the enlargement of the European Union, included in the Final Act of the Conference which adopted the Treaty of Nice. **102**

Qualified majority votes face a triple hurdle:

Since 1 January 2005, qualified majority votes had to represent 73.4% of weighted vote, two thirds majority among member states, as well majority that collectively represents 62 percent of the total of the EU population. Since 1 January 2007, the blocking minority in a Union of 27, is raised to 91 votes, and the qualified majority threshold resulting from the table given in the Declaration on enlargement of the European Union was automatically adjusted accordingly. **103**

These reform efforts done by the Nice Treaty on EU soon were facing doubts whether the achievements of the reforms would be sufficient to respond to a new range of challenges: In December 2002, the European Union invited ten new countries to accede to the Union. The accession took effect on 1 May 2004. **104**

The Member States when signing the Maastricht Treaty on EU, and conducting the Intergovernmental Conference 1996/97 to amend the Maastricht Treaty in the light of the future enlargement, had already foreseen the challenges following the Union's future enlargement. But they remained without result concerning the challenge to improve the decision-making in the Council of an enlarged Union with ten new Members of an Union of the Twentyfive and, with the accession of Romania and Bulgaria to a Union of the Twentyseven. Without improvements even of what the Nice Treaty on EU had achieved, the EU would become more difficult to govern because it would be larger and more diverse.

102: Article 3 “ Provisions concerning the weighing of votes in the Council “ of the Protocol on the enlargement of the European Union”, attached to the consolidated version of the Treaty establishing the European Community, Official Journal of the European Communities, December 24, 2002, C 325/33 (163, 164, 165); and the Nice Treaty on EU, **Declaration on the qualified majority threshold and the number of votes for a blocking minority in an enlarged Union, Official Journal of the European Communities, March 10, 2001, C 80/01 (85)**

103: *ibid.*

104: The list included: Poland, Hungary, the Czech Republic, Slovenia, Slovakia, Malta, Cyprus, Estonia, Latvia and Lithuania. Romania and Bulgaria joined the EU on 1 January 2007.

Twelve more potential vetoes could bring the Council to a political halt. The Union could also risk breaking into fragments, its institutions and policy-making becoming more distant from the citizens and voters in the Member States. And the peoples of the Union would find it even more difficult to identify with the European Union: an enlarged European Union with deficiencies in democratic accountability and efficient decision-making would raise severe doubts about the EU's identity and about the future of the Union's citizens who want a Union to be open, transparent enough, and democratic and efficient enough to ensure the

Therefore, as to any further enlargement, even if basically desirable, the European Parliament was firmly against any further enlargement unless the European Union has deepened, equipped itself with the means of keeping stable pace with further enlargement.

2. The issue of enlargement

The further enlargement of the European Union to include countries with no doubt being part of Europe, in Southern-Central (former Yugoslavia) and Eastern Europe (Ukraine), as well as including other countries meeting the requirements was decisive for the EU's geostrategic interests. It was and still is decisive for the EU's interests of security, political stability and economic development within the EU and all over Europe. It is important that not only should prospective Member States fulfill the necessary requirements as established by the Copenhagen summit in 1993, but the **EU itself needed and needs to improve its own capacities to enlarge. Such an appeal, as made by the December 2006 summit of the EU's heads of State and Government, was not launched for the first time:**

Until the enlargement from 15 to 25 countries that took place on May 1st 2004, the EU's legal shape had been determined by a series of treaties which turned out to pave a long way of reforms and to be long-winded and illegible to common people within the EU:

3. The issue of reforms: the EU attempting to improve identity and decisiveness

3.1 amendment procedures laid down in the Treaties

Amendment procedures are laid down in the Treaties themselves. The ECSC Treaty **105** differs from the EC Treaty **106** and the Euratom Treaty **107** in that it provides for a simplified procedure for amending certain provisions, whereas the other two treaties only make provision for decisions taken by unanimity to be ratified by all the national parliaments.

105: <http://europa.eu.int/abc/obj/treaties/en/entoc29.htm>

106: <http://europa.eu.int/abc/obj/treaties/en/entoc05.htm>

107: <http://europa.eu.int/abc/obj/treaties/en/entoc05.htm>

3.2 The question of extensive reform of the Treaties, which was much discussed in the 1950s (European Defence Community, ad hoc parliamentary assembly to prepare the ground for a European Political Community) and at the beginning of the 1960s (Fouchet and Cattani plans), was put on hold to some extent for the rest of the 1960s and 1970s, during which period the complex provisions of the Treaties were implemented.

From 1970 onward, the Member States acting within the Treaty's objectives, but the Treaty lacking the necessary powers, had no need for reforming the Treaty, as far as the Member States used Article 235 (now Article 308) of the Treaty establishing the European Economic Community – TEC - to act, through the Council, unanimously on a proposal from the Commission and after consulting the European Parliament, to “take the appropriate measures” if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty had not provided the necessary powers, Article 308 TEC **108**. The range of the Communities' operation thus could be widened, within the Treaty's objectives, but, and this was the sort of needed flexibility, without a need for amendments of the Treaty, e.g. for matters of regional policy, monetary policy etc.) **109** and some purely intergovernmental procedures (1970 Davignon reports **110** and Carrington report of 13 October 1981 on European political cooperation, and “institutionalisation” of the European Council in 1974) to bring about a significant reform of the content of the European venture, without appreciably reforming the Treaties.

Despite the considerable emphasis on deepening the Community, cf. 1971 Vedel report on the decision-making procedure regarding enlarging the law-making powers of the European Parliament **111** and and 1975 Tindemans report **112**, the approach to reform only changed in 1984.

3.3 Until the 1980s, the Member States had made very little use of the provisions for reforming the Treaties. Essentially, there had only been the 1967 Merger Treaty **113** and the two budget treaties of the 1970s. **114**

108: : Official Journal of the European Communities, December 24, 2002, C 325/33 (153).

109: The October 1972 European Council was particularly significant in this respect (at the time such meetings were still referred to as summits, as the new title was only attributed in 1974) (Bull. of the EC, 10-1972).

110: Bulletin of the EC, 11-1970.

111: Supplement 4/72 – Bulletin of the EC.

112: Supplement 1/76 – Bulletin EC.

113: Treaty establishing a Single Council and a Single Commission of the European Communities, Official Journal of the European Communities, July 13, 1967, L 152 and <http://europa.eu.int/abc/obj/treaties/en/entoc112.htm>.

114: Treaty amending certain budgetary provisions of the Treaties establishing the European Communities and of the Treaty establishing a single Council and a single Commission of the European Communities, OJ L 2, January, 02, 1971, and Treaty amending certain financial provisions of the Treaties establishing the European Economic Communities and of the Treaty establishing a single Council of the European Communities, Official Journal of the European Communities, L 359, December 31, 1977.

Both the accession treaties and the Act concerning the election of the representatives of the Assembly by direct universal suffrage: both involved significant institutional adjustments. **115**

3.4 European Parliament's approval of the "Draft Treaty on European Union", February 14, 1984

In response to the "eurocrisis", the European Parliament, elected by universal suffrage for the first time, approved the "Draft Treaty on European Union" on February 14, 1984. **116** In June 1985, the Member States decided by a majority at the **Milan European Council to convene the Intergovernmental Conference which culminated in the Single European Act.**

3.5 The Single European Act, signed in Luxembourg on 17 February 17, 1986, and The Hague on February 28, 1986 by Italy, Belgium and Denmark, was an initiative of the European Parliament and was prepared by a Committee of representatives of the Heads of State or Government, chaired by Irish senator James Dooge. **117**

It was based on the European Commission's strategy of making the single market provided for by the Treaties a reality, laying down:

- a precise timetable and
- improving relevant decision-making procedures by
- increasing the use of qualified majority voting and
- strengthening the democratic control of the European Parliament (introduction of the legislative cooperation procedure between the European Parliament and the Council).

The word "single" comes from the fact that, for the first time, Community matters such as the creation of a single market and European political cooperation (Article 30), were specifically dealt with in a single treaty.

The **Single Act also refers to future reforms, notably in Article 30 and Article 20 on economic and monetary union. Five years later, these two points would provide the impetus for the Intergovernmental Conference to prepare the Treaty of Maastricht.**

115: OJ L 278, October 08, 1976, and <http://europa.eu.int/abc/obj/treaties/en/entoc117.htm>.

116: Spinelli plan; Resolution on the draft Treaty on European Union, OJ C 77, March 19, 1984, p. 53, Celex No 51983IP1200.

117: OJ L 169, June 29, 1987, and <http://europa.eu.int/abc/obj/treaties/en/entoc113.htm>.

3.6 The second phase of the reform process, the *Treaty of Maastricht*, initiated in the mid eighties and signed on February 07. 1992 at Maastricht, represented an important commitment by Member States to continue with the process of European integration after the end of the cold war. It focussed on two main areas: 118

- the **monetary question**, on which preparatory work was carried out by the Delors Committee, which opened the way for the introduction of the single currency, the setting up of a European Central Bank and a European System of Central Banks and rules and procedures for drawing up joint economic policies; this allowed the Union to complete the process begun at the start of the 1960s, after the convertibility of the dollar was suspended, which included the legislation for the European Monetary System in 1978 and Article 20 of the 1986 Single European Act. Economic and monetary union marks the completion of the single market, but it also has a much greater significance in political terms.**119**
- the **reform of institutions and powers**. This relates to *traditional Community powers, common foreign and security policy* (the new name for European political cooperation) and *justice and home affairs*. These **three areas are the new “pillars” of the system**; there are **different decision-making procedures and instruments for implementing each of them**:
 - **The first** is based on the “**Community system**” and the
 - **other two** on the “**Intergovernmental system**”.

It should be remembered that the Treaty of Maastricht introduced the concept of **European citizenship 120)** and, , at institutional level, **legislative codecision** between the Council and the European Parliament , and **Parliament’s vote of approval of the European Commission**. Article N 2 of the Treaty, the article on codecision (189b) and the articles on common foreign and security policy refer to future reform.

3.7 After a long preparation period by the “Reflection Group”, the Intergovernmental Conference was convened in Turin on March 29,1996, to prepare the basics for the Treaty of Amsterdam, signed on 2 October 1997, 121)

The Amsterdam Treaty establishing the European Union, amending the Maastricht Treaty establishing the European Union, contains provisions on

- fundamental rights , **122)** and
- as a response to the concerns of citizens provisions regarding non-discrimination, equality between men and women, the environment, health, social policy, the disabled, religious organisations, voluntary work and, specifically, employment.**123)**

118: <http://europa.eu.int/abc/obj/treaties/en/entoc112.htm>.

119: About the euro: <http://europa.eu.int/euro/html/home5.html?lang=5>.

120: http://europa.eu.int/abc/cit3_en.htm.

121: <http://europa.eu.int/abc/obj/amst/en/index.htm>.

122: http://europa.eu.int/abc/cit1_en.htm.

123: http://europa.eu.int/comm/dg05/empl&esf/index_en.htm.

- fundamental as regards the common foreign and security policy and, in particular, defence (Article 17 of the Treaty on European Union; this part of the Treaty contains all the general questions and those which are not included in the amended Community Treaties).
- vital to the building of an area of freedom, security and justice,¹²⁴ encompassing cooperation on civil matters, immigration and asylum under the Community pillar, and criminal justice and police cooperation under the third pillar, which has, in fact, been strengthened greatly by comparison with the provisions of the Treaty of Maastricht. Consequently, it was possible, though with derogations for some Member States, to incorporate the Schengen Agreement in the Treaty, opening the gateway to expanding freedom of movement and even making it applicable to all Union residents. ¹²⁵

3.8. The Amsterdam and Nice Treaty unsatisfactory on the institutional front

Despite substantial improvements as regards the decision-making process and the legitimacy of the European Commission (approval of the President of the Commission by the European Parliament); specifically, **the Member States were dissatisfied with the steps taken to adapt the Treaty for the next wave of enlargement** (countries of central and eastern Europe and some Mediterranean countries). This was why, after the “night of Amsterdam” on **17/18 June 1997**, a **Protocol on the institutions was adopted which deferred the questions of**

- **the composition of the Commission** and
- **weighting of votes in the Council to the next Conference.**

This Protocol contained two new provisions: the first regarding the changes required to reach twenty members, while the second provided for radical reform in the case of a greater number of accessions (however, the speed at which enlargement procedures were moving had made this distinction somewhat superfluous). Three Member States (Italy, France and Belgium) made a declaration requesting that the question of extension of majority voting in the Council should also be considered in the light of the impending enlargements.

On the basis of the Protocol and of this declaration, the Cologne European Council, convened shortly after the entry into force of the Treaty of Amsterdam (1 May 1999), started the process of convening the Intergovernmental Conference which began its work on 14 February 2000 in Brussels to prepare the Nice Treaty on European Union.

Even the Nice Treaty on European Union did fail to sufficiently complete the Amsterdam “leftovers”.

¹²⁴: http://europa.eu.int/pol/justice/index_en.htm

¹²⁵: [http:// europa.eu.int/citizens/](http://europa.eu.int/citizens/)

4. Conclusion

This survey on reforming the Treaties shows that it is **since the Maastricht Treaty on European Union 1992**, that the EU is intensifying **trying to better balance deepening and enlarging the Union**. Namely since the 1996/1997 Intergovernmental Conference – IGC 1996/97-, preparing the Amsterdam Treaty on EU, the EU was and ever since then is preparing the reform of the institutions to improve the efficiency of the decision –making process within an enlarged EU. Reforming the institutions was meant by national delegations at the IGC **pleading for a priority to be clearly given to deepening the EU first before further enlargement**.

The Amsterdam Treaty on EU, however, fell short of reforming the institutions: issues remained unresolved. The so-called “left-overs” of the Amsterdam Treaty on EU described what, in the view of the IGC preparing the Draft Amsterdam Treaty on EU, was necessary to agree upon institutional reforms to help the EU to find an efficient response to the common challenges which would be caused by enlargement. **Institutional reforms were expected to make the substantial contribution to the European Union’s transparency, democracy and decisiveness**.

Approval of reforms on decision-making in the Council failed due to the dividing line between diverging interests of those member countries preferring enlargement even if further deepening of European integration came under risk.

VI. Activities to establish a Constitution for Europe to overcome the Union’s mess of tensions between deepening and enlarging the Union

1. The Laeken Declaration

In view of the Union’s deficiencies even under the Nice Treaty on EU, the Heads of State or Government of the EU’s European Council, therefore, had decided on their summit held in Laeken, on 14 and 15 December 2001, the so called “Laeken Declaration on the Future of Europe”, to hold an **Intergovernmental Conference in 2004**. The Intergovernmental Conference should resolve the problems of democratic and transparent accountability and inefficient decision-making in the EU’s institutions. **To prepare the Intergovernmental Conference, they decided to convene the European Convention on the Future of Europe** to undertake a comprehensive overhaul of the EU’s policymaking institutions. According to the Declaration of Laeken, the **Convention’s mission** was to draw up a single document, a Treaty establishing a Constitution for Europe, that should both be simpler for the average citizen to understand and make the EU more effective, **focussing on three subjects** :

- how to bring citizens closer to the European design and European Institutions;
- how to organise politics and the European political area in an enlarged Union; and
- how to develop the Union into a stabilising factor and a model in the new world order.. **126**

The Laeken Declaration addressed the role of national parliaments in the EU, the drafting of a Charter of Fundamental Rights, the division of competencies between the Union and Member States, the composition of the Commission, the rotating Council presidency, and the external relations of the Union. **127**

In detail, the Laeken declaration set the following guide-lines for the Convent's design of the future European Union:

- to propose a better division of Union and Member State competencies

- to recommend a merger of the Treaties and the attribution of legal personality to the Union;

- to establish a simplification of the Union's instruments of action;

- to propose **measures to increase the democracy, transparency and efficiency** of the European Union, by
 - developing the contribution of national Parliaments to the legitimacy of the European design,
 - simplifying the decision-making processes, and by
 - making the functioning of the European Institutions more transparent and comprehensible;

- to establish the necessary measures to improve the structure and enhance the role of each of the Union's three institutions, taking account, in particular, of the consequences of enlargement.

The Laeken **declaration also asked** *whether the simplification and reorganisation of the Treaties should not pave the way for the adoption of a constitutional text.*

126: The Laeken Declaration. (2001, December 15). Retrieved October 7, 2003, from http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm; as to to the Convention's mission and focal three subjects, see the preface of the draft Treaty establishing a Constitution for Europe, Official Journal of the European Union, July 18,2003, C 169/01 (07)

127:ibid.,supra, note 126..

2. The drawing up of a draft Treaty establishing a Constitution for Europe by the Convention for the future of Europe

2.1 Introduction

The task of the drawing up of a draft Treaty establishing a Constitution for Europe was entrusted to a Convention in which 105 representatives of national parliaments, the European Parliament, the national Governments from both current and candidate Member States and the Commission openly discussed the future of the Union. **128** The Convention, chaired by the former French President Valéry Giscard d'Estaing, started in March 2002. **129**

The basic objectives of the Convention were to make the European Union's institutions more democratic as well as more transparent and efficient (in anticipation of enlargement). The **Laeken Declaration had given the Convention a virtually open mandate**. Without delays, the Convention reached the drawing up of reforms of the institutional framework of the European Union, carefully aware of the needs to balance opposing concerns and interests among the larger and smaller countries, richer and poorer countries and among the Union's institutions.

The European Convention's **proceedings ultimately led to the text of a draft Treaty establishing a Constitution for Europe**, which achieved a broad consensus at the plenary session on 13 June 2003. The text had been presented on 20 June 2003 to the European Council meeting in Thessaloniki, and on 18 July 2003 submitted to the President of the European Council in Rome on behalf of the European Convention, in the hope that it would constitute the foundation of a future Treaty establishing the European Constitution: **130**

2.2 The draft Constitution

The resulting **Draft Constitution is separated into four parts**.

- **Part I** on fundamental legal principles.
- **Part II** : the Charter of Fundamental Rights for EU citizens.
- **Part III** : the Policies and functioning of the Union, expanding Community policies to areas of criminal law, taxation, and social policy, as well as Common Foreign and Security Policy
- **Part IV**: terms for ratification of the Draft.

128: Grabbe, Heather. Policy brief: Preparing the EU for 2004. London: Centre for European Reform.

129: *ibid.*; *supra*, note 128.

130: “*Draft Treaty establishing a Constitution for Europe*, Adopted by consensus by the European Convention on 13 June and 10 July 2003 submitted to the President of the European Council in Rome— 18 July 2003 —, *Official Journal of the European Communities*, 2003/C169/01; http://european-convention.eu.int/doc_register.asp?lang=EN&Content=DOC.

The three parts cover details embedded in reflective context. A lengthy preamble is praising the history and values of Europe, Europe's cultural, religious and humanist traditions. The draft then draws up the definitions and objectives of the Union: its "aim is to promote peace, its values and the well-being of its peoples." And it "shall offer its citizens an area of freedom, security and justice without internal frontiers, and a single market where competition is free and undistorted."

2.2 1 Definition and objectives of the Union, membership

The draft clearly declares that membership in the Union shall remain open to all European States:

“

DEFINITION AND OBJECTIVES OF THE UNION

Article 1

Establishment of the Union

1. Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common. The Union shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise in the Community way the competences they confer on it.
2. The Union shall be open to all European States which respect its values and are committed to promoting them together.

Article 3

The Union's objectives

1. The Union's aim is to promote peace, its values and the well-being of its peoples.
2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and a single market where competition is free and undistorted.”

The draft states that the Union is founded upon the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These liberal values, prominently confirmed in the draft Treaty, constitute the innermost part, the essentials of the modern European identity: Article 2 of the draft Treaty. **131**

131: Ibid., supra note 130, Official Journal of the European Communities, 2003/ C 169/01(08).

2.2 2 A single legal personality and the conduct of a Common Foreign and Security Policy including a Common Security and Defence Policy

The draft Treaty's proposals thus cover a wide range of provisions on objectives, legal status, policies, institutions, competences, law-making power and actions. According to the draft the European Union would gain a **single legal personality** rather than its current political entity covering the only one entity, the European Community, having the legal status of a legal personality, as well as the two entities of intergovernmental cooperation nature: the second and the third pillar under the Treaty architecture of the current Treaty on European Union. **132**

Attributing a single legal personality to the European Union would significantly change the **decisiveness of the EU** implementing a **comprehensive Common Foreign and Security Policy** enclosing energy policy and foreign and security policy, development policy and foreign and security policy as well as trade relations and foreign and security policy of the EU. A single legal personality would allow the EU to negotiate and ratify international treaties independent of its Members and, theoretically, to take a seat at the United Nations' Security Council. **133**

As to the idea of taking a seat at the United Nations – to exclude the United Kingdom and/or France at the UN Security Council ?, however, such an exclusive power of the EU would go much ahead of current realities that require a system of cooperation between the EU Member States that includes exclusive competences of the EU, e.g. trade relations, and mixed competences shared between EU level of the EU's institutions and the national level of national Governments, as well as exclusive national powers, thus forming a multilevelled system of interconnected forms of conducting a comprehensive Union foreign and security policy the basic characteristic of which is its cooperative nature.

No doubt, the comprehensive approach of the draft Treaty would constitute a coherent system by replacing the three-pillar structure set-up by the Maastricht Treaty on EU and thus, by interconnecting the different pillars and their different institutional decision-making procedures, the draft Treaty would streamline, **would improve the efficiency of the EU's policy-making and decision-making.** **134**

According to Article 39 and Article III-195 of the draft Treaty **the European Union shall conduct a common foreign and security policy.** **135**

132: Centre for European Reform. (2003, June 24). The CER guide to the draft EU constitution. *Briefing Notes*. London: Author, pp. 1-6. Also available online at http://europa.eu.int/futurum/documents/other/oth010603_4_en.pdf.

133: *ibid*, supra note 132.

134: The European Union's Constitution: Tidying Up or Tyranny? (2003, May 31). *The Economist*.

135 Official Journal of the European Communities, July 18, 2003, C 169/01 (17, 66).

The common foreign and security policy shall be put into effect by **the Union Minister for Foreign Affairs** and by the Member States, using national and Union resources., Article 39 4th paragraph and Article III-197. The Union's Foreign Minister for Foreign Affairs, for the field of common foreign and security policy, who shall chair the Council of Ministers for Foreign Affairs, shall contribute to the preparation of the common foreign and security policy and shall ensure implementation of the European decisions adopted by the European Council and the Council of Ministers, **136** He would implement the common foreign and security policy provisions of the Treaty in the context of the principles and objectives of the Union's external action, in the common interest and in line with the Member States' policies as defined by the European Council's guidelines defining and implementing a common foreign and security policy, in view of the Member States' commitment to "support the common foreign and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity."**137**

According to Article 40 and Article III-210, the **Union shall implement the common security and defence policy** that shall be an **integral part of the Common Foreign and Security Policy**,

Article 40 :

"1. The common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on assets civil and military. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States." **138**

The draft Treaty would also create, **within the Union's common defence policy**, an **European Armaments, Research and Military Capabilities Agency**, under the authority of the Council of Ministers, with the task to help to **coordinate** the improving of the Member States' **military capabilities, defence technology research and arms procurement procedures**:

“

- identify the Member States' military capability objectives and evaluating observance of the capability commitments given by the Member States;
- promote harmonisation of operational needs and adoption of effective, compatible procurement methods;
- propose multilateral projects to fulfil the objectives in terms of military capabilities, ensure coordination of the programmes implemented by the Member States and management of specific cooperation programmes;
- support defence technology research, and coordinate and plan joint research activities and the study of technical solutions meeting future operational needs;
- contribute to identifying and, if necessary, implementing any useful measure for strengthening the industrial and technological base of the defence sector and for improving the effectiveness of military expenditure.”, **139**

136:Article III-197 1st paragraph of the draft Treaty, Official Journal of the European Communities, July 18,2003, C 169/01 (66).

137:draft Treaty, Article III-195 1st and 2nd paragraph , Official Journal of the European Communities, July 18,2003, C 169/01 (66).

138: C 169/18

139:Article III- 212 , ibid. C 169/69.

2.2 3 Distributing exclusive and shared competences between the European Union and the Member States

The draft Treaty tries to set up clear **principles of distributing the competences between the European Union's institutions and the Member States** by the principles of:

- “**conferring exclusive competences**” on the Union
- “**conferring on the Union competences shared** with the Member States
- the **Union's competence to promote and coordinate the Member States' economic and employment policies**
- the **Union's competence to define and implement a common foreign and security policy including defence policy**
- the Union's competence to support, coordinate or supplement Member States' actions, Article 11 **140**

“1. When the Constitution confers on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of acts adopted by the Union”, Article 11 1st paragraph and Article 12 **141**“

The Draft Constitution does not assign any new **exclusive competences** to the EU; it simply codifies current policy practices.:

- **competition** rules necessary for the functioning of the internal market, and in the following areas:
- **monetary policy**, for the Member States which have adopted the euro,
- **common commercial policy**,
- **customs union**,
- the **conservation of marine biological resources under the common fisheries policy**.

the **conclusion of an international agreement (implied powers)** when its conclusion is provided for in a legislative act of the Union, is necessary to enable it to exercise its internal competence, or affects an internal Union act. **142**

The Union's **areas of shared competence** apply in areas:

- internal market
- area of freedom, security and justice
- agriculture and fisheries,
- transport and trans-European networks
- energy

140: *ibid*, C 169/10.

141: *ibid*, C 169/10.

142: Crossick, Stanley. (2003, June). *The Europe We Need*. Brussels: The European Policy Centre.

- social policy
- economic, social and territorial cohesion
- environment
- consumer protection
- public health
- scientific research and technological development, R&D,space exploration
- development cooperation and humanitarian aid.
-

The Union's areas of supporting, coordinating or complementary action are, at European level:

- industry,
- protection and improvement of human health,
- education, vocational training, youth and sport,
- culture,
- civil protection.

Legally binding acts adopted by the Union on the basis of the provisions specific to these areas in Part III may not entail harmonisation of Member States' laws or regulations.,Article 17 **143**

2.2 4 Creating one institutional framework for the Union's institutions

As to **the Union's institutions** and the institutional framework, the draft Treaty maintains the major EU institutions. According to Article 18, the **Union's Institutions** shall be served, however, by **a single institutional frame-work** to

- advance the objectives of the Union,
- promote the values of the Union,
- serve the interests of the Union, its citizens and its Member States,and
- ensure the consistency, effectiveness and continuity of the policies and actions which it undertakes in pursuit of its objectives.

This institutional framework comprises:

The European Parliament,
 The European Council,
 The Council of Ministers,
 The European Commission,
 The Court of Justice.

2.2 5 Principle of attributed, limited powers; transparency of decision-making

As to the **principle of attributed powers**, Article 18 paragraph 3 of the draft Treaty expresses in similar words as does Article 5 of the Treaty on EU that “ each institution shall act within the limits of powers conferred on it in the Constitution.”,

144

Emphasis is given to increased transparency of the proceedings of the institutions :
“

Article 49

Transparency of the proceedings of Union Institutions

1. In order to promote good governance and ensure the participation of civil society, the Union Institutions, bodies and agencies shall conduct their work as openly as possible.”

“*Article III-305*

1. The Institutions, bodies and agencies of the Union shall recognise the importance of transparency in their work and shall, in application of Article I-49, lay down in their rules of procedure the specific provisions for public access to documents.

The Court of Justice and the European Central Bank shall be subject to the provisions of Article I-49(3) when exercising their administrative tasks. “ , 145)

2.2 6 The European Parliament

The draft is **strengthening the European Parliament`**s shared legislative role with the Council of Ministers, by assigning an equal position: “ The European Parliament shall, jointly with the Council of Ministers, enact legislation, and exercise the budgetary function, as well as functions of political control and consultation as laid down in the Constitution.”, Article 19 1st paragraph. 146

European laws and European framework laws shall be **adopted** on the basis of proposals from the Commission, **jointly by the European Parliament and the Council of Ministers** under the ordinary legislative procedure as set out in Article III-302: The two Institutions have the task of reaching agreement, within the Conciliation Committee, on a joint text, by a qualified majority of the members of the Council of Ministers or their representatives and by a majority of the members representing the European Parliament, after they could not reach agreement on an act in policy areas that are subject to majority voting in the Council. 147

The European Parliament would elect the President of the European Commission upon proposal by the European Council . Article 19 1st paragraph , 2nd sentence ; Article 26 1st paragraph.148

144: consolidated version of the Treaty on European Union, Official Journal of the European Communities, December 24, 2002, C 325/5 (11); draft Constitution Treaty , C 169/12.)

145: *ibid.*, C 169/ 01(85).

146: *ibid.*, C 169/01 (12).

147: *ibid.*, C 169/01 (84).

148: *ibid.*, C 169/01 (12,14).

2.2 7 The Council of Ministers

The draft maintains the Council of Ministers' co-decision legislative role shared with the European Parliament, Article 22 1st paragraph .**149**

The Legislative and General Affairs Council shall **ensure consistency in the work of the Council of Ministers**. “ When it acts in its legislative function, the Council of Ministers shall consider and, jointly with the European Parliament, enact European laws and European framework laws, in accordance with the provisions of the Constitution. “, Article 23 paragraph 1 . **150**

To achieve **more coherent policy-making** of the Council of Ministers, the draft is extending the Presidency's term of equal rotation among the Member States from six months to at least a year, Article 23 4th paragraph.**151**

2.2 8 The Commission

The draft maintains the **traditional role of the Commission being the motor of European integration** and namely **having the exclusive right to initiate the making of European Laws**:

- “promote the general European interest and take appropriate initiatives to that end. It shall ensure the application of the Constitution, and steps taken by the Institutions under the Constitution.”
- “2. Except where the Constitution provides otherwise, Union legislative acts can be adopted only on the basis of a Commission proposal. Other acts are adopted on the basis of a Commission proposal where the Constitution so provides.”, Article 25 1st and 2nd paragraph. **152**
- The **exception** made for the Commission's role of initiative is provided for the European Council **to ensure consistency in the political work of the Council of Ministers**:

“The European Council can adopt, on its own initiative and by unanimity, after a period of consideration of at least six months, a decision allowing for the adoption of such European laws or framework laws according to the ordinary legislative procedure. The European Council shall act after consulting the European Parliament and informing the national Parliaments. “, Article 24 4th paragraph . **153** .

149: ibid.,C 169 /01 (13).

150: ibid.,C 169/01 (13).

151: ibid., C 169/01 (13).

152: ibid., C 169/01 (13).

153: ibid., C 169/01 (13).

In addition to the Commission's role to initiate the Union's law-making, the draft maintains the Commission's executive and bureaucratic functions. The Commission shall:

- **oversee the application of Union law** under the control of the Court of Justice;
- execute the **budget** and
- manage **programmes**,
- exercise **coordinating, executive and management functions**,
- ensure the **Union's external representation**, with the exception of the common foreign and security policy, and other cases provided for in the Constitution;
initiate the Union's **annual and multiannual programming** with a view to achieving interinstitutional agreements. Article 25 1st paragraph. **154**

The **President of the Commission** would be elected by the European Parliament's majority vote on a candidate nominated by the European Council, deciding by majority vote. The President-elect would then select the thirteen European Commissioners, from a list put forward by each Member State determined by a system of rotation, "for their competence, European commitment, and guaranteed independence." The President and the persons so nominated for membership of the College, including the future Union Minister for Foreign Affairs, as well as the persons nominated as non-voting Commissioners, shall be submitted collectively to a vote of approval by the European Parliament. The Commission's term of office shall be five years. " , Article 26 1st and 2nd paragraph. **155**

2.2 9 Conclusion

Thus, the future Constitution was supposed, in the view of the Convention on the Future of Europe, to be drafted along the lines as set up by the EU's summit meeting's Laeken Declaration. The Convention's consensus was the result of long negotiations and hard to accomplished compromises. The draft text had received opposing and welcoming response from the European public, from the citizens at large, from European experts and European politicians. While some appreciated the Constitution to be an ambitious, if not the biggest leap forward for the European Union since the Treaties of Rome on the European Economic Community – EEC- and on the European Atomic Community-Euratom-, others judged the faults of the draft not to be concise enough, using more words than necessary, and to be too ostentatious. **156**

Others criticized the draft as having fallen too far from the Convention's mission to make the European Union more democratic and transparent. **157**

By the text's evidence, fact is that the text's structure and contents of the draft are born by the existing treaties establishing the European Union and establishing the European

154: *ibid.*, C 169/01 (13).

155: *ibid.*, C 169/01 (14).

156: Niskanen, William. *Comparing the U.S. and EU Constitutions*. Washington, DC: The Cato Institute. Also available online at <http://www.cato.org/dailys/08-14-03.html>

157: Centre for European Reform. (2003, June 24). *The CER guide to the draft EU constitution. Briefing Notes*. London: Author, pp. 1-6. Also available online at http://europa.eu.int/futurum/documents/other/oth010603_4_en.pdf.

Community. Much of the complexity of institutional structures and decision-making rules of the European Union is maintained unchanged .**158**

The draft is thus giving the impression that, in the minds of citizens, the draft appears to be too illegible to be called “Constitution” as a brief document containing provisions on basic objectives, tasks, fundamental rights, institutions and legislative powers while incorporating every other provisions necessary to rule implementing policies and procedures in a secondary law of the European Union. The draft is, actually, not an approach to harmonize the two different methods of cooperation between the Member States, integration and intergovernmental cooperation, but to deepen the tensions existing between the two methods. For, the text of the draft is giving the impression the European Union is going to develop into a federal-state like entity, distinguishable from the Member States, and thus forgetting that the current system of the Union is the multilevelled system of interconnected levels of the nation state (the still sovereign Member States) and the level of the jointly operating collectivity of the Member States acting within the common institutional structures. To make these two levels functioning well and efficiently, it is not sufficient to appeal to the Member States’ commitment to a common solidarity (Articles 3 paragraph 3, 15, 39 paragraph 5, Article 42, Articles III-158, III- 169, III- 193, III- 195, III-201, III-231, implementation of the solidarity clause). What counts are legally binding and enforceable rules of procedure to imbed the Member States’ cooperative discipline operating within the Union’s legislative institutions.

3. The Intergovernmental Conference debating the draft Treaty establishing a Constitution for Europe

The draft Constitution had been discussed by the representatives of the Governments of the Member States at the *Intergovernmental Conference – IGC* - , that began in October 2003. At the Brussels summit (12-13 December 2003), Heads of State or Government did not reach an agreement on the final text of the Constitution, as finalising the constitution failed dramatically over the distribution of voting power between the Member States. The March 2004 election that changed Spain's government however broke the deadlock. With Irish help, constitutional talks revived in March 2004 and were completed by the European Council on 17 June 2004.

The final agreement on the Treaty establishing a Constitution for Europe – Treaty on Constitution- had largely endorsed the Convention’s basic proposals of the draft.

Beyond a large number of editorial modifications, the **substantial changes were focussing on the much disputed issue of qualified majority voting on legislation by the Council of the EU.**

4. The Treaty establishing a Constitution for Europe

The Treaty on Constitution , as agreed upon by the European Council in June 2004, is a treaty concluded between the Member States under the rules of international law. It would enter into force when the entire number of the Member States has ratified the treaty.

158: *ibid.*,supra note 156.

Two referenda failed: in France and in the Netherlands in 2005.

Any modification of the Constitution's text at a later stage would require the unanimous agreement of the Member States and, in principle, ratification by all again. For some modifications, however – for example with regard to the extension of the scope of qualified majority voting – a unanimous decision by the European Council might suffice

The Treaty on Constitution, as agreed upon by the European Council in June 2004, is a quite long document, it runs over 200 pages, and, it is to many judgements still bafflingly complex.
159

The essential elements of the reforms stipulated by the Treaty on Constitution are as follow:

4.1 The Union would have a single foundation, the Constitution and simplification of the European construction: one single institutional framework

Europe has been built in stages and is based on different Treaties that have been concluded over time. This is why the European construction is difficult to understand today. From now on, there **would be only one European Union replacing the present “European Communities” and the “European Union”; the three “pillars” will be merged**, even though special procedures in the fields of foreign policy, security and defence are maintained; the “Treaty establishing a Constitution for Europe” would replace the EU and EC Treaties, as well as all the treaties amending and supplementing them, by creating one single institutional framework.

The **integration of the Charter for Fundamental Rights into the text**, the acknowledgement of the Union's values and objectives as well as the principles underlying the relationship between the Union and its Member States, might allow to call this basic text “Constitution”. It also contains a clearer presentation of the distribution of competences and a simplified set of legal instruments and procedures. In future, European laws would be known as laws.

In legal terms, however, the Constitution remains a treaty concluded between the Member States under the rules of international law. It would enter into force when only all Member States have ratified it, which implied referenda in some Member States.

And any modification of the Constitution at a later stage would require the unanimous agreement of the Member States and, in principle, ratification by all. For some modifications, however – for example with regard to the extension of the scope of qualified majority voting – a unanimous decision by the European Council would suffice.

159: A consolidated version of the treaty establishing a Constitution for Europe, see: <http://europa.eu.int/constitution..>

4.2 Commission ,recognition of its different missions, its:

- near monopoly of legislative initiative,
- executive function and
- function of representing the Union externally, except in the field of common foreign and security policy.
- interinstitutional programming is assigned to the Commission's initiative.

4.3 Institutional framework: Parliament and Council

- The Treaty extends the scope of the co-decision procedure, which, significantly, will henceforth be called the legislative procedure (95% of European laws will be adopted jointly by the Parliament and the Council).

4.4 Main institutional innovations within the Council

- the creation of the post of Union Minister of Foreign Affairs, who will be responsible for the representation of the Union on the international scene. This function will merge the present tasks of the High Representative for the Common Foreign and Security Policy with those of the Commissioner for external relations. The Minister of Foreign Affairs will thus be mandated by the Council for common foreign and security policy, while being a full member of the Commission and as such in charge of the Commission's responsibilities in the field of external relations as well as of the coordination of the other aspects of the Union's external action;
- in addition, he will chair the External Relations Council.

4.5 The European Council

- the Treaty establishes the European Council as an institution, distinct from the
- Council. The European Council will be chaired by a President, with limited powers, appointed for a period of two and a half years.

4.6 Composition of the institutions

- the IGC finally had decided to raise the maximum number of **seats in the European Parliament to 750**. These seats will be allocated to the Member States according to the principle of "degressive proportionality", with a minimum of six and a maximum of ninety-six seats. The precise number of seats attributed to each Member State will be decided before the European elections in 2009.
- **Commission:** The IGC decided to maintain the current composition of the Commission – one Commissioner per Member State – until 2014. From then on, the Commission will comprise a number of Commissioners corresponding to two thirds of the number of Member States. The members of the Commission will be chosen according to a system based on equal rotation among the Member States, which had been already decided by the Nice Treaty.

4.7 Qualified majority for decision-making in the Council: Strengthening the Union's decisiveness by striking the balance between sovereign equality of each Member State and the democratic legitimacy by proportionate weighing the votes:

- **The definition of qualified majority for decision-making in the Council: the most difficult question the IGC had to deal with:**

The **Convention wanted the Council to decide on the basis of the double majority of the Member States and of the people**, which constitutes an expression of the Union's double legitimacy.

The IGC nonetheless decided to raise the thresholds:

instead of the majority of Member States representing 60% of the population, the IGC decided that **a qualified majority will require the support of 55% of the Member States representing 65% of the population**. This definition is accompanied by **two further elements:**

- First, in order to avoid the situation where, in an extreme case, only three (large) Member States would be able to block a Council decision due to an increase in the population threshold, **a blocking minority needs to comprise at least four Member States**.
- Moreover, a number of Council members representing at least three-quarters of a blocking minority, whether at the level of Member States or the level of population, can demand that a vote is postponed and that discussions continue for a reasonable time in order to reach a broader basis of consensus within the Council:

Article I-25 of the Treaty:

“

Definition of qualified majority within the European Council and the Council”

1. A qualified majority shall be defined as at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union.“

Whereas the Convention's text of Article 24, paragraph 1 of the draft constitution, proposed on qualified majority decisions in the Council of Ministers :

“1. When the European Council or the Council of Ministers takes decisions by qualified majority, such a majority shall consist of the majority of Member States, representing at least three fifths of the population of the Union.”.

4.8 The Union's newly acquired single legal personality :

- it also is meant to enable the Union to play a more visible role in world affairs.

4.9 Achievements in the area of freedom, security and justice, and in the field of common foreign and security policy

- The **Community method of qualified voting will apply to nearly all the areas of criminal justice and police cooperation.** The Constitution retains or introduces some special features in these areas, namely in the area of judicial cooperation in criminal matters and in the area of police cooperation.
- Common foreign and security policy: the distinction between common foreign and security policy and the other aspects of EU external action still determines the respective roles of the institutions and the procedures that apply. Unanimity is retained in the field of common foreign and security policy.
- Strengthening the ways for the Member States to cooperate more closely in the field of defence is meant to reinforce the credibility of the Union's foreign policy.

4.10 Economic, taxation, social policies:

- Further extension of the scope of qualified majority and a near generalisation of the codecision procedure.

Unanimity is retained in the field of taxation and, partially, in the field of social policy. "Passerelles" allow a unanimous decision that henceforth qualified majority will apply in a given area.

4.11 Increased democracy and transparency ? The Constitution's provisions are aiming at more democratic, transparent and controllable EU institutions that are closer to the citizen.

- Citizens' right to invite the Commission to submit an appropriate proposal to the legislator, if they manage to collect one million signatures in a significant number of Member States.
- proceedings of the Council, when exercising its legislative function, are to be open to the public.
- **The role of the European Parliament has been strengthened.**
- **National parliaments are to be informed about all new initiatives from the Commission** and, if one third of them consider that a proposal does not comply with the **principle of subsidiarity**, the Commission must review its proposal.
- New provisions on participatory democracy and good governance have acquired constitutional status.
- The Charter will guarantee better protection of fundamental rights.

5. Conclusion:

5.1 The situation after the failing French and Dutch votes on ratification

Throughout the Treaty, there is a tension between making the EU work better and maintaining different national positions claimed as vital or basic ones and consequently maintaining national vetoes in sensitive areas.

It was no surprise that several points of disagreement made reaching the final text of the Treaty on Constitution difficult:

For, the aims of the EU's different members for the constitution varied widely. The British Prime Minister had been trying to sell the idea to his Eurosceptic voters that the Draft Treaty on Constitution was merely a consolidation of existing treaties. Many British voters, however, thought that any "constitution" implied a nascent European super state, a federal state, "federal" as interpreted in the British special tradition that "federal" meant "central unity state", and were dead-set against this. Other EU leaders, e.g. the French President Mr Chirac and Germany's Chancellor Herr Schröder, not only wanted a single, clear document—they wanted to make the EU more relevant by using a EU Constitution the vehicle for achieving this goal, namely by expanding the existing majority-voting powers of the EU to matters which until then still were subject to nation states' veto rights of unanimous voting covering matters like foreign and security policy as well as judicial and police cooperation.

Still unchanged until today, some EU laws could and still can be passed with a "qualified majority vote" (QMV). The current QMV system is complex and gives smaller countries power disproportionate to their populations so that bigger countries have a bigger say. But in other, particularly sensitive areas, all members must agree. But the Treaty Constitution wants to replace it with a special "double majority, according to Article I-25 of the Treaty.

The Treaty on Constitution allows for the eventual extension of QMV to corporate taxation, some aspect of criminal justice and foreign policy. The British Prime Minister, Blair, insisted on keeping Britain's national veto in these areas.

As to a miscellany of other crucial issues that had been finalised by the Treaty, the British Prime Minister was also concerned that the proposed Charter of Fundamental Rights attached to the constitution would introduce rigidity into Britain's flexible labour market by bolstering the right to strike.

Poland and Italy wanted a reference to God or Europe's Christian heritage in the text, which France and others opposed. The bigger countries wanted to slim down the commission so that not every country would always be represented, but the small ones were resisting. The Dutch Government wanted to strengthen the commission's powers to enforce the stability and growth pact, which sets limits on the budget deficits that member countries of the euro can run. France and Germany, both egregious breakers of the pact, were opposed.

If, in view of the fact that ratification already failed in France and in the Netherlands, ratification by the entire number of the Member States is not reachable, it appears to be too readily understood to put the blame on the Heads of State or Government having endorsed the very long and complex document of the Constitution. .

What in fact appears causing great concern , however, is that the Heads of State or Government in the course of drawing up the draft failed to realize the issue of identity of the European Union, the issue of transparency, democratic accountability and efficiency all of which *they failed to make clear to the public in the EU how to understand the EU:*

what kind of identity of the EU is meant by the instrument "constitution of the EU" and by its main substantial features?

They failed to leave no doubts about the functional role of a EU Constitution whether to construct a EU “Superstate” or to make the EU better work after further enlargements and to guarantee people’s future in the world of globalization and modernization.

5.2 How to leave the impasse ? Leaving the impasse through focussing on identity shaping essentials

` transparency, democracy, decisiveness ` not necessarily presented in a Treaty labelled “ Constitution

At the present state of the procedure, it appears unclear how to achieve the necessary unanimous consent by all EU members to the Treaty on EU ‘Constitution.

If ratification by the entire number of the Member States fails, it appears unrealistic to submit a new, modified text of the Treaty constitution to the plebiscite again: the French and Dutch voters who denied the Treaty in 2005 might well feel to be messed around. And in addition to this, **it appears unrealistic as well to hope that the Treaty constitution as a whole package might easily be renegotiated and be successfully submitted to ratification procedures in the Member States: the national electorates and Parliaments that already had voted for the draft Constitution might well doubt about the seriousness and legitimacy of the ratification procedures.**

In this situation there is much academic discussion in the EU on how to leave the impasse. By finding a pragmatic way of balancing the legal requirements for ratifying any basic modifications of the Treaty on Constitution or of the existing Founding Treaties on EU and EC on the one hand, and the requirements of legitimacy with respect for the democratic acceptability of the constitutional reforms, whether the reforms are part of a text called “Constitution” or whether they are part of the existing Founding Treaty of the EU and EC: the reforms have necessarily to be part of what I am calling the constitutional quality of the European Union.

And the issue of the acceptability and legitimacy of the Treaty on Constitution is, essentially, the issue of the identity of the European Union:

The essential features shaping the European Union’s identity should be incorporated in a text

- which might be called “constitution” or
- which might be a modified text of the existing founding Treaties on EU and EC reflecting the essentials of the constitutional quality of the European Union.

The essential features shaping the European Union’s identity should be incorporated in a concise text the citizens of the European Union might easily understand and accept. The text should contain the stipulation on giving the response to the questions:

- what is the European Union ?
- why is the European Union a “joint venture” in the best interest of the citizens?
- what are the European Union’s basic values and objectives to secure the interests of the citizens
- what are the European citizens’ fundamental rights protected by the European Union?

- what are the European Union's main institutions to act to protect the citizens' rights and interests`
- what are the European Union's main policy areas to protect the citizens' interests?
- what is the basic line of distributing the competences between the European Union and the Member States?
- what are the European Union's main legal powers and instruments to design, to decide and to implement common policies?
- All implementing provisions are to be incorporated in the European Union's secondary law, complementary to the primary constitutional law as incorporated by a treaty on Constitution or by a modified founding treaty on EU and EC.

Whether the form of a concise text containing the Union's essential identity features has to be a formal text called "constitution" or has to modify the existing Founding Treaties on EU/EC appears to be rather a matter of political psychology than a matter of legal stringency as will be explained in the following chapter:

Chapter III

The identity issue and the formal text called "Constitution"

A. Introduction

Before the Laeken Declaration had been launched, a constitutional law debate had discussed the question whether the nature of the EU as a supranational entity might allow to create an EU Constitution or, if , in view of the already existing Founding Treaties on EU shaping the constitutional quality of the EU in its present shape , there might be any further need for setting up a comprehensive codification in the sense of a written text to be called Constitution.

The Heads of State and Government of the EU had actually decided to create a formal text called "constitution" meant to get the Union closer to the citizens by better shaping the Union's identity shaping essentials in terms of democracy, transparency and decisiveness.

After the Treaty establishing a Constitution for Europe had failed ratification in France and in the Netherlands, the constitutional law debate about the adequate form of presenting the constitutional quality to the European public started again.

For, the Treaty has to be ratified by the entire number of the Member States. Taking into account the fact that the Treaty ratification has already failed to get ratification in France and in the Netherlands, it is not imaginable that the already rejected text of the Treaty establishing a Constitution for Europe might be submitted again in France and in the Netherlands, for this would undermine the voters self-respect. And it is not

imaginable to submit a modified text to the voters in France and the Netherlands, for this would not meet the requirements that a text has to be ratified by the entire number of the Member States, while the great number of the Member States has already ratified the initial version of the text.

Therefore, one option appears to be imaginable:

- a totally different text, a merger text of a modified Treaty on European Union might be submitted to all Member States to get the necessary final unanimous vote by the entire Member States, and , in this case,
- the totally new text has to contain essentials that prove an identity oriented solution helping to avoid a „coalition of the willing“ represented by those Member Countries which have already voted in favour of the Constitution and which-as “ Kern - Europa” might feel to be challenged to opt for enhanced multiple-speed integration. Such a turn of events would increase the risk of a gradual disintegration of the Union as a whole.

For, drawing up a totally different text which is not called “constitution” but which contains the essential constitutional elements in the tradition of the Founding Treaties would, rather in terms of political psychology than in terms of legal stringency, facilitate acceptance throughout all Member States:

In political theory, a text called "constitution" might have an identity shaping and reinforcing effect for the Union's democratic accountability and legitimacy in the people's public perception of the EU. The contrary effect, however, proved reality:

Viewing at the voting in France and in the Netherlands, it basically appears doubtful if a formal text called "constitution" can successfully be used making reference to traditional instruments known from nation states' traditional patterns and easily being subject to misunderstandings by broad masses in the European public believing that a “Constitution” for Europe might be the signal for starting the project of creating a European Super State which, in fact, is not the finalité of the current project

There is, therefore, reason for a deeper discussion of the nature of an instrument called "constitution" for the EU, its functional role in the policy-making of the European Union, compared to the nation state constitution and its functional role in the nation state's policy-making, and the need to establish, for the EU, a formal text called “constitution”.

B. Basics of nation states Constitutions and mutual interdependencies between the national constitutional systems of the EU Member States and the existing political and legal order of the EU

I. The comparative approach to the basics of national constitutional laws.: the functional role of nation states' constitutions and the functional role of the EU's legal and political order

As the European Union's political and legal order is not imaginable without the political and legal systems of the sovereign nation states which have founded the European Union, we want to use a comparative approach to the basics of national constitutional laws. For, the objective of that comparative approach is to find out the functional role of the nation state's constitution and compare it to the functional role of the European Union's existing political and legal essentials. The comparative approach might facilitate the understanding of the form and contents that an instrument called "constitution" for Europe may necessarily require in order to fulfill the legitimate expectations of the European electorate who wants to know in the coming elections to the European Parliament in 2009 what kind of European Union is calling for the polls.

The nation state constitution traditionally is the written document describing the *more static* than flexible basic legal system of a nation state which describes the basic laws and principles that rule the functions and limits of legislative, executive and jurisdiction powers within a nation state:

The assessment will be based on the mutual interdependencies between the national constitutional systems of the EU Member States, which represent static systems, and the existing political and legal order of the EU which is characterized by a tradition of a dynamic development since the beginning of the historical process of European integration, which influences the development of the traditional nation state concept of a national constitution.

The modern concept of Postwestphalian-Nation State Constitution is that nation state constitutional policy and law will remain the principal source of the legal systems of the Member States of the EU, even nowadays in times of globalisation and European integration. The nation state legal system, however, is subject to dynamic changes in view of the dynamic process of European integration.

An analysis and assessment of the European Union's constitutional quality essentials will, therefore, have to take into account the national constitutional laws, in view of the mutually influencing national and EU levels of constitutional law. The national constitutional law is marking the constitutional range and limits set to any transfer of national sovereign rights to EU level for a joint exercise of legislative, executive and judiciary powers (pooling of powers), thus deciding upon the future development of the EU.

At the same time, the process of European integration has a remarkable repercussion on the national constitutional, legal and political order.

In the beginning of the process of European integration, the emerging European law on European institutions, on their functional role and on their powers, had been created on the basis of national traditions and concepts, even creating the European Community as an entity *sui generis*, not comparable with any other existing international or national entity.

And on the other hand, during a second phase of the historical process of European integration, the **Founding Treaties on European Union-TEU- and on European Community-TEC-** as EU primary law, and the established law of the European

Community as secondary law which is based on the TEC representing the first pillar under the TEU architecture, are presenting a comprehensive system of a constitutional quality by and in itself, on its own “merits” by own objectives, tasks, institutions, powers, representing a sui generis system of jointly pooled parts of national sovereign powers which are jointly exercised by attributed, limited powers, limited by the founding Treaties..

This comprehensive system of the EU’s constitutional quality shaped by primary and secondary EU/EC law: this European Union law has begun to reflect legal and political repercussions on the national constitutional systems of the Member States. Thus, it is comprehensible to realize, as Schwarze has rightly described it at the beginning of the rising debate on a EU constitution, as the emerging of an institutional multilevel system of mutually influencing EU and Member States national levels as well as a process of mutual adaptations of national and EU constitutional orders. 160)

This is why the President of the European Court of Justice, Gil Carlos Rodriguez Iglesias had called these **interdependencies between the EU constitutional order and the national constitutional orders as the “ emerging of a European legal order “**, covering the **interplay between national constitutions and basic rules of the European Union law.**

It is in view of evaluating interdependencies between the EU constitutional order and the national constitutional orders, that the criteria I use to assess the essentials of the Treaty on EU Constitution are based on an **comparative approach to the basics of national constitutional laws.** The comparative approach is **covering four main groups of points of discussion for finding out what the constitutional quality of the EU might consist of as common essentials** qualifying for the legitimate identity:

II. Notion of nation state constitution and the functional role of main national constitutional systems of the EU Member States

1. Germany

The doctrine in German constitutional law as well as the rulings of the German „Bundesverfassungsgericht“, the German Federal Constitutional Law Court do not present a comprehensive and distinctly defined notion “constitution”. **161** Consent exists, however, as to basic guiding principles of the „Constitution“: „Constitution“ is the basic legal order, ranging first in hierarchy among all sources of national law, and thus guaranteeing the unity of national law. The “constitution” is a written text set up by the “pouvoir constituant” along established procedures and which contains legally binding guiding principles on

- human rights,
- basic rights of freedom of all citizens
- organizing and functions of the legislative, executive and jurisdiction. **162)**

160: Schwarze, Jürgen: “ Die Entstehung einer europäischen Verfassungsordnung “, Jürgen Schwarze (2000), Nomos Baden-Baden, pp. 205-286 (221-245).)

161: Badura, P., P.Badura, Artikel Verfassung ,in:Ev.Staatslexikon ,hrsg. R.Herzog u.a.:3.Aufl. ,1987,Spalte 3737 ff;K.Hesse,Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland,20.Aufl. ,1995,Rn. 2,4; T.Maunz/R.Zippelius,Deutsches Staatsrecht,30.Aufl.,1998,§5 1.

162:J.Isensee,Staat und Verfassung ,in: J.Isensee/P.Kirchhof(Hrsg.),Handbuch des Staatsrechts der Bndesrepublik Deutschland,Band I,1987,§ 13 Rn. 122.

The constitution's basic role is setting up limits to the exercise of the nation State's public powers, to guarantee legal protection from any abuse of public power.

The constitution is no closed, rigid body of basic rules: the constitution's clauses are open to flexible interpretation, flexible enough to adjust to fast changing political, social and economic changes. There are limits, however, to the flexibility of constitution: basic guiding principles are unchangeable, principles on human dignity, human rights, the principles of republican State and parliamentary democracy, the rule of law, the basic federal structure, the basics in social welfare system: they all are unchangeable basic guiding principles which never can be changed even by unanimous vote of Parliament (Article 79 Abs.3 Grundgesetz). The constitution, thus stable enough to preserve the basic values of a stable society, and flexible enough to help to reinforce the state's unity and the society's varieties in order to survive by responding to modern challenges in a world of permanent modernization and globalization.

As to the stipulation of guaranteeing fundamental rights of freedom, the constitution is the embodiment of basic values and universal human rights, **163**

2. Great Britain

Peculiar position of the status of constitutional law in the United Kingdom, the absence of a written constitution and entrenched bill Bill of Rights and the fact that in British law the „state“ has no legal identity and is not a legal concept (but the state can hold property. This relates to the fact that the UK comprises four different countries in a unitary or “union” structure.).

Although there has been an absence of a written constitution since the Instruments of Government (1653-60), British political and legal language over the centuries has been rich in its discussion of the principles of the “Ancient Constitution “, built on fealty and feudal bonding, developed through precedent guiding the custom and practice of the realm, embracing ever wider estates into its body politic.

The “Revolution “ and Bill of Rights of 1689 were far from a revolution, rather a reestablishment of ancient order with the Crown at its apex and constitutionalised – though not the executive – and everything thereunder in its rightful place, and it was believed, a place for everyone. That the “Ancient Constitution “ existed was never doubted. What it meant, however, no-one really knew.

If the British system of government was built on the Rule of Law and Parliamentary Sovereignty, this was held to be evidently true even though practice often denied the twin assertions of British Constitutionalism. In the latter case, Parliament is dominated by a government-it would not be government if that were not the case- and what Parliamentary Sovereignty too frequently produced was de facto Executive Sovereignty.

3. Spain

The Notion of Constitution in the Spanish Constitution .

The 1978 Spanish Constitution is written Constitution, rigid in nature, containing the supreme rule which prevails over that of any other source of law.

The constitution's purpose is to organise the basic political structure of the Spanish people. Having got a 87.78 percent vote of approval in the referendum, and being approved by an

163: Hesse, Konrad, Die Verfassungsentwicklung seit 1945, in:

E. Benda/W. Mairhofer/H.J. Vogel (Hrsg.), Handbuch des Verfassungsrechts, 2. Aufl., 1995, §3 Rn. 27.)

even wider margin by the first democratically elected Spanish Parliament since 1936, voting against the Franco regime's institutional and legal apparatus. For this reason the Constitution has always been considered a rule of "national consensus" among all the political forces, a fact which has given it a greater legitimating authority than any other Spanish constitution in history.

4.Sweden

The notion of "Constitution" in the Swedish legal order :

The term "Swedish Constitution" includes Sweden's fundamental laws .The Constitution of Sweden is built on four fundamental laws : The Act of Succession(1810), The Freedom of the Press Act(1949:105), the Instrument of Government (1974::152) and the Freedom of Expression Act (1991:1469).

Amendments of fundamental laws require two identical decisions by the Parliament with a general election intervening before they can be approved.

The fundamental laws are at the top of the hierarch.Immediately under the level of fundamental law comes the Riksdag Act.

The provisions concerning the restriction of certain rights and freedoms are the next level.

The next level down is the sphere of facultative law. Law is established as the basic principle, but the Constitution offers a wide range of opportunities for the Parliament to use provisions in law to authorise the Government to issue prescriptions in certain matters.

The way in which the constitutional rules have been incorporated into the legal system has varied. There is today no single statute entitled "the Swedish Constitution". The central provisions of the Swedish Constitution are to be found in the "Instrument of Government which is very similar to that of other countries in Europe. The "Instrument of Government contains rules:

- regarding fundamental rights and freedoms,
- rules on the different institutions of the Government etc.

The Swedish constitution like any constitution does contain general statements of principle, which are declared to form the basis on which the Constitution is constructed.

The opening provision of the Swedish Constitution 1:1 stipulates that :

" All public power in Sweden proceeds from the people. Swedish democracy is founded on the free formation of opinion and on universal and equal suffrage.It shall be realised through a representative and parliamentary polity and through local self-government. Public power is exercised under the law."

Clauses establishing general policy goals are to be found, eg. In provision 1:2 of the Constitution: that the personal, economic, and cultural welfare of the individual shall be the fundamental aim of public activity. These policy goals are not regarded as rules of law in the proper sense and therefore not justiciable.

Important task of the Swedish Constitution is, according to Chapter 2, to safeguard the citizen's fundamental rights and freedoms in his relation with the State.

5. Conclusion on the functional role of main national constitutional systems of the EU Member States

The **functional role of main national constitutional systems of the EU Member States** is to establish, inside the respective nation state, the basic legal source, the rule of law, highest ranking in the legal hierarchy of laws, prevailing all other national laws, laying the basics of organising the policy-making. They all are representing **static systems** balancing the existing “ready made” nation state. They are also to safeguard the citizens’ fundamental rights and freedoms under the respect for the rule of law.

C. The constitutional quality of the political and legal system of the European Union on the basis of the Founding Treaties on EU/EC.

The EU’s constitutional essentials, not depending on a formal text called “Constitution”

I. Introduction: The nature and development of European Union law:

The nature of the secondary law of the EC as developed under the TEU’s 1st pillar, the Treaty establishing the European Community-TEC-

The European Union’s law created by the Union’s institutions according to the provisions of the Founding Treaties establishing the European Union and the European Community is constituting an identity shaping essential of a constitutional quality of the European Union. The constitutional quality essentials of the European Union and of the European Community are emanating from the Founding Treaties on EU and EC.

The European Community has evolved from what many believed to be a purely inter-governmental organization governed by public international law into a quasi-federal entity with an autonomous legal order. The nature of the European Community is marked by the EC primary and the autonomous secondary law as developed under the TEU’s 1st pillar, the Treaty establishing the European Community-TEC-, by the main characteristics of the EC law and by constitutional principles in EC law.

The legal order of the EC is a body of rules which had not been created by one single stroke on the basis of one single constituting act in the sense of a national constitution .

II. General characteristics of the European Community’s primary and secondary law

The European Community constitutes a new legal order in international law for the benefit of which the States have limited their sovereign rights, even though within limited field according to the above –under II. - mentioned principle of attributed powers.

The founding Treaty establishing the European Community – TEC- created an autonomous, independent legal order of the Community, differently from other instruments under

international law, **an own, autonomous specific legal order** which is characterized by own institutions acting for and on behalf of the Community and their respective Treaty objectives, competences and legislative powers . Furthermore , the Member States have , themselves , through a transfer of parts of their own, national sovereign rights to the Community renounced the exercise of that part of their transferred national sovereign rights, while, at the same time, conferring the power to jointly exercise these respective rights upon the Community.

The Community is, by this limited transfer of powers, entitled to implement the powers independently from the Member States, by creating an autonomous legal system through the enactment of Community law which is called the EC's secondary law as it is based on the Founding Treaty on EC as primary resource of law for the enactment of Community law:

“ In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.”, Article 249 1st paragraph TEC **164**

The **EC's law in the sense of a provision having general application** is, in terms of the TEC, called “ regulation”: “ A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.”, Article 249 second paragraph TEC.

The Article 249 1st and 2nd paragraph TEC can ,therefore, be regarded as the basic Treaty provision to stipulate the characteristic of the Community's legal order: it is its claim to be applicable and effective which is inherent to the autonomous character of the Community's legal order.

To ensure the *effectiveness* of Community law, the Community law has **supremacy power over national law** and has **direct applicability throughout the Community** without any national legislative act of transformation. Consequently, the **Community constitutes a supra-national autonomous legal system.** Community law represents an independent legal order, both vis-à-vis international law on the one hand and the national laws of the Member States on the other.

III. European Community law special characteristics, its main features as constitutional principles in EC law :

1. Constitutional transfer of power from the Member States to the Community

1.1 Introduction

The constitutions of the Community's Member States approach to the European method of integration accomplished through creating common binding rules on the legal basis of a

- transfer of parts of nation states' sovereign legislative and executive powers

164: consolidated version of the Treaty establishing the European Community, Official Journal of the European Communities, December 24, 2002, C 325/33 (132).

to the level of a common pooling of jointly exercised powers, jointly exercised through a legal body, called “the Community” and acting through institutions to achieve common objectives through implementing common policies by basically using the instrument of creating common binding rules.

The legal basis of creating Community law is the Treaty establishing the European Community. The Treaty on EC is an agreement concluded between the Member States on the basis of international law, an agreement which, after ratification through the national legislative bodies according to the national constitution's provisions, is applicable throughout the Community and, as the primary law of the Community, it is binding the Member States and the institutions of the Community.

The act of agreement on transferring parts of national sovereign powers to the Community constitutes an act of **constitutional transfer of power** from the Member States to the Community because the transfer of power is based on constitutional clauses in the Member States' national constitutions:

1.2 National Constitutions contain “gateway” clauses to open the national law to the European Union law:

1.2.1. France

The French judicial system is divided between the administrative court and the ordinary courts, and the “split” occurred when the supremacy of Community law over French law was accepted in 1975 by the Cour de Cassation, the highest of the ordinary judicial courts, but was rejected in practice by the Conseil d'Etat, the supreme administrative court, until as late as 1989. In the case of *Semoules*, the problem was expressed as a jurisdictional one: the Conseil d'Etat ruled that, since it had no jurisdiction to review the validity of French legislation, it could not find such legislation to be incompatible with Community law nor could it accord priority to the latter. And although the French Constitution provided for the primacy of certain international treaties over domestic law, in the view of the Conseil d'Etat, decisions on the constitutionality of legislation were matters for the Conseil Constitutionnel – the French Constitutional Court – to make before the legislation was promulgated.

However, in the *Cafe Jacques Vabres* case in 1975, when faced with a conflict between Article 95 of the EC Treaty and a later domestic provision – article 265 of the French Customs Code –, the Cour de Cassation took a different view of its jurisdiction. The Cour de Cassation held that the question was not whether it could review the constitutionality of a French law. The court based its decision on Article 55 of the French Constitution, rather than adopting the *communautaire* or “global” approach that the Article 55 approach could have damaging effects as regards those Member States whose constitutions did not contain a similar provision.

It was until 1989, however, that the Conseil d'Etat finally abandoned its so-called “splendid isolation” and decided to adopt the same position as the Conseil Constitutionnel and the Cour de Cassation – decision *Nicolo*. It has been suggested that earlier decisions of the Conseil Constitutionnel which indicated that it was for the other French courts to ensure that international treaties were applied, acted as a spur to the Conseil d'Etat to reverse its original position.

In France, the main obstacle to the recognition of supremacy of EC law was the jurisdictional limitation of the French courts. In other Member States, in particular in Germany the difficulties which arose related to the fundamental constitutional nature of the national legislation which appeared to contravene Community law.

1.2.2 Germany

Article 24 of the German Constitution allows for the transfer of legislative power to international organizations, but in litigation which arose over apparent conflicts between Community legislation and provisions of the German Constitution, the extent of power which could be transferred in accordance with this Article was questioned, in particular, the focus of the case law was on whether Article 24 permitted the transfer, to an organization outside the German constitutional structure, of a power to contravene certain basic principles protected under the Constitution itself.

After the ruling of the Court of Justice in the case *Internationale Handelsgesellschaft mbH. V. Einfuhr und- Vorratstelle für Getreide und Futtermittel* (1972) received by the German Administrative Court, the German Administrative Court was **worried about principal constitutional items. The consequences were not only that Germany would be held to have given away power which it was not constitutionally permitted to give, but also that in so doing it would be empowering a supranational executive which was not bound by the same guarantees as those of the German Constitution. With these concerns in mind, the Administrative Court ruled, in the face of the conflicting judgement of the Court of Justice, that the Community deposit system breached basic principles of German constitutional law, and it requested a ruling on the matter from the Federal Constitutional Court. This ruling was given by the Constitutional Court in 1974:**

This Court – in this respect in agreement with the law developed by the European Court of Justice – adheres to its settled *view that Community law ...forms an independent system of law flowing from an autonomous legal source; the Community is not a state, in particular not a federal state, but a "sui generis community in the process of progressive integration"* within the meaning of Article 24 (1) of the Constitution ... Article 24 of the Constitution deals with the transfer of sovereign rights to interstate institutions... But Article 24 of the Constitution limits this possibility in that it nullifies any amendment of the Treaty which would destroy the identity of the valid constitutional structure of the Federal Republic of Germany by encroaching on the structures which go to make it up ...

By 1986, however, the Federal Constitutional Court gave a judgement which revised considerably its earlier 1974 decision. This decision is known as the *Solange II* case, the 1974 decision being the first *Solange* case. This means the “so long as” case. The Federal Constitutional Court stated here that so long as the Community had not removed the possible conflict of norms between the provisions of Community law and national constitutional rights, the German court would ensure that those rights took precedence over Community law.

Germany had completed the legislative part of the process of *ratification* of the *Maastricht* TEU in December 1992, amending its Constitution, but before the Federal President signed the formal instrument of ratification, constitutional complaints were lodged alleging that ratification would breach the Constitution. The second chamber of the Federal Constitutional Court gave judgement on 12 October 1993, ruling that ratification was compatible with the Constitution (confirming cooperative ties between the Court of Justice and the Federal Constitutional Court concerning safeguarding democratic control of EU governance), and confirmed this position in his judgement on the constitutional compatibility of the *ratification of the Amsterdam TEU*. It also did not dispel the ratification of the Nice TEU.

Brunner v. The European Union Treaty (1994) is a powerful judgement warning to the Community institutions and the Court of Justice that Germany's acceptance of the supremacy of community law is not unquestioning acceptance of every measure and every judgement that emanates from Community institutions. The critical paragraph 99 of this judgement refers to the "open-handed treatment of Article 235" and the difference between interpretation and amendment of the Treaty, suggesting that the Constitutional Court will not readily defer to the Court of Justice on such questions.

1.2.3 Italy

The EEC Treaty Ratification Act 1957, whereby the Italian Parliament gave full and complete execution to the Treaty instituting the EEC, has a sure basis of validity in Article 11 of the Constitution whereby Italy "consents, on condition of reciprocity with other states, to limitations of sovereignty necessary for an arrangement which may ensure peace and justice between the nations" and then "promotes and favors the international organizations directed to such an aim". The article 11 of the Italian Constitution permits such limitations of sovereignty as are necessary to constitute a concrete actualisation of general validity of the European Community principles. This has formed the basis for the Italian courts' acceptance of the supremacy of Community law, although, as in the case of other Member States, this acceptance has not been unconditional.

The Constitutional Court in the judgement *Frontini v. Ministero delle Finanze* (1974) expressed similar reservations to those voiced by the German Federal Constitutional Court. In particular, although it appeared to accept the effectiveness of Community law within its proper field of application, the Italian Court confirmed that it would continue to review the exercise of power by the organs of the EEC to ensure that there was no infringement of fundamental rights nor the basic principles of the Italian constitutional order.

The *Frontini* decision was followed in 1984 by the case of *Granital* in which the Italian Constitutional Court accepted that, in order to give effect to the supremacy of Community law, Italian courts must be prepared in the case of a clash to apply Community law and to disregard the conflicting national law. However, this acceptance by the Constitutional Court was not unreserved, and its reservations have left open various questions concerning the supremacy of Community law in Italy. The problems which the *Granital* case has unsolved are of great relevance. First, the Constitutional Court has reserved to itself not only the questions of conflicts between Community provisions and basic constitutional principles or inalienable rights of the human being, but also the question of national law which challenges the very division of competence established by the Treaties, on the grounds that such division draws constitutional force from Article II of the Constitution. This is a consequence of the markedly different approach to the issue of the supremacy of Community law adopted by the Court when contrasted with the view taken by the European Court: a difference which could still lead, in the future, to further conflicts.

In *Spa Fragd v. Amministrazione delle Finanze* (1989), the Court examined whether a system, such as that applying to preliminary rulings on validity of Community acts, whereby a declaration of invalidity may not produce any effect in the proceedings before the referring court, is consistent with the constitutional principles on judicial protection. Unlike the *Frontini*, the *Fragd* decision shows that the Constitutional court is willing to test the consistency of individual rules of Community law with the fundamental principles for the protection of human rights that are contained in the Italian Constitution.

1.2.4 The United Kingdom

The acceptance of the supremacy of community law within the United Kingdom has certainly not been unproblematic. Since the British Constitution is largely unwritten it is difficult to speak of “amending” it. What are known as constitutional conventions in the United Kingdom law cannot be formally created, but rather they evolve or emerge over a considerable period of time. No special mechanism exists for amending rule or conventions of a constitutional nature other than by an ordinary Act of Parliament. The central obstacle to acceptance by the United Kingdom of the supremacy of EC law is the fundamental constitutional principle of the sovereignty of Parliament. According to this principle, Parliament has the power to do anything other than to bind itself for the future. A fundamental principle of this nature clearly made it very difficult, constitutionally, for the United Kingdom to transfer to the European Community institutions a sphere of exclusive legislative power.

With those problems in mind, it was nevertheless decided, after the EC Treaties were signed and ratified by the United Kingdom in 1972, to give internal legal effect to Community law by means of an Act of Parliament: the European Communities Act 1972.¹⁶⁵

The central provision of the Act is section 2(1) which provides as follows:

“All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression ‘enforceable Community right’ and similar expressions shall be read as referring to one to which this subsection applies.”

Despite earlier judicial comments to the contrary in *Felixstowe Dock and Railway Company v. British Transport and Docks Board* (1994), the following cases: *Shields v. Coomes* (1979), *Macarthys v. Smith* (1981), *Garland v. British Rail Engineering Ltd* (1982), *Pickstone v. Freemans* (1989) demonstrated a willingness to accept the principle of supremacy of EC law.

In a recent phase of its acceptance of the supremacy of Community law, the House of Lords had stated that there is no constitutional barrier to an applicant before the United Kingdom courts directly seeking judicial review of primary legislation, which is alleged to be in breach of Community law. As in the *Factortame* (1991) case, although this is presented by the House of Lords as a natural extension of its earlier case law and based on the will of Parliament Act from 1972, the impact of the ruling is nonetheless quite dramatic.

165: Birkinshaw, Patrick, “ British report “ on National constitutional law and European Integration , Parliamentary Sovereignty and Transfer of Sovereignty , Relationship Between national Constitutional Law and Community Law ,Judicial Acceptance of Community Law´s Supremacy , in: “ Die Entstehung einer europäischen Verfassung – sungsordnung “, Jürgen Schwarze (2000), Nomos Baden-Baden, pp. 205-286 (221-245).

1.2.5 Conclusion:

The outlined **national constitutions` clauses are transferring parts of national sovereignty to a common “pooling “**, the EU level of jointly exercising common, formerly distinct nation states` powers, thus **attributing and limiting the EU’s legislative powers to create an own, autonomous legal order of the EU as a “ sui generis “ community** in the process of progressive integration under the Founding Treaty on EU concluded and ratified by still sovereign nation states.

2. Basic provisions of the Treaty establishing the European Community: constitutional principles and their functional role in EC primary law and as case law crafted by the Court of Justice

- **attributed, limited powers**
 - **subsidiarity of Community powers**
 - **effectiveness of the Community law**
 - **supremacy of EC law over conflicting national law**
-

2.1 Constitutional principles of attributed, limited powers, subsidiarity and effectiveness of Community law in the EC Treaty: they manifest the “sui generis “ nature of the EC

The Treaty establishing the European Community –TEC- states that the Community while fulfilling its task as set out in the Articles 2 and 3 ,, **166**

“shall **act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.**”, **Article 5 1st paragraph TEC 167)**

and “**Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.**”, **Article 5 third paragraph TEC . 168)**

This is the Treaty’s **stipulation of the principle of attributed powers**, which is the nation states’ reassurance that they did not provide the Community with a power to decide by the Community to enlarge the scope of powers, thus having no – competence-competence.

“ In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the *principle of subsidiarity*, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty. ,, : **Article 5 second paragraph TEC stipulates the principle of subsidiarity. 169)**

166: Official Journal of the European Community, December 24.2002, C 325/33 (40).

167: C 325/33 (41).

168: C 325/33 (41,42).

169: C 325/33 (42) ; Wiener,Antje/Shaw,Jo(2000): on constitutionalism of the European Community, in: Harvard Law School Jean Monnet Working Paper 10/99.

According to Article 10 TEC .”Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty. .,

2.2 Functional role of the Community’s primary and secondary law according to the caselaw of the Court of Justice - limitation of sovereignty and transfer of powers from the Member States to the Community

Article 10 TEC rules general Member States’ obligations to practice a cooperative approach to the Community in order **to guarantee the principle of effectiveness. The Court of Justice has crafted out the principle of effectiveness:**

This principle, the Court had said repeatedly, is a duty to cooperate in good faith, willingly and constructively. Every national authority which has any responsibility in relation to Community law is bound by the obligations which result from Article 10: parliaments, governments and courts are all bound. It also applies to private bodies insofar as State powers have been delegated to them. All national authorities are Community authorities.

Obligations resulting from Article 10 have *developed gradually , step by step, in the caselaw of the Court of Justice* which includes the most important principles of Community law

- the rule that national courts must grant remedies for breach of Community law rules which are as effective as those for corresponding breaches of national law, and which are effective to protect Community law rights fully, notwithstanding any contrary rule of national law;
- the rule that directives can have direct effects;
- the rule that all national authorities, not only courts, may apply national law only if it is in accordance with Community law;
- obligation of Member States to respect the powers of Community institutions and not to undermine them or interfere with them; it protects the integrity of the Community structure and system in a way that no other rule of Community law does.

The Court of Justice chose to avoid the problem of Member States’ differing constitutional approaches to international treaties by **describing the legal order created by the Member States under the EC Treaty and stating the functional role of Community law:**

The Court describes the *legal order as an entirely new system which is different in nature from international law.* The Court argued not from the specific perspective of the constitutional law of any individual Member State, but instead spoke broadly of a **constitutional transfer of power from the Member States.** In the Court’s view, the specific, unprecedented nature of the EC Treaty and of the legal order it had created was to be understood on the basis that the states had limited their sovereign rights and had established

new political institutions which they had endowed with sovereign rights **to accomplish the objectives of the European Community (principle of effectiveness)**

The **objective of the Community** is, according to Article 2 Treaty establishing the EC, **by establishing** a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4,

to promote throughout the Community

- a harmonious, balanced and sustainable development of economic activities,
- a high level of employment and of social protection,
- equality between men and women,
- sustainable and non inflationary growth,
- a high degree of competitiveness and convergence of economic performance,
- a high level of protection and improvement of the quality of the environment,
- the raising of the standard of living and quality of life, and
- economic and social cohesion and solidarity among Member States. ,,

The TEC's use of the term "task" in Article 2 is misleading to a wrong understanding of what the Member States meant by stipulating Article 2. Their desired purpose, the objective, and not the "task" was the achievement of the different goals called in detail in Article 2, by establishing a Common Market and an Economic and Monetary Union and by implementing policies, the Common Market e.g. not serving as an end in itself, not being the desired purpose, not being the objective of the Community, but the Common Market being a piece of work, a needed instrument, a task in order to help to achieve what the TEC is wrongly calling "task", but meaning "the objectives" as they are stipulated. It is, therefore, advisable, to read the term "task" as used in Article 2 TEC, but to actually understand this term as "objective" of the Community.

And to accomplish the Treaty's objectives the Member States had established real and autonomous Community powers derived from a limitation of sovereignty by a transfer of powers from the States to the Community, thus creating a body of law which binds both the Member States' nationals and the Member States themselves.

The **functional role of the EC's law is to ensure uniform application of Community law to make the Common market work**. This function explains and underlines many of the specific duties resulting from Article 10.

The principle of uniform application

- ensures that national law rules can never prevent Community law being fully applied;
- obliges national courts to refer a question of Community law to Court of Justice under the Article 234 when they find that it has been differently decided by different national courts or different national authorities, and when there is no further appeal from the decision of the national court which refers the question.

Text of Article 234 :

”
The **Court of Justice shall have jurisdiction** to give preliminary rulings concerning:
(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice. ,,

As to the caselaw of the Court of Justice - limitation of sovereignty, and transfer of powers from the Member States to the Community :

In *Van Gend en Loos* (1963) and *Costa v. Enel* (1964), then, the Court set out its theoretical basis for **the principle of supremacy of Community law**. The force and practical application of the principle became clearer still in its later decisions.

Simmenthal (1978) is an interesting and an important case, since it spells out the practical implications for the Community legal order of the **principles of supremacy and direct effect**.

The legal power of EC law having full effect against the Member State is explained for example in cases *Factortame* and *Francovich*.

In *Factortame* (1991) the Court, as an interim measure, had ordered the UK to suspend the application of *certain* fisheries legislation. After this order, national court proceedings which had already begun reached the House of Lords which asked the Court of Justice for a ruling. The Court held that "it is for the national courts, in application of the principle of cooperation laid down in Article 5 of the EC Treaty, to ensure the legal protection which persons derive from the direct effect of provisions of Community law".

In *Francovich* (1991) it was laid down the basis for claims for compensation against a Member State which infringes fundamental rights rules, in the sphere of Community law.

The duty to give direct effect against the State to certain directives is expressed for example in the judgements *Ratti*, *Moormann* and *Costanzo*.

Court held in the case *Ratti* (1979) that a private party may rely, against a State, on a directive, even if it has not been implemented, if the directive is unconditional and sufficiently precise.

The Court said in *Moormann* (1988) that this principle is based on(ex) Article 5 combined with (ex)Article 189 EC Treaty.

- National administrative authorities are legally bound , equally as national courts, to apply national law only if it is in accordance with Community law, including directives – case *Constanzo* (1989). An administrative authority cannot ask the Court for advice under Article 234, but it can ask the Commission for advice if it wishes to do so, or it can ask for a declaratory judgment from a national court if national law allows this.

The duty to interpret national legislation so as to fulfil directives was explained by the Court in *Marleasing* (1990). The Court said: "... as the Court pointed out in its judgment in case *Von Colson and Kamann v. Land Nordrhein-Westfalen* (1984), the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under (ex)Article 5 of the Treaty to take all appropriate measures, whether general or particular, to

ensure the fulfillment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 249 (exArticle 189) of the Treaty.”; i.e. this duty exists even when the interpretation needed to implement the directive is not the normal or natural interpretation under national rules of construction.

This certainly became clear in the United Kingdom after the ruling in the well-known *Factortame* (1990) litigation, on the question of interim relief against a provision of national law which appeared to conflict with one of Community law. Having repeated much of its ruling in *Simmmenthal* on the need for effectiveness and for the automatic precedence of Community law over national law, the Court addressed the issue of interim relief.

In sum:

These constitutional principles of attributed, limited and subsidiary powers to ensure effective fulfilment of the obligations arising out of the EC founding Treaty characterize the “sui generis “ nature of the European Community and the functional role of Community law.

3. Conclusion: pleading for the integrative approach

The constitutional quality of the Founding Treaties on EC and EU and perspectives for the future: constitutional essentials to be incorporated in a new Treaty replacing the Treaty on Constitution in case of actually failing of ratification by the enter Member States

3.1 national constitutions` clauses transferring parts of national sovereignty to a common “pooling “

The outlined **national constitutions` clauses are transferring parts of national sovereignty to a common “pooling “**, the EU level of jointly exercising common, formerly distinct nation states` powers, thus **attributing and limiting the EU’s legislative powers to create an own, autonomous legal order of the EU as a “ sui generis “ community** in the dynamic process of progressive integration under the Founding Treaty on EU concluded and ratified by still sovereign nation states **establishing a political and legal order which is not a static one but which is a framework to allow and limit the gradual process of creating an ever closer Union of the peoples in Europe.**

Comparing the functional role of nation states` constitutions and the functional role of the European Union’s political and legal order, of its constitutional essentials:

The EU` constitutional essentials (attributed,limited power; subsidiarity; effectiveness) are **totally different in nature, different from nation states` constitutions. In view of the principle of attributed, but limited powers, without the sovereign power of enlarging the scope of competences, the EU cannot be compared to the traditional, familiar nation state pattern. Any comparison to nation states`constitutions should be made in the light of the nature of the Member States` collectivity of sovereign states jointly**

exercising their common powers to achieve common objectives through common policies, acting through common institutions and setting common binding rules with supremacy over conflicting national laws, with a legal system of protecting the individuals' rights before the Court of Justice : a political and legal system which is already incorporated in the existing Founding Treaties on EU/EC and which, therefore, can be called to be Treaties containing constitutional essentials even though they are not explicitly called "Constitution".

The Founding Treaties are the manifestation of the political and legal reality that the EU is still under construction. The EU is still developing by dynamics on the basis of Founding Treaty formulas which are flexible enough to allow the traditional dynamical development by the European method of integration and cooperation between still sovereign Member States. The EU is a federation of nation states, but no state, at least not yet. Insofar a written formal text called "constitution" may arise misunderstandings about the nature and the objectives of the European Union, which is not going to become a State. For the time being, a formal Constitution for the European Union would undermine any serious endeavours to further strengthen the EU's identity of being a still developing entity the finalité of which is not or at least not yet necessary to design, because the essential of the EU is a **integrative system of organising the cooperation between the Member States** which, in each of the items on the institutions'agenda, is manifesting peaceful policy-making among the Member States. And this is a "constitution" adequate enough and, viewing at European history, not not to be underestimated, even nowadays.

3.2 Establishing a formal text called "constitution" would risk to deny the sustainable constitutional development of the existing integrated duality of EU-level and nation state level as basic elements of *one* emerging European constitutional order:

Viewing at the national constitutions and at the Founding Treaties on EU/EC, we realize, in the European Union, the existence of a plurality of supreme texts of two interdependent and mutually influencing levels, the nation states'level and the Union/Community level. Both levels' constitutional orders are **basic elements of *one emerging* European constitutional order**. The emerging of one integrated European constitutional order could be at stake, if a premature instrument called "constitution" came to raise contraproductive misunderstandings that a European Constitution was just about to make the final design of a European SuperState.

It had not been easy to persuade national authorities to accept the supremacy of Community law when that law had been introduced without a constitutional amendment to guarantee its supremacy – as indeed was the case in France until the amendment to facilitate the TEU changes, and in Germany and Italy whose constitutions already contained provisions which contemplated the transfer of legislative power to an international organization.

Despite the fact that *all of the Member States and their courts by now accept the practical requirement of giving priority to Community law over national law, few, if any, would be prepared to abandon their supervision of the Community institutions* – and indeed of the Court of Justice to ensure that the Community does not attempt to extend the powers it has been given. However, on the more difficult *Kompetenz-Kompetenz* issue, they are not prepared to relinquish jurisdiction to examine the exercise of Community powers in order to

ascertain whether the Community has exceeded the limits of the powers specifically granted to it under the Treaties in accordance with the constitutional system of each Member State.

This is particularly evident from the decision of the German Constitutional Court in *Brunner*, in which that Court referred somewhat cryptically to the ruling of the Court of Justice to extend the scope of Community powers on an open-handed reading of the Treaty, and in which it stressed that, in the future, *a clear distinction would have to be drawn between the interpretation of existing powers and an actual amendment or extension of the Treaty.*

The gradual acceptance of the principles of direct effect and supremacy of Community Law has been sustained by a continuous dialogue between the European Court of Justice and the national courts:

The relationship between European Union/Community law and the national constitutions is not to be settled according to unilateral principles of hierarchy, by a mere stipulation within an instrument called “Constitution” .

And national courts should not be torn between loyalty of their own constitution and loyalty to their Community duties. Both the Court of Justice and the national constitutions and supreme courts could recognize that

- **the relationship between the European Union/Community legal order and the nation states’ constitutional orders can be seen from two different, but equally legitimate, perspectives , both focussing on a relationship of two interdependent and mutually influencing levels that both are basic elements of one emerging European constitutional order, and that there is , at present,**
- **a duality between two different methods of European integration both of which are incorporated in the present three pillars Treaty architecture of the Treaty establishing the European Union covering the supranational , sui-generis or federal like nature of the European Community assuming the powers, functions and responsibilities traditionally, before the founding of the European Community for Steel and Coal, reserved for nation States’ Governments and Parliaments; and**
- **the powers subject to cooperation remaining essentially inter-governmental in nature.**

The two methods of organizing the cooperation between the Member States at European Union level are reflecting a fundamental divergence of opinion among those who basically argued and still argue in favor of European cooperation. This divergence of opinion does not exist since the signing of the Maastricht, Amsterdam and Nice Treaty on European Union only: the two different approaches to “an ever closer Union among the peoples of Europe “(Article 1 TEU) already exist since the Member States had established the ECSC .

170
What any attempt to establish a formal instrument called “Constitution” should consider is the fact that the Treaty on EU, however, is a compromise, an attempt to stabilize the tension between these two methods, containing , however, intricately

170: *ibid.*, supra, note 86. Calleo, David P. (2001). *Rethinking Europe’s Future*. Princeton: Princeton University Press.

combined parts of an essentially hybrid system of mulilevelled and interdependent sovereignty. 171

And the enlargement issue has intensified the discussion about the deficiencies of the existing Nice Treaty on European Union being an insufficient framework for making the European Union of the Twentyseven efficiently work.

The **Treaty on European Union stands for the dialectics of a duality** these two different methods are confronting the realities in European Union's policies. This duality is represented by the two "supreme" texts of the Treaty establishing the EU and of the Treaty establishing the EC. **Despite this duality of Treaty texts, there is, however, one emerged and still further developing constitutional quality of the European Union, developed until today on the basis of the TEC and TEU and further to be developed in order to make the enlarged Union work.**

The planned dialogue –in 2007- during the German EU Presidency , between the EU Member States Governments on a political schedule to work on an acceptable, legitimate and concise text containing provisions on what an enlarged European Union needs and having at least legitimacy strengthening constitutional quality, might be facilitated by the fact that, substantially, there has probably never been before *such a broad common understanding about the Union's institutional deficiencies and such a community of values among European States.*

As previously demonstrated by Russia's energy price and export policy, the European Union's Member States typically used to move toward deepening integration when occasionally stirred up by external events. But even after facing the new challenges brought to Europe when the Cold War had ended, the Member States Governments failed to meet the needs for amending the Maastricht Treaty on EU for improving the enlarged Union's decisiveness, transparency and democracy. **The Member States failed to design and to agree upon a dominant common strategy. For, European integration still appeals to national interests or better: to those ones which are falsely or deliberately taken for national interests.**

The challenge ahead is to make out of the national interests building blocks of European Unity rather than bulwarks of sovereignty. *The draft of which was the task of the Constitution of the European Union, the entering into force is still the open question, and how to find an alternative acceptable for entire ratification.*

And if a formal Constitution will actually fail to get entire ratification, **a modified alternative will have the same mission to promote and safeguard European identity as it is the**

171: *ibid.*, supra, notes 170,86.

mission of the Founding Treaties on EU/EC:

- not to replace national constitutions, but
- to be a constitutive element of two interdependent and mutually influencing levels –the national and the EU level- that both are basic elements of one emerging European constitutional order.
- The European Union pillar of that European constitutional order is characterized by the essentials of a constitutional quality of the EU, notwithstanding a written document called “Constitution” or a document amending the TEU will emerge.
- In sum, if a formal text called “constitution” appears to hinder rather than to serve the identity shaping of the EU, a final failure of ratification –which seems to be likely to happen if there will be no chance in a repeated voting in France and the Netherlands –will not be harmful if in time a realistic alternative will be prepared to have the same functional role as it would have been the “constitution”: to strengthen the identity shaping and legitimacy building essentials of the enlarged EU.

3.3 The identity issue: maintaining and improving the legitimacy *acquis* of the current Treaty on EU by *integrative* approach. Constitutional essentials count more than the formal aspect .

The draft constitution was meant to be released as a written text which is called “constitution”, but which may turn out clearly not be meant to set up the final design of a European “Super” State, so that there is no reason for any respective serious doubts or fears within important parts of the peoples of the Union when the question of how to strengthen the EU is put on the European agenda again to find solutions to the negative French and Dutch plebiscites. New solutions might get acceptance in all Member States when solutions convince what matters: essentials have priority, the formal aspect, the legal frame is less important.

What counts for legitimacy through acceptability is the reasonable and legitimate objective to maintain and improve what has been achieved by European integration until now by strengthening:

- democracy , transparency and decisiveness of the European Union

and to amend the existing Treaty on EU by integrating the accepted improvements in the TEU according to the established national procedures on ratification, also adding concise texts on the basic principles of the Union and a basic rights catalogue to serve the people’s fundamental rights and interests they find safeguarded by the Union and to be the only legitimate motive why the European Union exists.

What allows to be optimistic about the chances of an approach considering that “ essentials count more than the formal aspect” is the fact: The draft constitution’s substantial provisions on strengthening the EU’s institutions and legislation procedures by strengthening democracy, transparency and decisiveness and efficiency of the EU had not met substantial opposition in the public debates in the Member States. It is, therefore, no

surprise that the academic discussion is focussing on how to safeguard these substantial elements of the draft constitution in case of final failure for the ratification by the entire Member States of the EU.

Integrating the substantial institutional and procedural provisions of the draft constitution into the existing Nice Treaty on EU-TEU- and the Treaty on European Community-TEC-is the idea of an pragmatic approach that had been developed by the Bertelsmann Stiftung and its academic partner, the Centre for Applied Policy Research-C.A.P., University of Munich.

172

A draft of a new Treaty integrating the TEU, the TEC as well as the substantial provisions of the draft constitution should, following this concept, be negotiated by an Intergovernmental Conference-IGC- and be submitted to ratification by the entire national electorates according to the respective established national constitutional procedures, thus observing the same ratification procedure as it had been used for the Treaties on EU (Maastricht,Amsterdam and Nice).

The pragmatic integrative approach as developed by the C.A.P. covered the more technical aspects of how to create a new Treaty by merging Treaty provisions from different legal sources.

What it did not discuss, however, is the crucial identity issue of the EU : how can it be achieved to improve the EU's acceptance by the electorates in 2009 - with the help of what kind of identity shaping provisions of a Treaty having the attributes of constitutional quality? What do provisions on improving democracy, transparency and decisiveness to have to tell the citizens in the EU about the EU's motivation, objectives and instruments needed to strengthen the EU to safeguard the interests of the people?

This means we need to discuss:

- the identity issue and the shaping of constitutional quality of the EU:. What is the EU's identity?
- The EU's constitutional essential: the principle of subsidiarity. The multilevelled system of European Governance , the vertical division of powers between EU and Member States as identity issue
- EU Constitution and legitimacy. European identity shaping role of the Constitution ? EU objectives and basic values.

In case of definite failure to ratify the Treaty establishing a Constitution for Europe by the **entire** national electorates, we **need to discuss what are the essentials to be part of a text to be submitted to ratification, a text destined to make the enlarged EU work and to improve the chances to get accepted within the Member States. The focal issues subject to improvements and integration into a new text of the TEU/TEC are:**

172:The integrative approach is based on the "Grundvertrag für die Europäische Union – Entwurf zur Zweiteilung der europäischen Verträge“, designed by the C.A.P. in 2000 to contribute to the future drawing up of the draft constitution along the lines given by the Founding Amsterdam TEU.

- **EU and democracy** : filling the democratic gap ? Participatory democracy , participation of National Parliaments
- **transparency of the EU's powers and decision.making**
- **EU and efficiency of the Council's decision-making.** Striking a balance between the equality of the Member States and strict proportionality of the European individuals(electorate)? The weighting of votes in the Council. Multiple-speed integration ? Enhanced cooperation: an identity issue ?

Chapter IV

The identity issue: legitimacy compliance needed for any text to avoid gradual disintegration of the Union

A. Identity shaping essentials of the European Union ? Factors contributing to the permanent process of European identity building. – form, levels and substance

1. Definition of the European Union's identity shaping essentials

Identity shaping essentials of any individual or legal entity are special features distinguishing one individual or one legal entity from others.

When the Heads of State or Government of the EU had decided to create a formal text called “constitution”, did they mean to make the EU distinguishable from other entities?

What they meant was to strengthen the identity of the EU: by making the EU more democratic,transparent and decisive and thus getting the EU closer to the citizens and deepening the EU enough to make it work as an enlarged European Union.

2. Factors contributing to European identity shaping essentials: “European” actors, actions, levels, instruments: legislative acts, “European” policy-making, transnational political parties and transnational structures of Europe oriented media and public opinion

A wide range of different actors, actions, forms, levels, instruments and substance contribute to a dynamic process of shaping the European Union's identity. Shaping the

EU's identity appears to be under permanent construction and to be permanently subjected to controversies in politics and scientific research.

An identity shaping essential is the capability to act and to be realized and recognized as an decisive and efficient actor or as an inefficient actor.

Jean Monnet's prophecy is close to Europe's identity: " L'Europe ne se fera pas d'un seul coup ,mais de la solidarité des faits". Europe is built and still is going further to be built on the dynamics of facts and actions:

"European" actions are called all those activities- discussions,decisions on issues of policy matters having a so called "European" dimension as the origin or the impact, importance of the issue may be reaching beyond the national boundaries of single Member States of the EU.

Countless numbers of "European " actions are discussed and decided within and also outside the EU institutions and even on national or regional and local level: they are European actions indepently from the level on which they are discussed or organised and decided.

Whenever "European" actions are discussed and decided on the **"European level"**, **"European level" means strictly speaking that the actions are discussed and decided within the EU institutions and according to the TEU/TEC provisions.** Whenever national or regional or local public bodies – Parliaments,Governments,town councils- are dealing with "European " matters they are discussing and deciding according to their own respective national, regional or local powers.

All „European „ actions together - understood as „European“ ones in the broadest sense of the term „European“ actions - are creating an awareness of the European dimension of their position, either a deliberate, mindful awareness of, or an unconscious feeling about an European dimension of each individual acting together and forming a complex system of transnational networks acting across national borders: growing numbers of working groups and advisory committees composed of national technical experts who influence the nation state's Government's policies as well as the decision-making of the European Commission and the working-groups within the Council,as Christopher Hill describes and as Wessels states:

“Once started, the process generates itself: the socialisation within daily interactions shapes a European way of thinking which leads to new or reformed institutional arrangements, though the limits of moving towards a supranational mode of governance have been reconfirmed in the legal provisions as in the daily use.”**173**

All **these European networks working in different areas of policies** are drawing up their positions on the basis of their national experience and national interests during every meeting of national experts representing their respective EU Member States. **Different national positions are entering a process of mutually confronting and influencing each other.**

- Finalizing the process of exchange of views and opinion, as result may emerge a commonly held position on what may be called a common interest as accepted common solution to a given issue of formerly divergent positions. And the result can actually be called “European”:Wessels uses the term “ the Emergence of this EU mode of Governance” **174**
- No matter if the common position was found on the smallest possible common denominator. What counts for achieving “European” results, for achieving a successful “europeanization” or “communitarisation” **175** of a topic of common interest to be dealt with in a transnational dialogue, is to achieve a common position and common action.

The **level of intergovernmental cooperation between the Governments of the EU** is of high importance **in the process of European identity building** taking place,in legal terms, outside the institutional structures of the EU,outside the EU institutions Commission and Council,but in real terms, when the Council of Ministers’ Members are meeting as Representatives of the Member States assembled within the Council- in all policy matters which are not subject to the TEU/TEC rules on integration decision-making under the first pillar of the TEU Treaty architecture.

173: Hill,Christopher, “The Actors in Europe’s Foreign Policy ,, Routledge Verlag,London, 1996; Wessels, Wolfgang , “Security and Defecne of the European Union. The institutional evolution:Trends and Perspectives”, contributions to the 6th ECSA conference, December 6, 2002, paper dated November 2002, 40 pages, pp(.29,30).

174:ibid.,supra,note 167,p.3.(Wessels).

175: ibid.,supra,note 167,p.7)(Wessels).

Europeanwide identity shaping is a dynamic process of mutually influencing levels of public opinion building through printed and TV and broadcasting media and political decision-making on national government, parliament and on European institutions' level. In terms of participatory democracy the European Parliament's contribution to identity shaping of the EU, the necessary emergence of transnationally organised and operating political parties as well as the contributions of national parliaments is a wide field of open questions and waiting for specific scientific research. **The identity shaping role of the European Parliament** will be discussed later as part of considerations about the **question whether a European public and European public media as well as European structures of Political Parties acting across national borders can be identified or not, required as prior conditions for an identity shaping role of the European Parliament and required for elections to it.**

The institutional framework conditions for an effective „europeanization“, no matter if achieved within or – by intergovernmental cooperation -outside EU institutions, are less important for the quest for the European identity. The EU institutions as such have, in so far, for the identity shaping, no importance. **EU institutions do influence the identity building and shaping through the political discussions, through political fightings for national positions** and practising debates for orientation to find what positions might be feasible to turn out as acceptable for a breakthrough which then might emerge as common position, while common position and national interest are not necessarily contradictory, they may turn out to be congruent, some times at least.

EU laws, EC regulations and directives, and EU policies do reflect the common political views of the EU's legislative institutions, common views as the result of a multiple and effective network managed by actors who are actively and permanently conducting the dialogue on common European affairs. It is through their permanent working on European affairs, through their permanent perception that they are influencing, reviewing, developing what is turning out as the emerging European position in each individual case ranging on the European agenda thus **contributing to the permanent process of European identity building.**

It is **due to this dynamic process of identity building that Europe's identity appears to be still under permanent construction and to be permanently subjected to controversies.** *Europe's design is open to new stages.* It, therefore, cannot and must not be a ready-made, static design similar to the static constitution of a nation Member State. What counts is that Europe's final shape cannot be designed yet, not at present, nor in the foreseeable future.

In sum:

Europe which is kept open for a final design, open for its finalité, can use its pluralistic identity to consolidate and help its Members and candidates from Eastern, Southern, Southeastern, Northern and Western Europe to identify themselves with the EU and to find their place thus contributing to the Union's cultural and political unity of varieties on the basis of basic principles and values which are common to all Members.

3. Identity and legitimacy compliance needed for any text to avoid gradual disintegration of the Union

Whatever will be the form – a text called “constitution” or a text of provisions to be integrated into the existing TEU and TEC: it will have to reflect the Union's identity, the unique, distinctive characteristics of a Union which make them not to be mistaken for any other entities, states or organizations. The provisions will have to clearly determine the Union's characteristics in order to help that the Union gets accepted by the people.

Enhancing acceptability of the Union and of the text describing its characteristics means : **a new text must enable the people to easily identify themselves with a text which would reflect their own expectations why they need a European Union. A European Union to protect their** vital interest in security, the protection of common values, their basic human rights, their interests within a world of globalization and challenges to their vital needs of security.

A text which would reflect the European Union's identity: the necessary distinct image of its

- **basic values**
- **own objectives,**
- **own institutions**
- **own powers, including a clear and distinct image of the distribution of powers between EU level and Member States level :subsidiarity issue**
- **common policies and**
- **efficient decision making procedures**

to fulfil the people's expectations from good, effective EU governance respecting basic rights and the rule of law, a text which would be called legitimate.

Avoiding a coalition of the willing within the EU, needing consensus of all on the identity shaping essentials of the Union:

As to the **legitimacy issue**: any text has to be in accordance with the basic standards as established by the Member States founding the European Community and the European Union: **guaranteeing the basic standards**:

- **being the objective and the basic Community method aiming at creating an ever closer Union of the peoples of Europe- and not an ever closer Union of the States(!).**

Supposed, no written text called Draft Treaty on EU Constitution might get the necessary final unanimous vote by the national ratification procedures, an identity oriented solution has to help to avoid a „coalition of the willing“ represented by those Member Countries which have already voted in favour of the Constitution and which-as “ Kern - Europa” might feel to be challenged to opt for enhanced multiple-speed integration. Such a turn of events would increase the risk of a gradual disintegration of the Union as a whole. Therefore, **the only feasible formula must be: Fight for the essentials, if you cannot bring to life the initially wanted specific legal frame in the sense of a written document called “Constitution”.**

Keeping up the Constitution's essentials in terms of its “ Laeken declaration “ mandate, but without focussing on its formal legal frame and all of the structural elements, this **can be done by adhering to the already existing constitutional quality of the EU. The already existing constitutional quality of the European Union** is clearly noticeable in the existing Founding Treaty on European Union **measured by standards of**

- democracy
- legitimacy, transparency
- decisiveness, effectiveness

which are essential identity shaping constitutional elements. These basic elements will have to be assessed how they work within the existing Founding Treaty on EU and if and how they need to be strengthened to serve the enlarged Union's objectives and its identity shaping role. The result of such an assessment will help to see what essentials of the Treaty establishing a Constitution need to be integrated into the existing Treaty on EU.

The overall guiding line for the following steps of the assessment is to **maintain intact the substance of the Treaty on Constitution..** Maintaining the essentials may be an endeavour which needs **to strike the balance of maintaining the present level of integration and of how to preserve the achieved level of the traditional and well proven dynamism of the integration process of an enlarged EU**, for: **otherwise the EU will have no stance at all to give convincing answers to the challenging questions :**

- What is the European Union's identity to answer world-wide security risks as well as pending questions like that one about further Membership of the EU going beyond the existing geographical boundaries ? What about Turkey ?

What about the Ukraina ?

What about conceiving a EU Membership of Russia ?

*What about a **neighbourship policy of the European Union in relation to the Union's neighboring countries of vital interest to the European Union in terms of secure energy supplies from these countries like e.g. Aserbeidschan?**The Union's president of the Council of Foreign Minister's visit, Mr. Steinmeier, to countries in the Transcaucasian region north of Iran, like Azerbaijan, on February 19/20, 2007, manifests the Union's interest in designing a Union's neighbourship policy;*

What about Israel ? What about Australia ? What about the Membership criteria ?

What is the state of the Union: what are the basics of the European Union and its condition of being, the basics of its "constitution"?

It is all a matter of the basic issue: what is "European Union identity" ? All those objectives, values, rules and practices governing the EU's policies and institutions attempting to achieve the political objectives for which the European democratic Sovereign, the people, has given its legitimating democratic consent to build up the European Union by transferring and jointly exercising parts of national sovereignties? And the EU's Constitution as the supreme political and legal framework will it give the basic political and legal guideline for building the future enlarged European Union ? To be an identity shaping guideline for giving the European peoples' democratic consent to further European Union policy making, will the EU's Constitution be transparent enough, democratic enough, efficient enough to allow to keep up the cohesion of the enlarged EU ?

The legitimate basis as well as the limit to all these questions is set by the main issue of what is the identity of the EU as characteristics expected to

to satisfy the people's expectations that the enlarged Union might keep up the needed cohesion

- **to serve their interests by**
- **giving the best possible responses to the modern worldwide challenges**, chances and risks which allow to keep up the cohesion of the enlarged EU ?

What about the extent to which the cohesion of the EU may stand to allow certain Member States representing a certain number of Member States, without weakening the Community edifice, to cooperate and move beyond the level of integration achieved today ?

Viewing at the difficult striking a balance between deepening and enlarging the EU, striking a balance between efficiency, decisiveness and identity shaping in European integration, on the one hand, and the cohesion of the enlarged EU, on the other , the study's focus will be directed on:

- the reform of the composition of the European Union institutions and of the decision-making process, analysing whether the result appears to make the EU more effective or whether it appears to be substantially doubtful that deepening and enlarging the EU nearly at the same time doesn't work.

With regard to the voting system in the Council, reviewing the decision made by the Treaty on Constitution for a re-weighting of votes, the benefits and limits of recommending a democratic system of a double majority will have to be analysed, striking the balance between weighted votes reflecting a strictly democratic proportionality with regard to the total population of the Union, and the equality of still sovereign nation states having one vote for each of the states.

Before starting with analyzing these issues, I will discuss the one subject which is essential and the common basis of all detailed issues about essentials of nation state constitutions and EU “constitution” : **the identity issue**.

The legitimate basis as well as the limit to all these questions is set by the main issue of what is the identity of the EU ?

B. The identity issue of the European Union: „constitution“ and the idea of Europe

I. Introduction : the identity issue, legal and living constitution, “sui generis” nature of the EU/EC and the secondary law, principle of attributed powers

1. The identity issue , the EU as a “sui generis “ collectivity, the European Union’s final design, its “finalité “ kept open in a dynamic process of creating an “ever closing Union among the peoples of Europe “

In debates on Europe and European Integration, it is **the identity issue** to discuss what are the European Union’s **objectives, tasks and instruments, its internal and external role**, specifically concerning its ability to be an effective global actor in the field of foreign and security policy.¹⁷⁶

¹⁷⁶:Wessels,Wolfgang, “Security and Defence of the European Union. The institutional evolution:Trends and Perspectives”, contributions to the 6th ECSA conference, December 6, 2002, paper dated November 2002, 40 pages, pp(.6,10) ; Regelsberger, Elfriede/Schmalz, Uwe (2001): “The common foreign and security policy of the Amsterdam treaty: towards an improved EU identity on the international scene”, in: Monar, Jörg/Wessels, Wolfgang (eds.): *The European Union after the Treaty of Amsterdam*, London/New York: Continuum, pp. 249-266.

Identity of an individual as well as **identity of an entity as legal person –incorporated by its legal constitution and developing a living constitution-** is usually marking the special features that make the difference between that individual and others and between that entity and others.

Raising the European Unions´identity issue refers to the European Union as an entity which is the collectivity of all the Member States of the EU, united according to the Founding Treaties on EU/EC. The Treaty on European Union is the legal constitution, the legal framework for the collectivity of the Member States to act according to the objectives, tasks, powers and legal instruments as attributed by the Treaty on EU including the Founding Treaty on European Community. As far as the Member States of the Union do comply or do not comply with the provisions of this legal constitution – they are developing a “living” constitution.

The **Union´s features** as layed down in the legal constitution and the Union´s features as developed by the living constitution **make the Union distinguishable** from other entities and distinguishable from the single Member State and from the entire number of single Member States that have founded the European Union: **The European Union is a federation of nation states , it is no federal state, it is no International Organization under international law, it is a “sui generis” collectivity, a special collectivity of nation states, unique, beyond comparison with other entities traditionally known in international law.**

In order to **understand the Union´s identity, the dynamic character of the collectivity called “European Union”,** we look at the **basic difference between the Union´s identity and the different identities of the nation States** in Europe. It is **their own individual past, each nation state´s own history, and their basic principles and objectives to respond to new challenges** which is the guiding orientation line for the nation states in Europe to have **developed the essentials marking their respective identity which differs from each other´s national identity..**

Europe, however, is shaping its identity by orientating towards what is ahead and it is not looking back:

According to the legal constitution of the EU/EC, the founding Treaties on EU/EC, Europe is looking ahead towards managing the future stages in the process of developing „an ever closer union among the peoples of Europe“: **Europe´s orientation is directed towards the future, because it is still under construction** and does not need a purely static order as nation states do, but *an open order which facilitates dynamics to give the necessary responses to challenges while building up Europe.* Stable managing the stages of dynamic construction without risking the overall Grand Design of European integration needs to *keep*

open the final exact design of the European Union. This is why the EU's so called „finalité“ is intentionally kept open in the *Founding Treaty on European Union*.

2. The legal resources: the EC primary and secondary law

The European Union had been created by the Treaty establishing a European Union. The Member States had negotiated, signed and concluded that Treaty under the rules of international law, and ratified according to the constitutional nation state rules and procedures established for legislative ratification of international treaties concluded by every Member State. That Treaty is manifesting the collectivity of the Union's Member States as sovereign states and Treaty making powers: it provides rights and obligations of the Member States to be committed to common objectives of the Union, institutions and policies. The European Union is not endowed with a legal personality in the sense of making laws binding individuals and legal entities within the European Union. That law making power is entrusted to the European Community:

For, the Treaty on European Union is a “roof”: in addition to the rights and obligations of the Member States concerning the achievement of common objectives and policies of the Union, according to the Treaty's architecture of a roof covering three pillars, the Treaty's first pillar is the Treaty establishing the European Community- TEC-.

The European Community has legal personality to act through own institutions and making law. The TEC is the **primary** resource of Community law: assigning rights and obligations to the EC's institutions, the power to make regulations, directives and decisions: binding rules of **secondary law** made on the basis of the primary law of the TEC.

The “sui generis” nature of the EU is due to the “secondary law”:

as noted above, **the EC regulation is a legislative act of**

- general application and binding in its entirety and
- directly applicable in all Member States, which, once published in the Official Journal of the EU, section “L”= legislation, is directly having full force and uniform application throughout the EU, with no need of intermediary legislative act of transformation by Member States' national legislative bodies.
- having primacy over national law, and which is
- launched by the EC's legislative bodies: the Council and the European Parliament.

It is due to this legal nature of being directly in full force and of having primacy over conflicting national law, that **the EC-regulation is comparable to a federal state's legislation..** Federal laws of a federal state do directly enter into force throughout the federation with no further intermediary legislative act needed by the single Member state within the federation to make the federal law to enter into force.

The EC directive does not, in principle, directly rule the rights and duties of individuals – citizens and companies- in the Member States. The EC directive is addressing Member States' legal rights and obligations to implement common objectives by implementing national legislative acts ruling the details about the means necessary to fulfil the EC directive. In principle, it does not have direct effect of giving individuals the right of revocation by the directive's mere publication in the Official Journal. Individuals are entitled to claim

provisions of an EC directive only after national implementing acts of legislation have entered into force or if a Member State has implementation substantially delayed. The EC directive, however, can be compared to the federal law framing the objective and leaving the state law the legal discretion to set binding implementing provisions about the means necessary to achieve the common objective.

3. Identity and the principle of attributed powers

The legal nature of the European Community's -EC's -legislative power clearly shows that the EC, whenever making regulations or directives through the Community's legislative institutions, the EC is acting as a collectivity of states. The legal constitution of the EC, the Treaty on EC, states that this collectivity does act as a legal personality endowed with own rights and duties to act in fora externa and interna on behalf of the EC according to its own institutional decision-making rules and on behalf of its own personality to be distinguished from the single personalities of the Member States. The **EC as legislative actor is acting according** to its own legislative power to accomplish own objectives, tasks, and to use own powers and instruments to act on its own by methods of integration or to act together with the Member States by using cooperative intergovernmental methods.

The EC enjoys powers which are limited by attribution. Modern sovereign nation states are endowed with the legislative power which, in principle, is not limited: it is called the "Kompetenz-Kompetenz", the right to put all imaginable areas within reach of own sovereignty under national legislative powers. The EC has not such a "Kompetenz.-Kompetenz", the EC is hindered to enlarge its legislative powers by autonomous action.. The legislative powers can be enlarged by the Member States only, through amendment of the Founding Treaty according to the established procedures of negotiating, signing and ratifying **.And this makes the EC substantially differ from the nation state:**

- **the legislative powers of the EC are attributed and limited by the Founding Treaties on EU/EC.** As the basic principle in EU/EC law ,
- **the principle of attributed powers,** clearly shows, the Founding Treaties on EU/EC are ruling the basic legal ties existing between EU/EC as collectivity on the one hand, and the single Member States, on the other hand, in a sense which, as far as the contents of the Founding Treaties are concerned , can be compared with a federal state's legal "Constitution". For ,
- **majority-voting EC legislative acts** do substantially overrule national sovereignties, similar to the overruling of a minority of single states by a majority of states in the legislative body "Länderkammer" or "Bundesrat" within a federal nation state.
- In cases of unanimous voting in the EC/Council, however, the principle of equality of sovereign Member States demonstrates the real existence of a dominance of substantial remainders of sovereign rights of the Member States in areas of what they believe to be reserved domains of vital national interests:

II. The identity issue and the constitutional quality of the Founding Treaties on EU/EC:

**Tensions between the legal constitution de lege lata of the existing EU/EC-Treaty and the living constitution: the reality of nation states' recurring to national resources:
the limits of the legal, institutional approach to finding the EU/EC's identity**

The mere existence and implementation of EC primary law through EC legislation does usually escape public awareness within the European Union Member States, at least as far as the majority of citizens of the Union is concerned. The identity shaping role of EC secondary law legislation is rather a matter of experts' concern. But **the identity shaping role of EC legislation is a factor** of increasing importance in European integration whenever the Court of Justice has made a verdict on national laws in matters of high publicity and showing the European public **a gap existing between the legal constitution and the living constitution:**

The **verdicts of the European Court of Justice do shape the EU's identity** in the view of the EU public by influencing, from time to time, the public awareness of the predominance of EU/EC secondary law overruling contradictory national law, as recently, in February 2007 shown by the Court's verdict that the German federal act on the Volkswagen Company- VW- violates EC internal market rules of free flow of capital. Or the Court's verdict that stand-by hours spent by medical doctors at German hospitals are to be paid as on-duty working-hours.

Any attempts are wrong which are made in the course of discussions about these rulings to see the EU/EC as entity, on the one hand, and the Member States on the other hand, in an opposite position of totally different or independently acting political and legal levels. Those **attempts to perceive a distinction between a EU identity and an identity of EU Member States do substantially misunderstand the reality of the EU's policy- making and decision-making levels:**

The national level and the European level of policy-making and decision-making do, under the legal as well as under the living constitution of the EU/EC, not mark mutually exclusive opposite positions. The two levels are rather mutually influencing each other as parts of a multi- levelled complementary system of joint policy-making and decision-making.

Studies on the development of the European Political Cooperation-EPC-and on the Common European Foreign, Security and Defence Identity have shown that **different national**

concepts on European identity do exist, indeed, and which may in fact compete with each other. 177)

In the course of the **political deliberations held in Working Groups of the Council in Brussels, however, an „europeanization“ of formerly pure national positions would be emerging: the formerly diverging national position is undergoing a process of mutually influencing initially diverging national positions by being interpreted by other national positions, and thus the formerly diverging position can change and even can be found, subsequently, later on, merging with a *common* position which then is called the European position.**

What appears to be striking, however, is **the Union’s Member States’ obvious deficit** to take the chance and make use of the Union’s resources of the two levels of national and European level of policy-making and decision-making, using the **EU as actor in the field of foreign and security policy:**

As made evident by **the case demonstrated of some of the Member States’ joining the so-called “coalition of the willing” waging the US led war on the Taliban in Afghanistan**, as well as made evident by the **case of the Member States failing to achieve a common strategy in the case of the US led war on Iraq in March 2003**, it was and still is due to divergent national interests that some of the EU Member States had not used the institutional framework of the EU’s Common Foreign and Security resources to try to draw up a Union position, but they recurred to national resources instead of strengthening their own national position by a joint position-building. Instead of jointly acting they preferred to be a political dwarf on the international stage, whereas the EU appears as a global player in matters of economic and trade relations.

Wessels has, therefore, in a realistic view of the Member States’ practice, doubted that the Member States would increasingly stick to legal provisions on a communitarisation of a Common Foreign and Security Policy because the “national resources “ would dominate and use the intergovernmental decision-making structures rather than the legal structures as provided for by the Nice Treaty on EU. “ Especially in managing international crises national actors re - emerge to run the machinery among themselves.” Drawing up a scenario on how to improve the efficiency of the “ living” constitution in the conduct of a Common Foreign and Security and Defence Policy, Wessels is sceptical:

“

Foreign and especially defence policies remain in the intergovernmental oriented mode which gives national actors sufficient opportunities to use autonomously their own resources if perceived as necessary. This “high politics” area would stay resistant to the usual spill over pressures. The heads of government might take further steps towards a further rationalisation of the intergovernmental coordination of national instruments in the next IGC, but they will

177: *ibid.*,supra,note 173, Hill,Christopher, “The Actors in Europe’s Foreign Policy ,,,
Routledge Verlag,London, 1996.

not cross the borderline towards supranational procedures to use methods of communitarized resources.”¹⁷⁸⁾

In other words: national and European identities have, according to the legal “constitution” de lege lata of the Treaty on EU the potential of mutually influencing each other, and, using the dialectics between national level and EU/EC level, developing new, common positions called European positions, but whenever “high politics “ are concerned, the Heads of State or Government would rather use the “living” constitution of the national resources than use methods of communitarised resources

Viewing at this tension between the legal constitution in terms of the Founding Treaties on EU/EC and the living constitution as developed by the Member States changing mode of using the Union’s resources, it should not be underestimated the legal and political power and the identity shaping power of the Community’s legislative power strengthened by the constitutional principles as crafted out by the case law jurisdiction of the European Court of Justice:

It is the **special design, the ‘suigeneris’ nature of the EC’s legislative power** running an autonomous system of legislation, which is **similar to the nation state system, similar even to the federal state** as far as the legal effect of direct and uniform applicability of federal laws within a federal state is concerned.

This special design is a clearly discernible identity shaping element of the EU’s treaty architecture. This EU/EC model of creating an own autonomous legal order ruling the legal relations between the EU/EC and the single Member States is the essential part of the EU’s identity around which are grouped other substantial identity shaping elements.

The finding of that special design is a result which is due to an institutional approach to find out, on the basis of the Founding Treaties on EU/EC, the EU’s identity, what are the institutions and what kind of powers do they use. But that legal feature of the EU/EC, resulting from the Founding Treaties, resulting from an institutional approach to the Founding Treaties, is not a sufficient answer to the question of what is the EU/EC identity.

178: Wolfgang Wessels, “Security and Defecne of the European Union. The institutional evolution:Trends and Perspectives”, contributions to the 6th ECSA conference, December 6, 2002, paper dated November 2002, 40 pages, pp(.29,30).

The institutional approach is not a comprehensive approach to give a full design of the EU/EC's identity. For, the institutional approach does not answer the following questions about the EU/EC's identity :

- What is the kind of identity we may owe to Europe?
- what are the basic elements of an EU/EC identity? How can Europe, the EU be perceived as an identity shaping force by a European public awareness?
- Is there any European public forum where European identity can be developed?
- What kind of identity can be developed within a European public forum?

A comprehensive approach to the EU/EC's identity has to cover the identity shaping essentials that reflect the heterogeneous varieties of identities in Europe as a mirror of different cultures, histories, languages, but that also reflects what does unite the varieties of identities on the basis of one common heritage of basic values.

III. European identity and the idea of Europe:

A comprehensive approach to the EU/EC's identity shaping essentials: reflecting heterogeneous varieties of identities in Europe and one common heritage of basic values ?

After having outlined under II. above **this more technocracy than basic values oriented approach to the identity issue**, we now discuss **the cultural and basic value oriented approach** to find out what European identity is.

1. Identity indicators

Taking actions to achieve objectives, the presentation of symbols and/or the existence and expression of feelings may indicate, may reflect the special traits of personality or character of an individual as well as the special traits of personality or nature of a collectivity called European Union:

European identity may be a political shape measured by the power and the use of it to act in order to achieve own objectives e.g. in the field of international relations covering political, economic, foreign and security policy including independence of energy supply and climate protection. The European Union is an actor participating in these areas, which are still marked by traditional nation state related symbols like flags, national hymns.

The European Union, too, is developing to use symbols to reflect the collectivity's own objectives, actions, features:

e.g. the German Radio Broadcast Service "Deutschlandfunk" started on January 1st 2007 to broadcast the **European Hymn of Beethoven's 9th Symphony final choir "Freude, schöner Götterfunke"** in addition to the German national hymn at the end of the programme every day before midnight. Or recalling the **Europe Day, May 05, the Schuman Day**.

European Union's identity might also be measured by what the citizens in Europe may feel, wish or expect from the European Union, as it is reflected by the Eurobarometer-polls:

feeling European by appreciating

- free movement of individuals beyond national frontiers,
- using one European currency,
- using the English language as lingua franca making free movement in Europe even easier, and there is, above all,
- peace between all Member States of the EU since decades.

All these achievements are well known to Europeans, even if not present every day.

2. The idea of Europe: an indefinite idea ?

Institutions dedicated to scientific research and education concerned with teaching and learning about the European integration are describing **Europe as an indefinite idea:**

- lacking precise limits,
- provided with geographic boundaries shaped by hazard and not indispensably congruent with the boundaries of the European Union.

Habitual teaching Europe is describing **Europe's identity as a non-conclusive cluster of basic values such as**

- the liberal and parliamentary democracy,
- human rights, freedom of thought and speech, individual freedom from arbitrariness committed by public authorities,
- rule of law, equal rights, independence of courts of justice,
- stable social care systems to ensure basic standards for human welfare,
- market oriented economic policies,
- role of Governments' policies framing market oriented economies by giving incentives and
- binding rules to ensure free competition among companies, thus contrasting any Governments' centrally planning of economic activities, but ensuring balanced and sustainable development of economic activities, sustainable and non-inflationary growth, demanding measures against increasing unemployment rates to ensure
- a high level of employment and of social protection under the conditions of globalization's challenges to competitiveness ,

- a high level of protection and improvement of the quality of the environment, including a growing desire to protect the world's climate,
- the raising of the standard of living and quality of life.

All educational schemes on Europe show this Europeanwide basically shared cluster of pursued values as reflecting Europe's identity which thus is being shaped by a modern pattern of basic principles guiding the expected good Governance in European states. **As challenges in a fast changing world need fast and effective responses, Europe's identity is not a closed system, it is not an order that would fix its formulas once and for all:**

Europe's identity is shaped by essentials as well as by a dynamic openness to ease to reach further stages "in the process of creating an ever closer union among the peoples of Europe"(Article 1, paragraph 2 TEU. 179)

3. The idea of Europe: identity shaping principles and values of universal nature, identity shaping elements of manifold varieties in culture, history, geography, languages, national and regional identities

3.1 Europe's identity shaping values and principles: centuries old heritage and of no exclusive, but universal character

The future oriented dynamism of developing Europe's identity should **not make forget that Europe's identity shaping basic principles of liberty, respect for human rights, fundamental freedoms and equality, of tolerance and of the rule of law had been developed in Europe's past during the European Centuries of the enlightenment and fighting for civil rights and democracy, whereas the period of peace and consent for unity building in Europe is lasting a relatively short period of time since the end of the Second World War, with fortunately only one exception of the war in southeast Europe, in the former Yugoslavia.**

It was until the Second World War that the States in Europe felt their respective identity by defining themselves as enemies within a relationship of mutually felt hostility, thus identity shaping through hostile separation, demarcation, and not through cooperation yet.

Europe's design today, the idea of Europe is more than preventing war among the peoples of Europe only. It is the common sense of responsibility and respect for life in this one world, in a sane environment and under the rule of law:

179: CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION, December 24, 2002, Official Journal of the European Communities C 325/05 (10).

Today's Europe is the grand counter design of cooperation oriented identity building. Europe's design, the idea of Europe as it had been projected by Jean Monnet, Robert Schuman, Alcide de Gasperi, Paul-Henri Spaak and Konrad Adenauer, is much more than the answer to the question of how to prevent any further wars among the peoples in Europe only.

Decades of peace, more than 60 peaceful years in Europe are enjoyed nearly as a matter of course and taken for granted. Long lasting peace in Europe is partly owed to the balance of mutual deterrence between the East and the West during the Cold War period ending in 1989. It is **owed even more to the unique European method of integrating different nation states and national interests**: in each individual case of reaching common consent to a topic ranging on the common agenda and negotiated, deliberated and decided according to legally binding common laws and rules of decision-making procedures applied in a common institutional framework forming the common EU institutions. It is hard work, and **it is every single common decision that can be called to be contributing to maintain and reinforce peace in Europe.**

What **the idea of Europe is more, however, than preventing peace in Europe only**, through channelling common interests through common institutions, it is the common sense of **Europe's task and commitment to give common response to common worldwide challenges to live in one peaceful world in respect for life.** The idea of Europe is, actually, implementing the **common sense of responsibility and respect for life in this one world, in a sane environment and under the rule of law.**

The **idea of Europe is not without defiance within the own confinements of Europe**, challenged by visible signs of misleading nationalistic efforts made by some groups in Europe's societies.

Being European means being firmly patriotic, being aware of one's own country's cultural values and traditions, self-conscious enough to be open and to tolerate other countries and values in Europe and in the world, being aware of the common cultural heritage: the respect for life, for living in peace, freedom and security.

“We are living, and we want to live, and we are aware that others are living and that they want to live.” This is the **pure formula of the universal ethic as the greatest European, living in the 20th Century, Albert Schweitzer had formulated it as „ Ehrfurcht vor dem Leben“: respect for life.** It should be in the common commitment to the respect for everybody’s life that we do have to share our unlimited responsibility in that one world. **In so far the idea of Europe is more than preventing war among the peoples of Europe only.**

In so far, the **idea of Europe** is the community of states committed to basic values of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law. **That is the substantial nucleus of the idea of Europe.**

The idea of Europe is not an abstract concept of bringing together nation states so as to form a European central state. The idea of Europe is to maintain its common basic values of liberty and fundamental freedoms within the enlarged European Union. And one of the essential questions is whether the European Union is committed to help to support these basic values also all over the world. Principles of liberty, respect for human rights, fundamental freedoms and equality, of tolerance and of the rule of law are **no exclusive, distinctive traits reserved to the states in Europe only.** For, these **basic principles that are shaping Europe’s identity do have an essentially *universal* character at the same time. Universal values of liberty and respect for fundamental freedoms can, in principle, if reasonably adapted to specific cultural traditions, be applied worldwide.**

These identity shaping principles are claiming and exercising universal dimension, they are marking the modern feature of good governance which every modern nation in the world does claim, which does not make it easier to identify the – specific- nature of the European identity by measuring it on the basis of these universal principles.

Namely the rule of law in the Western understanding of being a binding universal principle is the rule of secular law created by the people and not created by any religious leaders. It is an open question whether

- the rule of secular law and
- the principles of liberty, democracy and respect for human rights and fundamental freedoms

can rightly claim to be of universal value to govern and judge internal affairs in all countries all over the world and, in case of violation, may allow to legitimate to intervene in internal affairs and own cultural traditions of foreign countries. Or whether these principles are an arrogant, non-legitimate intervention in internal affairs. of another country.

The right approach to giving the answer is to draw a strictly distinctive line between these principles, on the one hand, and the right and obligation to intervene for the sake of humanity against any murder and torture committed against any groups of people within societies, no matter if minorities or majorities are murdered or tortured.

This **humanitarian intervention approach is an essential Western principle** which the European Union, the USA and significant numbers of countries in other parts of the world feel commonly committed to. In this field, joint positions and cooperation between the West

and countries including nuclear powers like China, India and Pakistan are emerging as common positions on fighting against terrorism, just in the light of the terrorists' attacks against a "train for peace" on its way from Pakistan to India on February 19,2007.

And in addition to this, **Europe does not exist through a specific negating of other nations nor through defensive exclusiveness against other nations**, which does not make it much easier either to identify Europe's identity. No negating, no deterring of others did Europe demonstrate in the case of the relationship existing between Europe and the Islam:

it was jointly with non-Europeans that Europe defended the Muslim Kosovo and Bosnia against the formerly totalitarian, non-democratic regime of the European orthodox Christian Serbia. *European Governments made a rightly clear distinction between waging a war on terrorism and waging a war on the Islam, thus leaving no doubt that Europe does not exist as an entity that would define and owe its existence to exclude other nations or to be aggressive against any other nation, religion or non-European culture.*

The Western principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law,never are free from conflicts,free from different views at diverging national interests and cultural traditions. The Western principles,however, are-as common heritage from enlightenment- tolerance born and they allow free competition and are dependent on free competition as well. Conflicts in human societies are reflecting contrasting characteristics in human nature of individuals, having and pursuing self-centered needs being in conflict with the needs of the society ,while it is just this conflict which is the genuine source of any progress under the prerequisite that no artificial governmental order imposes a compulsory and arbitrary settlement. Compulsory rulings on freedom from conflicts bring no freedom. **Managing conflicts in societies must not destroy, but safeguard the competition between the ideas to make the best possible use of human resources for the sake of progress and a human life in dignity.**

Kant, nature of morals in politics, universal principles and progress of societies:

Progress of societies and mankind means using the antagonistic traits of individuals'character by peaceful means refusing wars as abused instruments in the pursuit of progress. Progress without wars needs what the German idealist philosopher Immanuel Kant, in his study "Zum ewigen Frieden (1795) " , is describing as a kind of global peace to be guaranteed by a sort of "United Nations" forming a global federation of free and sovereign states endowed with constitutions committed to the republican principle of representative institutions and distribution of powers:

What progress without wars means is focussed in **Kant's study of ethics and politics, of the general nature of morals and of specific moral choices in politics.** In the attachment to his draft Treaty on world peace, **Kant claims any political activity to be subjected to the rules of morals: the conduct of international relations between states to be ruled by the same intentions as the moral choices are made by enlightened individuals with the obedience to the categorical imperative of making sure that the principles guiding the actions of the individual should easily become universal principles.**

A progress in the sense of guaranteeing universal principles might actually be achieved by establishing a functioning international system of social organization that will protect a vital, vivid competition, respect for the rule of law, social progress and solidarity among the peoples and binding rules on peaceful conflict prevention and conflict settlement. The need of binding and enforceable rules on peaceful conflict prevention and conflict settlement is obvious in present times of globalization, international investments and flows of capital across national borders and beyond reach of national Governments as well as of the institutions of the EU, whereas these global activities across national borders are still without a global frame of binding and enforceable laws on common principles guiding the conduct of these activities in accordance with universal ethics. There do exist some single voluntary commitments made by some big companies as global players like British Petroleum when BP voluntarily negotiated and concluded agreements with native parts of the population living in remote areas of Canada on how to safeguard the specific culture, traditions and environmental living conditions before BP started the exploitation of oil and gas. These examples of voluntarily agreed codes on the ethics of conduct of internationally acting companies are influencing societies to a large extent, they are still too few in order to be able to compensate the absence of a global framework of binding rules.

Unclear, however, would not be the objective of such a global frame of binding rules. What, under the realities, is still unclear- how to make enforceable a global frame of binding rules on the respect for universal principles. There is a long way to go until achieving a global binding system of principles of liberty and competition, democracy and respect for human rights and fundamental freedoms, the rule of law, security through wealth and social security and solidarity among the peoples. The objective might appear to be utopian, an ideal of a standard as too perfect, not achievable.

It is, however, **the European practice of creating and maintaining peace by primarily non-military means that Europe is committed to earnestly appeal to partners in the world to look at the convincing model of the European idea of basic principles of universal nature.**

3.2 European concept and USA concept of basic values

There are, however, some attempts to define Europe's identity by trying to recall **essentially different concepts of cultural values existing between Europe and the USA:** e.g. referring to the different concepts of justice, e.g. the execution of Saddam Hussein on December 30, 2006, and to the unanimous condemnation of the **death penalty** by an impressive number of European Governments and printing press and TV media in Europe.

Or referring to the **different concepts of social protection and of the role of the State for balancing economic performance, social protection and for the raising of the standard of living and quality of life including the protection and improvement of the quality of the environment just in the light of the visible dangers to the world's climate affected through global warming.**

And referring to the **totally different positions on the legality of the U.S. led war on Iraq**, having Great Britain as the partner of the USA, and demonstrating the **lack of serious endeavours for one European voice of a united Europe in such a fundamental matter**:

These are current issues of European concern and claims to **recognize the substantial differences of opinion still existing between Europe and the USA and having the potential of shaping Europe's identity, taking into account that even the British Government has condemned the false, namely faked justifications of starting the war on Iraq**, and now the British Government is trying how and when to draw back without risking to even worsen the disastrous and wrotten security situation in Iraq, after even the new Secretary of Defence of the USA had to admit during the public hearing in the US Congress in December 2006 that he did not think that the **war in Iraq** could be won.

What is, just **after the faked "evidence" for creating the preconditions to wage the war on Iraq**, still under discussion and without receiving convincing answers:

That is the question whether, under international law, worldwide defending universal values, also called Western values, is in accordance with the strict principle of non-intervention in the affairs of other nations, with the sovereign rights and territorial integrity of other states. Do crimes against humanity committed by dictators like Saddam Hussein against Shiite parts of the population legitimate the US led military intervention by the so called "coalition of the willing" claiming to remove the dictatorship from power and to restore the rule of law and respect for fundamental freedoms in the Iraq and to install democracy?

And, actually, referring to substantially different positions on the methods to prevent further deteriorating of the world's climate. While the European Union is clearly committed to the Kyoto-Protocol on binding reduction goals and measures to reduce the emission of CO₂, the U.S. continues to be opposed to ratification of the Kyoto-Protocol. It is the different approach to energy consumption and to the development and use of modern energy saving technologies and alternative regenerative energies that reflects the different view at basic issues of how to preserve the one world: a different approach to basic cultural values ? A special identity shaping approach ?

4. European concepts of single EU Member States substantially differ from each other: in strategy of why and how to make use of the shaping of a European identity:

It appears doubtful whether Europe's experience made namely with the Iraq case would **strengthen European identity. It appears doubtful as long as the European concepts of the single EU Member States still continue to substantially differ from each other.**The reason for this is not that Member States would see European identity to be contradictory to

national identity. EU Member States recognize their nation and European identity to be the two sides of one coin to be nation and part of the process of European integration. What still **differs is the different strategy of why and how to make use of the shaping of a European identity:**

The **French nation considers its own European identity** as the substantial challenge to strengthen the French nation by strengthening its influence on the European level of European affairs as discussed and decided by EU institutions according to the Founding Treaties on EU/EC.

German history and German educational schemes, however, see a predominance of a growing European or even more international identity ruling over a German nation the identity of which is more and more getting less visible under worldwide trading, technologies, consumer interests and worldwide tourism.

5. Europe of the Regions – contribute to identity shaping

An orientation beyond own national boundaries is also held partly due to the realities of a growing **Europe of the Regions**. Interregional cooperation beyond national frontiers has contributed to enhance the formation of regional, decentralized structures within central states like France and Spain.

6. In sum: Europe is presenting a variety of identity shaping elements of manifold

varieties in history, geography and culture, as well as in national and regional identities

All these elements are not reflecting a homogenous shape of one single comprehensive European identity. **The shape of European identity is not presenting one single independent and homogenous model consisting of multiple levels** as Weiler has described it. **180)** .

The shape of European identity is rather a complex cluster consisting of an inorganic system of multiple dissimilar elements that substantially differ from each other in origin, nature and functional role :

180: Weiler, J.H.H. "The constitution of Europe", Cambridge, 1999.

By referring to the pluralistic identity of Europe and its common basic principles and values, we realize the nucleus of legitimacy of the European construction to create “an ever closer Union among the peoples of Europe.”

Europe’s idea of universal principles and its successful way of peace-building and peace-maintaining is giving vivid evidence that Europe’s idea is not utopian, but a practiced model. It is still under construction, but dynamically continuing with further stages in the process of creating an ever closer union among the peoples of Europe. This experienced model does not want to compulsorily impose Western principles on a worldwide scale what would easily be misunderstood as a wrong concept of a clash of civilizations as a fight of cultures between the West and namely the Islam, a wrong concept that even everyone in the European Union did not and would not share, because such a “clash of civilizations” would totally deny what the European identity firmly stands for:

to be founded on and to be guided by the principles of respect for

- human dignity,
- life,
- human rights and fundamental freedoms,
- liberty,
- tolerance including respect for the peoples’ history, culture and traditions,
- promoting wealth and fundamental social rights,
- promoting peace, security and progress in Europe and
- in the world,

which means practiced tolerance on the basis of the European identity and its independence, as well as

- respect for democracy, and
- the rule of law,

principles which are common to all Member States of the European Union:

this is the 21st Century design of the European Union.

III. Conclusion on the European Union’s identity and perspectives for overcoming the ratification deadlock of the EU’s Treaty establishing a Constitution for Europe:

1. The European Union’s identity shaping essentials are, in legal terms, a cluster of attributes layed down in the constitutional orders of the Founding Treaties on EU/EC and in the Treaty on Constitution: own objectives, tasks, institutions, competences, powers.

The relationship between the European constitutional order and the national constitutional orders is **not to be settled according to unilateral principles of hierarchy**. The **relationship** between the two orders can be seen from two different, but equally legitimate perspectives:

- the intergovernmental nation-state perspective denying the existence of a relationship of two **interdependent and mutually influencing levels that both are basic elements of one emerging European constitutional order**, and the
- Union federal like perspective to establish a Constitution for Europe by settling a hierarchy of supreme texts with the supremacy of a Constitution for Europe over national constitutions .

There is , actually, a plurality of ‘supreme’ texts in Europe, but there does exist a relationship of two **interdependent and mutually influencing constitutional levels -the EU constitutional order and the nation constitutional orders-that both are basic elements of one emerging European constitutional order:**

it is the basic legal framework which ensures the secure development of the **heterogenous cluster of manifold varieties of different cultural and regional identities according to common basic values and principles**. It is meant as a **binding framework for the Member States to make Europe to contribute to stable and durable international relations for peace and security: if they want Europe really to be a real, efficient internal and external actor**

- **to fulfil the expectations of the peoples of Europe to live in security, peace, wealth and in a sane environment ,**

and to contribute, not necessarily with a single voice, but in one voice as a real, efficient actor

- in transatlantic relations between Europe and the USA
- in relations with the rising, ambitious threshold countries in Asia, South America and in the Pacific
- in the north-south dialogue with the developing countries.

2. The EU, however, is in a severe crisis. It is still an open question how to overcome the ratification deadlock of the EU’s Treaty on Constitution. The central provisions of the Treaty on the Constitution of the European Union were and still are meant to deepen the Union, to strengthen the decisiveness and effectiveness as well as the democratic legitimacy of the enlarged EU. In case of definite failure of the Treaty’s ratification by the required entire 27 Member States, an alternative has to be found that avoids the deficiencies of the Treaty on Constitution:

The failure of the Treaty on Constitution to get the approval in the French and Dutch plebiscites was held due, partly, to a lack of transparency the French and Dutch voters were missing in terms of how to understand the EU's Constitution. The text of the Treaty is long and, to many, bafflingly complex. It actually emerged not as an exactly pretty document itself—it runs over 200 pages. And in addition to this technical aspect, an even more substantial feeling of scepticism is held responsible for the negative French and Dutch votings :a widespread feeling in the EU, that due to the present and future extent of the EU's enlargement, the citizens in the European Union are uncertain about the Union's identity and legitimacy. The Draft Treaty on EU Constitution was the final result of a long standing public debate on the emerging of a European Constitution. But the discussion about the future EU constitution was a discussion between elitarian Members of the Convent. In the view of the people in the EU, the functional role of the EU's Constitution still kept on being unclear: In their view, the EU Constitution could be a genuine new political and legal instrument to create a EU Superstate. To others, the EU's Constitution is no instrument to create a EU Superstate, and nothing else but the written text as a better sum up of what already exists : a reviewed Founding Treaty on EU(Nice),already having constitutional quality, but lacking transparency and having difficulty in enhancing legitimacy, having difficulty in convincing the European people about the objectives, policies and powers of the EU.

Realistic perspectives to overcome the deadlock, whether through modification of the existing Treaty on constitution or through fusion of the existing Treaties on EU/EC need entire ratification in all 27 Member States. To acquire ratification, any realistic alternative has to avoid the same deficiencies the Treaty on Constitution is suffering from as noted above. And it has to avoid the deficiencies of the Nice Treaty on EU .

For, the political leaders in the EU and experts at EU affairs do basically agree that the existing Nice Treaty on European Union was and still is no sufficient legal and political framework to satisfy the requirements to help the European Union of then 25 and now 27 or even more Member States to respond to future challenges in a world of permanent modernization and globalization .

A mere technical fusion of the existing Treaties on EU/EC would fail again.

Thorough analyzing the legitimacy potential of the provisions on reforming the democracy, transparency and decisiveness of the European Union would facilitate the ratification chances.

3. Reforming the democracy, transparency and decisiveness of the European Union would increase legitimacy and facilitate the ratification chances.

Chapter V

The Union and Democracy

The constitutional quality of the European Union – essentials and perspectives for improving the enlarged EU's *democracy* incorporated in a concise text of a fusion Treaty of the existing Treaties on European Union and European Community

A. Introduction

I. Political decision required for alternatives in case of definite ratification failure of the current Treaty establishing a constitution for Europe: presenting a modified Constitution treaty repeating the label “constitution” or a fusion of the Treaties on EU/EC avoiding the label “constitution”

It is rather a political than a legal issue to decide – by the Union's Heads of State or Government – whether to present a modified text of the Treaty on Constitution or a fusion of the Treaties on EU/EC as an alternative to overcome the ratification deadlock.

Both a modified text of the Treaty on Constitution and a fusion of the EU>/EC-Treaties have to present convincing solutions to improve the enlarged Union's democracy, transparency and decisiveness. What appears to speak in disfavor of presenting a modified text of the Treaty on Constitution is the fact that the text which is called “constitution” has already been disreputed by the negative vote in the French and Dutch referenda. It cannot be excluded that a modified text which is called “constitution” will also be subject to polemics, misunderstandings and allegations that a “Constitution” would be the signal for the European Union to run for “federal” Superstate while the term “federal” in still widespread British understanding is having the same meaning as the term “central”.

It appears, therefore, **for reasons of political opportuneness to be more desirable to present a fusion of the existing Treaties on EU/EC avoiding the label “constitution” : they are substantially treaties assigning constitutional quality to the European Union, but they are not called “constitution “.**

A fusion text, however, in order to enhance the legitimacy and acceptance quality, should be

-- concise enough and

-- present the required reform essentials to make the enlarged Union work in terms of improved democracy, transparency and decisiveness rather than raising walls of

defensive fortifications of national sovereignty. Organising the draft of which is the task of the Governments of the European Union.

A fusion model as alternative to the failing Treaty on Constitution should have the same mission: to promote and safeguard European identity. Not to replace national constitutions, but to be a constitutive element of two interdependent and mutually influencing levels –the national and the EU level- that both are basic elements of one emerging European constitutional order. A fusion model as the European Union pillar of that European constitutional order should contain the essentials of a constitutional quality of the EU as follows:

II. Constitutional quality essentials of the European Union –subject to reforms and constituent elements of a fusion model – to increase democracy, transparency and efficiency of the European Union

The activities of the European Union have a growing impact on society. European regulations are increasingly interwoven with those of national, regional and local authorities. More than a third of national regulations are of European origin. The growing importance of the fourth level of Government, **the EU level** – EU policies negotiated and decided by EU institutions according to the provisions of the TEU/TEC, means that this level, too, is **required to meet constitutional quality standards**.

At national level, the authorities are *bound by constitutional guarantees and general principles of proper administration*. On the other hand, the **development of the constitutional quality of the Union is still incomplete. It does not continue at the same level of the Union's increased effect on the fortunes of the people in the Member States. This risks to further damage the functioning of the EU**, as, for example, the unsuccessful French and Dutch plebiscites on the draft Treaty on Constitution had reflected refusal or unvoluntary resentment about the intention of the Constitution to deepen further European integration. Deepening the European Union, however, continues to be of vital importance for the peoples of the Union, and it is essential to strengthen support for the development of the Union:

supporting the development of the Union means strengthening the identity, the legitimacy of the Union. This requires, therefore, that the same standards of proper administration should apply at European level as at national level. On European Union level this can be achieved by what the Laeken-Declaration had set as more detailed guide-lines for the Convent's design of the future European Union:

“- to propose a better division of Union and Member State competences;

- to recommend a merger of the Treaties and the attribution of legal personality to the Union;

- to establish a simplification of the Union's instruments of action;

- to propose measures to increase the democracy, transparency and efficiency of the European Union, by developing the contribution of national Parliaments to the legitimacy of the European design, by

simplifying the decision-making processes, and by making the functioning of the European Institutions more transparent and comprehensible; ” **180 a)**

The **substance of the Laeken-guide-lines**, actually, is aiming at **stabilizing the Union’s legitimacy by applying and improving the three principles of**

- democracy
- transparency, including subsidiarity , and
- efficiency.

B. Increasing democracy, democratic legitimacy of the European Union

I. The Treaty on European Union calls for enhancing further the democratic and efficient functioning of the Union institutions

1. Introduction

People have entrusted tasks to the Union expecting “good governance” that they are efficiently and accountably carried out. The Maastricht Treaty on EU brought necessary improvements. Filling the democratic gap a leftover ?

The Maastricht Treaty on European Union- TEU- as well as the Amsterdam and Nice Treaty on EU declare in the Preamble that the Member States were “ DESIRING to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them,”. 181)

180a: *ibid*,supra, note 126.

181: Maastricht TEU, Official Journal of the European Communities, 29 July 1992,C 191; Amsterdam TEU,Official Journal, 10 November 1997, C 340; consolidated Treaties, Treaty on European Union, Treaty establishing the European Community, Official Journal of the European Communities,24 December 2002, C 325/5 and C 325/33 ; http://www.ellispub.com/downloads/eu_cons_treaty.pdf); http://www.eur-lex.europa.eu/en/treaties/dat/12001C/pdf/12001C_EN.pdf ; Nice Treaty: Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts,**in:** Official Journal of the European Communities, 10 March 2001, C 80/01).

The Member States desire to strengthen what in other words is to be called the democratic legitimacy of the European Union. The people have entrusted tasks to the Union expecting that they are efficiently and accountably carried out according to democratic principles, otherwise this would not demonstrate a sufficient constitutional, legitimate reason for the transfer of parts of nation states' sovereign rights to a joint exercise through the EU's institutions.

The Maastricht TEU had brought about the necessary improvements:

- expanding of the legislative and monitoring powers of the European Parliament,
- codification of respect for human rights,
- introduction of civil rights and
- stipulation of the principle that decisions should be taken as closely to the citizen as possible. Since the Maastricht Treaty, the national parliaments of the Member States have increasingly intensified their influence on the positions their governments adopt within the EU Council.

2. Democratic improvement: enlarged legislative powers of the European Parliament

It took a long way to go from the Vedel-group's studies in 1970,1971 on perspectives to enlarge the legislative powers of the European Parliament and to reach at the Maastricht Treaty on EU (1992). As far as regulations in the EU's 1st pillar, the Community, are concerned, the Maastricht Treaty improved the legislative powers of the European Parliament by introducing the co-decision procedure in certain policy areas, particularly the internal market. According to Article 189 1st paragraph Maastricht Treaty on EU:

“

In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.”

Since Maastricht, the Council and the European Parliament are co-legislators: no regulations are drawn up without both agreeing to them. This co-decision procedure is unchanged under the Amsterdam Treaty on European Union: Article 249 paragraph 1 Amsterdam Treaty establishing the European Community **182**

As to the principle of democracy, this co-decision was a decisive step to get closer to fill the democratic gap on the Community level. Although different parts are interconnected while making Community legislation, **the co-decision procedure has generally proved successful. It, therefore, should be extended to replace the cooperation procedure, which, as far as the democratic point of view is concerned, is not satisfactory.** The cooperation procedure still applies to policy areas such as energy and environmental protection (Article 175 paragraph 2 Amsterdam TEU), public health(Article 152 TEU), social(Article 136) and transport policy(Article 70 TEU), consumer protection (Article 153 TEU).

182: consolidated version, Official Journal of the European Communities, 24 December 2002, C 325/33(132).

And, consequently, the Treaty on European Constitution does extend the co-decision procedure to replace the cooperation procedure in the fields of health, safety, environmental protection and consumer protection for establishing and ensuring the functioning of the internal market by making “European laws or framework laws”: Article III-65 paragraph 1

“

Article III-65

1. Save where otherwise provided in the Constitution, this Article shall apply for the achievement of the objectives set out in Article III-14. European laws or framework laws shall establish measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. Such laws shall be adopted after consultation of the Economic and Social Committee.

.....

3. The Commission, in its proposals submitted under paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council of Ministers will also seek to achieve this objective. “

3. The European Parliament’s right to consultation before the conclusion of international agreements

It is in certain cases requiring unanimous decision-making, that the European Parliament is acting beyond merely having the right to consultation:

Treaties signed by the European Community often require the approval of the European Parliament . The procedure of concluding international agreements is layed down in Article 300 of the consolidated version of the Treaty establishing the European Community, **183)**

This Article is unreadable. According to Article 300 3rd paragraph

“

3.The Council shall conclude agreements after consulting the European Parliament,except for the agreements referred to in Article 133(3),including cases where the agreement covers a field for which the procedure referred to in Article 251 or that referred to in Article 252 is required for the adoption of internal rules.**The European Parliament shall deliver its opinion within a time limit which the Council may lay down according to the urgency of the matter.In the absence of an opinion within that time limit, the Council may act....”.**

183:consolidated version of the Treaty establishing the European Community, Official Journal of the European Commnities,24 December 2002, C 325/33 (150,151).

Article III-227 7th paragraph second subparagraph of the Treaty on Constitution states:

“7. The Council of Ministers shall adopt a European decision concluding the agreement on a proposal by the agreement negotiator.

Except where agreements relate exclusively to the common foreign and security policy, the Council of Ministers shall adopt the decision referred to in the first subparagraph after consulting the European Parliament. .”

And according to **Article III-227 7th paragraph third subparagraph :**

“ **The European Parliament's consent shall be required for:**

- (a) association agreements;**
- (b) Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;**
- (c) agreements establishing a specific institutional framework by organising cooperation procedures;**
- (d) agreements with important budgetary implications for the Union;**
- (e) agreements covering fields to which the legislative procedure applies.**

The European Parliament and the Council of Ministers may, in an urgent situation, agree upon a time-limit for consent. “

4. Supervision, monitoring: new power of the European Parliament

As far as *supervision, monitoring* as an instrument to respond to complaints from citizens of the Union is concerned, the Maastricht Treaty on EU had introduced

- the right of any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, “to address a petition to the European Parliament on a matter which comes within the Community's fields of activity and which affects him ,her or it directly.”, Maastricht TEU Article 138 d, Amsterdam/Nice Treaty on EU Article 194. **184)**
- **an ombudsman** (Maastricht TEU Article 138e (Amsterdam TEU Article 195): “empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.”, and
- to **hold inquiries.** , Article 193 TEC. **185**

184:consolidated version of the Treaty establishing the European Community, Official Journal of the European Communities,24 December 2002, C 325/33 (115).

185:ibid.,supra, note 184,C 325/33 (115).

The European Parliament, however, has not so far made sufficient use of these powers. As far as this is partly caused by the European Parliament itself, the Parliament had not yet appointed an ombudsman. Consequently, the **Treaty on Constitution, Article III-237,reminds:**

“

1. **The European Parliament shall appoint anEuropean Ombudsman.”**

Holding inquiries:

It was due to the Council that the European Parliament has not been able to hold inquiries. According to the Amsterdam/Maastricht/Nice Treaty on EU, without approval given by the Council and the Commission, the European Parliament is not allowed to exercise the right to inquiry:

According to Amsterdam Treaty on EU Article 193 (ex Maastricht TEU Article 138c)

“...the European Parliament may, at the request of a quarter of its Members, *set up a temporary Committee of Inquiry* to investigate, without prejudice to the powers conferred by this Treaty on other institutions or bodies, alleged contraventions or maladministration in the implementation of Community law, except where the alleged facts are being examined before a court and while the case is still subject to legal proceedings. The temporary Committee of Inquiry shall cease to exist on the submission of its report. The detailed provisions governing the exercise of the right of inquiry shall be determined common accord of the European Parliament, the Council and the Commission.” **186**

5. Controlling the Commission:

Strengthening the democratic legitimacy of the European Union under the current legal constitution of the Founding Treaties on EU/EC and the proposals made by the Treaty on Constitution:

The European Parliament’s right to control the Commission had been gradually strengthened in the course of the three Treaties establishing the European Union (Maastricht,Amsterdam,Nice). The European Parliament has increasingly made use of its – under the Maastricht TEU – **acquired power to influence the appointment of the Commission-** through the **right to be consulted** before the Governments nominate the person they intend to appoint as President of the Commission, according to Article 158 Maastricht Treaty on EU. **187**

186:ibid.,supra, note 184,C 325/33 (115.)

187:Official Journal, 29 July 1992, C 191.

The European Parliament's right to be consulted has been **strengthened by the right to a vote of approval** concerning the nomination of the President of the Commission and to approve the President and the other Members of the Commission as a body, Article 214 Amsterdam TEU:

« *Article 214 (ex Article 158)*

1. The Members of the Commission shall be appointed, in accordance with the procedure referred to in paragraph 2, for a period of five years, subject, if need be, to Article 201. Their term of office shall be renewable.

2. The governments of the Member States shall **nominate by common accord** the person they intend to appoint as President of the Commission; **the nomination shall be approved by the European Parliament.**

The governments of the Member States shall, by common accord with the nominee for President, nominate the other persons whom they intend to appoint as Members of the Commission.

The President and the other Members of the Commission thus nominated shall be subject as a body to a vote of approval by the European Parliament. After approval by the European Parliament, the President and the other Members of the Commission shall be appointed by common accord of the governments of the Member States”

” **188**

The Nice Treaty on EU Article 214 confirmed the European Parliament's right to a vote of approval concerning the nomination of the Commission's President and the nomination of the President and the other Members of the Commission as a body, while the nomination of the President and the body of the Commission through the Council, under the Amsterdam TEU was subject to **common accord** between the Governments, both nominations are subject to **qualified majority** of the Governments under the Nice Treaty. **189**

As far as **the right to dismiss a Commissioner or the body of the Commission** is concerned, the **European Parliament has no power under the current legal constitution of the Founding Treaties on EU/EC:**

The dismissal of any Member of the Commission who “no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct, the Court of Justice may, on application by the Council or the Commission, compulsorily retire him.” Article 216 TEU: the Nice TEU had not amended this Article, the ex-Article 161 Maastricht TEU. **190**

The dismissal of a Commissioner, governed by the existing Treaty on EU, can be called a complex procedure which is a difficult political hurdle to jump over by the European Parliament.

188: Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related Acts, Official Journal of the European Communities, 10 November 1997, C 340.

189: consolidated version –following the Nice Treaty on EU, Official Journal of the European Communities, 24 December 2002, C 325/33 (121).

190: *ibid.*,supra, note 189, Official Journal of the European Communities, 24 December 2002, C 325/33 (121).

The Treaty on Constitution attempts to strengthen the European Parliament's power of control by

- stating that the Commission as a College, shall be responsible to the European Parliament, and by
- facilitating the dismissal procedure through giving the right to pass a censure motion on the Commission,

"A European Commissioner shall resign if the President so requests", Article 26 3rd paragraph Treaty on Constitution.

Article 25 5th paragraph:

"5. The Commission, as a College, shall be responsible to the European Parliament.

The Commission President shall be responsible to the European Parliament for the activities of the Commissioners. Under the procedures set out in Article III-243, the European Parliament may pass a censure motion on the Commission. If such a motion is passed, the European Commissioners and Commissioners must all resign. The Commission shall continue to handle everyday business until a new College is nominated." **191**

The Treaty on Constitution's Articles 25 and 26 giving the power to the President of the Commission to force a Commissioner to resign and even more the European Parliament's right to pass a censure and, if a motion is passed, to force the Commission to resign can be regarded as a breakthrough to actually further strengthen the European Parliament's power to influence a dismissal of a Commissioner and, actually, to exercise the right to dismiss the College. This would further fill the democratic gap on EU level

6. Despite improvements of the Union's democratic quality through introduction of co-decision legislative power of the European Parliament a democratic gap still exists:

Despite those improvements, neither the Amsterdam Treaty on EU nor the Nice TEU **192** do correct the democratic deficit which is still existing on EU level. It was up to the Treaty on Constitution to make a clear statement on **the principle of representative democracy:**

In TITLE VI THE DEMOCRATIC LIFE OF THE UNION the Treaty on Constitution states by **Article 45: "The principle of representative democracy**

1. The working of the Union shall be founded on the principle of representative democracy.
2. *Citizens are directly represented at Union level in the European Parliament.* Member States are represented in the European Council and in the Council of Ministers by their governments, themselves accountable to national parliaments, elected by their citizens.
3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly as possible and as closely as possible to the citizen.
4. Political parties at European level contribute to forming European political awareness and to expressing the will of Union citizens. "**193**

191: Draft Treaty establishing a Constitution for Europe, Official Journal of the European Union, 18 July 2003, C 169/01 (14).

192: *ibid.*, *supra*, notes 188, 189.

193: *ibid.*, *supra*, note 191, C 169/01 (19).

No doubt about the fact that the Citizens are directly represented at Union level in the European Parliament. And the European Parliament's right of co-decision in legislation "acting jointly with the Council" is well established.

And it is true that the (national) Members of the Council of Ministers are Members of national Governments each of which is accountable to and controlled by national Parliaments which have been democratically elected by their citizens in national elections. **The democratic gap, the democratic deficit on EU level, however, is, to a certain extent, a matter of concern about decisions made by the Council by majority voting in which national parliaments do not have an adequate say while the Council does not depend on the European Parliament. The political monitoring of the Council by the European Parliament is no real parliamentary control which is effective only by the power to release the acting executive from office. And the European Parliament has not that power in relation with the Council.**

Counterbalancing the lacking comprehensive democratic control of the Council, concerning all the legislative acts of general application (EC laws) taken by the EU's institutions, national Parliaments should have control over them .

The question, then , is :does the Treaty establishing a Constitution fill the democratic gap by strengthening the participation of national Parliaments in the EU's legislation?

II. The role of national Parliaments: Filling the Union's democratic gap ?

Enhancing the Union's legitimacy through transparency of the decision-making process: Openness of government and the right of national parliaments to timely and comprehensive information ; national Parliaments and the principle of subsidiarity

1. More than a decade's combat for the right of national Parliaments to information on Union legislation

The role of national Parliaments contributing to the Union's legitimacy through the right of parliaments to timely and comprehensive information during the Union's legislation procedures on justice and home affairs had already been discussed by the 1996 Intergovernmental Conference on preparing the Amsterdam Treaty on the Union. A right to get informed was related to decision-making also in other fields of the Union's policy-making. In 1996 good reasons were felt for including a specific provision in the Amsterdam Treaty on the Union which should lay down the national Parliaments' right of information.

Until then the procedure of information of national Parliaments on the Commission's legislative proposals was not ruled by provisions of the Treaty on European Union. A formal legal position of the national Parliaments to get informed as soon as possible was based on national agreements concluded between the national Government and the national Parliament. In Germany, before the conclusion of the Maastricht Treaty on European Union, the German Government regularly informed the German Länder as soon as possible on Community legislative projects, the information procedure had been agreed upon by the German Govern-

ent and the German Länder. The Länder wanted to influence the German Government's positioning in European matters that would influence the Länder's competences and interests. After the entry into force of the Maastricht Treaty on EU, the information procedure did not change, in principal, the legal basis, however, changed: the former administrative agreement between the German Government and the German Länder had been put on a new safe legal basis: on a German federal law. The German Länder had successfully made a bargain: they gave their consent to ratification of the Maastricht Treaty under the condition that the German Government

- accepted the Länder's right to information to be guaranteed in the German Constitution (Grundgesetz) while the details of the information procedure were subject to principles laid down in a German federal law; and in view of the fact that
- the German Government had successfully negotiated the insertion of the principle of subsidiarity in the Treaty on EU. (Article G 4th paragraph inserting Article 3 b in the Treaty establishing the Treaty on the European Economic Community, the clause on the principle of subsidiarity). **194)**

The Governments of the Member States, however, in the course of the IGC 1996/97, actually failed to agree on the inclusion of a specific provision on national Parliaments' right of information directly **in the Treaty articles**, but they agreed upon the "Protocol (no.9) on the role of national parliaments in the European Union (1997)", annexed to the (Amsterdam) Treaty on European Union :

THE HIGH CONTRACTING PARTIES,

RECALLING that scrutiny by individual national parliaments of their own government in relation to the activities of the Union is a matter for the particular constitutional organisation and practice of each Member State,

DESIRING, however, to encourage greater involvement of national parliaments in the activities of the European Union and to enhance their ability to express their views on matters which may be of particular interest to them,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union and the Treaties establishing the European Communities,

I. INFORMATION FOR NATIONAL PARLIAMENTS OF MEMBER STATES

1. All Commission consultation documents (green and white papers and communications) shall be promptly forwarded to national parliaments of the Member States.

194: Maastricht Treaty on European Union, Official Journal of the European Communities, 29 July 1992, C 191.

2. **Commission proposals for *legislation*** as defined by the Council in accordance with Article 151(3) of the Treaty establishing the European Community, ***shall be made available in good time so that the government of each Member State may ensure that its own national parliament receives them as appropriate.***

3. A six-week period shall elapse between a legislative proposal or a proposal for a measure to be adopted under Title VI of the Treaty on European Union being made available in all languages to the European Parliament and the Council by the Commission and the date when it is placed on a Council agenda for decision either for the adoption of an act or for adoption of a common position pursuant to Article 189b or 189c of the Treaty establishing the European Community, subject to exceptions on grounds of urgency, the reasons for which shall be stated in the act or common position.” **195)**

Consequently, **the role of the national Parliaments** contributing to the Union’s legitimacy through the right of parliaments to timely and comprehensive information during the Union’s legislation procedure, then had been **emphasized by the Convention** preparing the text of the Draft Treaty on the Constitution for Europe. The Convention had identified responses to the questions put in the Laeken declaration:

- it proposes a better division of Union and Member State competences;
- it recommends a merger of the Treaties and the attribution of legal personality to the Union;
- it proposes a simplification of the Union's instruments of action;

“- it proposes measures to increase the democracy, transparency and efficiency of the European Union, by developing the contribution of national Parliaments to the legitimacy of the European design, by simplifying the decision-making processes, and by making the functioning of the European Institutions more transparent and comprehensible;” 196)

Following this line, as regards the right of national parliaments to timely and comprehensive *information* on “ European laws and framework laws” ,the Treaty establishing a Constitution for Europe confirms the basic principles in the “ The PROTOCOL ON THE ROLE OF NATIONAL PARLIAMENTS IN THE EUROPEAN UNION” 197)

195: Treaty of Amsterdam, Official Journal of the European Communities, 10 November 1997, C340.

196: see the Preface of the Draft Treaty on the Constitution, Official Journal of the European Union, 18 July 2003, C 169/7 .

197: Treaty establishing a Constitution for Europe, Official Journal of the European Union, 16 December 2004, C 310/01 (204).

The Treaty provision Article 24, paragraph 4, states that, in cases of qualified majority making decisions, the European Council can adopt a decision allowing the Council of Ministers to act by qualified majority, and:

1.1 National Parliaments shall be informed *before European laws are adopted in ordinary legislative procedure*

National Parliaments shall be informed *before* the European Council shall adopt, by unanimity, a decision allowing for the adoption of European laws or framework laws according to the *ordinary* legislative procedure where the Constitution provides in Part III for European laws and framework laws to be adopted by the Council of Ministers according to a *special* legislative procedure:

“Where the Constitution provides in Part III for European laws and framework laws to be adopted by the Council of Ministers according to a special legislative procedure, the European Council can adopt, on its own initiative and by unanimity, after a period of consideration of at least six months, a decision allowing for the adoption of such European laws or framework laws according to the ordinary legislative procedure.

The European Council shall act after consulting the European Parliament and informing the national Parliaments.”, Article 24 “Qualified majority” 4th paragraph, 1st subparagraph. 198)

1.2 National Parliaments shall be informed *before extension of majority voting in a given case*:

National Parliaments shall be informed no less than four months before the European Council takes a decision, by unanimity, on the politically important matter of extending majority voting by allowing the Council of Ministers to act by qualified majority in a given area, where the Constitution provides in Part III for the Council of Ministers to act unanimously, Article 24 4th paragraph, 2nd subparagraph. 199

1.3 National Parliaments participate in evaluation of implementing the area of freedom, security and justice

According to Article 41 2nd paragraph, on specific provisions for implementing the area of freedom, security and justice, stipulates the participation of national parliaments in evaluation mechanisms:

“2. Within the area of freedom, security and justice, *national parliaments may participate in the evaluation mechanisms foreseen in Article III-161*, and shall be involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles III-177 and III-174.

198: Draft Treaty on the Constitution, Official Journal of the European Union, 18 July 2003, C 169/01 (13); Treaty establishing a Constitution for Europe, Official Journal of the European Union, 16 December 2004, C 310/01

199: *ibid.*, *supra*, note 198.

2. National Parliaments and the principle of subsidiarity

The unmistakably clear provision on the role of national Parliaments in ensuring the implementation of the principle of subsidiarity is inserted in the Treaty establishing a Constitution for Europe – TCE -:

According to the TCE , Part I, Title III Union Competences, Article 9 : Fundamental principles, 3rd paragraph, last sentence: “ National Parliaments shall ensure compliance with that principle(of subsidiarity) in accordance with the procedure set out in the Protocol” , **200** and explicitly referred to by Article III-160 1st paragraph , Article III- 174, Article III- 177 2nd paragraph in matters of proposals and legislative initiatives in the field of judicial cooperation in criminal matters and police cooperation as well as in matters of evaluation of Eurojust’s activities and the laying down of procedures for scrutiny of Europol’s activities:

Article III-160, states:

“

1. Member States’ national Parliaments shall ensure that the proposals and legislative initiatives submitted under Sections 4 and 5 of this Chapter *comply with the principle of subsidiarity*, in accordance with the arrangements in the Protocol on the application of the principles of subsidiarity and proportionality. Member States’ national Parliaments may participate in the evaluation mechanisms contained in Article III-161 and in the political monitoring of Europol and the evaluation of Eurojust’s activities in accordance with Articles III-177 and III-174. ““ **201)**

Member States’ national Parliaments may send to the Presidents of the European Parliament, the Council of Ministers and the Commission a reasoned opinion on whether a legislative proposal complies with the principle of subsidiarity, according to the procedure laid down in the Protocol on the application of the principles of subsidiarity and proportionality.” **202)**

Consequently, referring to Article III-160 of the Treaty on the Constitution for Europe, the PROTOCOL ON THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY, paragraph 3 delineates the participation of national Parliaments in the decision-making process on monitoring the application of the principle of subsidiarity in the law-making process of the Union/Community: 203)

200:ibid.,supra,note 198, C 169/01 (10).and Treaty establishing a Constitution for Europe, Official Journal of the European Union, 16 December 2004, C 310/01

201:ibid.,supra,note 200, C 169/01 (68, 70, 71).

202: draft Treaty on the Constitution, Official Journal of the European Union, 18 July 2003, C 169/01(57,58).

203: Treaty establishing a Constitution for Europe, Official Journal of the European Union, 16 December 2004, C 310/01 (207).

“The Commission shall send all its legislative proposals and its amended proposals to the national Parliaments of the Member States at the same time as to the Union legislator. Upon adoption, legislative resolutions of the European Parliament and positions of the Council of Ministers shall be sent to the national Parliaments of the Member States.”

THE HIGH CONTRACTING PARTIES,

WISHING to ensure that decisions are taken as closely as possible to the citizens of the Union,

RESOLVED to establish the conditions for the application of the principles of subsidiarity and proportionality, as enshrined in Article I-9 of the Constitution, and to establish a system for monitoring the application of those principles by the Institutions,

HAVE AGREED UPON the following provisions, which shall be annexed to the Constitution:

1. Each Institution shall ensure constant respect for the principles of subsidiarity and proportionality, as laid down in Article I-9 of the Constitution.

2. Before proposing legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged. In cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for the decision in its proposal.

3. The Commission shall send all its legislative proposals and its amended proposals to the national Parliaments of the Member States at the same time as to the Union legislator.

Upon adoption, legislative resolutions of the European Parliament and positions of the Council of Ministers shall be sent to the national Parliaments of the Member States.”

3. Flexibility clause and national Parliaments

The European Commission “ shall draw national Parliaments’ attention to proposals” based on the flexibility clause:

“ARTICLE 17, Flexibility clause,

1. If action by the Union should prove necessary, within the framework of the policies defined in Part III, to attain one of the objectives set out in the Constitution, and the Constitution has not provided the necessary powers, the ***Council of Ministers, acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.***

2. Using the procedure for monitoring the subsidiarity principle referred to in Article 9 (3), the ***European Commission shall draw national Parliaments' attention to proposals based on this Article.***

3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Constitution excludes such harmonisation.” **204)**

204:draft Treaty establishing a Constitution for Europe, Official Journal of the European Union, 18 July 2003, C 169/ 01 (11). Treaty establishing a Constitution for Europe, Official Journal of the European Union, 16 December 2004, C 310/01

4. National Parliaments participation in the Union's acts in fields of intergovernmental cooperation ?

The Treaty on Constitution, CHAPTER II SPECIFIC PROVISIONS ARTICLE 39, relating to **implementing common foreign and security policy**, does not provide national Parliaments' participation in the Union's acts in the field of common foreign and security policy. **205)**

But according to ARTICLE 41 "Specific provisions for implementing the area of freedom, security and justice" ,paragraph 2. " Within the area of freedom, security and justice, *national parliaments may participate in the evaluation mechanisms foreseen for in Article III-161, and shall be involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles III-177 and III-174.*" **206)**

5. National Parliaments shall be notified of Union Membership application

Title TITLE IX

UNION MEMBERSHIP

ARTICLE 57

Conditions of eligibility and procedure for accession to the Union

1. The Union shall be open to all European States which respect the values referred to in Article 2, and are committed to promoting them together.

2. Any European State which wishes to become a member of the Union shall address its application to the Council. The *European Parliament and national Parliaments shall be notified of this application.* The Council shall act unanimously after consulting the Commission and after obtaining the consent of the European Parliament, which shall act by a majority of its component members. The conditions and arrangements for admission shall be the subject of an agreement between the Member States and the candidate State. That agreement shall be subject to ratification by each contracting State, in accordance with its respective constitutional requirements." **207)**

205: Draft Treaty on the Constitution, Official Journal of the European Union, 18 July 2003, C 169/01 (17); Treaty establishing a Constitution for Europe, Official Journal of the European Union, 16 December 2004, C 310/01.

206: *ibid.*, supra, note 205, draft Treaty on Constitution, C 169/01 (18); Treaty establishing a Constitution for Europe, Official Journal of the European Union, 16 December 2004, C 310/01.

207: *ibid.*, supra note 205, C 169/01 (21); Treaty establishing a Constitution for Europe, Official Journal of the European Union, 16 December 2004, C 310/01.

III. Comment on the Constitution Treaty's democracy related provisions: do they help to increase the Union's democratic legitimacy through giving national Parliaments a better say as before and necessary?

1. European Parliament's co-decision legislative power under the Constitution Treaty provisions may be left unchanged and extended to replace cooperation procedures

As to the issue of strengthening the European Union's principle of democracy, the introduction – through the Maastricht Treaty on EU - of the co-decision legislative power for the European Parliament was a decisive step to get closer to fill the democratic gap on the Union/Community level. Although different parts are interconnected while making Community legislation, **the co-decision procedure has generally proved successful. It, therefore, should be extended to replace the cooperation procedure, which, as far as the democratic point of view is concerned, is not satisfactory.** The – Council's unanimous voting- cooperation procedure still applies to policy areas such as energy and environmental protection (Article 175 paragraph 2 Nice Treaty establishing the European Community-TEC-), social (Article 137 2nd paragraph 2nd subparagraph) and transport policy (Article 71 2nd paragraph TEC).. **208**

And, consequently, the draft and the Treaty establishing a Constitution for Europe – TCE - does extend the majority-voting co-decision procedure to replace existing cooperation procedures for establishing and ensuring the functioning of the internal market by making “European laws or framework laws”: Article III-65 paragraph 1. **209**

This achievement:

- introduction of the European Parliament's co-decision legislative power and
- its extension to replace cooperation procedures for establishing and ensuring the functioning of the internal market -

should easily be integrated in a new draft modifying the Treaty on Constitution or in a merger Treaty merging the two Treaties on EU and EC.

2. Participation of national Parliaments

In cases where the Council (of Ministers) takes decisions *unanimously*, irrespective of whether they involve legislation or policy, parliamentary involvement is in principle guaranteed through the *national parliaments*. It is their constitutional task they have to fulfil what they are elected for: **to control Governments' exercise of public power**, no difference whether national or jointly exercised level called Union level.

The *internal* relationship between national Governments and national Parliaments is not a matter with which the Treaty on EU Constitution or a merger/fusion Treaty substituting the Treaty on Constitution in case of falling short of the entire ratification

208: consolidated version Treaty establishing the European Community, Official Journal of the European Community, 24 December 2002, C 325/33 (108, 94, 62).

209: Official Journal of the European Union, 18 July 2003, C 169/01 (38); Official Journal of the European Union, 16 December 2004, C 310/01.

needs to deal. However, the Treaty on Constitution or the drawing up of a merger Treaty merging the Treaties on EU/EC are offering the chance to help to ensure that national Parliaments can obtain better access to information at an earlier stage and more efficiently. And this is the explicit intention of the Constitution Treaty's provisions: to **inform the national parliaments before the respective actions of the EU institutions are taken.**

These provisions are not directly giving national parliaments a better say as before. It is up to the national parliaments to establish and improve procedures within their internal relationship between national Governments and national Parliaments to ensure the Parliaments' influence on the position the national Government is planning to design and present within the EU's council. That is the procedure to follow also in the cases of ensuring "compliance with the *Principle of subsidiarity*".

The Article 9 3rd paragraph of the Treaty on Constitution, Part I, Title III Union Competences: "National Parliaments shall ensure compliance with that principle (of subsidiarity) in accordance with the procedure set out in the Protocol". **210)**

This provision **does not assign a direct right to intervention by the national parliaments: they have to "play the game" directly with their own governments:**

For, it is a matter of constitutional standard within all EU Member States that the real power of a national Parliament cannot extend further than the influence it exercises on the own Government. National Parliaments may hold their Governments to vote against specific EU legislation on the Council's agenda. The range of European actions for Parliaments to direct the course of their country's European interests is rather limited.

National Parliaments are free to strengthen their influence by enhanced interparliamentary cooperation only: enabling likeminded national Parliaments to influence their respective Governments. The success of this approach of strengthening interparliamentary cooperation depends on the national Parliaments' initiative. However, whenever unanimous votes in the Council are needed, the chances to reach unanimity are torn down by one national Parliament and by one Member State only unwilling to join one common interparliamentary position.

3. The European Parliament can act as an helpful agent, a catalyst for national Parliaments

In cases of lack of joint interparliamentary positions, **the European Parliament can act as an helpful agent, a catalyst to bring national Parliaments into cooperative and constructive relationship with the Council and the Commission:**

It is helpful, therefore, that the European Parliament has the right to be consulted in cases of decisions requiring unanimity according to Article 24 4th paragraph 1st subparagraph of the Treaty on Constitution.

210: *ibid.*, supra, note 209, C 169/01 (10);

It is helpful for organising cooperative ties between national Parliaments and the European Parliament that the **European Parliament has the right to be regularly consulted** on the main aspects and basic choices of the common foreign and security policy and of the common security and defence policy and to be kept informed according to **Article 39 6th paragraph and Article 40 8th paragraph** of the Treaty Constitution **211)**

The European Parliament's **right to consultation also presupposes that the European Parliament has an adequate right of access to information** on actualities together with regular information on the general shaping of the EU's policies to follow how the Council's policy evolves.

4. The European Parliament's right to consultation before the conclusion of international agreements

The unreadable Article 300 of the consolidated version of the Treaty establishing the European Community – TEC- providing the European Parliament's right to consultation before the conclusion of international agreements should be replaced by a readable version which, at the same time, resolves the uncertainties caused by the text's ambiguous range of interpretation. **212)**

As Article 300 3rd paragraph, 1st sentence states:

“3.The Council shall conclude agreements after consulting the European Parliament,.....”:

This text **keeps open several interpretations of what “consulting” exactly means.** *Efficiency* and *democracy* require a less ambiguous formula. The merger/fusion Treaty should bring more clarity and may accept what the Treaty establishing a Constitution for Europe stipulates for the conclusion of agreements with one or more third countries or international organisations according to Article III- 225 TCE . **213)**

Article III-227 7th paragraph of the Treaty Constitution is a less ambiguous formula than Article 300 3rd paragraph. TEC. Article III-227 7th paragraph second subparagraph of the Treaty on Constitution states by clarifying, in the 3rd subparagraph, what “consultation” means:

“7. The Council of Ministers shall adopt a European decision concluding the agreement on a proposal by the agreement negotiator.

Except where agreements relate exclusively to the common foreign and security policy, the Council of Ministers shall adopt the decision referred to in the first subparagraph after consulting the European Parliament. The European Parliament shall deliver its opinion within a time-limit which the Council of Ministers may lay down according to the urgency of the matter. In the absence of an opinion within that time-limit, the Council of Ministers may act.” : That provision leaves no ambiguous range of interpretation of what “ the Council of Ministers shall adopt the decision(concluding the agreement) after consulting the European

211:ibid., supra,note 210, C 169/01 (17,18).

212 :consolidated version of the Treaty establishing the European Community, Official Journal of the European Communities,24 December 2002, C 325/33 (150,151).

213: Draft Treaty establishing a Constitution for Europe, Official Journal of the European Union (OJ), 18 July 2003, C 169/ 01 (72). Treaty establishing a Constitution for Europe, OJ, 16 December 2004, C 310/01.

Parliament” exactly means. It means: **The Council shall conclude agreements after consent given by the European Parliament in those cases as explicitly stated in Article III-227 7th paragraph third subparagraph :**

“ The European Parliament's consent shall be required for:

- (a) association agreements;
- (b) Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;
- (c) agreements establishing a specific institutional framework by organising cooperation procedures;
- (d) agreements with important budgetary implications for the Union;
- (e) agreements covering fields to which the legislative procedure applies.

The European Parliament and the Council of Ministers may, in an urgent situation, agree upon a time-limit for consent. “ 214)

5. Supervision, monitoring: right to petition and holding inquiries

a) As to the **efficient use of the right to petition through a European Ombudsman** the Constitution’s reminder Article III-237 : “ 2. The European Parliament shall appoint a European Ombudsman....” should be an essential part of a Merger Treaty to enable the European Parliament to make sufficient use of its power to be addressee of citizens’ petitions and to efficiently respond to petitions. **215)**

It was due to the Council that the European Parliament has not been able to hold inquiries. According to the Amsterdam/Maastricht Treaty on EU, without approval given by the Council and the Commission, the European Parliament was and also under the Treaty on Constitution still is not allowed to exercise the right to inquiry.

b) As to the European Parliaments **right of inquiry**, the efficient use of this power depends , as noted above, under the existing constitutional provision of Nice, Amsterdam Treaty on EU Article 193, on “provisions governing the **exercise** of the right of inquiry by common accord of the European Parliament, the Council and the Commission.” The Treaty on Constitution clears previous uncertainties whether the Parliament could act on its own initiative. According to the Constitution Article III-235, it shall now be precisely by “ a European law of the European Parliament” that shall lay down the “detailed provisions “ governing the exercise of the right of inquiry”. **216)**

What, in addition to the precise stipulation of a “European law” as the legal basis to determine the exercise of the right of inquiry, is substantially new: **that the European Parliament shall act on its own initiative after obtaining the approval of the Council of Ministers and of the Commission.**

214: *ibid.*, supra, note 213, C 169/01 (73).

215: *ibid.*, supra, note 214, C 169/01 (75).

216: *ibid.*, supra note 213, C 169/01 (75).

This right to act on its own initiative is **a substantial extension of the rights of the Parliament and can be called innovation to strengthen the monitoring power of the European Parliament and thus strengthening the democratic legitimacy of the European Union.**

6. Controlling the Commission: strengthening the democratic legitimacy of the European Union

The **European Parliament's right to control the Commission** is **part of the democratic legitimacy of the European Union.** The extent of that right and the real power to make efficient use of that right for the benefit of the citizens in the European Union is a substantial legitimacy shaping element of the democratic identity of the European Union. The importance of that identity essential is obvious in view of the legal constitution that still makes the Council the real power player in legislation, though the Council is not under the control of the direct elected Members of the European Parliament.

As noted above, the **European Parliament's power to influence the nomination of the Commission and thus to exert control over the Commission** has gradually, under the current legal constitution of the Founding Treaties on EU/EC, been strengthened: it developed from the right to be consulted to the right to a vote of approval concerning the nomination of the Commission's President and the nomination of the President and the other Members of the Commission as a body. **The respective Article 214 of the Treaty on EU – consolidated version under the Nice Treaty- should be an essential part of a merger Treaty.**

The **European Parliament's power to control the Commission** through direct influence exerted on the Commission's nomination and appointment could be further strengthened if the **composition of the Commission** is altered in such a way that no Member State has a right to its "own" commissioner. According to the Treaty on Constitution, Articles 25 and 26, however, European Commissioners shall be selected on the basis of a system of equal rotation between the Member States, which leaves the principle of an "own" commissioner unchanged. There appears no reason to see that political situation may change .

As far as the **right to dismiss a Commissioner or the body of the Commission** is concerned, and in view of the legal situation , as noted above, that under the current legal constitution of the Founding Treaties on EU/EC the European Parliament has no power to dismiss a Commissioner or the College, the **Treaty on Constitution is presenting a substantial breakthrough:**

The Treaty on Constitution's Articles 25 and 26 giving the power to the President of the Commission to force a Commissioner to resign and **giving the power to the European Parliament's right to pass a censure and , if a motion is passed, to force the Commission to resign. This right of the European Parliament to pass a censure may actually further strengthen the European Parliament's power to control the Commission..**

This would further fill the democratic gap on EU level and strengthen the legitimacy of the European Union. The Treaty on Constitution's Articles 25 and 26 should be an essential part of the merger Treaty.

Chapter VI

The Union and Transparency

The constitutional quality of the European Union – essentials and perspectives for improving the enlarged EU's *transparency* incorporated in a concise text of a fusion Treaty of the existing Treaties on European Union and European Community

I. Introduction: the interdependencies of transparency, democratic accountability, acceptability and legitimacy of the European Union

The constitutional quality of the European Union is not determined by the features of its democratic principle only. It also depends on its transparency of what the Union stands for: thus marking the distinct identity shaping essentials.

The European Union's identity and legitimacy are closely interconnected. The better the Union's essentials, the more its distinct features are clearly discernible for the peoples of Europe who may recognize its ability to solve problems the single Member States cannot solve any more, the better it is for improving the Union's democratic accountability, acceptance, better: legitimacy. The Union's acceptability depends on its transparency of what exactly the Union does and of how it does it and of what it is all about: the transparency of its objectives, tasks, competences, institutions, powers. It is obvious, Public confidence in good governance practised by the European Union depends on the Union's transparency.

Public confidence in the European Union depends not only on its ability to solve problems challenging the peoples of Europe across national borders. Public confidence in the European Union depends also on the extent to which the public European decision-making process as laid down in the legal constitution: the Founding Treaty on European Union is accessible and intelligible, accountable. The Maastricht Treaty had not helped to increase the Treaty's accessibility.

Improvements, therefore, needed to be made in this respect. Various options are recognizable in the course of the process to reform the legal constitution of the European Union:

- First, the *principle of open government* needs to be regulated clearly and properly at European level. This includes
- an accountable distinguishable attribution of powers (competencies) to the European Union: if problems can be solved only at European level, the EU must

be given the necessary powers and instruments, providing in each case of EU legislation an accountable explanation as to why EU/EC regulations are required, whereas the European Union must leave to the Member States those matters that they can handle themselves on national level only (*principle of subsidiarity*). And, in addition,

- Second, *decision-making procedures* can be considerably simplified in order to *improve the Union's efficiency*.
- Third, the merger EU Treaty can be formulated more clearly, more concisely, without meddling with its content:
 - objectives of the EU (*raison d'être*)
 - fundamental rights of the peoples in the EU
 - competencies, tasks of the EU, clearly distinguishable from Member States' competencies
 - instruments: institutions and law-making powers of the EU
 - basic rules of decision-making procedure.
- detailed rules for the application of the merger Treaty are decided by the EU institutions according to the law-making procedures.
- Fourth, the quality of EU legislation can be improved

II. Principle of Openness of European governance by legislation

The European Parliament and the Council are the co-legislators, as well as being institutions for conferring, holding political consultations. European legislation increasingly affects the public directly. The openness of European governance by legislation therefore needs to be properly regulated if European Union's legitimacy shall be improved through transparency and accountability of EU legislation in the peoples' view. Two aspects should be dealt with:

- public awareness of what exactly the European Union is needed for and of what exactly are the Union's powers clearly distinguishable from the Member States' powers, *the principle of subsidiarity aspect*, and
- public and parliamentary access to information and clarity in decision-making.

1. The Principle of subsidiarity in all Founding Treaties on EU and in the Treaty establishing a Constitution for Europe

1.1 Introduction: subsidiarity of Union action ensures the Union's acceptability and legitimacy

The principle of subsidiarity has met comprehensive recognition in all Founding Treaties on EU as well as in the Treaty on Constitution. This is no matter of course. For, in view of different traditions to balance central power levels of Governance and decentralised levels of power in the Member States, it was due to German efforts made in the course of the Intergovernmental Conference preparing the Maastricht Treaty on European Union that the Member States accepted to insert the principle of subsidiarity

in the Treaty's text. The traditional concerns of the German Länder to prevent unitarian approaches to the issue of distributing the powers between Union level and Member States' level had lead the German Länder to successfully defend their sovereign rights in the course of further communitarization. And the principle of subsidiarity was their victorious vehicle.

European Governance is not an end in itself. Specifically exercising Governance in the Community way-through the European Community, the Union's 1st pillar legislation-the legislative competencies the Union's Member States confer on the Union are not an end in themselves: European Governance has the mission to achieve common objectives, common to the Member States and as laid down in the Founding Treaty through which the Member States have conferred parts of their sovereign nation states' powers to a common pooling and jointly exercising the common powers. In order to improve the Union's acceptance in the public, whatever the Union-through the Union's institutions – takes action to attain objectives the Member States have in common, it must be clearly distinguishable what exactly are the objectives the Union is striving for. It means that a merger Treaty's provisions have to make it clearly distinguishable where the Member States are no longer able to offer satisfactory answers to common social , economic and political challenges.

The prerequisite for legitimacy building acceptance of the European Union is that the Member States, when drafting and presenting a merger Treaty, are visibly committed to the basic principle:

that decisions of the European Union's institution should be taken as closely to the citizen.

1.2 The principle of subsidiarity under the EU's founding Treaty and Treaty on Constitution

a) General Definition

“In areas which do not fall within its exclusive competence, the Community shall take action, *in accordance with the principle of subsidiarity*, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States *either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.*”, Article 9 3rd paragraph Treaty establishing a Constitution for Europe, 217)

The **principle of subsidiarity** and its functional role was mentioned for the first time in the history of the EU founding Treaties in the **Preamble** and in **Article A of the Maastricht Treaty on EU – TEU-** by stating:

217:ibid.supra, note 213, C 169/01 (10).

“Preamble:.....

RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which *decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity* ,..”

” Article A:.....

This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which *decisions are taken as closely as possible to the citizen.* “ 218)

And the **general definition of the principle of subsidiarity**, as noted above, is stipulated by **Maastricht TEU Article G paragraph 5** amending the Treaty establishing the European Economic Community, amending by *inserting Article 3b Treaty on Community* .

The **principle of subsidiarity was reaffirmed** by the Amsterdam Treaty on Union, by the Laeken Declaration on the future Constitution and, actually, by the Treaty establishing a Constitution:

“

TITLE III: UNION COMPETENCES

Article 9: Fundamental principles

1. The limits of Union competences are governed by the principle of conferral. ***The use of Union competences is governed by the principles of subsidiarity and proportionality.***

3. Under ***the principle of subsidiarity, in areas which do not fall within its exclusive competence the Union shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.***

The Union Institutions shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Constitution. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in the Protocol.” **219)**

The Constitution’s text follows the political orientation line given by the Laeken Declaration of the Heads of State or Government:

218: :Maastricht Treaty on European Union, Official Journal of the European Communities, 92/C 191/01.

219: The “Laeken Declaration”, *ibid.*,supra.note 126, the draft Treaty establishing a Constitution for Europe,in: Official Journal of the European Union, 18 July 2003, C 169/01 (10) ; OJ 16 December 2004, C 310/01; the Nice Treaty on EU, consolidated version of the Treaty establishing the European Community, Official Journal of the European Communities 24 December.2002, C 325/33 (42).

The Laeken declaration, noted above, reaffirmed the principle of subsidiarity embedding it in the European Union's legitimacy as derived from the Union's democratic values as laid down in the Union's legal constitution and practised by the Union's living constitution. The Union's legitimacy as derived from the Union's objectives it pursues and derived from the powers and instruments it possesses, as well as derived from democratic, transparent and efficient institutions:

“A first series of questions that needs to be put concerns how the division of competence can be made more transparent. Can we thus make a clearer distinction between three types of competence: the exclusive competence of the Union, the competence of the Member States and the shared competence of the Union and the Member States?”

At what level is competence exercised in the most efficient way? How is the principle of subsidiarity to be applied here? And should we not make it clear that any powers not assigned by the Treaties to the Union fall within the exclusive sphere of competence of the Member States? And what would be the consequences of this?” 220)

And the **achieving of the Union's objectives** is put under the **observance of the principle of subsidiarity** according to **Maastricht TEU Article B, last paragraph**, as well as according to **Amsterdam TEU and Nice TEU Article 2 last paragraph**, making reference to the principle of subsidiarity :

“The objectives of the Union shall be achieved as provided in this Treaty and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 5 *of the Treaty establishing the European Community.” * ex-Article 3 b 221)

b) Ensuring the effectiveness of the principle of subsidiarity

The basic philosophic and the application of the principle of subsidiarity follow the

“Protocol on the application of the principles of subsidiarity and proportionality”, which is annexed to the Treaty establishing a Constitution for Europe .222

The text of the Constitution's Protocol is identical with the text of the Protocol on the application of the principles of subsidiarity and proportionality attached to the Amsterdam TEU, as far as the basic philosophy (functional role) of the principle is concerned:

220: *ibid.*,supra, note 126.

221: Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related acts, Official Journal of the European Communities –OJ–, 10 November 1997, C 340; OJ, 24 December 2002, C 325/05 (11).

222: Official Journal of the European Union, 16 December 2004, C 310/01 (207).

“43. Declaration relating to the Protocol on the application of the principles of subsidiarity and proportionality

The High Contracting Parties confirm, on the one hand, the Declaration on the implementation of Community law annexed to the Final Act of the Treaty on European Union and, on the other, the conclusions of the Essen European Council stating that the administrative implementation of Community law shall in principle be the responsibility of the Member States in accordance with their constitutional arrangements. This shall not affect the supervisory, monitoring and implementing powers of the Community Institutions as provided under Articles 145 and 155 of the Treaty establishing the European Community. “ **223)**

Both texts contain the obligation that for any proposed Community/Union legislation, the reasons on which it is based shall be stated with a view to justifying its compliance with the principles of subsidiarity and proportionality; the reasons for concluding that a Community/Union objective can be better achieved by the Community/Union must be substantiated by qualitative or, wherever possible, quantitative indicators.

What substantially differs in the Constitution’s text of the protocol compared to the protocol annexed to the Amsterdam TEU are

- a) the assignment of the Commission’s obligation to **declare, explain and prove with evidence that regulations are necessary** and
- b) the active participation of national Parliaments .

To make the principle of subsidiarity effective, the **Constitution’s text explicitly assigns to the Commission the obligation** that

a) any legislative proposal should contain a “ detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality.” and

b) the Commission shall “ send all legislative proposals and its amended proposals to the national Parliaments of the Member States at the same time as to the Union legislator. Upon adoption, legislative resolutions of the European Parliament and positions of the Council of Ministers shall be sent to the national Parliaments of the Member States.”, 3rd paragraph of the Protocol. **224)**

What counts in terms of ensuring the effectiveness of the principle of subsidiarity is the **direct influence given to the national Parliaments**: their reasoned opinions on a Commission’s proposal’s non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the Member States' national Parliaments and their chambers, the national Parliaments’ vote is binding the Commission to review its legislative proposal and decide to maintain, amend or even withdraw its proposal ,giving reasons for its decision.

223: Protocol annexed to the Amsterdam **TEU**: Official Journal of the European Communities, 10 November 1997, C 340.

224: see Protocol, 3rd paragraph and 4th paragraph, 2nd sentence, *ibid.*, *supra*. note 222, JO, 16 December 2004, Official Journal of the European Union, C 310(01) (207).

The national Parliaments' right to active participation in the legislation of the European Union and, complementary, the Court of Justice having jurisdiction to hear actions on grounds of infringement of the principle of subsidiarity by a legislative act, ensures the effectiveness of the principle: that is a substantial innovation brought up by the Constitution, 6th paragraph and 7th paragraph of the Protocol.225)

And as to using the procedure for monitoring the subsidiarity principle in order to ensure the effectiveness of that principle, the Treaty establishing a Constitution for Europe, actually, states, in addition to Article 9 3rd paragraph on the principle of subsidiarity, as noted above 226)

Article 17: Flexibility clause

1. If action by the Union should prove necessary within the framework of the policies defined in Part III to attain one of the objectives set by the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall take the appropriate measures.

2. *Using the procedure for monitoring the subsidiarity principle referred to in Article 9(3), the Commission shall draw Member States' national Parliaments' attention to proposals based on this Article.*" 227)

Part II of the Constitution, the Charter of fundamental rights of the Union, states in the Preamble that the Charter reaffirms the rights "with due regard for the powers and tasks of the Union and the principle of subsidiarity,".228)

Aiming at ensuring the effectiveness of the principle of subsidiarity, the Constitution's Articles on implementing the Union's policies refer to the role of the Member States' national Parliaments to ensure that the Union's legislative proposals comply with the principle of subsidiarity ,for example in the field of the " area of freedom, security and justice:

"

Article III-160

1. **Member States' national Parliaments shall ensure that the proposals and legislative initiatives submitted under Sections 4 and 5 of this Chapter *comply with the principle of subsidiarity***, in accordance with the arrangements in the Protocol on the application of the principles of subsidiarity and proportionality.

225: *ibid*,supra, note 222; see also OJ,18 July 2003, C 169/01 (95).

226:*ibid*.,supra ,note 222; see also OJ,18 July 2003, C 169/01 (10).

227:*ibid*.,supra ,note 222; see also OJ,18 July 2003, C 169/01 (11).

228:*ibid*.,supra ,note 222; see also OJ,18 July 2003, C 169/01 (23).

Member States' national Parliaments may participate in the evaluation mechanisms contained in Article III-161 and in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles III-177 and III-174.

Member States' national Parliaments may send to the Presidents of the European Parliament, the Council of Ministers and the Commission a reasoned opinion on whether a legislative proposal complies with the principle of subsidiarity, according to the procedure laid down in the Protocol on the application of the principles of subsidiarity and proportionality." 229)

1.3 Conclusion: making the principle of subsidiarity effective: through holding public subsidiarity admissibility debates in the national Parliaments, in the European Parliament and in the Council in addition to the right of information

a) concerning the Commission's obligation to substantiate: *to declare, explain and prove with evidence why regulations at Union level are necessary, and the Commission's obligation to send to national Parliaments all its legislative proposals and its amended proposals to the national Parliaments of the Member States at the same time as to the Union legislator. Upon adoption, legislative resolutions of the European Parliament and positions of the Council of Ministers shall be sent to the national Parliaments of the Member States.*

b)) Proposal to hold *public subsidiarity admissibility debate* in the Council, in the European Parliament and in national Parliaments, an "added value" compared to paragraphs 5 and 6 of the Protocol on the application of the principle of subsidiarity and proportionality, annexed to the Treaty on Constitution

a) The Commission's obligation to substantiate its position on the principle of subsidiarity is a constitutive element of legitimacy of the Union's power. It is an expression of constitutional quality of the Union and, therefore, the a.m. obligation should be directly stipulated in the merger Treaty on Union.

No doubt, the principle of subsidiarity has met comprehensive recognition in all Founding Treaties on EU as well as in the Draft Treaty on Constitution. However, this principle has proven difficult to apply it in practice.

229: *ibid.*, supra, note 222; see also OJ, 18 July 2003, C 169/01 (23).

Subsidiarity shows two sides. On the one hand, the principle of subsidiarity assumes that problems that the Member States can no longer solve themselves are actually solved at European Union level: by actions decided within EU institutions according to EC competences and procedures on making bills into EC legislation. This implies that the Member States must also be prepared to formulate objectives at the EU level and provide the EU with the means and instruments to achieve the objectives as efficiently as possible. And this has often not been the case. It is unfair to reproach the EU for not having a solution to cross-border crime, illegal immigration, drug trafficking, women slavery and organised prostitution and similar cross-border crimes. The EU must be given the necessary instruments if those problems can be solved at European Union level only.

On the other hand, the European Union must attempt to leave to the Member States those matters that they can handle themselves. Here, too, the application of the principle of subsidiarity leaves much to be desired and what the Treaty on Constitution and the above mentioned “*PROTOCOL ON THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY*” attempt to set right. Despite the agreements made on this matter by the EU institutions, after the Maastricht Treaty on Union had entered into force, the Commission, in submitting its proposals, did not provide an adequate explanation as to why EC regulations at Union level were required. The Commission simply affirmed that it had assessed a proposal in the light of the principle of subsidiarity. And no proper assessment was carried out either by the national Parliaments or by the Council.

Certain aspects of the rules, therefore, had to be tightened up:

The Commission, under the existing Treaty on EU as well as under the Draft Treaty on Constitution, has the exclusive right of initiative in EC matters. When the Commission submits a proposal of “law” (under Draft Treaty on Constitution) or a proposal of EC regulation or EC directive under the existing Treaty on Union, it therefore has primary responsibility for explaining and proving that regulations are necessary. It is not enough, under the existing Treaty on EU, simply to affirm that the Commission has assessed a proposal in the light of the principle of subsidiarity.

The Commission, therefore, when submitting a proposal, should declare, explain and prove with evidence why regulations at Union level are necessary. This obligation is a constitutive element of legitimacy of the Union’s power : this obligation is an expression of constitutional quality of the Union and, therefore, the obligation should and easily could be directly stipulated in the merger Treaty on Union, with reference made to further details as arranged in a Protocol on the application of the principles of subsidiarity and proportionality.

The Commission’s explanation should focus on three main issues:

1. Subsidiarity:

- Why is regulation at Union level necessary ?

2. Proportionality:

- Would a less stringent regulatory instrument be as much as is needed (e.g. a recommendation instead of a directive, or a directive instead of a regulation) ?
- Would a less detailed form of rules be sufficient ?

3. Cost, benefit analysis; susceptibility to fraud; enforceability:

- What are the costs for the EU, the national government, the business community?
- How easily can implementation be monitored ?

The Treaty on Constitution, Article 9, including the Protocol on the application of the principle of subsidiarity and proportionality, annexed to the Treaty on Constitution, is in line with the above mentioned three main issues, and could easily be stipulated in a merger Treaty on Union, stating that:

- *“The use of Union competences is governed by the principles of subsidiarity and proportionality.”*

- *“The Union Institutions shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Constitution. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in the Protocol.”*

- *According to paragraph 4 of the Protocol*

“The Commission shall justify its proposal with regard to the principles of subsidiarity and proportionality. Any legislative proposal should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality.

This statement should contain some *assessment of the proposal’s financial impact and, in the case of a framework law, of its implications for the rules to be put in place by Member States*, including, where necessary, the regional legislation.

The reasons for concluding that a Union objective can be better achieved at Union level must be substantiated by qualitative and, wherever possible, quantitative indicators.

The Commission shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.

The Commission shall send all its legislative proposals and its amended proposals to the national Parliaments of the Member States at the same time as to the Union legislator. Upon adoption, legislative resolutions of the European Parliament and positions of the Council of Ministers shall be sent to the national Parliaments of the Member States.”

b) Proposal to hold *public subsidiarity admissibility debate* in the Council, in the European Parliament and in national Parliaments, an “added value” compared to paragraphs 5 and 6 of the Protocol on the application of the principle of subsidiarity and proportionality, annexed to the Treaty on Constitution:

Since the Commission’s proposals are made public, the Commission’s arguments are also accessible to the public, national Parliaments, decentralised authorities and interest groups. These need time to study the arguments, e.g. two months, except in cases of emergency procedures, and to make their responses known. And subsequently, on the basis of these arguments and the responses received, it should be possible to hold an “admissibility debate” in the Council and in the European Parliament.

The admissibility debates would cover the substantial issues, and focus on the three main issues as mentioned above. This also has the advantage that the Commission’s proposals are first discussed at political level and enable the Commission, after such reviewing debates, to decide to maintain, amend or withdraw its proposal, while giving reasons for its decisions, *b e f o r e* the Commission’s proposal is being considered by working groups.

The proposal to hold public debates on “subsidiarity” sounds technical, but is basically political. Public debates on subsidiarity would do more to reflect the primacy of the political dimension at Union level. These political debates should be conducted publicly. A subsidiarity debate of this kind would be a substantial “ added value “ compared to paragraphs 5 and 6 of the subsidiarity Protocol and can improve the public’s understanding of what the Union does and why it does it.

Public debates on subsidiarity will not always lead to unanimous conclusions. In certain cases some Member States might be able to achieve specific policy objectives independently while others might not. The guiding principle in interpreting subsidiarity should be that the former states, too, before joining the Union, take the general and common interests of the Union into account in formulating their national positions in the light of interdependencies between national and common interests.

A great deal of Union legislation merely amends existing directives or regulations. It would not be, therefore, quite efficient to hold public admissibility debates on *e v e r y* proposal submitted by the Commission. The Constitutional Treaty should therefore state that such debates can be held only if a Member State has explicitly requested it.

In addition, the merger Treaty should state that the principle of subsidiarity should not be misused as a covert means of limiting the Commission’s powers. The subsidiarity test should therefore be accompanied by the necessary guarantees, including the existing legal rights of appealing to the Court of Justice.

2. Enhancing the Union's legitimacy through transparency of the decision-making process of Union Institutions:

- European Parliament and Council of Ministers meeting in public when examining and adopting legislative proposals
- Openness of government and public access to information under the Treaties on Union

2.1 Citizens' right of access to information on Union Institutions' documents being weighed against the importance of secrecy

Transparency of the Union's decision-making process strengthens the democratic nature of the Union and the public's confidence in the Union's governance and legislation. Improving public access to the information available to the Union's institutions and being the basis of their decisions can be an efficient policy to strengthen the Union's credibility, legitimacy.

The issue of public access to information and its effect on the European Union's legitimacy had already been discussed during the negotiations on the Maastricht Treaty on European Union. The Netherlands had put forward for consideration of the inclusion of a provision, modelled on the Dutch Government Information (Public Access) Act, which would lay the basis for an adequate level of openness.

The basic idea was that government information is in principle accessible, unless there are specific reasons for its keeping confidential. During the negotiations, the Dutch proposals did not get sufficient support, and the provision was therefore not directly stipulated in the form of a legally binding Article within the text of the Treaty on European Union.

However, a Declaration No. 17 "**DECLARATION on the right of access to information**" was annexed to the Maastricht Treaty on European Union, merely recommending that the Commission submits to the Council "no later than 1993 a report on measures designed to improve public access to information available to the institutions." 230)

The course of action, however, changed in 1992. Under pressure from public opinion, especially after the first Danish referendum on the Maastricht Treaty on European Union, the *European Council at Birmingham*, held in October 1992, did a first decisive step: **the Council and the Commission were instructed to take measures to ensure that European citizens have maximum access to information held by these institutions.**

Following difficult negotiations, *the Council and the Commission reached agreement on a code of conduct*. That code of conduct contained the rules for citizens who submit a request for information to one of these institutions. Unfortunately, this provision, which the Council had elaborated in its Rules of Procedure, had been largely

230: Maastricht Treaty on European Union, Official Journal of the European Communities, 29 July 1992, C 191-

limited in scope. As the the Ministry of Foreign Affairs of the Netherlands had reported in its Memorandum on the Intergovernmental Conference 1996 preparing the Amsterdam Treaty on European Union, the Government of the Netherlands had voted against the code of conduct and the decision amending the Rules of Procedure, and appealed to the European Court of Justice, pleading that the Union should draw up regulations to give citizens a substantial right of access to information and also adequate means of appeal. The Dutch Government also took the side of a private individual who appealed to the European Court against a decision rejecting a request for information,pleading: **each individual rejection of a request for information must be properly justified, with the importance of public access to information being weighed against the importance of secrecy.** 231)

Subsequently, following the 1996 Intergovernmental Conference preparing the Amsterdam Treaty on European Union, as to any Union citizen's right of access to institutions' documents, reaching a more advanced level of legally binding Treaty provision, **Article 255 Amsterdam Treaty establishing the European Community – TEC - stipulates the basic principle of the right of access, while leaving the elaboration of specific provisions regarding access to each institution's documents to each institution's own rules of procedure:**

“

- 1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.**
- 2.General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.**
- 3.Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.”**

And, according to Article 207 paragraph 3 Amsterdam TEC regarding the application of Article 255 paragraph 3 TEC, the Council has elaborated in its Rules of Procedure the conditions under which the public shall have access to Council documents:

“3. The Council shall adopt its Rules of Procedure.

For the purpose of applying Article 255(3), the Council shall elaborate in these Rules the conditions under which the public shall have access to Council documents. For the purpose of this paragraph, the Council shall define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to

231: The Government of the Netherlands, Ministry of Foreign Affairs, Memorandum: “The Netherlands and Europe. The Intergovernmental Conference 1996”.Den Haag, p. 265.

documents in those cases, while at the same time preserving the effectiveness of its decision-making process.

In any event, when the Council acts in its legislative capacity, the results of votes and explanations of vote as well as statements in the minutes shall be made public.” 232)

The **Treaty establishing a Constitution for Europe**, Part I, Title VI :”The democratic life of the Union”, **Article 49**, specifically paragraphs 3 and 4, stipulates **the general rule of a right of access** while a European law shall lay down the general principles and limits which, on grounds of public or private interest, govern the right of access to such documents. The **legitimacy building functional role of the right of access to Union’s documents is explained in Article 49 paragraph 1: to promote good governance and ensure the participation of civil society, the Union Institutions, bodies and agencies shall conduct their work as openly as possible.**

“Article 49: Transparency of the proceedings of Union Institutions

- 1. In order to promote good governance and ensure the participation of civil society, the Union Institutions, bodies and agencies shall conduct their work as openly as possible.**
- 2. The European Parliament shall meet in public, as shall the Council of Ministers when examining and adopting a legislative proposal.**
- 3. *Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State shall have a right of access to documents of the Union Institutions, bodies and agencies in whatever form they are produced, in accordance with the conditions laid down in Part III.***
- 4. *A European law shall lay down the general principles and limits which, on grounds of public or private interest, govern the right of access to such documents.***
- 5. Each Institution, body or agency referred to in paragraph 3 shall determine in its own rules of procedure specific provisions regarding access to its documents, in accordance with the European law referred to in paragraph 4.” 233)**

Article 49 of the Treaty on Constitution is proving continuity of what has been achieved in striving for the Union’s citizen’s right of access to institutions’ documents , and could easily be incorporated in a new Treaty, being a concise and comprehensive provision which constitutes the legally binding basic rule of a right of access.

232 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related acts, *ibid.*, Official Journal of the European Communities, 10 November 1997, C 340.

233: Official Journal of the European Union, 16 December 2004, C 310/01; Official Journal of the European Union, 18 July 2003, C 169/01(20).

2.2 The Union institutions meeting in public- European Parliament, Council of Ministers

As common standard in the Member States of the European Union, legislative bodies are meeting in public plenary session when examining and adopting a legislative proposal. So does Article 49 2nd paragraph of the Constitution provide that “the European Parliament shall meet in public, as shall the Council of Ministers when examining and adopting a legislative proposal.” 234)

3. Enhancing the Union’s legitimacy through transparency of the decision-making process:

Openness of government and the right of parliaments to timely and comprehensive information

The role of the national Parliaments contributing to the Union’s legitimacy through the right of parliaments to timely and comprehensive information during the Union’s legislation procedures on justice and home affairs had already been discussed by the 1996 Intergovernmental Conference on preparing the Amsterdam Treaty on the Union. But this right also concerned decision-making in other fields of the Union’s policy-making. In 1996 were felt to see good reasons for including a specific provision in the Amsterdam Treaty on the Union which should lay down the parliamentary right of information. The Governments of the Member States ,however, actually **failed to agree on the inclusion of a specific provision in the Treaty articles, but agreed upon the “Protocol(no.9) on the role of national parliaments in the European Union(1997) “**, annexed to the (Amsterdam)Treaty on European Union :

“THE HIGH CONTRACTING PARTIES,

RECALLING that scrutiny by individual national parliaments of their own government in relation to the activities of the Union is a matter for the particular constitutional organisation and practice of each Member State,

DESIRING, however, to encourage greater involvement of national parliaments in the activities of the European Union and to enhance their ability to express their views on matters which may be of particular interest to them,

234: *ibid.*, Official Journal of the European Union, 18 July 2003, C 169/01(20).

Official Journal of the European Union, 16 December 2004, C 310/01; Official Journal of the European Union, 18 July 2003, C 169/01(20).

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union and the Treaties establishing the European Communities,

I. INFORMATION FOR NATIONAL PARLIAMENTS OF MEMBER STATES

1. All Commission consultation documents (green and white papers and communications) shall be promptly forwarded to national parliaments of the Member States.

2. Commission proposals for legislation as defined by the Council in accordance with Article 151(3) of the Treaty establishing the European Community, shall be made available in good time so that the government of each Member State may ensure that its own national parliament receives them as appropriate.

3. A six-week period shall elapse between a legislative proposal or a proposal for a measure to be adopted under Title VI of the Treaty on European Union being made available in all languages to the European Parliament and the Council by the Commission and the date when it is placed on a Council agenda for decision either for the adoption of an act or for adoption of a common position pursuant to Article 189b or 189c of the Treaty establishing the European Community, subject to exceptions on grounds of urgency, the reasons for which shall be stated in the act or common position.” 235)

Consequently, **the role of the national Parliaments** contributing to the Union’s legitimacy through the right of parliaments to timely and comprehensive information during the Union’s legislation procedure, then had been **emphasized by the Convention** preparing the text of the Draft Treaty on the Constitution for Europe. **The Convention had identified responses to the questions put in the Laeken declaration:**

- it proposed a better division of Union and Member State competences;

- it recommended a merger of the Treaties and the attribution of legal personality to the Union;

- it proposed a simplification of the Union's instruments of action;

“- it proposed measures to increase the democracy, transparency and efficiency of the European Union, by developing the contribution of national Parliaments to the legitimacy of the European design, by simplifying the decision-making processes, and by making the functioning of the European Institutions more transparent and comprehensible;” 236)

235: Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related acts, *ibid.*, Official Journal of the European Communities, 10 November 1997, C 340.

236: see the Preface of the Treaty on the Constitution, Official Journal of the European Union, 16 December 2004, C 310/01; 18 July 2003, C 169/01 (07).

Following this line, as regards the right of national parliaments to timely and comprehensive *information* on “European laws and framework laws”, the Draft Treaty establishing a Constitution for Europe, Article 24, paragraph 4, states that, in cases of qualified majority making decisions, the European Council can adopt a decision allowing the Council of Ministers to act by qualified majority. The European Council shall act *after consulting the European Parliament and informing the national Parliaments*, and any initiative taken by the European Council shall be sent to national Parliaments no less than four months before any decision is taken on it:

“Where the Constitution provides in Part III for European laws and framework laws to be adopted by the Council of Ministers according to a special legislative procedure, the European Council can adopt, on its own initiative and by unanimity, after a period of consideration of at least six months, a decision allowing for the adoption of such European laws or framework laws according to the ordinary legislative procedure. *The European Council shall act after consulting the European Parliament and informing the national Parliaments.*

Where the Constitution provides in Part III for the Council of Ministers to act unanimously in a given area, the European Council can adopt, on its own initiative and by unanimity, a European decision allowing the Council of Ministers to act by qualified majority in that area. Any initiative taken by the European Council under this subparagraph shall be sent to national Parliaments no less than four months before any decision is taken on it.” 237)

According to Article 41, concerning specific provisions for implementing the area of freedom, security and justice, paragraph 2 stipulates the *participation of national parliaments in evaluation mechanisms*:

“2. Within the area of freedom, security and justice, *national parliaments may participate in the evaluation mechanisms foreseen in Article III-161*, and shall be involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles III-177 and III-174.” 238)

And, as noted above, Article III-160, states:

“

1. Member States' national Parliaments shall ensure that the proposals and legislative initiatives submitted under Sections 4 and 5 of this Chapter *comply with the principle of subsidiarity*, in accordance with the arrangements in the Protocol on the application of the principles of subsidiarity and proportionality.

Member States' national Parliaments may participate in the evaluation mechanisms contained in Article III-161 and in the political monitoring of Europol and the evaluation of Eurojust's

activities in accordance with Articles III-177 and III-174.

237:Official Journal of the European Union, 16 December 2004, C 310/01; 18 July 2003, C 169/01 (13).

238:ibid.,supra, note 237, C 310/01; C 169/01 (18).

Member States' national Parliaments may send to the Presidents of the European Parliament, the Council of Ministers and the Commission a reasoned opinion on whether a legislative proposal complies with the principle of subsidiarity, according to the procedure laid down in the Protocol on the application of the principles of subsidiarity and proportionality."

Consequently, referring to Article III-160 of the Draft Treaty on the Constitution for Europe, the **PROTOCOL ON THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY**, paragraph 3 delineates the participation of national Parliaments in the decision-making process on monitoring the application of the principle of subsidiarity in the law-making process of the Union/Community:

"The Commission shall send all its legislative proposals and its amended proposals to the national Parliaments of the Member States at the same time as to the Union legislator.

Upon adoption, legislative resolutions of the European Parliament and positions of the Council of Ministers shall be sent to the national Parliaments of the Member States."

“

THE HIGH CONTRACTING PARTIES,

WISHING to ensure that decisions are taken as closely as possible to the citizens of the Union,

RESOLVED to establish the conditions for the application of the principles of subsidiarity and proportionality, as enshrined in Article I-9 of the Constitution, and to establish a system for monitoring the application of those principles by the Institutions,

HAVE AGREED UPON the following provisions, which shall be annexed to the Constitution:

1. *Each Institution shall ensure constant respect for the principles of subsidiarity and proportionality, as laid down in Article I-9 of the Constitution.*

2. *Before proposing legislative acts, the Commission shall consult widely.* Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged. In cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for the decision in its proposal.

3. *The Commission shall send all its legislative proposals and its amended proposals to the national Parliaments of the Member States at the same time as to the Union legislator.*

Upon adoption, legislative resolutions of the European Parliament and positions of the Council of Ministers shall be sent to the national Parliaments of the Member States.” **239)**

239:ibid.,supra, note 237, C 310/01; C 169/01 (95).

4. Enhancing the Union's legitimacy through transparency of the decision-making process: the openness of consultation within the Council

Under the Maastricht Treaty on European Union-TEU- Council meetings were held “en cadre restraint”, they were held closed, unless it was unanimously decided that a session should be public. Article 151 Maastricht TEU had no explicit provision. This situation was not satisfactory.

Preparing the 1996 Intergovernmental Conference on the future Amsterdam TEU, Governments considered that the sessions of the Council, acting as the European Community's legislator, should be open to the public as far as possible. By “as far as possible” Governments meant that the Council's debate on admissibility, i.e. the subsidiarity test, concerning every proposal made by the Commission should be open to the public, as should the final vote in the Council, including explanations of votes. Whereas the intermediate phase of negotiations held within the Council, on the other hand, could remain closed. Governments held this position to be desirable because the consultations performed within the Council, even when acting as legislator, had an intergovernmental, interstate character to some undeniable degree. Full public access, therefore, to all sessions would lead only to a situation where the actually held negotiations were taking place outside the institutional framework of the Council which rightly could not be appreciated.

Consequently, resulting from these 1996 Intergovernmental Conference considerations, the **Amsterdam Treaty establishing the European Community**, Article 207, 3rd paragraph, kept the principle of openness of the Council's sessions to the public under specific limits, trying to balance the openness to the public, on the one hand, and preserving the effectiveness of its decision-making process, concluding that “*in any event, when the Council acts in its legislative capacity, the results of votes and explanations of vote as well as statements in the minutes shall be made public*”:

“3. The Council shall adopt its Rules of Procedure.

For the purpose of applying Article 255(3), the Council shall elaborate in these Rules the conditions under which the public shall have access to Council documents. For the purpose of this paragraph, the Council shall define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in those cases, while at the same time preserving the effectiveness of its decision-making process. In any event, when the Council acts in its legislative capacity, the results of votes and explanations of vote as well as statements in the minutes shall be made public.” 240)

And, finally, *Article 49 of the Draft Treaty establishing a Constitution for Europe is stipulating the European Parliament's and the Council's meetings in public.*:

240: Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related acts, Official Journal of the European Communities, 10 November 1997, C 340.

This is the final step in this evolutive process of gradually achieving substantial improvements in gaining transparency through openness of the consultation and decision-making procedures namely in the Council::

“

Article 49

Transparency of the proceedings of Union Institutions

1. In order to promote good governance and ensure the participation of civil society, the Union Institutions, bodies and agencies shall conduct their work as openly as possible.

2. The European Parliament shall meet in public, as shall the Council of Ministers when examining and adopting a legislative proposal.

3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State shall have a right of access to documents of the Union Institutions, bodies and agencies in whatever form they are produced, in accordance with the conditions laid down in Part III.

4. A European law shall lay down the general principles and limits which, on grounds of public or private interest, govern the right of access to such documents.

5. Each Institution, body or agency referred to in paragraph 3 shall determine in its own rules of procedure specific provisions regarding access to its documents, in accordance with the European law referred to in paragraph 4.” **241)**

5. Alternative Treaty and Simplification of the Treaty text

Considering the Treaty establishing a Constitution for Europe to be probable to fail ratification by all needed 27 Member States and, therefore, to fail entering into force, the European Union is in need of an acceptable alternative, which meets the needs of reflecting the identity of the Union, showing the peoples in Europe what and how the Union is standing up for protecting their rights, as well as meeting the needs of making the larger Union work, thus reinforcing the Union’s legitimacy and acceptance.

There is a strong belief among political leaders and European Union experts that the existing Treaties on European Union and on the European Community: the ***CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION and the CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY***

241:ibid.,supra, note 237, C 310/01; C 169/01 (20).

are not practicable to manage a European Union of the Twentyseven and even more to give the adequate response to the common challenges. 242)

The Treaty establishing a Constitution for Europe, is , through its core provisions on strengthening democracy, transparency including subsidiarity, and efficiency of taking action, aiming at improving the constitutional quality of the Union. The public demand for these essentials of the Founding Treaty on European Union to continue and to be strengthened for a better working of the enlarged Union was, in principal, no controversial issue throughout the debate about a Constitution. And these essentials should be maintained further on, whatever the legal framework might be in case the Constitution's ratification actually fails.

The approach to finding an acceptable solution, replacing the Treaty establishing a Constitution for Europe, a new text which appears to be acceptable in terms of democracy, transparency and efficiency, would be an ***integrative approach***:

- making the political decision on choosing the constitutional quality shaping essentials of the Draft Treaty establishing a Constitution as identified above: democracy, transparency and efficiency, added to the Union's basic objective and its basic values of protecting the rights of the European citizens as well as describing the Union's main tasks and instruments;
- integrating these essentials into the existing Treaty on European Union and the Treaty establishing the European Community and thus amending the Nice Treaty on European Union;
- negotiating and adopting the new text of a revised Treaty on European Union by an Intergovernmental Conference meeting both the needs of efficient negotiating and the needs of transparency and public debate, thus the needs of traditional preparing ratifying the new text according to the national constitutional procedures in the Member States;
- promoting ,throughout the negotiating procedure, the accessibility and acceptance of the new text .

Promoting the accessibility and acceptance of the new text means :

making the constitutional quality shaping essentials of the Union part of a new Treaty merging the current Treaty establishing the European Union and the current Treaty establishing the European Community the structure and the text of which strongly needs simplification, accessibility.

For, under the current Treaty on European Union, the legal structure makes up one European Union which rests on three pillars. The first of which is the Treaty establishing the European Community (EC Treaty), ruling the mode of European integration through EC law-making.

The legal order created under this first pillar is characterized not only by legislation that is both verifiable and enforceable and the central role it affords the European Commission as initiator, but also by the fact that it safeguards enforcement of the Treaty, is subject to parliamentary control and provides legal protection.

242: Official Journal of the European Communities, 24 December 2002, C 325/5 and C 325/33.

The other two pillars are ruling the method of cooperation through enhanced intergovernmental cooperation in the fields of a Common Foreign and Security Policy and of Police and Judicial Cooperation in Criminal Matters. The Community, the first pillar, is a legal person, but the Union itself does not (yet) share this legal status, a fact which has led and still leads to considerable confusion.

Resulting from constant amendments, the text of the Treaty on European Union has grown to a genuine hotchpotch, in some cases referring to the Nice Treaty on European Union inserting new provisions or amending existing provisions. **As a result, the Treaty is rather inaccessible, not only to the general public, but also to EU experts and administrators themselves.**

Meeting the needs of a new text which might better be accepted by the different European national electorates is no simple task expressing the awareness of European matters as they are:

the history of the European Treaties is marked by compromises that are both creative and complex of nature. From the point of view of efficiency, these compromises might always well have disregarded the principles of logic and made the text inaccessible, but in the tradition of European integration policy making compromises did and do reflect the maximum the negotiating parties were and are and will be willing to concede at any given moment. Quite a bunch of matters should therefore be viewed within their political context. This applies, for example, to the Treaty architecture of pillars. In other cases, however, it can easily turn out that the text of an amended Treaty could quite easily be simplified:

There is a widely held opinion that the Treaty needs radical simplification :

Simplification of the text should be seen as a political challenge to enhance transparency, acceptance and legitimacy of the Treaty, and this political challenge cannot be responded by a mere technical approach to the matter. Simplification of the text, however, should be seen as separate from the substantive amendments recommended above, such as the simplification of decision-making procedures.

What is required is, therefore, mainly a forceful driving out of the text. There is no need to harmfully interfere with the substance of the provisions of the Treaty establishing a Constitution for Europe as regards the provisions on the essentials:

- **basic objectives,**
- **values,**
- **fundamental rights,**
- **democracy, transparency, efficiency,**
- **main tasks and instruments.**

Being aware of the difficulties involved, it is essential that work be started promptly to tackle with the substantial issues, and not focussing only on a time-table to be set up by the German EU Presidency as planned to be launched towards the end of the Presidency next June 2007.

For, time is running short enough if a new Treaty should enter into force before the European electorate will vote for the European Parliament in 2009. As a first step, a Reflection Group could authorize a small group of independent lawyers to deal with the matter quite prior to the Intergovernmental Conference, and parallel to this more technically preparatory platform, a **Europeanwide discussion with the European citizens should be performed, both focussing on the coming elections to the European Parliament, and focussing on the new**

Treaty's essentials simply showing what and why the European citizen is going to cast his vote for.-

Chapter VII

The Union and Efficiency, Decisiveness

Constitutional quality shaping essential: *Efficiency* of the European Union, focussing on the issue of improving the decision-making within the Council

A. Introduction

Efficiency of the European Union is an identity and legitimacy shaping essential : being important for the Union's visibility and acceptance by the European citizens.

A European Union which, in the citizens' view , would not meet their needs of an efficiently running good European Governance policy-making to protect their rights, could never expect acceptance: it would risk losing legitimacy. Efficiently functioning institutions are one of the legitimacy building and identity shaping essentials of the European Union.

The efficiency of decision-making in the Council does depend, not only but to a large extent, on the Council's decisiveness. The more enlargement increased the number of Member States, the less each Member State influences decision making, the more it is made difficult for an ever greater Member States to collect sufficient votes to obtain a qualified majority, or a blocking minority which would have an adverse effect on the Council's decisiveness.

It was one of the crucial issues discussed, negotiated already at the Intergovernmental Conference 1996/97, but without reaching consensus as this issue was focussing on one of the core sensitivities of nation states' claiming the respect for equality of each sovereign state in the Union: the revision of the then existing system of weighted votes. This issue was one of the essential leftovers which remained unresolved by the Amsterdam Treaty and was taken up again by the Nice Treaty on European Union.

Efficiency oriented elements of establishing a merger Treaty on European Union on the basis of the essentials made up by the Treaty establishing a Constitution for Europe and by the Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities, in the consolidated version of the Treaty on European Union and the consolidated version of the Treaty establishing the European Community 243) would have to deal with the following focal issues:

243: Official Journal of the European Communities, 10 March 2001, C/80/01, and 24 March 2002, C 325/05 and C 325/33.

B. Improving the Union's efficiency through clarity of the decision-making procedures and through institutional adjustments

I. The dynamic process of developing the enlarged Union's efficiency of decision-making aiming at balancing the Union's enlargement and cohesion, decisiveness – from the 1996/97 IGC to the Nice Treaty on EU and the Constitution Treaty

The issue of decisiveness, the issue of efficiency had already been the issue of the institutional adjustment during the Intergovernmental Conference in 1996, and that issue is still the present issue of great importance for the Union's future:

- how to maintain, within the European Union of the Twentyseven and of even more, the *acquis communautaire*, i.e. the internal market and the common legal order, and thus a European Union that is capable of decisive internal and external action.

Both efficiency oriented issues – clarity of the Union's decision-making procedures and institutional adjustments – are two sides of one coin: the enlargement of the Union. The European Union of the Twentyseven and even more is likely to fail without reforms ensuring the efficiency of the decision-making procedures of the Union's institutions.

1. The Intergovernmental Conference 1996/97 and efficiency of decision-making in the Council: the system of weighted votes, limits of extrapolation

1.1 The Council's decisiveness and the system of weighted votes facing the 1996/97 Intergovernmental Conference

Efficiency oriented steps of reforming the European Union through institutional adjustment is never undertaken without awareness of the basics of the Union's composition and decision-making structures. Both the composition and decision-making structures of the Union's institutions date from 1957, when the Community comprised six Member States. Checks and balances were needed between the smaller Benelux countries on the one hand and the three big Member States on the other. *A suitable balance, therefore, had to be struck, in 1957, between strict proportionality in majority voting on the one hand, and the nation state's sovereignty related equality of all Member States, expressed by unanimous voting on the other.*

No easy matter is decision-making in the Council in a Union comprising twentyseven (since January 1st, 2007) or even more Member States. This is true not only for decisions that require unanimity. It is also true for those decisions taken by a qualified majority vote. As far as the first pillar (Treaty establishing the European Community) is concerned, Council decisions should, *in principle*, be reached on the basis of a qualified majority.

'In principle' means: even though the Treaty text stipulates the majority-decision making, it is still an implied part, a tacitly working essential part of the constitutional quality that **the Union is built on the principle of "consensus" all Member States, just the smallest one, too, can firmly rely on if they are recurring to claim their vital national interest in a**

given case under negotiation within the Council. It is still alive in the realities of decision-making of the Council, and it is today not limited to use in agricultural policy only:

the March 1966 compromise of the then Six Member States of the European Economic Community realized that France accepted the principle of majority decision-making in the EEC's agricultural policy, but all Member States agreed to the formula that each Member State may recur to a national veto and reject an intended majority decision-making in a given case put on the Council's agenda. The Luxemburg compromise had set an end to the policy of the empty chair France had practised between July 1965 and March 1966, trying without success in the end to oppose to the use of qualified majority decision-making in the field of the EEC's agricultural policy to start with on January 1966, as it had been laid down in the Rome Treaty on the European Economic Community 1957. ***This Luxemburg compromise never could and, until now, never can be found in a written text of the Founding Treaties, but it is part of the constitutional quality of the European Union as being based on the principle of consensus governing the political and legal ties between all EU Member States in the majority decision-making process within the Council..***

Within the 1st pillar's system of checks and balances, **majority decision-making, a system of weighted votes**, is justified, from the point of view of both the larger and smaller Member States. For, it was only due to this Community decision-making procedure that the internal market could be completed and enforced. This also applies to the Community's economic and commercial policy, i.e. the ***protection of the Member States joint economic interests in the world economy, including safe energy supply from third countries' energy resources.***

This system, however, was to the advantage of the smaller Member States. As early as the 1970s (Spierenburg report) and again in the course of preparing and holding the Intergovernmental Conference 1996/97 – IGC 96 - **this system was subject to critical review in view of the enlarged European Union's need of efficiently running decision-making of the Union's institutions.**

The Intergovernmental Conference 1996/97 reviewed the crucial issue of how to manage the Council's efficient decision-making in a Union comprising 15 and later even more Member States. The IGC had to deal with three options open to the Union:

- extrapolation,
- measures in the Community sphere and
- measures in the intergovernmental sphere of intrastate cooperation between the Member States of the Union.

The first one of these options was based on the status quo, i.e. keeping the existing institutional Treaty provisions unchanged and entering the negotiations on enlargement without any fundamental changes to the institutional system of the Union. This was the method adopted for all negotiations with candidates then:

- the number of votes for each Member State in the Council
- the number of members of the European Parliament and the Commission

were arrived at simply by ***extrapolating the existing rules.***

While preparing the 1996 Intergovernmental Conference, there was a widely felt awareness of the damaging effects further extrapolating would have: if the same method was used next

time, the *efficiency and decisiveness of the Union*, including the quality of law-making and of administration, would, as a result, unavoidably be damaged severely. For, already the accession of the former EFTA countries in 1995 had strained the extrapolation model nearly beyond the limit: the causing of institutional disorder by dividing and sharing what had been 17 portfolios before among the then 21 new Commissioners showed that the Commission had already reached the limits of what could be managed successfully.

In addition, *the larger the Union got*, already in the period following the Maastricht Treaty on European Union and the Copenhagen and Corfu summits, *the less influence each individual Member State* could exert on the Union's policy-making within the Union's institutions.: *the weight of the votes* held by each Member State was diminished the more partner Member States each Member State needed to push through or to set up a blockade against a particular decision. The Ioannina settlement by making institutional concessions was an omen of the conflicting interests that could be expected later. Already in 1996, it was widely felt among the members of the Intergovernmental Conference, that, going on extrapolating the formula for obtaining a *qualified majority*, the point soon would come when a group of small countries together representing a minority of the population of the European Union, would be able to force a majority decision. Large Member States would then dispute that the existing method of allocating votes not only gave the small countries an unacceptable advantage but that it also would undermine the democratic legitimacy of the Union.

For, seeking the support of more and more partners to influence decision-making was regarded as a problem by the larger Member States in particular. They felt that they had been allocated too few votes. They argued that their relative share of the total number of votes had dropped with every enlargement of the Union:

- The four large Member States, during the IGC 1996/97, had held 10 votes,
- Spain held 8,
- Belgium, Greece, Portugal and The Netherlands each held 5,
- Austria and Sweden each held 4,
- Denmark, Finland and Ireland each held 3,
- Luxembourg held 2.

Out of a total of 87 votes, 62 or the equivalent of almost exact 70 % were needed for a qualified majority. 26 votes at least were needed for a blocking minority. A minority of 25 votes could therefore be outvoted. If such a minority were formed by, for example, the United Kingdom, the Netherlands and Germany, this meant that a group of countries together representing, in 1996/97, 150 million EU citizens could be outvoted. While this number constituted a minority of the total population of the Union, at 40 % it was a substantial minority, of which the number of votes held, 30 %, was no equivalent.

This meant: Each new enlargement would lead to even greater gaps. After all, facing the future accession of the Central and Eastern European countries, apart from Poland, only smaller countries appeared likely to accede to the European Union in the foreseeable future, in the way of seeing the situation during the IGC 1996/97.

There was, therefore, throughout the Intergovernmental Conference in 1996, a widespread judgement that continuing the extrapolation model would block the decision-making with grinding noises:

The decisiveness of the Union would be diminished to an unacceptably low level. The resulting lack of efficiency would endanger the survival of the internal market and thus endanger the driving force behind the integration process. Although the internal market had been put in place on January 1st 1993, it could not yet and it cannot yet be regarded as being complete:

even and just now, in early 2007, new regulations are still needed to some extent, both to maintain the market through keeping pace with technological progress, world trade, the globalisation's impact on the internal market, economic and financial flows' shifts and new political judgement about perspectives of how to adapt to globalisation, and to develop supplementary Union's policies to stimulate, steer and remedy the market's deficiencies through deciding on social and environmental as well as on energy policy as provided for in the Maastricht Treaty and in the Amsterdam Treaty on EU (e.g. Article 175 (ex Article 130 s):

For, care had and still has to be taken to ensure that unnecessary national and European Union legislation does not block the efficient functioning of the internal market.

Efficiency oriented steps of reforming the European Union's Council decision-making required, therefore, a *suitable balance to be struck between strict proportionality on the one hand, and the nation state's sovereignty related equality of all Member States, on the other.*

1.2 The 1996/97 Intergovernmental Conference in search of alternatives to extrapolating the existing system of weighed votes

Member States of the Union were, therefore, in search of alternatives, along the lines :

- *to strike a feasible, acceptable balance between the voting strength of the large, medium-sized and small Member States.*

Member States Governments preparing the IGC 1996/97 had discussed two possible alternatives aiming at giving greater voting strength to the countries with large populations:

1.21 Allocating extra votes to the larger countries:

This would have required as a necessary consequence to introduce more proportionality in the voting strengths of individual Member States. Doing so, the traditional voting key of 70 % required for a qualified majority would have corresponded more closely to the population numbers represented. This option would, however, have been difficult to effect. Not only would the smallest Member States have opposed it: the largest ones would have had to accept that greater proportionality would have led to Germany acquiring more votes than any other Member State.

1.22 Introduction of the double key option:

The existing vote allocation would have remained unchanged, but a second voting key would have been added: a qualified majority would have been required to represent at least a certain percentage – in principle 50 % - of the Union's population. This would have ensured that, after further enlargement, a majority of the European Union's

population could not have been outvoted. Furthermore, the double key option was meant, in theory, to be developed in a number of modes:

- decision-making in non-controversial fields could have proceeded on the basis of a simple majority (one country, one vote), secured by a 50 % population requirement , o r
- a “super qualified majority “ could have been introduced as an alternative to unanimity (80 % of the vote, 70 % of the population).

The issue of the “double key option” , however, remained unresolved by the IGC 1996/97, and therefore, had not been introduced by the Amsterdam Treaty on European Union, but had been further examined within the *Nice Treaty on EU negotiations* as well as by the *Convent on a Draft Treaty establishing a Constitution for Europe* .

The reason for the 1996/97 IGC’s failure to resolve the issue of the system of weighted votes in the Council was a basically political one: the different national concepts of how to use the Intergovernmental Conference as an instrument to defend different national concepts of the European Union and to use the Union’s constraints within the difficult correlation between deepening and enlarging the European Union:

2. The Intergovernmental Conference 1996/97 and different national concepts of the correlation between deepening and enlarging the European Union under the Community’s law on the principle of effectiveness

The issue of the enlarged Union’s efficiency of decision-making was subject to different concepts of the correlation between deepening and enlarging the Union among Member States holding the Intergovernmental Conference 1996/1997.

It had not been by the Laeken Declaration of the Union’s Heads of State and Government launching the Convent on Drafting the Treaty establishing a Constitution for Europe, that the issue of how to ensure the Union’s efficiency trough achieving clarity of the decision –making procedures and through institutional adjustment, had been put forward on the Union’s agenda for the first time:

With the entry into force of the Maastricht Treaty on European Union 1992, the conclusion of the Uruguay Round and the finalisation of negotiations with four new Member States on accession to the Union, the European Union had taken significant steps towards further development. These steps took account of the events of 1989 and after. They can be regarded as the conclusion of an era which was characterized by the division of Europe. The Member States of the the European Union were faced with the challenge of finding a real response to the fundamental changes caused by the collapse of communism. It was the common view of the majority of the Member States’ Governments that the only possible solution was to integrate the Countries of Central and (first)Eastern Europe, later on adding South-Eastern Europe(Bulgaria,Rumania) into western economic and political structures. These countries themselves desired such integration, including membership of the European Union, for economic, political and military security reasons. It had also been and still is in the Union’s interest to ensure that these countries did not fall into a political vacuum and move towards

instability.

Viewing at the great economic and social differences existing between the Union and the countries of Central, Eastern and Southeastern Europe, a number of unavoidable obstacles needed to be cleared before the gateway to membership was open. The *institutional adjustment* of the Union was not the least of these obstacles. Most of the Union's Member States' Governments, therefore, *wanted to find a balance between the political wish, on the one hand, to bring forward the moment at which the countries of Central, Eastern and Southeastern Europe accede to the Union, and, on the other, attempting to ensure that the existing Union maintains its cohesion and decisiveness. The political formula, then, was: deepening and enlarging the Union at the same time*, instead of enlarging first or deepening first.

For, since the signing of the 1992 Maastricht Treaty on European Union and the Copenhagen summit in 1993 when the European Council decided the Copenhagen criteria candidate countries wishing to accede to the Union had to comply with, the Member States of the EU had common positions on the basic principles of the criteria, but they had different positions on the objective of the Union's enlargement and on the need for deepening the Union, especially through institutional adjustment to avoid negative results from the enlargement.

The **European Council at Copenhagen** had drawn up a list of general criteria in order to preserve maximum political scope for manoeuvre without making any firm commitments to dates of accession, nor did the European Council draw up commitments to reform the Union's institutions as a prerequisite to accession. The European Council concluded as follows:

“ The European Council today agreed that the associated countries in Central and Eastern Europe that so desire shall become members of the European Union. Accession will take place as soon as the associated country is able to assume the obligations of membership by satisfying the economic and political conditions required.”

Membership required and still requires that the candidate country had achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for the protection of minorities, the existence of a functioning market economy as well as the capacity to cope with the competitive pressure and market forces within the Union. Membership necessarily involved and involves the candidate's ability to assume the obligations of membership including commitment to the objectives of economic, monetary and political Union.

The Copenhagen criteria explicitly commit candidate countries only. The text of the Copenhagen criteria ,however, must not be interpreted as a one-way formula which would commit the candidate countries only. The text does imply that the European Union was and still is obliged to do anything necessary to avoid negative impacts enlargement might have on the Union's effectiveness, decisiveness. Under EC law any Union institution is committed to the principle of effectiveness to guarantee the well functioning of the acquis communautaire. This means that the Union's capacity to absorb new members , while maintaining the momentum of European integration, was and still is also an important political and legal commitment in the general interest of both the Union and candidate or new Member countries.

The substantive criteria , as laid down in the Copenhagen Council relate, therefore, to both the candidate countries and the Member States of the Union itself. While candidate countries had and have to prove mainly efforts in the political and economic field, **the Member States of the European Union were and are obliged to have got their own houses sufficiently in order so that the Union´s enlargement will not have an ill effect on the European integration.** It was and still is in the basic and common interest of all Member States of the European Union that an enlarged European Union will not lose either its decisiveness or its effectiveness. And in any case, **under the EC law principle of effectiveness, it is overdue that immediate and full attention and implementation will have to be given to the issue of decisiveness of the Union of Twentyseven, regardless of the question of if, how and when to replace the Treaty establishing a Constitution for Europe in case of definite ratification failure.**

As far as the Member States´position on a **correlation between “deepening and enlarging”** was concerned **during the post-Maastricht and post-Copenhagen period of preparing the 1996 Intergovernmental Conference** on amending the Maastricht Treaty, mainly by institutional reforms, the Union´s Member States France, Germany and the United Kingdom wanted the accession of the countries of Central and Eastern Europe, but did not pledge definite dates on which negotiations were to start. Germany, then, had pressed for rapid action in gaining closer European integration (deepening the Union) and in stabilizing Germany´s relations with France.

As far as the issue of deepening the Union was concerned, it is today, nearly two years after the voters of France had rejected the Draft Treaty establishing a Constitution for Europe in 2005, worth remembering that it was just France after 1993 that had shown deep sincerity about the issue of what might be the impact the accession of the Central and Eastern European countries would have on the efficiency, decisiveness, cohesion and thus the identity of the European Union. It had exactly been **France** that strongly pleaded for deepening the Union by a closeknit European Union structure and for preserving close cooperation with Germany.

Facing the present efforts made within the European Union towards enduring solutions to draw up a **legitimate identity shaping Treaty on the Union with clearly and concisely written constitutional quality essentials**, it is worth remembering that it had been **France and Germany** that , already preparing their positions on the Intergovernmental Conference in 1996, both countries had **pleaded for institutional reforms** aiming at wide-ranging effect on **efficiently working EU institutions required as a *prior condition of any further enlargement of the European Union.***

Taking, in so far, **the opposite, the United Kingdom** welcomed the future accession of the Central and Eastern European countries as a vehicle towards making the European Union structure less closeknit. While at the same time the **Mediterranean Member Countries** of the European Union supported the accession perspective given to the Central and Eastern European countries by the 1993 Copenhagen summit, and they **tried, however, to obtain compensation in getting political commitments to a southward enlargement of the European Union, and they did not express as much concern about deepening the Union prior to enlargement, but about preserving their share in the existing financial transfer mechanisms working through the EU Regional Fund.**

Any judgement on future perspectives of how to reach a legitimate legal framework provided with constitutional quality essentials of the European Union needs to

remember these interconnected different political interests and viewpoints, as referred to above. They had been, they are and they still will be alive. **There were and there will be Member States of the European Union that attach great importance to an efficiently working European Union: the European Union is the anchor of stabilizing economic prosperity and peace in Europe.**

It is, therefore, important to remind the fact that decisions amending the EU founding Treaty or on drawing up a new merger Treaty must be unanimous, and are subject to the ratification approval of the Member States.

3. The Nice Treaty to deal with the institutional reform “leftover”: reinforcing the Council’s decisiveness and giving larger countries greater voting strength and raising the blocking minority threshold in a Union of the Twentyseven

The “leftover” of the Amsterdam Treaty on European Union: the issue of efficient decision-making in the Council **through balancing the voting strength of larger and smaller Member States in the Council** had to be negotiated by the Intergovernmental Conference preparing the draft of the Nice Treaty on EU stipulating the reforms needed to create the prerequisites for later enlargement of the Union of the Twentyfive, the draft had been agreed upon by the fifteen Heads of State and Government at the Nice European Council on December 07-10, 2000. The Member States tried to find consensus on how votes would be weighted in compliance with the total size of the Union’s population to enhance the democratic legitimacy of the Council’s decision-making and, by doing so, to improve the Council’s decisiveness and thus making the European Union to act more efficiently.

The result of the Nice Treaty on EU, however, is an increased voting strength of the large Member States by nearly three times as much than before, on the one hand, and the raised (to 91 votes out of a total of 345 votes) threshold for the blocking minority in the Union of 27 in terms of strengthening the Council’s decisiveness, on the other:

Before the European Union enlarged from the Fifteen to the EU of the Twentyfive on May 01, 2004, the **Council’s voting procedures** where, in policy matters under the 1st pillar of the Treaty on EU, the Treaty establishing the European Community, the Council was required by a qualified majority, the votes of its members were weighed **according to Article 205 2nd paragraph TEC: 244)**

Belgium 5
Denmark 3
Germany 10
Greece 5
Spain 8
France 10
Ireland 3

Italy 10
 Luxembourg 2
 Netherlands 5
 Austria 4
 Portugal 5
 Finland 3
 Sweden 4
 United Kingdom 10.

Before the “Twentyseven “ enlargement of the European Union and before the Nice Treaty on EU entered into force, for their adoption, acts of the Council required at least:

-62 votes in favour where the Treaty on European Community required them to be adopted on a proposal from the Commission,
-62 votes in favour, **cast by at least 10 members, in other cases.**

Before the Nice Treaty on EU, each Member State had been assigned the number of votes as quoted above and roughly in proportion to the population of that Member State. Out of the total of the 87 votes were 62 votes required for voting on matters requiring “qualified majority voting” in the Council. The **consequence of “qualified majority voting”** was that, unlike international organizations and unique, **EU Member States could be outvoted on most types of legislation.** This was **the case just for larger countries:**

- **qualified majority voting was meant to be a compromise in favor of larger Member States claiming that a weighting of votes should reflect their larger populations by a proportionally larger vote than the vote of smaller States.**
- **Qualified majority voting, however, favored smaller states** because at least one small Member State was required to vote joining a number of large States to reach the required 62 votes. Whereas a group of small States needed at least one large State to reach the required 62 votes. E.g., even if large Member States like France or Germany voted against a proposal from the Commission - say on qualifications for architects - they still were bound if the other Council members voted „yes,,

The “ **innovation “ , however, introduced by the Nice Treaty to increase the voting strength of the larger EU Member States in the Council by nearly three times as much, and to increase the voting strength of the smaller Member States by nearly twice as much only:**

Article 205 TEC had been amended, on 1 January 2005, in accordance with the “ Protocol on the enlargement of the European Union “ (245)

According to the Protocol’s Article 3 “Provisions concerning the **weighting of votes in the Council “ the votes in the Council are weighted** according to the “20. Declaration on the enlargement of the European Union “, attached to the Nice Treaty on EU, corresponding to the table “ **for an enlarged Union of 27 Member States “ with the accession of Bulgaria and Rumania on January 01, 2007. Out of a total of 345 votes, acts of the Council, for**

245: Official Journal of the European Communities, December 24, 2002, C 325/33 (163, 164, 165):

their adoption under the Nice Treaty, require at least 258 votes in favour, cast by a majority of members, where this Treaty requires them to be adopted on a proposal from the Commission.

In other cases, for their adoption acts of the Council shall require at least 258 votes in favour cast by at least two-thirds of the members.. 246)

“Thresholds” had been set up according to the “Declaration on the qualified majority threshold and the number of votes for a blocking minority in an enlarged Union”:

“Insofar as all the candidate countries listed in the Declaration on the enlargement of the European Union have not yet acceded to the Union when the new vote weightings take effect (1 January 2005), the *threshold for a qualified majority will move*, according to the pace of accessions, from a percentage below the current one **to a maximum of 73,4 %**.

When all the candidate countries mentioned above have acceded, **the blocking minority, in a Union of 27, will be raised to 91 votes**, and the qualified majority threshold resulting from the table given in the Declaration on enlargement of the European Union will be automatically adjusted accordingly.” 247)

4. Efficiency of decision-making: alternative, flexible forms of cooperation between the Union’s Member States within the Union’s Treaty institutional system in order to strengthen the Union’s decisiveness
introduction of multiple- speed integration or differentiated cooperation ?

4.1 Integration and cooperation : flexibility through multiple speed integration and variable geometry discussed at the 1996/97 IGC

Another issue the IGC 1996/97 had discussed to make the enlarged union work was the issue of how to secure the decisiveness and the efficiency of the Council’s decision-making by *introducing alternative forms of cooperation between Member States permitting flexibility, differentiation without undermining the cohesion of the Union*.

All Member States were well aware of the need for alternative forms of integration or cooperation that will increase as the growing number of Member States would tend to affect the decisiveness of the Union. Within a Union of 20 to 27 or more Member States, a certain degree of differentiation in the integration process appeared inevitable. It was held to prove impossible in the future to place all the Member States in the same category in all the fields of policies covered by the European Union Treaty, let alone at the same time.

246: Treaty of Nice amending the Treaty on European Union, The Treaties establishing the European Communities and certain related acts, 2001, Official Journal of the European Communities, March 10, 2001, C 80/01 (80, 82,83).

247: *ibid.*,supra,note 246,Treaty of Nice , C 80/01 (85).

Like-minded Member States would seek ways of filling the gaps in those areas in which the Union proves incapable of meeting their expectations and needs. In a Union of what would ultimately be 27 and even more states of an enlarged Union of what was already the perspective in 1996/97 after the Copenhagen summit had given aspirants the perspective to accede to the Union, flexible forms of cooperation were considered to be the only way of keeping the integration process within an enlarged Union going.

Governments of Member States had examined the scope for and problems arising from flexible forms of cooperation. No Government, however, had, until 1996/97, assessed developments in that direction in a public document. For, ideas in Europe on flexible forms of integration or cooperation were still embryonic and involved unknown political risks at that time. The German paper on “variable geometry” published by Mr. Lamers, the German Christian Democratic Union Member of Parliament (Deutscher Bundestag) and Member of the Committee of Foreign Relations of The Bundestag, had been met with great, European wide attention and was, at that time, the only widely known non-governmental attempt to perform a thorough and courageous analysis. The reluctance, at least receptive position of the Member States’ Governments to deal with this issue is understandable, as the Member States were venturing into unknown territory. They had no sure knowledge about the consequences of any form flexible cooperation between Member States of the European Union. They had to consider the chances to enhance integration and the risks that had to be weighed carefully. It was obvious that any differentiation between Member States willing to join a cooperation with other Member States while leaving behind Member States that were not willing to join would give rise to extremely complex political, institutional and legal problem:

The main question was how the EU institutions, composed of and for all Member States, could continue to play a role in enabling smaller groups of Member States to integrate more closely. While preparing their positions for presenting at the IGC 1996/97, most Governments shared the opinion that in further elaboration of views on flexible forms of cooperation, the single institutional framework of the European Union must not be damaged in any way. At quite an early stage of the preparation for the IGC, it was the Government of the Netherlands that continuously advocated that the Union should, if at all possible, go in a single direction. Governments did not see flexible cooperation as the priority action of the Union. The fact that the United Kingdom had been allowed to opt out of the Social Charter in the Maastricht Treaty on European Union, and the fact that the Treaty on European Union allowed Member States to join the Monetary Union while allowing Member States not yet willing or not yet being able to join were free to hold themselves back and free to join later: these facts constituted no rule in principle, but a last-resort-measure of temporary nature.

The question the Member States had to answer at the IGC 1996/97 was whether flexibility of integration or cooperation between the Union’s Member States would enhance the Union’s decisiveness and efficiency or hamper it, whether the advantages of flexibility would outweigh the risks. To understand the situation the Member States had been facing ten years ago, for the sake of clarity, the relevant terms should be defined here, well bearing in mind that the terms are often less easy to distinguish in practice than in theory of European integration.

To begin with, it is worth recalling the Treaty architecture of the Treaty on European Union, the architecture of which does represent two basically different forms of cooperation practised between the Member States of the Union, namely:

- integration and
- cooperation.

Integration means developing and maintaining the Community legal order, i.e. the institutional structure of the European Community, *the first pillar of the Treaty on European Union*. This legal order is characterised not only by legislation that is both verifiable and enforceable, and the central role it affords the European Commission as initiator, but also by the fact that it safeguards enforcement of the Treaty, and that it is subject to parliamentary control and provides legal protection.

Cooperation means developing and maintaining intergovernmental forms of reaching agreement between the Member States to operate together in fields that are not directly related to the internal market, such as Common Foreign and Security Policy including defence policy as well as Justice and Home Affairs Cooperation, as ruled by the 2nd and the 3rd pillar under the Maastricht and Amsterdam Treaty on European Union.

Two forms of integration are to be distinguished de lege lata, on the basis of the European Union's primary law, the Founding Treaties, as well as on the basis of European Union's practice of integration, namely:

- *multiple-speed integration* and
- *variable geometry*.

Multiple-speed integration means that while the policy objective is the common objective, the same objective for all Member States, the speed at which the common objective is being achieved individually by each Member State varies. This idea was not a new idea. It was and it still is *a tried and tested method of achieving gradual convergence* when new Member States join the European Union. *Multiple-speed integration is not an end in itself but a means to an end:*

It enables a core group, or rather a leading group of Member States to proceed with further integration.

In the case of *variable geometry*, it is *not the speed but the objective that varies* for each group of countries, i.e.:

- their targets are different as well as
- the pace of implementation .

One example of variable geometry is the United Kingdom's decision to opt out of the European Union's social policy. In the field of the Union's social policy the Council is allowed to

“ adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. The Council shall act in accordance with the procedure referred to in Article 251...”, **Article 137 paragraph 2, lit. b Treaty establishing the European Community, and**

“The Council shall act in accordance with the procedure referred to in Article 251,” according to which (Article 251 paragraph 2) the Council is acting by a qualified majority after obtaining the opinion of the European Parliament. **248) This is the voting procedure of legislation under the terms of the 1st pillar of the Treaty on EU, the integration pillar.**

The United Kingdom’s opting out of the social policy meant that a separate social agreement had to be added to the Treaty of Maastricht for the remaining eleven Member States. *As with the multiple-speed model, differences in the rate of integration arise between the Member States by using the variable geometry model. But opting for divergent objectives increases the risk of the gradual disintegration of the Union as a whole.*

The often used expression “ Europe à la carte “ can be seen as a more advanced form of variable geometry, in which the freedom of choice of the Member States is held up almost as an ideal which, basically, is not in favor of the Union’s cohesion.

The term “ a Europe of concentric circles” had been used mainly in France during the 1990’s, describing a situation where groups of an ever smaller number of countries – the inner circles comprising relatively tightknit groups such as the Union – exist within the larger whole of the European continent: the outer circle of countries cooperating with each other in a looser form, as within the Conference on Security and Cooperation in Europe-CSCE. The inner circles were and are operating at two speeds – the European Monetary Union- and, at present, the operating of the common single currency, the Euro zone, or be based on the principle of variable geometry, the former Western European Union (WEU).

4.2 The 1996/97 IGC and differentiated cooperation in the field of Common Foreign and Security Policy and Justice and Home Affairs and the 1996/97 IGC

The Maastricht Treaty on EU had established the Common Foreign and Security Policy by Article J. 249)

The Maastricht Treaty on European Union considered the fact that not all the Member States were and are willing to be working towards the same treaty objectives to the same extent, as e.g. *the United Kingdom’s position on joining the US led war on Iraq-without taking care of seeking a common European Union position, was and is proving.*

248: Official Journal of the European Communities, 24 December 2002, C 325/33 (93).

249: Official Journal of the European Communities, 29 July 1992, C 191.

It was outside the scope of the internal market and of the making of EC laws (regulations and directives) under the 1st pillar of the Treaty on European Union, that the Maastricht Treaty on EU allowed **differentiated cooperation** between the Member States by “closer cooperation”: in the field of a **Common Foreign and Security Policy of the European Union**, including the **eventual framing of a Common Defence Policy**, Article J.4 1st paragraph, and in the field of **Cooperation in the fields of justice and home affairs** under Article K of the Maastricht TEU. “Closer cooperation” according to Article J.4 5th paragraph “*the development of closer cooperation*” between two or more Member States on a bilateral level, in the framework of the WEU and the Atlantic Alliance, provided such cooperation does not run counter to or impede that provided for in this Title. “”, and according to Article K.7 “*the establishment or development of closer cooperation*” between two or more Member States in so far as such cooperation does not conflict with, or impede, that provided for in this Title. “. . . 250)

An example of differentiated cooperation by “closer cooperation” in the field of *Common Foreign and Security Policy* was the WEU, the former organisation comprising a number of European Union Member States, which had existed for some years and was incorporated in the inexperienced Common Foreign and Security Policy provided for by the Maastricht Treaty on European Union. The Declaration No. 30 “DECLARATION on Western European Union” annexed to the Maastricht Treaty on European Union stated in No.5 of the Declaration the principle of “closer cooperation”:

“4. The policy of the Union in accordance with this Article shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.

5. *The provisions of this Article shall not prevent the development of closer cooperation* between two or more Member States on a bilateral level, in the framework of the WEU and the Atlantic Alliance, provided such cooperation does not run counter to or impede that provided for in this Title.” 251)

The IGC 1996/97 had to consider a decision on the future of the WEU. Not all the Member States were prepared to enter into closer defence cooperation arrangements. The WEU, therefore, continued to provide a framework for closer cooperation among a smaller group of countries within the broader context of the European Union until 2002 the year when WEU expired.

Another example of differentiated cooperation by closer cooperation that already existed before the IGC 1996/97 started was and is the *Schengen process* which aimed at bringing about the free movement of people, one of the objectives of the Treaty on European Community. Each Member State of the European Union was free to join Schengen. The

250: *ibid.*supra,note 249.

251: *ibid.*supra,note 249.

Schengen Convention also stated that the – *intergovernmental* – Schengen rules would disappear as soon as there are Community rules that have the same function to establish a common legal order governing the free and secure movement of people within the Community.

And , consequently, annexed to the Amsterdam Treaty on European Union , the Declaration No. 47 “ Declaration on Article 6 of the Protocol integrating the Schengen acquis into the framework of the European Union “ stated:

“ The High Contracting Parties agree to take all necessary steps so that the Agreements referred to in Article 6 of the Protocol integrating the Schengen acquis into the framework of the European Union may enter into force on the same date as the date of entry into force of the Treaty of Amsterdam. “ 252) .

In view of the current and future “closer cooperation “ operations, the 1996/97 IGC had to answer the question of how, within a Union of 20 to 27 Member States or even more , a certain and inevitable degree of differentiation in the integration process could be guided to direct the course of the Union’s process of integration in the right direction: the delegations were aware of the need

- to consider carefully to what extent differentiation appeared necessary,
- what conditions needed to be met and, more generally,
- what the consequences of this process would be for the the cohesion of the Union.

It seemed to the delegations to be obligatory, in other words,

- to find a way of permitting differentiation without undermining the cohesion of the Union more than is strictly necessary.

In general, there was,therefore a *growing common estimation that variable geometry should preferably and primarily be avoided. For, allowing Member States’ objectives relating to finding common responses to commonly shared challenges would only encourage Euro-pean disintegration.* And, by contrast, there was a growing common estimation presented by delegations’ members that the Member States’ Governments would not strongly object to a multiple-speed approach. But the impact of each new initiative in this direction did have, however, to be evaluated in each case. *Most Governments’s proposals , in substance, were of one opinion that the following criteria be applied to assess such initiatives aiming at introducing multiple-speed in a given case:*

- differentiated integration must be compatible with the objectives of the Treaty on European Union;
- each Member State must be free to participate if it can and wants to meet the requirements for the fast track:

252: Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and other related acts, Official Journal of the European Communities, 10 November 1997, C 340.

- differentiated integration must not undermine the Community legal order or, in principle, impair the cohesion of the internal market;
- Member States which elect to opt out must not be allowed to oppose the formation of a leading group which does meet the above-mentioned criteria.

4.3 From “closer cooperation” to “enhanced cooperation” under the Amsterdam Treaty on European Union, the Nice Treaty on EU and the Treaty establishing a Constitution for Europe

a)The Amsterdam Treaty on EU , under **title V**, Articles 11, 17, **confirms the Maastricht TEU’s acquis of provisions on a comprehensive Common Foreign and Security Policy** including “ all questions relating to the security of the Union, including the progressive framing of a common defence policy, in accordance with the second subparagraph, which might lead to a common defence, should the European Council so decide.”, **Article 17 1st paragraph. 253)**

And as an innovation, the Amsterdam Treaty introduced cooperation in the field of armaments:

“The progressive framing of a common defence policy will be supported, as Member States consider appropriate, by cooperation between them in the field of armaments.” , Article 17 1st paragraph last sentence. 254)

Taking up the IGC’s proposals on differentiated cooperation , the Amsterdam TEU confirmed the Maastricht ex-Article J.4 5th paragraph as far as the cooperation in defence matters within the WEU was concerned, and incorporated “ the development of *closer cooperation* between two or more states “on a bilateral level” within the WEU and in the North Atlantic Alliance in the Treaty’s Articles stating under Article 17 paragraph 4 (ex Article J.7 4th paragraph . 255)

“

4. The provisions of this Article shall not prevent the development of closer cooperation between two or more Member States on a bilateral level, in the framework of the WEU and the Atlantic Alliance, provided such cooperation does not run counter to or impede that provided for in this Title.

5. With a view to furthering the objectives of this Article, the provisions of this Article will be reviewed in accordance with Article 48.”

253: *ibid.*,supra, note 252.

254: *ibid.*,supra, note 252.

255: *ibid.*,supra,note 252.

And the Amsterdam Treaty on European Union inserted a new Title VII(ex Title VI a) “Provisions on closer cooperation”, Article 43 (ex Article K.15) of the Treaty on EU:

**“ TITLE VII (ex Title VIa)
PROVISIONS ON CLOSER COOPERATION**

Article 43 (ex Article K.15)

1. Member States which intend to establish closer cooperation between themselves may make use of the institutions, procedures and mechanisms laid down by this Treaty and the Treaty establishing the European Community provided that the cooperation:

- (a) is aimed at furthering the objectives of the Union and at protecting and serving its interests;
- (b) respects the principles of the said Treaties and the single institutional framework of the Union;
- (c) is only used as a last resort, where the objectives of the said Treaties could not be attained by applying the relevant procedures laid down therein;
- (d) concerns at least a majority of Member States;
- (e) does not affect the ‘acquis communautaire’ and the measures adopted under the other provisions of the said Treaties;
- (f) does not affect the competences, rights, obligations and interests of those Member States which do not participate therein;
- (g) is open to all Member States and allows them to become parties to the cooperation at any time, provided that they comply with the basic decision and with the decisions taken within that framework;
- (h) complies with the specific additional criteria laid down in Article 11 of the Treaty establishing the European Community and Article 40 of this Treaty, depending on the area concerned, and is authorised by the Council in accordance with the procedures laid down therein.

2. Member States shall apply, as far as they are concerned, the acts and decisions adopted for the implementation of the cooperation in which they participate. Member States not participating in such cooperation shall not impede the implementation thereof by the participating Member States.

Article 44 (ex Article K.16)

1. For the purposes of the adoption of the acts and decisions necessary for the implementation of the cooperation referred to in Article 43, the relevant institutional provisions of this Treaty and of the Treaty establishing the European Community shall apply. However, while all members of the Council shall be able to take part in the deliberations, only those representing participating Member States shall take part in the adoption of decisions. The qualified majority shall be defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in Article 205(2) of the Treaty establishing the European Community. Unanimity shall be constituted by only those Council members concerned.

2. Expenditure resulting from implementation of the cooperation, other than administrative costs entailed for the institutions, shall be borne by the participating Member States, unless the Council, acting unanimously, decides otherwise.

Article 45 (ex Article K.17)

The Council and the Commission shall regularly inform the European Parliament of the development of closer cooperation established on the basis of this Title. “ **256)**

b) **“Enhanced Cooperation “ under the Nice Treaty on European Union:**

The term “closer cooperation” used under the Amsterdam Treaty Article 43 had been amended by the term “ **enhanced cooperation “** under Article 43 of the ”Consolidated Version of the Treaty on European Union”, 257)
(the amendments are marked below):

“TITLE VII
PROVISIONS ON ENHANCED COOPERATION

Article 43 (*)

Member States which intend to establish *enhanced cooperation* between themselves may make use of the institutions, procedures and mechanisms laid down by this Treaty and by the Treaty establishing the European Community provided that the *proposed* cooperation:

(a) is aimed at furthering the objectives of the Union *and of the Community*, at protecting and serving their interests *and at reinforcing their process of integration*;

(b) respects the *said Treaties* and the single institutional framework of the Union;

(c) *respects* the *acquis communautaire* and the measures adopted under the other provisions of the said Treaties; (the amended version stated: “does not affect....)

(d) *remains within the limits of the powers of the Union or of the Community and does not concern the areas which fall within the exclusive competence of the Community*;

(e) *does not undermine the internal market as defined in Article 14(2) of the Treaty establishing the European Community, or the economic and social cohesion established in accordance with Title XVII of that Treaty*;

(f) *does not constitute a barrier to or discrimination in trade between the Member States and does not distort competition between them*;

(g) *involves a minimum of eight Member States*; (the amended version: Article 43 paragraph 1 (d): “concerns at least a majority of Member States.”)

(h) *respects* the competences, rights and obligations of those Member States which do not participate therein;

(i) *does not affect the provisions of the Protocol integrating the Schengen acquis into the framework of the European Union*;

(j) *is open to all the Member States, in accordance with Article 43b.*

(*) Article amended by the Treaty of Nice.

Article 43a (*)

Enhanced cooperation may be undertaken only as a last resort, when it has been established within the Council that the objectives of such cooperation cannot be attained within a reasonable period by applying the relevant provisions of the Treaties.

Article 43b (*)

When enhanced cooperation is being established, it shall be open to all Member States. It shall also be open to them at any time, in accordance with Articles 27e and 40b of this Treaty and with Article 11a of the Treaty establishing the European Community, subject to compliance with the basic decision and with the decisions taken within that framework. The Commission and the Member States participating in enhanced cooperation shall ensure that as many Member States as possible are encouraged to take part.

Article 44 ()**

1. For the purposes of the adoption of the acts and decisions necessary for the implementation of enhanced cooperation referred to in Article 43, the relevant institutional provisions of this Treaty and of the Treaty establishing the European Community shall apply. However, while all members of the Council shall be able to take part in the deliberations, only those representing Member States participating in enhanced cooperation shall take part in the adoption of decisions. The qualified majority shall be defined as the same proportion of the weighted votes ***and the same proportion of the number*** of the Council members concerned as laid down in Article 205(2) of the Treaty establishing the European Community, ***and in the second and third subparagraphs of Article 23(2) of this Treaty as regards enhanced cooperation established on the basis of Article 27c.***

Unanimity shall be constituted by only those Council members concerned.

Such acts and decisions shall not form part of the Union acquis.

2. Member States shall apply, as far as they are concerned, the acts and decisions adopted for the implementation of the enhanced cooperation in which they participate. ***Such acts and decisions shall be binding only on those Member States which participate in such cooperation and, as appropriate, shall be directly applicable only in those States.*** Member States which do not participate in such cooperation shall not impede the implementation thereof by the participating Member States.

Article 44a (*)**

Expenditure resulting from implementation of enhanced cooperation, other than administrative costs entailed for the institutions, shall be borne by the participating Member States, unless all members of the Council, ***acting unanimously after consulting the European Parliament***, decide otherwise.

(*) Article inserted by the Treaty of Nice.

(**) Article amended by the Treaty of Nice.

(***) Article inserted by the Treaty of Nice (former Article 44(2)). “

In the field of Common Foreign and Security Policy “ enhanced cooperation “ , according to Article 27 a Treaty on EU,

“ shall be aimed at safeguarding the values and serving the interests of the Union as a whole by asserting its identity as a coherent force on the international scene. It shall respect:

- the principles, objectives, general guidelines and consistency of the common foreign and security policy and the decisions taken within the framework of that policy,**
- the powers of the European Community, and**
- consistency between all the Union's policies and its external activities.”**

The Member States may use” enhanced cooperation” for the implementation of a joint action or a common position.” It shall not relate to matters having military or defence implications.”, Article 27 b Treaty on EU. 246) (246: *ibid.*,supra note 245, C 325/05 (20)

c) The Treaty establishing a Constitution for Europe- TCE- stipulates, in chapter III, Article 43, “enhanced cooperation”, a provision which does not change the substance of the Nice TEU Articles 43- 44 (a) on enhanced cooperation , but which presents a more concise text. 258)

According to Article 43 paragraph 1 TCE, “enhanced cooperation shall

- be granted by the Council of Ministers as a last resort, when it has been established within the Council of Ministers that the objectives of such cooperation cannot be attained within a reasonable period *by the Union as a whole*, and *provided that it brings together at least one third of the Member States*.**
c compared to Article 43 (g) Nice Treaty on EU:” (g)*involves a minimum of eight Member States*);
- aim to further the objectives of the Union, protect its interests and reinforce its integration process”, but, according to Article III-322 , “ shall**
- comply with the Union's Constitution and law.”,and “ shall**
- not undermine the internal market or economic, social and territorial coehsion. It shall**
- not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them.”**
- “ respect the competences, rights and obligations of those Member States which do not participate in it. Those Member States shall not impede ist implementation by the participating Member States.” ,Article III-323.**

258: Official Journal of the European Union, 16 December 2004, C 310/01.

**TEC Chapter III “Enhanced cooperation”
(amendments are marked below):**

“

Article 43: Enhanced cooperation

1. Member States which wish to establish enhanced cooperation between themselves *within the framework of the Union's non-exclusive competences* may make use of its Institutions and exercise those competences by applying the relevant provisions of the Constitution, subject to the limits and in accordance with the procedures laid down in this Article and in Articles III-322 to III-329.

Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall **be open to all Member States when it is being established and at any time, in accordance with Article III-324.**

2. Authorisation to proceed with enhanced cooperation shall be granted by the Council of Ministers as a last resort, when it has been established within the Council of Ministers that the objectives of such cooperation cannot be attained within a reasonable period *by the Union as a whole*, and *provided that it brings together at least one third of the Member States*. (compared to Article 43 (g) Nice Treaty on EU:” (g)*involves a minimum of eight Member States*).

The Council of Ministers shall act in accordance with the procedure laid down in Article III-325.

3. Only members of the Council of Ministers representing the States participating in enhanced cooperation shall take part in the adoption of acts. All Member States may, however, take part in the deliberations of the Council of Ministers.

Unanimity shall be constituted by the votes of the representatives of the participating States only. *A qualified majority shall be defined as a majority of the votes of the representatives of the participating States, representing at least three fifths of the population of those States.*

Where the Constitution does not require the Council of Ministers to act on the basis of a Commission proposal, or where the Council of Ministers is not acting upon initiative of the Minister for Foreign Affairs, the required qualified majority shall be defined as a majority of two thirds of the participating States, representing at least three fifths of the population of those States.

4. Acts adopted in the framework of enhanced cooperation shall bind only participating States.

They shall not be regarded as an *acquis* which has to be accepted by candidates for accession to the Union. “

II. Comment on the criteria related to differentiated integration through multiple-speed integration and to differentiated cooperation, enhanced cooperation as guiding-line for a merger Treaty

1. Within a European Union of 27 and even more Member States, a certain degree of differentiation is inevitable and should be accepted to an extent which, in each case, must not undermine the cohesion of the European Union.
2. Variable geometry should preferably be avoided, because opting for divergent objectives increases the risk of the gradual disintegration of the European Union as a whole.
3. The multiple-speed approach to differentiated integration is the preferable option because the friendly integrational approach does share the same policy objective common to all the Member States, allowed to vary the speed at which the common objective is achieved.
4. ***Differentiated integration by multiple-speed integration must not undermine the Community legal order or, in principle, impair the cohesion of the internal market:***
Particular importance should be attached to this criterion. Careful consideration must always be given to the question of whether integration as part of smaller circle of Member States will perpetuate, improve or actually harm the internal market, especially in those European Union's policy areas which touch on the well functioning of the internal market.

For, the *survival of the internal market* depends on there being

- *free competition* within certain parameters that apply equally to all the parties;
- *parameters* laid down at European Union level, *creating a level playing field*;
- *Small groups of countries being nonetheless given the opportunity to take more far reaching measures and reach agreement on this at Community level, namely in the social and environmental protection and safe energy supply fields*;
- *Establishing in each case whether the differentiation of norms and policy will gradually undermine the level playing field.*

One of the crucial political issues will be : are the leaders willing and able to maintain free competition with Member States that cannot, or do not yet want to apply the leaders' norms? How large may the gap be between the leaders and the rest? How can the friendly integrational (the willing) Member States ensure that multiple-speed integration will not take on a life of its own, so that the lead of the group in front does not become permanent?

5. Last, but not least, the question is : can the legally binding and the securing nature of the Community structure which secures the cohesion of the internal market be adapted to cope with multiple-speed integration? Flexibility demands adaptation,

but flexibility must not be allowed to undermine *the Community's decision-making structure. This constitutes the core of European integration. The preservation and development of the Community legal order with its relatively efficient rules on decision-making and its democratic and legal safeguards are to be regarded as indispensable for the proper functioning of the internal market and the observance of the rules of that market*

6. As far as *differentiated cooperation through intergovernmental cooperation in the fields governed by the 2nd and the 3rd pillar of the Treaty on European Union* is concerned:

The problem was that neither the European Community –before the Maastricht Treaty entered into force – and, after the Maastricht Treaty entered into force, nor the Justice and Home Affairs Cooperation under the Maastricht TEU had and have been able, to date, to put an efficiently working system in place that covers the whole of the European Union as easily can be seen from the recently endeavors of Spain failing to get adequate support from all EU Member States to cope with the problems existing at the common EU border in view of refugees coming from Africa and looking for a better life in Europe.

The implementation of the free movement of persons at Union level requires a unanimous decision, and one Member State in particular was opposed to the idea. Should an *alternative form of cooperation* have been sought in such a case, one that did not need a Community decision? In the case in question, it was justified in the circumstances for a smaller group of states to take further actions together.

The arguments for and against will always have to be considered again in similar situations in the future. The *still early and recent history of Schengen demonstrates* the kind of dilemma that arises when certain Member States continue to block EC decision-making while others want to push ahead with more radical measures. Such situations will occur more frequently, especially if a reform of the rules on Community decision-making will fail so that blockades of this kind cannot be avoided.

- **Summarizing:** as far as differentiated integration through multiple-speed integration in matters of the Community policies, namely of the internal market and of the legal order is concerned, or “enhanced “ cooperation in matters of Foreign, Security and Defence Policies and of Justice and Home Affairs cooperation:

The Member States' delegations, at the eve of the IGC 1996/97 and during the IGC, considered it realistically that differentiated integration should be the last resort for use only to prevent stagnation in the process of integration. Taken as an exception, differentiated integration appears to be a legal and legitimate way to ensure the well functioning of the internal legal order and of the internal market of the Union as well as to ensure the well functioning of the

Union's external role by speaking with one voice in order to achieve the Union's objectives and not to undermine the internal legal order of the Union.

For, differentiated integration within the larger future Union groups of Member States would emerge to seek closer integration and enhanced cooperation in specific policy areas and, in each single case, would have to make choices and weigh up objectives that cannot be achieved to the same extent at the same time by all Member States of the European Union. For, differentiation may in some cases provide a solution within a larger Union to the problem of how to preserve the dynamism of the integration process looking carefully at the chances and risks that developments in this direction might entail for the well functioning of the internal market and of the legal order of the Community and looking at the consequences for the cohesion of the European Union as a whole as an internal and external actor.

Chapter VIII

Constitutional quality shaping essential:

Efficiency of the European Union, focussing on the issue of improving the

■ decision-making within the Council in the field of European Foreign, Security and Defence Policy

The European Union: speaking with one voice? The legal constitution for stronger external action by the European Union in the field of European Foreign, Security and Defence Policy

I. Extending the qualified majority voting namely on deciding on joint positions and joint actions in the field of Common Foreign and Security Policy : the response to challenges in international security

1. The state of international security challenging the European Union to speak with one voice

With the radically changed political and security situation since the end of the 1980s in Europe, the political and military threat that existed in the past had disappeared. No longer was Western Europe faced with the risk of a large-scale attack mounted over a broad front with little warning. The reduced threat had caused the United States of America to adapt a more restrained role concerning Western Europe while at the same time increasing the scope for the

larger European countries to pursue a foreign policy free from former constraints exerted by the Cold War. Peoples of Central and Eastern Europe got the perspective to see their countries represented by democratically elected governments and join Western cooperative fora, joining the European Union and the North Atlantic Treaty Organisation. The strategic situation changed, opening the way to significant developments in the field of arms control and disarmament and to other challenges to international security in a wider sense influenced by worldwide search for secure and sane energy supply and by worldwide concerns about global warming. Confrontation had given way to cooperation, which had and still has to be seen against the background of an increased risk of worldwide instability, both in Europe and namely in Europe's neighbourhood in the Middle East and in Africa.

Over fifty years of peace based on deterrence cultivated a comfortable belief that the spectre of war had been eliminated from the European continent. This, however, had proved not to be the case. With the end of the Cold War, the centuries-old conflict between nationalities, between the right of self-determination and the maintenance of political unity came to the surface again. International crises and conflicts do not directly threaten the territorial integrity of Western Europe, crisis like the disastrous civil war like instabilities in Iraq, the Israel-Palestine conflict, Europe's dependencies on primary energy resources' imports from countries like Russia and the uncertainties about the impact the energy price conflicts between Russia, on the one hand, and Ukraine and White Russia, on the other, do have on the EU's secure energy supplies from Russia in the long run. These are **crisis that can nevertheless have serious consequences for the stability and/or vital interests fo Europe as a whole:**

For, if the peoples of the Member States of the European Union will see reason enough to identify themselves with the European Union it is for the Union's capacity to guarantee stability, namely: peace, security and economic ,social and environmental health.

The **disintegration of Yugoslavia** had led to a serious armed conflict which threatened to spread to neighbouring countries. The case of the Kosovo is still without a durable solution. Border disputes and minority issues could spark off conflicts elsewhere, too, like in Georgia and Armenia in the Caucasus. Eastern and Southeastern European countries like Bulgaria and Rumania are fighting with grave economic and social problems as well as fighting with organised crime and corruption, which may endanger their transformation into politically and economically stable democratic states. And ,vice versa, these countries do strongly hope for the European Union's contribution to their own stability after they had joined the European Union on January 1st 2007.

And, last but not the least of the security risks for the European Union, uncertainty as to the political course Russia will take after the expiration of Wladimir Putins presidency and the nature Russia's future political system makes it **impossible to predict the security situation in Europe**. The **relationship between the central power in Moscow and the "near abroad" of Russia** is still far from clear. Russia is still by far the biggest military and nuclear power in Europe. The "near abroad" of Russia ,namely the region of Asia Minor in the Caucasus, as well as the region of Transcaucasia north of Iran, in west-central Asia northeast, east and west of the Caspian Sea (Georgia, Azerbaijan, Turkmenistan, Uzbekistan, Kazakhstan) , these are countries in the European Union's nearby region:

Socioeconomic, political and in some cases military instability are characteristic features of that nearby region, as well as of other nearby regions such as the Mediterranean, the Middle-East and the Gulf.

There is the growing influence of **Iran** in the region after the situation in Iraq became disastrous. Europe will have to strengthen visible contributions to stability namely in the **Middle East**, as far as the the use of **violence orientation of Islamic fundamentalists** severely affects the stable and peaceful relationship between Islamic parts and non-Islamic parts of the peoples living in the European Union, and as far as the **lack of a durable peaceful settlement between Israel and Palestine** giving the Palestinians a State and giving Israel security will continue to affect stability in the whole region as well as the security of the European Union.

Security and stability can be gradually and severely undermined by a **continuing proliferation of nuclear weapons** and their delivery vehicles and by the development and the transfer of related technology. This is an obvious risk that must be controlled by peaceful means of diplomacy **and negotiations to be continued with Iran on the basis of mutual respect and firmness as far as the development of highly enriched Uranium and the development and use of centrifuges by Iran is concerned.**

Other dangers include:extremism, religious or otherwise, terrorism and growing international organised crime, all of which can be combated effectively only at international level, and acting with one voice as far as the EU's role of an active and effective player is concerned.

2. The provisions of the Treaty on European Union concerning the Common Foreign and Security Policy (CFSP) - from European Political Cooperation – EPC - to CFSP

2.1 Experience of unanimous decision-making within the second pillar of the Treaty on European Union : blocking the European Union acting with one voice

The European Union's Member States' conduct of the *Common Foreign and Security Policy* as well as of the *Common Security and Defence Policy* and of the *Home and Justice cooperation in criminal matters* shows that the Member States tend to take single action on national level when they are challenged to respond to threats to international security. When they take the intergovernmental cooperation this method requires deciding by unanimity which too frequently renders the Member States insufficiently able to take decisions properly and promptly.

The question,therefore, is whether an efficient “one voice” of the European Union is reachable . Acting with one voice of the European Union in the field of Common Foreign and Security Policy appears to be manageable through applying the EU's instruments of common positions and of joint actions as provided for by the Treaty on European Union and foreseen by the Treaty on Constitution:

It is *necessary and feasible under the current Treaty on EU to extend the 1st pillar Community method of integration through majority-voting decisions to decision-making on policies under the second and third pillar*, at least as regards the **decisions on participation in the implementation of possible common positions and joint actions which do implement strategy oriented decisions of the Council. The decisions on the Union's principles of and general guidelines for the common foreign and security policy, including for matters with defence implications, decisions on common strategies, however, require unanimity:**

- *the European Council can adopt, on its own initiative and by unanimity, a European decision allowing the Council of Ministers to act by qualified majority in that area to decide on common positions and joint actions. 259)*

The legal constitution of the Union's conduct of Common Foreign and Security Policy-CFSP- under the Treaty on European Union is the result of a dynamic process ranging from European Political Cooperation – EPC – to the CFSP.

2.2 The dynamic process from European Political Cooperation – EPC - to Treaty provisions on CFSP extending the scope beyond mere economic issues to be implemented by new instruments: common positions and joint actions

European Political Cooperation – EPC – had been launched in 1972. EPC had been restricted to the political and economic aspects of security. It achieved permanent form in 1985, under Article 30 of the Single European Act.

With the entry into force of the **Maastricht Treaty on European Union** on 1 November 1993, one of the Union's task was and is to develop a Common Foreign and Security Policy-CFSP- under Article J.1 of the Treaty to replace the existing European Political Cooperation. Article J.1:

“

1. The Union and its Member States shall define and implement a common foreign and security policy, governed by the provisions of this Title and covering all areas of foreign and security policy.

2. The objectives of the common foreign and security policy shall be:

- to safeguard the common values, fundamental interests and independence of the Union;
- to strengthen the security of the Union and its Member States in all ways;

259:Articles 12, 13, 14, 15, 23 2nd paragraph Treaty establishing the European Union, consolidated version, Official Journal of the European Communities, 24 December 2002, C 325/5 (14, 15, 18).

- to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter;
 - to promote international cooperation;
 - to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.” **260)**
- “

The Common Foreign and Security Policy shall include

“ **all questions relating to the security of the Union, including the eventual (“progressive”) framing of a common defence policy, which might in time lead to a common defence “**, Article J.4 Maastricht Treaty on EU. **261)** , confirmed by Article J.7 1st paragraph Amsterdam Treaty on EU – TEU -, again by Article 17 1st paragraph Nice TEU and, actually, by Article 15 1st paragraph Treaty establishing a Constitution for Europe – TCE- “The common foreign and security policy”, paragraph 1, replacing the Article J.4 Maastricht TEU which used the less dynamic term “ eventual “ framing of a common defence policy. **262)**

By the Treaty on EU, both the the scope of policy itself and the policy instruments available had been expanded in relation to the former European Political Cooperation- EPC-:

The European Political Cooperation had restricted the scope of the European Community’s security policy to the political and economic aspects of security.

The Maastricht Treaty on EU had abandoned this restriction and expanded the Common security cooperation beyond political and economic aspects of security to common defence matters of intergovernmental cooperation between Member States.

The new instruments available under the CFSP were “common positions” and “joint actions”. The latter, in particular, were and are seen as a more far reaching form of policy agreement which is binding on the Member States of the European Union. **263)**

260: Official Journal of the European Communities, 29 July 1992, C 191.

261: *ibid.*, *supra*, note 260..

262: Amsterdam Treaty on EU, Official Journal of the European Communities, 10 November 1997, C 340 ; Nice TEU, consolidated version , Official Journal of the European Communities, 24 December 2002, C 325/05 (16); Treaty establishing a Constitution for Europe , Official Journal of the European Union, 18 July 2003, C 169/01 (11); Official Journal of the European Union, 16 December 2004, C 310/01.

263: Articles 14 and 15 Nice Treaty on EU, consolidated version, Official Journal of the European Communities, 28 December 2002, C 325/5 (15).

3. Evaluation of CFSP and CSDP *de lege lata: the Member States prepared to translate political will into joint positions and joint actions ?*

3.1 The situation before the Intergovernmental Conference 1996/97

Fourteen years after the entry into force of the Maastricht Treaty, it is hardly surprising that there is still now no question about the *legal* constitution (the situation *de lege*

lata), the attribution of a common foreign and security policy power to the European Union, attributed by the Founding Treaty on European Union, that is held to speak and to act with *one voice* and with common positions and joint actions taken promptly and properly on the basis of a common modern term of security in a comprehensive, wider sense of security going beyond merely military challenge and response: e.g. challenged by confidence-building and peace-keeping requirements namely in Afghanistan where the security dilemma might decrease the more civil reconstruction projects successfully prove confidence-building in the eyes of the people in Afghanistan

A totally different issue, however, is the situation of the living constitution. the real situation of the CFSP, as the wars on the Taliban and on Iraq had made evident the role played by the Member States of the European Union: see below the following chapter 11 of the present study .

The aim of the 2nd pillar of the Treaty on European Union – Common Foreign and Security Policy- is to **strengthen the Union’s external action and enhance the Union’s capacity for decisive action**. To this end the EU had been provided with the power of a wide range of policy instruments, the use of which would combine economic, diplomatic and military elements in differing combinations, depending on the characteristics of a specific regional and sub-regional situation. The origins of many problems in neighbouring regions of the European Union could and still can be traced to socioeconomic factors as well as religious and/or ethnic disaccords (e.g. Kosovo, Iraq), and can therefore be influenced to some extent by socioeconomic instruments. **Preventive diplomacy** or mediation would and will sometimes achieve results. **In some cases, however, if diplomacy is to be effective, it must be backed up by a military option.**

For, the wording of Article 15 of the Treaty establishing a Constitution for Europe – TCE- “The common foreign and security policy”, paragraph 1: **264**)

“ The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy, which might lead to a common defence.”

indicates – in the tradition of the Treaty on EU - the **wide sense of the term “ security “** covering a **wide scope** of areas and actions relating to the Union’s foreign and security policy, empowering the European Union to negotiate and “ conclude international agreements with one or more third countries or international organisations where the Constitution so

provides or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives fixed by the Constitution, where there is provision for it in a binding Union legislative act or where it affects one of the Union's internal acts", Article III-225 TCE, following the traditional line of the European Union's treaty-making power on the basis of the Court of Justice jurisdiction concerning the so-called AETR-case . 265)

The Union's competence in matters of common foreign and security policy in all areas of security in the **wide sense of the term "security"** covers

- **common interests – not as an abstract academic formula but as a “case” oriented definition of a given challenge and of the Union’s reasoning of why to move to action –**
- **areas of common interests for common action, areas reaching beyond mere military conflicts, areas of common interests such as common security by safeguarding**
 - **free flows of energy supply,**
 - **the security of well functioning space-based European communication satellite systems to keep them safe from military threats in order to secure free flows of information and data;**
 - **world climate by preventing climate change and by combating global warming**
 - **free and legal worldwide competition between existing and emerging new big economies such as China and India;**
 - **conflict prevention and conflict management through the deployment of wide range socio-economic instruments to assist economic, social and political stabilization policies in world regions of common interest**
 - **combating poverty in developing countries by helping to use their own resources and through opening the Union’s market**
 - **deployment of military resources for common defence and peace keeping actions under United Nations’ mandate**

265: see Pletsch, Michael, thesis on the EEC's treaty-making power, dissertation Bonn University, 1980: the author had contributed the basic theory to the European Court's obiter dictum (in the so-called AETR-case) that the EEC has, except explicitly attributed treaty-making powers, additional tacitly attributed, implied powers to conclude international agreements in order to prevent the undermining of the internal legal acquis of the Union through single actions of the Member States outside the Union's procedures.

Shortly after the entry into force of the Maastricht TEU, however, it was evident that **the *living* constitution, the *reality of the Union's external power*** in the field of Common Foreign and Security Policy was **substantially different from the *legal* constitution under the existing Founding Treaty on EU concerning the enlarged Union's power of decisive external action.**

The CFSP procedures based upon European Political Cooperation, introduced since 1985 and codified in the Maastricht Treaty on European Union, in its origins had been at its most effective in deploying more moderate foreign policy instruments such as demarches, political consultation. **and the exchange of information. The Maastricht Treaty on EU had the potential to develop these moderate instruments further into a common foreign policy instrument,** resulting in an ever-increasing number of **common positions**, based on Article J.2 (Maastricht TEU), Articles 12 and 15 Nice TEU, and **joint actions**, based on Article J.3 Maastricht TEU, Articles 12 and 14 Nice TEU.

Joint actions were meant to enable the Member States and the European Union institutions, in areas where they have considerable interests in common, to **make their shared views explicitly binding, by means of combined diplomatic action,** Community (TEU's first pillar) and national measures. **The combined approach had meant to be an achievement,** for, it had always been regretted that the EPC had no such binding force, along the lines of directives and regulations issued within the Community framework

The inauguration of the CFSP by the Maastricht TEU in 1992 gave rise to expectations which could not and which cannot be realised in a short period of time. Though experience of the CFSP was still limited, even in the light of the growing number of joint actions., **the experience of the CFSP had made obvious significant weaknesses as shortcomings**

- **in joint analysis,**
- **slow decision-making processes,**
- **difficulties in coordinating the first and second pillars and**
- **the issue of democratic control.**

Not later than during the preparatory work of the Intergovernmental Conference in 1996/97 reviewing the Maastricht TEU and preparing the Amsterdam TEU, it had, therefore, been readily understood that there were **limits to the scope for joint action in areas which were and still are viewed at by the majority of the Member States as the ultimate domaine réservé,** as the ultimate resort of national sovereignty whatever the substance of the Post-Westphalian nation state's sovereignty might really be worth under the realities of modern challenges of globalisation.

The ineffectiveness of the CFSP was therefore to be judged in more than technical terms only. It was and it is still now, after the Nice Treaty on European Union and under the Treaty establishing a Constitution for Europe the entry into force of which is pending, is primarily a political problem: whether nation state's Governments are ready to demonstrate a political will to review their traditional understanding of the nation state's sovereignty and to recognize their severely limited scope and range of influence

if the nation state continues to be reluctant to take common positions and joint actions to make the European Union speak and act with one voice.

It is one of the great and severe weaknesses of the 1996/97 Intergovernmental Conference that the Member States gave the impression that an institutional approach to reform the Treaty provisions on decision-making procedures would improve the Council's decisiveness and thus the Union's effectiveness. The institutional approach of the IGC, however, could not hide the fact that any change of provisions on institutional decision-making procedures cannot compensate the absence of the political will of the Member States' Governments to make use of new institutional provisions.

The Member States continued the same institutional approach to the efficiency issue of the Council's decision-making when they gave the mandate to the IGC to prepare the Nice Treaty amendments and the mandate to the Convent and to the IGC again to reform the institutions of an enlarged European Union of the Twentyfive –since 01 May 2004, and of the Twentyseven since 01 January 2007. And the old weakness known from the institutional approach since the 1996/97 perpetuated: the national Governments' art of establishing common institutions but cooking the consensus rule too long and thus prolonging the old concept of nation state sovereignty.

One of the **key issues** discussed at the Intergovernmental Conference in 1996/97 was therefore *whether the Member States were prepared to translate political will into action by means of new provisions in the Treaty which would lessen the need for rules of consensus when it comes to taking and implementing decisions as promptly and properly as possible.*

It took and it still will take a long time to design and to learn to **conduct a common policy**, common in the true sense of the word. This is particularly the case in an area such as foreign policy and, even more, **security where nation state's sensitivities and behavioural peculiarities, excentricities tend to amount to a large extent while misunderstanding the traditional nation state's potential to defend national interests on a worldwide scale and at the same time ignoring the functional role of the Common Foreign and Security Policy to offer *one voice* to reinforce the Member States' potentials.**

The inauguration of the CFSP by the Maastricht TEU in 1992 gave rise to expectations which could not and which cannot be realised in a short period of time as of two decades – even if the challenge to common security has been seriously increased since the September 11 2001 terrorists' attacks in the USA, followed by attacks in Madrid March 2004 and London 2005, proving the serious situation of a terrorists' network that is not a closeknit system that could easily be targeted and prevented, and the dangerous nature of which apparently will not be mitigated, but increased by the catastrophic situation in the Iraq.

In turn, all this has led to a widely –felt sense of disappointment, which, however does no justice to the potential and to the achievements of the Common Foreign and Security Policy.

When it comes to joint action, the European Union has focused for the time being on a limited number of regions and issues. The regions are – historically listed: Central and Eastern Europe, the Middle Eastern peace process(the Maghreb, South Africa, southeast Europe (former Yugoslavia), East Africa (coast of Somalia, Djibouti, on Mission

Enduring Freedom), Afghanistan, Israel-Palestine (together with USA, Russia and China), Democratic Republic of Congo (ensuring under UN mandate first free and peaceful national elections), Libanon (deploying naval forces under UN mandate to control smuggling of weapons destined to supply Hamaz in Libanon), Iran (non-proliferation of nuclear weapons talks).

Thus, the **issues** were: the OSCE process (election observers in Russia, Ukraine), arms control, non-proliferation, anti-terrorist coalition, peace-building and peace-keeping (election observers in Palestine, economic assistance, assistance to the Palestine police force), the Stability Pact for the former Yugoslavia, the EU administration in Mostar, and economic aspects of international security, to mention some of the joint actions and themes as representative for the whole range of CFSP joint actions.

Experience of the CFSP is still limited, even in the light of the growing number of joint actions as referred to above. Thus **any evaluation** of the CFSP undertaken with a view at helping to judge the decision-making procedures, based on limited experience made with the CFSP can, therefore, **be no more than provisional**.

What appears to be clear, at any rate, is, the growing awareness that the instruments of joint action and common positions help the collectivity of the Member States to pool their contributions and to target them. if the Member States are willing and ready to lessen the need for rules of consensus when it comes to taking and implementing decisions as promptly and properly as possible.

3.2 The IGC 1996/97 considering ways to a more effective CFSP through increasing the effectiveness of decision-making as essential of the EU's constitutional quality

It was one of the tasks of the Intergovernmental Conference in 1996/97 (IGC 96/97) to analyse and to negotiate whether the Common Foreign and Security Policy could be made more effective and decisive. This study is focussing on the decision-making aspects of how to improve the effectiveness of the CFSP as constitutional quality essential of the Union and leaving apart the issues of capacity for analysis, funding and consistency of external action.

3.21 Alternatives to the consensus rule? Institutional attempts to increase the effectiveness of decision-making in the field of Common Foreign and Security Policy- CFSP-

The IGC 1996/97 had to investigate whether there was any scope for increasing the effectiveness of CFSP decision-making. In so doing it meant to focus primarily on alternatives to the consensus rule. This applied both to the adoption and to the implementation of joint actions:

- Article J.3 of the Maastricht TEU stipulated **unanimous decision-making** of the Council for **adopting joint action** in matters covered by the foreign and security

policy, unless the exceptional rule of qualified majority is explicitly stipulated. Article J.3 paragraph 1 states that the Council shall decide, on the basis of common guidelines from the European Council, that a matter should be the subject of joint action. That decision is subject to consensus, to be taken by unanimity.

- Article J.3 paragraph 2 stated that the Council might itself, when adopting the joint action and at any stage during its development, define those matters on which *decisions concerning the implementation of a joint action are to be taken by a qualified majority*:

Experience shows that the Council until the IGC and since the Maastricht Treaty's on the European Union entry into force the Council had never made use of his right to take a decision on implementing a joint action by a qualified majority. It appeared to be possible that this situation might be improved if Article J.3.2 were amended to ensure that all decisions on implementing a joint action were to be taken by a qualified majority. But, such a relaxation of the voting system by making decisions on implementing joint actions a principle rule, might have had the effect of deterring Member States from deciding on joint action;

- **Wider use of the abstention option** when **adopting** a joint action, which implies the acceptance of the decision of those voting in favor, see declaration no.27 to the Maastricht Treaty on European Union:

“DECLARATION on voting in the field of the common foreign and security policy

The Conference agrees that, with regard to Council decisions requiring unanimity, Member States will, to the extent possible, avoid preventing a unanimous decision where a qualified majority exists in favour of that decision. “ 266)

- **The application of decision-making by consensus** when **adopting** a decision on joint action could be restricted *by introducing a system of consensus minus one*. Decision making on the basis of consensus minus one would have to be the rule, except where the vital interests of member states were at stake, in which cases the consensus rule would apply. **The burden of proof would then be on the Member State which was invoking its vital interests.**
- The idea put forward by the German Government, namely the **introduction where possible of majority decision-making** for the **adoption** of a joint action had been considered by other delegations. This option covered the first of the alternatives listed above, since majority decision-making in respect of the **realisation of a joint action also implied majority-voting of its implementation**. The majority decision-making here means **majority-decision-making within an intergovernmental context**. This

is to be distinguished from majority decision-making within the Community framework, which is a process based on the Commission's exclusive right of initiative, the involvement of the co-decision of the European Parliament and the role played by the Court of Justice in reviewing the legality of the Community legislation. **Communitarisation of the CFSP along these lines was to be seen by Member States of the Union during the IGC 96/97 as an option for the longer term.**

The options listed above with regard to the adoption of joint actions were also relevant to decision-making on common positions pursuant to Article J.2.

The Amsterdam Treaty on European Union, Article 23, 2nd paragraph, achieved innovation of the decision-making through extending majority decision-making to adopting a decision on joint action as well as to adopting a decision on common positions, while the predecessor, the Maastricht TEU had limited majority decision-making to decisions on implementing a joint action.

Article 23, 2nd paragraph, Amsterdam and Nice TEU reads as follows:

“.....the Council shall act by qualified majority:

- when adopting joint actions, common positions or taking any other decision on the basis of a common strategy,
- when adopting any decision implementing a joint action or a common position,
- when appointing a special representative in accordance with Article 18(5).” 267)

And pursuant to the findings during the negotiations at the IGC 1996/97 concerning the application of the consensus rule when adopting a decision on joint action, Article 23, 2nd paragraph continues:

“

If a member of the Council declares that, for important and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority, a vote shall not be taken. The Council may, acting by a qualified majority, request that the matter be referred to the European Council for decision by unanimity.

The votes of the members of the Council shall be weighted in accordance with Article 205(2) of the Treaty establishing the European Community. For their adoption, decisions shall require at least 62 votes in favour, cast by at least 10 members (). “ (**)This subparagraph will be amended on 1 January 2005 in accordance with the Protocol on the enlargement of the European Union (see Annex)” 268)**

267: consolidated version of the Nice Treaty on EU, Official Journal of the European Communities, 24 December 2002, C 325/05 (18).

268: *ibid.*, supra, note 267, C 325/05 (16).

3.22 Decision-making on matters of a Common Defence Policy *de lege lata*

A common defence policy of the European Union is subject to the provisions of the Nice TEU Article 17:

“

Article 17 (*)

1. The common foreign and security policy shall include all questions relating to the security of the Union, *including the progressive framing of a common defence policy, which might lead to a common defence*, should the European Council so decide. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.

The policy of the Union in accordance with this Article shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.

The progressive framing of a common defence policy will be supported, as Member States consider appropriate, by cooperation between them in the field of armaments.

2. Questions referred to in this Article shall include humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking.

3. Decisions having defence implications dealt with under this Article shall be taken without prejudice to the policies and obligations referred to in paragraph 1, second subparagraph.

4. The provisions of this Article shall not prevent the development of closer cooperation between two or more Member States on a bilateral level, in the framework of the Western European Union (WEU) and NATO, provided such cooperation does not run counter to or impede that provided for in this title.

5. With a view to furthering the objectives of this Article, the provisions of this Article will be reviewed in accordance with Article 48. “ 269)

As far as the European Union’s decision-making in the area of a common defence policy is concerned, Article J.4 paragraph 4, Maastricht TEU had stated that :

“ The common foreign and security policy shall include all questions related to the security of the Union, including the eventual framing of a common defence policy, which might in time lead to a common defence.”

And Article J.4 paragraph 3 concerning issues having defence implications dealt with under Article J.4, had clearly kept those issues off reach of the procedures set out in Article J.3., which meant that *these*

269: *ibid.*, supra, note 267, Official Journal of the European Community, 24 December 2002, C 325/01 (16).

issues were beyond any considerations on a use of majority decision-making.

Keeping up this provision of the Maastricht TEU, Article 23 ,2nd paragraph, Nice TEU states , too,

“ This paragraph shall not apply to decisions having military or defence implications.”, which means that there is **no majority decision-making in defence matters under Article 23 Amsterdam TEU, too.** 270)

3.23 Unanimity, consultation and qualified majority decision-making in the field of a Common Foreign and Security Policy under the Treaty establishing a Constitution for Europe - TCE-

The Treaty on Constitution confirms the principles and instruments of the Union's CFSP as provided for by the current Treaty on European Union:

In the field of the Union's Foreign and Security Policy the Treaty on Constitution confers

- the *unanimous voting* to the European Council in matters of identifying the Union's strategic interests and determining the objectives of its common foreign and security policy, including matters with defence implications. European decisions relating to the common foreign and security policy shall be adopted by the European Council and the Council of Ministers unanimously, except in the cases referred to in Part III., Article 39 2nd and 7th paragraph.
- Member States shall *consult* one another within the European Council and the Council of Ministers on any foreign and security policy issue which is of general interest in order to determine a common approach. Before undertaking any action on the international scene or any commitment which could affect the Union's interests, each Member State shall consult the others within the European Council or the Council of Ministers. Member States shall ensure, through the convergence of their actions, that the Union is able to assert its interests and values on the international scene. Member States shall show mutual solidarity. Article 39 5th paragraph.

270: *ibid.*,supra, note 267, C 325/01 (16).

- **The common security and defence policy shall be an integral part of the common foreign and security policy. European decisions on the implementation of the common security and defence policy, including those initiating a mission outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter, Article 40 1st paragraph.**
- **the *qualified voting to the Council of Ministers* which shall adopt the European decisions “ on Union actions and positions on the basis of a European decision of the European Council relating to the Union's strategic interests and objectives, as referred to in Article III-194(1)”: Article III-201, 2nd paragraph.. 271)**

The respective Articles of the Constitution read as follows: 261) (261:ibid.,supra, note 260

“Article III-194

1. On the basis of the principles and objectives referred to in Article III-193, the *European Council shall identify the strategic interests and objectives of the Union.*

European decisions of the European Council on the strategic interests and objectives of the Union shall relate to the common foreign and security policy and to other areas of the external action of the Union.

Such decisions may concern the relations of the Union with a specific country or region or may be thematic in approach. They shall define their duration, and the means to be made available by the Union and the Member States.

The *European Council shall act unanimously on a recommendation from the Council of Ministers*, adopted by the latter under the arrangements laid down for each area. European decisions of the European Council shall be implemented in accordance with the procedures provided for by the Constitution.

2. The Union Minister for Foreign Affairs, for the field of common foreign and security policy, and the Commission, for other fields of external action, may submit joint proposals to the Council of Ministers.

Chapter II

COMMON FOREIGN AND SECURITY POLICY

Article III-195

1. In the context of the principles and objectives of its external action, **the Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy.**

271: Treaty establishing a Constitution for Europe, Official Journal of the European Union, 16 December 2004, C 310/01 subs.

2. The Member States shall support the common foreign and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity.

The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.

The Council of Ministers and the Union Minister for Foreign Affairs shall ensure that these principles are complied with.

3. The Union shall conduct the common foreign and security policy by:

(a) **defining the general guidelines;**

(b) **adopting European decisions on:**

(i) *actions of the Union,*

(ii) *positions of the Union,*

(iii) *implementation of actions and positions;*

(c) strengthening systematic cooperation between Member States in the conduct of policy.

Article III-196

1. The European Council shall define the general guidelines for the common foreign and security policy, including for matters with defence implications.

If international developments so require, the President of the European Council shall convene an extraordinary meeting of the European Council in order to define the strategic lines of the Union's policy in the face of such developments.

2. The Council of Ministers shall adopt the European decisions necessary for defining and implementing the common foreign and security policy on the basis of the general guidelines and strategic lines defined by the European Council.”

.Article III-201

1. European decisions referred to in this Chapter shall be adopted by the Council of Ministers acting *unanimously*. Abstentions by members present in person or represented shall not prevent the adoption of such decisions.

When abstaining in a vote, any member of the Council of Ministers may qualify its abstention by making a formal declaration. In that case, it shall not be obliged to apply the European decision, but shall accept that the latter commits the Union. In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position. If the members of the Council of Ministers qualifying their abstention in this way represent at least

one third of the Member States representing at least one third of the population of the Union, the decision shall not be adopted.

2. By derogation from paragraph 1, the *Council of Ministers shall act by qualified majority*:

(a) when adopting European decisions on Union actions and positions on the basis of a European decision of the European Council relating to the Union's strategic interests and objectives, as referred to in Article III-194(1);

(b) when adopting a decision on a Union action or position, on a proposal which the Minister has put to it following a specific request to him or her from the European Council made on its own initiative or that of the Minister;

(c) when adopting any European decision implementing a Union action or position;

(d) when adopting a European decision concerning the appointment of a special representative in accordance with Article III-203.

If a member of the Council of Ministers declares that, for vital and stated reasons of national policy, it intends to oppose the adoption of a European decision to be adopted by qualified majority, a vote shall not be taken. The Union Minister for Foreign Affairs will, in close consultation with the Member State involved, search for a solution acceptable to it. If he or she does not succeed, the Council of Ministers may, acting by a qualified majority, request that the matter be referred to the European Council for decision by unanimity.

3. The European Council may decide unanimously that the Council of Ministers shall act by a qualified majority in cases other than those referred to in paragraph 2.

4. Paragraphs 2 and 3 shall not apply to decisions having military or defence implications. “

Comment: The Member States' obligation to practice solidarity and consultation within the Union's Council before taking single State's external action is no innovation, it is a clarification of the current Treaty obligations and should be incorporated in any new text in case of final entire ratification failure of the Constitution treaty:

As to the issue of the Union's decisiveness in the field of Common Foreign and Security Policy, we realize a crucial area of nation state's sovereignty and responsibility. It is an area where the need of balancing national sovereignty and the Union's decisiveness is obvious. There cannot be given one abstract answer to all single cases of possible conflicts between nation state's interest to keep the equality of all Member States in matters of foreign and security policy, on the one hand, and the interest of the Union to achieve and maintain its decisiveness of external action.

What the Treaty on Constitution can do is providing a framework for decisions trying to balance potential conflicts in every given single case :

In the field of the Union's Foreign and Security Policy the Treaty on Constitution confers

■ the *unanimous* voting to the European Council and to the Council of Ministers in matters of identifying the Union's strategic interests and determining the objectives of its common foreign and security policy, including matters with defence implications. European decisions relating to the common foreign and security policy shall be adopted by the European Council and the Council of Ministers unanimously, except in the cases referred to in Part III., Article 39 2nd and 7th paragraph.

The Treaty on Constitution confirms the principle established by the Treaties on EU that decisions having defence implications are kept off from majority voting. The situation remains unchanged: the sovereignty of the Member States is upheld by unanimous decision on matters with defence implications, which are matters of life and death and not subject to majority voting.

This may hamper decisive action of the European Union as organisation. But, on the other hand, the Treaty on Constitution does not set free the Member States from their obligation to develop “ mutual political solidarity among Member States, the identification of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States' actions.”, Article 39 1st paragraph.

Recalling the Member States' obligation under “mutual political solidarity among Member States “ is not an innovation introduced by the Treaty on Constitution. The Treaty on Constitution confirms what the Treaty on European Union states by Article 23 1st paragraph 2nd subparagraph: “ In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action..” when abstaining in a vote on decisions taken by the Council acting unanimously in matters of Foreign and Security policy. That legal commitment to mutual solidarity as stipulated in Article 23 1st paragraph Treaty on EU is emanating from the constitutional principle of effectiveness, Article 10 Treaty establishing the European Community, and confirmed by Article 3 2nd subparagraph Treaty on EU:

“ The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies.”

The (Coinstitution)Treaty's provision on the Member States's obligation to consult one another within the Union's European Council and the Council of Ministers is no innovation. Article 39 5th paragraph states:

“

Member States shall consult one another within the European Council and the Council of Ministers on any foreign and security policy issue which is of general interest in order to determine a common approach. Before undertaking any action on the international scene or any commitment which could affect the Union's interests, each Member State shall consult the others within the European Council or the Council of Ministers.

Member States shall ensure, through the convergence of their actions, that the Union is able to assert its interests and values on the international scene. Member States shall show mutual solidarity.“ The provision is a clarification of Article 16 Treaty on European Union:

“Article 16

Member States shall inform and consult one another within the Council on any matter of foreign and security policy of general interest in order to ensure that the Union's influence is exerted as effectively as possible by means of concerted and convergent action.”

The clarification,made by Article 39 5th paragraph, wants to clearly express what is a matter of course: to consult before taking action. The clarification of that consultation rule is the result of the experience the European Union has made when Member States of the Union joined the two US led coalitions waging the wars on the Taliban and Al Qaida in Afghanistan and on the Iraq. In both cases Member States of the European Union participated in a way outside the institutional structures of the European Union though there was no doubt that the cases of starting and waging the wars in Afghanistan and in Iraq would affect the Union's interests to assert its values on the international scene.

The chapter IX will deepen that issue, trying to find out:is there a gap between the Union's *potential* to be an actor in the Common Foreign and Security Policy and the *realities* of the Member States' conduct of Foreign and Security Policy as proven in the cases of some EU-Member States' joining the wars on the Taliban /Al Qaida and on Iraq.

3.24 Efficiency of the EU's external action:

Speaking for the European Union with one voice in the field of a Common Foreign and Security Policy:

The Troika

Efficient external action of the European Union needs speaking with one voice.

In implementing the Union's Common Foreign and Security Policy, it is the “Troika” representing the European Union

“ when it is necessary for the European Union to conclude an agreement with one or more States or international organisations in implementation of the Common Foreign and Security Policy, the Council may authorise the Presidency, assisted by the Commission as appropriate , to open negotiations to that effect. Such agreements shall be concluded by the Council on a recommendation from the Presidency.”,Article 24 TEU.

The Troika consists of

- the acting Presidency of the Council(the Foreign Minister of the Member State being in chair of the 6 months' term of Presidency)
- the Member of the Commission which is responsible for foreign affairs,Article 24 paragraph 1, Article 7 TEU; and

- **the Secretary-General of the Council, High Representative for the common foreign and security policy, Article 26 TEU. 271)**

For example, when negotiating with the Russian Government on Russia's commitment to the European Energy Charter, the German Foreign Minister, Steinmeier, in chair of the EU Presidency, he acted as member of the EU troika: together with the Commissioner for Foreign Affairs. Mrs. Ferrero-Waldner, and with the Secretary-General of the Council, High Representative for the common foreign and security policy, Mr. Solana, who held talks in Moscow on February 5, 2007.

This Troika procedure does not seem to be the last resort of efficient external action:

The Treaty establishing a Constitution for Europe – TCE- attempts to ease the procedure:

According to Article III- 227 TCE agreements between the Union and third States or international organisations shall be negotiated and concluded in accordance with the following procedure:

- **The Council of Ministers shall authorise negotiations to be opened, adopt negotiating directives and conclude agreements,**Article III-227 paragraph 2 TCE.
- In connection with the European decision authorising negotiation, depending on the subject of the future agreement, the **Council of Ministers shall nominate the negotiator or leader of the Union's negotiating team.**Article III-227 paragraph 4.
- There is **only one** “negotiator” or “leader of the Union's negotiating team”. The Treaty,however, is leaving open who exactly shall be “the” negotiator. This might,however, be Member of the Commission responsible for matters of the CFSP. Or this might be the Union Minister for Foreign Affairs ; for,
- **The Commission, or the Union Minister for Foreign Affairs** where the agreement exclusively or principally relates to the common foreign and security policy, **shall submit recommendations to the Council of Ministers,** which shall adopt a European decision authorising the opening of negotiations,Article III-227 paragraph 3.
- **The Council of Ministers may address negotiating directives to the Union's negotiator** and may designate a special committee in consultation with which the negotiations must be conducted.Article III-227 paragraph 5.
- **On a proposal from the negotiator, the Council of Ministers shall adopt a European decision authorising the signing of the agreement and, if necessary, its provisional application.**

This procedure under Article III-227 of the TEC appears to be a breakthrough in making the European Union to speak with one voice and thus making the Union more decisive and efficient, and thus decisively contributing to improve the Union's visibility and identity when acting on matters of Foreign and Security Policy where the European citizens expect the Union to prove efficient action in this field even more than in other policy areas.

271:consolidated version after the signing of the Nice Treaty on EU, Official Journal of the European Communities, 24 December 2002, C 325/05(18,19)..

Chapter IX

The living constitution and the European Union's external role The European Union's 21st Century design for international security and cooperation ?

Constitutional quality shaping essential:

Efficiency of the European Union, focussing on the issue of improving the

■ decision-making within the Council in the field of Common Foreign, Security and Defence Policy

A. Introduction

The intention of Chapter IX is to exemplify this study's method of applying the lesson taken from European integration history to current issues and to future challenges to the European Union, here in the field of the Common Foreign and Security Policy focussing on the Union's experience made in the years 2001-2003 after the September 11 attacks and on the current crucial issue of international security and cooperation politics of how to overcome the deadlock in Iraq and the serious prospect of another deadlock in Afghanistan.

This chapter does not continue to discuss the *potential* of the European Union's Common Foreign and Security Policy – CFSP- on the basis of the *legal* constitution as provided by the Treaty on European Union. What this chapter discusses, however, is the issue of the European Union's *living* constitution:

What does the *living constitution* in matters of the Common Foreign and Security Policy *reveal* ? Are the Member States in matters of challenges of vital interest to all Member States speaking with one voice? Do they want and practice stronger external action by the European Union in the field of European Foreign, Security and Defence Policy ?

Or is there a gap between the Union's *potential* to be an actor in the Common Foreign and Security Policy and the *realities* of the Member States' conduct of Foreign and Security Policy ? Do the Member States comply with the provisions of the Treaty on European Union-TEU- when conducting foreign and security relations with one or more third countries and international organisations (UN, NATO) if the matter is subject to the rules of the Treaty on European Union requiring the Member States to decide within the Union's institutional structure and to act according to the TEU's provisions on the CFSP ? Or do the Member States decide and act outside the EU's institutions and in contradiction to the TEU's rules ?

The Member States' compliance with the Treaty rules cannot be measured by one abstract formula applied once and for all cases. Compliance in each individual case depends on a complex system of political, security, legal and economic framework conditions varying from case to case and influencing each individual case.

What counts, however, is the unquestionable obligation to inform and consult one another within the Union's Council before single Member State's external action is undertaken whenever the single case does affect the objectives and values of the European Union on the international stage of security and cooperation, including defence matters.

In view of that obligation to inform and consult within the Council, the chapter is focussing on the reality of the European Union's and/or the Union's Member States' behaviour during the months after the September 11, 2001 terrorists' attacks when the international community was facing the efforts made by the US-Government to build the "coalition of the willing" preparing the US-led war on the Taliban in Afghanistan and, consequently, the war on Iraq. The chapter wants to examine the role the European Union played in the international decision-making on waging these wars.

This chapter starts with displaying the facts describing the world security situation, the global World order after the Sept. 11 attacks and the kind of response given by the European Union.

The intention is to find out whether the Member States of the European Union did use the instruments of a Common Foreign and Security Policy under the current Treaty on European Union they had created in order to strengthen the external role of the European Union.

The question is: How did the EU's Member States respond to the Global risks and new risks to Europe's security situation after the September 11, 2001 terrorists' attacks? What kind of dilemmata of collective security policy were facing the international community and thus the European Union? Did the EU have to face a revival of the nation state in strategic doctrine and foreign policy? Or did the European Union emerge as an actor in foreign relations and security cooperation by influencing the preparatory phase of coalition-building and the waging of the war on the Taliban and on Iraq?

Did the world order build coalitions and sustain multilateralism? If the world was and is policed collectively or not at all, then, what is the European Union's contribution to international security through cooperation? After the military situations in Iraq and Afghanistan turned out to be "critical", does the European Union – the joint national and collectivity levels- contribute to civil reconstruction and thus contribute to international security and cooperation beyond merely military strategies and merely military means?

Does the European Union take the chance to design comprehensive foreign and security policies in the cases of Afghanistan and Iraq that reflect the objectives and instruments of the identity of the European Union : common objectives and actions demonstrating the interdependent and complementary cooperation of Union level and Member States' levels?

B. The world security situation, global world order after September 11

I. The notion „ international security and cooperation „

1. Article 51 of the Charter of the United Nations : the right of individual or collective self- defence and the notion „ international security „

International security and cooperation are abstract notions that require definition .¹

In international law , there is no explicit definition of both terms . Article 51 of the Charter of the United Nations (CUN) contains the term „ international security „ , but does not explicitly define it.

Article 51 stipulates the right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations , until the Security Council has taken measures necessary to maintain **international peace and security** .

Text of Article 51 CUN :

„ Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. „

Attempting to interpret Article 51 , in order to understand the notion of `international security` we look at the linkage between the terms `international security` , `international peace` and violence .

„**Containing violence has always been the key to security**“, says Delpech .^{1a}

International security is the situation in which an individual person or a collectivity of individuals organized as states and thus being Members of the United Nations realize that they are safe because the absence of any violence : use of force to impose other peoples´ or other states´ will upon them is guaranteed . They expect that their surviving in freedom , on this fast-shrinking globe , is bound up with the freedom of all people to achieve their objectives and to settle international disputes only by peaceful means , by means of diplomacy .

Achieving freedom by peaceful means does include , if necessary , international cooperation and does exclude any use of force other than the use of force for the exercise of the right of individual or collective self-defence.

1. Stefan Verosta on the term " international security " in the Charter of the United Nations in: Internationale Festschrift für Alfred Verdross, München 1971, pp. 533-547 (text in English) .

1a Thérèse Delpech (2001): The Imbalance of Terror, in: The Washington Quarterly, Winter 2002, pp. 31 – 40 (39) .

As to the linkage between security and peace, Henry Kissinger, in his famous book „ Nuclear Weapons and Foreign Policy „, still convincing today, is referring to the two terms “ security and peace” in their relevance for relations between states: Kissinger describes peace, considered by a national psychology, as „ the `normal` pattern of relations among states and which has few doubts that reasonable men can settle all differences by honest compromise.“ ²

And as to the correlation existing between peace, security and use of force, Kissinger points out :

„ The motive force behind international settlements has always been a combination of the belief in the advantages of harmony and the fear of the consequences of proving obdurate. A renunciation of force, by eliminating the penalty for intransigence, will therefore place the international order at the mercy of its most ruthless or its most irresponsible member.“ ³

2. The objective of the strategic doctrine. The strategic doctrine’s definition of `threats` and the notion „ international security „

The strategic doctrine’s traditional definition of “threats” to “international security is related to states as initiators of “threats”: states were and are threatening the peace among states, states were and are waging wars on other states. Since the September 11,2001, terrorists’ attacks the international community is aware of the increasing role of organised and well planning individuals who are attacking states and civilians through single actions causing death and damages to an extent that traditionally was “reserved” to states. The traditional strategic doctrine tried to improve preventive and defensive action of States against potential and real aggressions from other States. Since the September 11,2001,attacks, however, strategic doctrine is trying to answer the challenge of how to respond to terrorists’attacks. Since the terrorists’ bombing attacks against passenger trains in Madrid in March 2004, there is no doubt that the September 11,2001, attacks were not the only crime of that disastrous extent. The strategic doctrine,however, has not found a comprehensive and convincing remedy to respond to this kind of threat to international security.

For understanding this kind of threats to international security, we look at the correlation existing between international security and the strategic doctrine’s crucial test of defining the kind of threats(planned or pending actions putting security at risk) that require taking defensive action. **Looking at the Strategic doctrine’s objective deepens the understanding of what international security means :**

The **objective of strategic doctrine** is to **use power to achieve political objectives** . Strategic doctrine must define what objectives are worth to strive for and define the means and the extent of the use of force if necessary to defend the objectives of the state – whether to achieve a peaceful or to prevent a violent transformation of political, economic, social, military stability of a nation .

² Henry A. Kissinger (1957): „ Nuclear Weapons and Foreign Policy „, p. 4 .

³ Kissinger , pp. 4,5 .

Strategic doctrine as the response to concepts of aggression including new types of challenges to national and/or international security is to make clear what kind of strategic transformations a state is prepared to resist and what to define as a threat .

Strategic doctrine describes threats as pending acts of aggression that are unambiguous acts that substantially harm , destabilize or even destruct a nation . **4**

The strategic doctrine of the USA , in the Cold-War-period as well as in the Post-Cold-war period , counted on US allies that had to hold the first line until the USA could realize if threats to national security or international balance of powers were becoming unambiguous .

After the collapse of communism , the US strategic doctrine had underestimated the challenges to international security . It was **already in the very early stages of the Cold-War period , that already Kissinger described what is the kind and nature of threats to international security, and it is still valid today.** Kissinger pointed out that

„ we have confused the security conferred by two great oceans with the normal pattern of international relations; we have overlooked that concepts of aggression developed in a period of relative safety may become dangerously inadequate in the face of a new type of challenge. A power favored by geography or by a great material superiority,...,can afford to let a threat take unambiguous shape before it engages in war . And the most unambiguous threat is overt military aggression against its territory. „ **5**

3. Kinds of threats , new dangers threatening international security in 2002

By the end of the last century,hopes concerning a “new world order ” had vanished. Delpech recalls that the strategic literature defines a full range of “new threats.” **6**

The pattern of threats against national and international security contains

- military aggression by states ,
- violations of human rights
- suppression of minorities , national sovereignty and right of self-determination in conflict

„ New threats „ are

- proliferation of weapons of mass destruction , biological and chemical weapons ,
- environmental devastations, global warming, environmental catastrophes like shortages in natural resources ,namely in water supply,
- shortages and even cutting of primary energy resources
- terrorists´attacks and
- dangers from poverty, from wealth´s gap between industrialised and developing countries.

Dangers in wealth gap is a long standing danger that is threatening international security : the internationally widespread weakness in spending to battle poverty :

The UN general-secretary , Kofi Annan, in a speech held on the World Economic Forum in New York on Febr. 4,2002, warned international business and political leaders that

4 see Kissinger on the term „ unambiguous acts „ , p. 10 .

5 Kissinger , p. 8 .

6 Thérèse Delpech (2001): The Imbalance of Terror , in: The Washington Quarterly,Winter 2002,p.31.

globalization risks a devastating boomerang effect if the world's elite fail to increase spending to battle poverty and disease in developing countries and act quickly to open up markets in rich countries.

Annan making reference to the terrorist attacks of Sept. 11, warned that some poor countries will collapse into conflict and anarchy and become a threat to global security and international business. ⁷ In 2002, after the September 11, 2001, attacks, the international public was not fully aware yet of the risks resulting from global warming as it is now, in 2006/07, after the publication of the United Nations' reports on the causes and extent of the expected worldwide devastating effects of global warming called, by the new UN general-secretary on 02 March 2007, as the new threat to international security.

II. The Sept. 11 terrorist attacks and the impact on the world security situation and on global world order

An introductory remark on the use of the terms „ world security situation „ and global world order :The term „ world security situation „ means the facts that prove the existence of lethal threats affecting one or more countries in the world . The term global world order means the existence of at least one state or more states that have the power to impose their will on other states , acting either independently from each other or acting as collectivity to set the rules of international power politics.

1. The Sept.11 terrorists' attacks : A traditional threat or a new kind of threats reaffirming or changing the notion of „international security “ ?

1.1 Terrorist attacks : a new phenomenon ? No surprising phenomenon since J. Robert Oppenheimer's study on dangers of nuclear terrorism(1946)

Terrorist attacks are no new phenomenon in history : throughout history , individuals used force to impose their will upon others to achieve objectives by other than peaceful means .

Even in literature the terrorist issue does exist : e.g Albert Camus' „ Les Justes „ is dealing with the ancient anarchists' bombing assaults against members of the former Russian emperors and raising the ethical question whether human oriented political goals justify the use of inhuman means .

Terrorists' attacks as a threat pending on the USA , as threats that in fact become true as it did on Sept. 11 did not really surprise . Terrorists' attacks as a threat pending on the USA had been discussed by the US government long before the Sept. 11 attacks happened :

The father of the atomic bomb , J. Robert Oppenheimer, in the spring of 1946 , answering questions in a congressional hearing whether small units of men could smuggle an atomic bomb into New York and blow up the whole city , he said it could be done and people could destroy New York. Mr. Oppenheimer's secret study on the dangers of nuclear terrorism, known as the „ Screwdriver Report „, caused political U.S. leaders to realize that there was no defence against such an attack and , believing to be defenseless, had chosen „, to play down its possibility „ . ⁸

Long before the Sept. 11 attacks occurred , apart from specific questions about terrorists'

⁷ International Herald Tribune (IHT) ,Febr. 4,2002,pp.1, 8, report on World Economic Forum ,New York , concerning post-Sept.11 threats and globalization risks .

⁸ Kai Bird and Martin Sherwin : „ A fair foreign policy is the best defense „ ,in: International Herald Tribune (IHT)Dec. 13,2001,p.7

threats, the USA was basically aware of the security situation , that the USA was not invulnerable due to speedy modern weapons of mass destruction that had reduced the ,, traditional margin of safety ,, so that the USA could not hope for other powers to hold a first defensive line while the USA was analyzing ,, whether a threat has become unambiguous ,,⁹

1.2 Terrorists' threats in recent times, before Sept. 11,2001

It was not the first time that terrorists had attacked the World Trade Center in New York. Terrorists' bombs in the hands of Islamic extremists had shattered the basement garage of the World Trade Center in the early 1990ies.

And as to terrorists' threats in recent times , it was already US President Clinton who was reported to have authorized a limited and covert war on Bin Laden .

Being reluctant to mount a major attack on the Taliban , US President Clinton , during the last two years of his presidency, long before the events of Sept. 11, was reported to have authorized a confined planning for lethal force within the boundaries to use weapons aiming from distance at an enemy that would be defined as individual terrorists , and not against those who provided sanctuary for terrorists targeting the United States. President Clinton was reported to have authorized killing instead of capturing Bin Laden. ¹⁰

The US Central Intelligence Agency (CIA) was reported to have paid a team of about 15 Afghan agents for four years ,before Sept. 11 ,to regularly track Bin Laden in Afghanistan. Reports indicated that the US search for Bin Laden was more concentrated and aggressive than previously disclosed, but had never the necessary high level of confidence about their information without confirmation from other intelligence.¹¹

2. What did not change since the terrorist attacks of Sept. 11 , is the basic national and international security situation: lack of traditional margin of safety

2.1 World order *before* Sept. 11

Thérèse Delpech interpretes the ,, post-Cold-War ,, 10 years from December 25,1991, until September 11,2001, ,, may become known as the interwar years ,, ¹²

She calls the Sept. 11 terrorists' warfare ,, a new phenomenon : the ,, asymmetric warfare ,, : ,,Such an extraordinary attack, in real time and real space,gave asymmetry a horrific shape.Those who planned the attacks seem to have operated from a list detailing the striking differences between the United States and themselves and to have played on those differences as much as they could.“ ¹³

We will try to find out what does Delpech understand by ,, a new phenomenon : the ,, asymmetric warfare ,, ? To understand Delpechs notion of the terrorists' asymmetric warfare , we turn to the ,, interwar years ,, :

⁹ Kissinger , p. 9 .

¹⁰ International Herald Tribune (IHT) , Dec. 20 , 2001, pp. 1. 4 .

¹¹ IHT, Dec. 24-25,2001, p. 3 .

¹² Thérèse Delpech , The Imbalance of Terror,in: The Washington Quarterly,Winter 2002, p.31 .

¹³ Delpech , p. 32

Ten Years before Sept. 11, in December 1991, the Soviet Union collapsed .With the collapse of the Soviet Union collapsed a fifty years'old global order of world security that was based on the two pillars of world powers – a two powers'system of checks and balances : Moscow and Washington.

Two world wars had created that system of global governance for the 20th century , a system of maintaining world peace and order .

That system of Cold-War global governance was held together , in the field of foreign and security policy , by a strategy of deterrence oriented balance of powers policy . Deterrence policy was based on threatening to keep the option up to wage a nuclear all-out war .¹⁴ The deterrence strategy ruling the Cold-War-period was the roof under which the multilateral framework of the United Nations' system of attempting to achieve collective security developed and enhanced the Security Council's role as forum of veto-playing powers USA, Britain ,France , Soviet Union ,China in matters of world peace and security .

Since the collapse of communism , the US is the only world power to be left over , alongside with a number of other powers having the potential of gaining world power status : Europe , Russia , China , the ambitious India as well as the economic giant Japan..

Hopes existed, in the short period , after the collapse of communism until the Sept. 11, attacks, to ensure collective international security through bilateral and multilateral cooperation. Delpech says that „ major actors —the United States,Russia,and China — worked with a curious mix of cooperation and confrontation. „¹⁵

In addition , in the period after the collapse of the Soviet Union , it was the phenomenon of the globalization which gave the impression that the role of the nation state had become obsolete due to transnational crossbordering effects of transnational flows of capital and data communications and international investments going beyond reach of nation states' powers to influence the transnational movements of financial flows and the global reach of globally acting international companies .

As to that role of globalization , there was the belief that “ conditions of globalization made a major, sustained conflict most unlikely. *The terrorist attacks, however, have altered those comfortably held assumptions.* ¹⁶

2.2 The role of international security and the global World order after Sept. 11

Hopes for collective security and multilateralism cooperation ?

Sept. 11 had , for the moment , smashed the vision of a multipolar balance of powers system. **The hegemonial power USA had not been challenged by states , but by private individuals , adherents to the Al Qaeda terrorist network aiming to defend the weak peoples against the hegemonial superpower.** They failed .And the states, mainly acting outside the institutional structures of NATO and EU , were the victors led by the superpower USA forging and leading an international coalition that had got the unanimous endorsement by the UN Security Council.

¹⁴ Kissinger , The notion of all-out war and the notion of a surprise attack , in: Nuclear Weapons and Foreign Policy,1957 , p. 30 .

¹⁵ Delpech , p. 31 .

¹⁶ Campbell , Globalization's First War ? in: The Washington Quarterly , Winter 2002, p.8 .

The lead by the hegemonial power USA seemed to continue to accomplish the Post-Cold-War vision of collective security within a multilateral system of international security and cooperation .

2. 21 The strategic impact that the Sept. 11 attacks do have on the national and international security : globalization of technologies and terrorists´ attacks as „ asymmetric warfare „

The security situation of the USA apparently became clear that the USA was not invulnerable. This was due to the existence and the use – by terrorists - of speedy modern weapons of mass destruction that had reduced the „ traditional margin of safety „ .

The USA , therefore , was , in fact , before and when the terrorists´ attacks occurred , not in the position to hope for other powers to hold a first defensive line while the USA was analyzing „ whether a threat has become unambiguous „ . **17 Exactly by the time the Sept. 11 terrorists´ attacks happened, they immediately became unambiguous in their lethal nature and it was too late to resist it so that the traditional margin of safety had fallen down to zero .**

Terrorists´ threats immediately becoming unambiguous is exactly what Delpech describes : “.. the most effective missile shield provides no protection against this type of attack If no consistent strategy is recognizable,if no anticipation can be expected,preparation is almost impossible. „ This is what Karmon describes to be the crucial nature of the war on terrorism: „Who is the Enemy and What is the Coalition?“ **18**

This „ down-to-zero“ impact the terrorists´ attacks did have on the US national security (margin of safety) is similar to the strategic impact speedy modern weapons of mass destruction do have on the security situation of a nation as well as on the international security. For, the national security of any civilized nations in the world was affected :

The terrorists were using modern technology devices that caused tremendous devastations and thousands of lethal casualties deeply shaking the USA nation´s sense of national security and psychological stability. Campbell described „ the terror attacks and the damage done „ , the „ incalculably negative impression on the U.S. psyche „ . **19**

The extent of the losses of lives and the extent of the devastations , this was believed, in previous times, to be a traditional pattern of state-to-state aggression .

What was realized to be new, therefore, about the Sept. 11 terrorists´ attacks , is the **ambiguous** correlation between globalization and terrorism :

- for the first time in history , it was individuals who used devices of mass destruction;
- . Campbell indicated the „complex connections and comparisons between terrorism and globalization „ **20** ; and

17 Kissinger , p. 9 .

18 Delpech , pp. 33 , 34 : And Karmon ,Ely(2001): The War on Terrorism, Who is the Enemy and What is the Coalition ? The International Policy Institute Counter Terrorism-ICT,October15,2001; <http://www.ict.org.il/>

19 Campbell , p. 8 .

20 Campbell , p. 10 .

- the terrorists used non-sophisticated tools to make globalization and modern technology operative for mass destruction, and terrorists are determined to sacrifice their own lives and thus achieving a high degree of devastating, lethal success.

Kai Bird and Martin Sherwin pointed out that „, on Sept. 11 Islamist terrorists used knives and box-cutters to turn commercial aircraft into weapons of mass destruction.The globalization of technology has reached a point where weapons of mass destruction can be wielded by a handful of individuals. In such a world, the United States` military prowess is its very last line of defense .. To Americans peril in this interdependent world, they are foolishly squandering their first and strongest line of defense : their reputation for fair play. In this sense Sept. 11 was the ultimate failure of a foreign policy that has systematically sullied the reputation of the United States .“ **21** And Delpech calls the Sept. 11 terrorists to be „, something different, something unrecognizable, something irreconcilable with concepts inherited from past experiences of either war or terrorism has come into being. This new phenomenon, however, does have a name: asymmetric warfare .“ **22**

Demonstrating the impact the Sept. 11 attacks did have on the international security, there was and still is a widespread, even worldwide feeling, that the terrorists` attacks against the US nation were, at the same time, attacks against any other civilized nation. The attacks were felt they might happen to any other nation. The attacks were felt to indicate an impending danger to harm or devastate other people at any other place in the World representing, in the eyes of the terrorists, the Western way of life the terrorists were lethally opposed to.

2. 22 Strategic doctrine, collective security and alliance policy after Sept. 11

Alliance policy of the USA is described to be based on the same assumption as US strategic doctrine does : The strategic doctrine`s task is to design and implement military deterrence by „, assembling the maximum force „, tending „, to equate deterrence with a system of general collective security which gave rise to the notion that, unless all allies resisted aggression jointly, no resistance was possible at all .“ **23**

„, ...the greater the force, the greater the reluctance to employ it. Both our military and our coalition policy tended to make it difficult to understand decisive action against peripheral threats : the former by posing risks disproportionate to the objectives in dispute, the latter by causing us to limit our actions to what could gain allied support . „, **24**

The strategic doctrine is achieving collective security through the design and implementation of alliance policy. US alliance policy performed coalition building aiming at preparing the warfare against the Taliban and the Al Qaeda network of terrorists.

21 Bird / Sherwin : „, A fair foreign policy is the best defense „, in: IHT Dec. 13, 2001, p.7 .

22 Delpech, p.32 .

23 Kissinger, on „, The dilemma of American security „, in : „, Nuclear weapons and foreign policy“, p.51 .

24 Kissinger, p.52

3. US-led coalition building : NATO's and EU's response

Alliance policy of the USA was at stake , as USA's NATO allies demonstrated reluctance to join US efforts in extending the war on terrorism in Afghanistan to the states `of the evil ` Iraq , Iran and North Korea (as they were called by President Goerge W. Bush).

Involving allies already had the same problems in times of the Korean war in the early 1950ies when the USA facing the opposition of the US allies refused any expansion of the Korean War .

The USA had forged a coalition including traditional friends like Britain , former enemies like Russia, and including China that is not challenging the USA yet . ,, A new ,closer relationship might emerge between the Cold War adversaries .“, says Delpech . **24a**

On Sept. 12,the day after, the US were considering an immediate response. But US President Bush and the British Prime Minister Blair , both speaking on the phone on Sept. 12, agreed not to retaliate with an immediate military strike. Many Europeans believed that hasty military action not only would be ineffective in deterring future terrorism but also would shatter any hopes of building an international coalition.

President Bush, in the fight against terrorism, had set up his doctrine of ,, either you're with us or against us ,, , a rhetoric that Miller called not to be ,, the stuff of a new multilateralism ,, . 25 a President Bush was reported to assure that he did not want to ,, pound sand with millions of dollars in weapons ,, . **25** Bush and Blair, therefore, aimed first at moving fast to coalition building , using the diplo-matic front to capitalize on international outrage about the terrorist attack. They wanted support from NATO and the United Nations so that they would have the political, diplomatic and legal framework to permit a military response afterward.

Accordingly, building up an anti-terrorism alliance, the US government paid up debts to the United Nations, made concessions to Pakistan, Russia and Central Asian republics. **The USA needed bases in Central Asia and endorsements from NATO and the Security Council to give legitimacy to US military actions :**

3.1 Invocation of Article 5 Washington Treaty: demonstrating the principle of collective defence by NATO: “ Sept. 11,2001 terrorists' attack against USA an attack against the Alliance.”

The invocation of Article 5 Washington Treaty demonstrated the principle of collective defence :” assistance is not necessarily military and depends on the material resources of each country. Each individual member determines how it will contribute and will consult with the other members, bearing in mind that the ultimate aim is to restore and maintain the security of the North Atlantic area .” **26**

The principle of collective defence was interpreted by presenting the following NATO positions :

24a Delpech , p.35

25a Miller, Steven E. ,“The End of Unilateralism or Unilateralism Redux ?,”in:The Washington Quarterly, Winter 2002,p 19 .

25 President George W. Bush , in: IHT Jan. 29, 2002 , p. 1 .

26 NATO Press Release (2001)124 , Sept. 12, 2001.

3.11 Statement by the Secretary General of NATO Lord Robertson, Sept. 11, Brussels, NATO

„ I condemn in the strongest possible terms the senseless attacks which have just been perpetrated against the United States of America. My sympathies go to the American people, the victims and their families. These barbaric acts constitute intolerable aggression against democracy and underline the need for the international community and the members of the Alliance to unite their forces in fighting the scourge of terrorism.” 27

3.12 Sept. 12: Invocation of Article 5 Washington Treaty ; Statement by the North Atlantic Council - 12 September 2001 27a

„ What is Article 5?

The decision :

"If it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty," stated NATO Secretary General, Lord Robertson, after a meeting of the North Atlantic Council on the evening of 12 September.

This is the first time in the Alliance's history that Article 5 has been invoked.

Article 5 of the Washington Treaty:

„The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security. „

What does Article 5 mean ?

Article 5 is at the basis of a fundamental principle of the North Atlantic Treaty Organisation. It provides that if a NATO Ally is the victim of an armed attack, each and every other member of the Alliance will consider this act of violence as an armed attack against all members and will take the actions it deems necessary to assist the Ally attacked.

This is the principle of collective defence.

27 NATO Press Release , PR/CP(2001)121 , Sept. 11, 2001 .

27a NATO Press Release (2001)124 , Sept. 12, 2001.

“Article 5 and the case of the terrorist attacks against the United States:

The United States has been the object of brutal terrorist attacks. It immediately consulted with the other members of the Alliance. The Alliance determined that the US had been the object of an armed attack. The Alliance therefore agreed that if it was

determined that this attack was directed from abroad, it would be regarded as covered by Article 5. NATO Secretary General, Lord Robertson, subsequently informed the Secretary-General of the United Nations of the Alliance's decision.

Article 5 has thus been invoked, but no determination has yet been made whether the attack against the United States was directed from abroad. If such a determination is made, each Ally will then consider what assistance it should provide. In practice, there will be consultations among the Allies. Any collective action by NATO will be decided by the North Atlantic Council. The United States can also carry out independent actions, consistent with its rights and obligations under the UN Charter.

Allies can provide any form of assistance they deem necessary to respond to the situation. This assistance is not necessarily military and depends on the material resources of each country. Each individual member determines how it will contribute and will consult with the other members, bearing in mind that the ultimate aim is to *"to restore and maintain the security of the North Atlantic area"*.

By invoking Article 5, NATO members have shown their solidarity toward the United States and condemned, in the strongest possible way, the terrorist attacks against the United States on 11 September.

If the conditions are met for the application of Article 5, NATO Allies will decide how to assist the United States. (Many Allies have clearly offered emergency assistance). Each Ally is obliged to assist the United States by taking forward, individually and in concert with other Allies, such action as it deems necessary. This is an individual obligation on each Ally and each Ally is responsible for determining what it deems necessary in these particular circumstances.

No collective action will be taken by NATO until further consultations are held and further decisions are made by the the North Atlantic Council.

Lord Robertson will now officially inform the UN Secretary-General Kofi Annan, that the North Atlantic Council has agreed this statement.

During a press conference, Lord Robertson reaffirmed that NATO allies will take such actions as deemed necessary, including the use of force, adding that members shall respond commensurate with their judgement and resources.

Earlier in the day, Lord Robertson, had consulted with EU High Representative for Common Foreign and Security Policy, Javier Solana, and Ambassadors from partner countries had joined NATO allies, within the Euro-Atlantic Partnership Council, to express their deepest sympathy to the American people. They condemned yesterday's terrorist attacks and made a pledge *"to undertake all efforts to combat the scourge of terrorism."* They added: *"We stand united in our belief that the ideals of partnership and co-operation will prevail."*

3.13 Invocation of Article 5 confirmed , Oct. 02, 2001

Frank Taylor, the US Ambassador at Large and Co-ordinator for Counter-terrorism briefed the North Atlantic Council - NATO's top decision-making body- on 2 October on the results of investigations into the 11 September terrorist attacks against the United States. As a result of the information he provided to the Council, it has been clearly determined that the individuals who carried out the attacks belonged to the world-wide terrorist network of Al-Qaida, headed by Osama bin Laden and protected by the Taleban regime in Afghanistan. **28**

At a special press conference, NATO Secretary General Lord Robertson announced that since it had been determined that the attacks had been directed from abroad, they were regarded as an action covered by Article 5 of the Washington Treaty . When the Alliance invoked the principle of Article 5 of the Washington Treaty on 12 September, it stated that it needed to know whether such actions had been conducted from abroad before the Article could become fully operative. This has now been determined, but Lord Robertson explained that, at present, it was premature to speculate on what military action would be taken by the Alliance, be it individually or collectively.

3.2 NATO implements invocation of Article 5

The Supreme Allied Command in Europe (SACEUR) Statement to the Media on October 09, 2001, confirmed the implementation of the invocation of Article 5 :

„ Today marks a historic first for NATO. Today, for the first time in the organization's 52-year history, assets are being made available to the continental United States, on their request, in support of Article 5 operations. Two of a total of five NATO Airborne Warning and Control Systems aircraft - the AWACS - began deploying today to the United States from our base in Geilenkirchen, Germany. The remaining aircraft will follow in the next few days.

These NATO aircraft, manned by multinational crews from 12 NATO nations, provide a critical air surveillance and early warning capability in operations. This deployment will directly support those aircraft under the command of the North American Aerospace Defense Command, or NORAD for short, by providing assets required to support the global campaign against terrorism.

In addition, NATO naval assets presently on exercise off the coast of Spain were re-assigned today to a new mission. Effective immediately, the Standing Naval Force Mediterranean (STANAVFORMED), consisting of nine ships from eight NATO countries, will set sail to provide an allied military presence in the eastern Mediterranean and to demonstrate our resolve.

These two actions underline the unwavering commitment of the 19 NATO nations to fight terrorism. Of course, we stand ready to provide any additional support requested by the United States, on order of the North Atlantic Council. „**29**

28 NATO press release on briefing by US Ambassador to NATO Council, Frank Taylor, Oct. 02, 2001.

29 Supreme Headquarter of the Allied Powers in Europe (SHAPE) News Release, Oct. 10, 2001.

3.3 The European Union`s immediate response to Sept. 11

3.31 Individual European Governments and the EU collectivity of EU Member States immediately made their *statements of solidarity*

In addition to the individually made and published European Governments` statements on solidarity with the USA , in a Joint declaration by the heads of state and government of the European Union, the President of the European Parliament, the President of the European Commission, and the High Representative for the Common Foreign and Security Policy, Mr. Solana, declared (Sept. 14, 2001) :

.....an expression of solidarity with the American people, Europe has declared 14 September a day of mourning. We invite all European citizens to observe, at noon, a three-minute silence to express our sincere and deepest sympathy for the victims and their families. On 12 September, the European Union condemned the perpetrators, organisers and sponsors of these terrorist attacks in the strongest possible terms. The European Union announced that it would make every possible effort to ensure that those responsible for these acts of savagery are brought to justice and punished. The US administration and the American people can count on our complete solidarity and full cooperation to ensure that justice is done.....”

3.32 The EU`s response - as organisation- to Sept. 11 , a bunch of measures mainly outside the scope of defence, military matters :

- The European Central Bank took steps , including an interest rate cut, to maintain confidence in the markets .
- The EU agreed on counterterrorist agenda, including a common legislative framework on definitions of terrorism and a European arrest warrant to replace national extradition procedures. The EU agreed on new legislation to dry up sources of terrorist finance.
- The EU launched a trade deal with major implications for Pakistan`s textile industry and new external assistance programs.
- The EU redoubled its humanitarian aid efforts in and around Afghanistan.
- The EU **decided to establish a EU presence in Afghanistan to plan the massive reconstruction work** in which the EU wants to be a key player in the years ahead.
- EU Rapid Reaction Force :**

The EU **had started to set up military capacity: building a Rapid Reaction Force** that is planned *to be able to mount certain peacekeeping and crisis management operations*, as well as humanitarian missions involving troops. This was in the very early stages. *While a number of individually acting EU member states started to contribute to the force which Britain started to lead in Afghanistan under United Nations auspices, this was not seen as an EU operation run under the Treaty on EU.* 30

30 Chris Patten , European commissioner for external relations, made comments on the EU`s potential of the common foreign and security policy, see: IHT, Jan. 02, 2002, p. 8.

III. The limited role of the EU as organisation reflecting the realities of the dominating US- led warfare against the Taliban and AL Qaeda network of international terrorism and US led warfare on Iraq

A „ war in the computer age „, a military breakthrough in the US reliance on foreign military bases and the impact on US Alliance policy : beginning of US unilateralism ?

1. The Taliban,in 2001/02, being deposed : The Afghan model a possible template for American military action against Iraq or other terrorist-supporting states ?

After effective coalition building , did the USA ,actually , return to unilateralism ? The USA , basically , waged the Afghanistan war on their own : with US long-range bombers performing global reach without depending on bases close to the war theatre and thus demonstrating the global reach of the imperial like military superpower USA., giving the impression not to depend on diplomacy ties with countries close to the war theatre. The coalition built up by the US government to back the US led military actions had given political and diplomatic legitimacy to the USA warfare in Afghanistan. **The coalition building was , insofar , helpful , but it was no militarily decisive action to influence the course of US-led warfare in Afghanistan .In the situation of the year 2001/2002, this had direct impact on the role of the European Union:**

Any attempt to draw up a EU common position and a joint action decided within and implemented within the EU's Council – without substantial military capacities of the Union as such , the planned Rapid Reaction Force of the Union was in early stages only- would have had no political effect on the issue of military intervention in Afghanistan, of coalition building and of contributing to a military action in Afghanistan. It would have been of *academic value* only, discussing the issue of the European Union as an actor in the field of Common Foreign and Security Policy under the realities of the US political and military power shortly after and seriously affected under the psychological trauma of the September 11 assault:

But for the EU's internal cohesion it would have been important if the EU Member States concerned had informed and consulted one another within the Union's Council according to the provisions of the Treaty on EU before they undertook joining the US led coalitions to wage the wars in Afghanistan and Iraq.

On the international stage, even if the European Union as such would already have had established full military capacities to influence the political issue of military intervention in Afghanistan and the issue of coalition building, it would not have changed the basic determination of the US Governmentt to take action:

„ Military contributions from others are in general neither sought nor needed.“, said Miller commenting on President Bush's „ with-us-or-against-us „ approach to terrorism , and adding: „ More than any other state, the United States is able to operate militarily as lone ranger .“ And Miller adds : „ Washington is likely to view the coalition as a source of support and an instrument of U.S. policy, but others are likely to see it as a mechanism for influencing U.S. decisions or restraining U.S. action—„, 31

The USA had initially run the whole warfare in Afghanistan , and did not admit others to US war councils : Even British SAS soldiers were expected to follow US command . The experience made in the Kosovo , when the US had to discuss tactics and operational decisions with NATO allies , the US military command said :” Never again “. **32**

The,initially, effectively waged US-led war in Afghanistan, starting in October 2001, after coalition-building, had , within weeks , crushed the Qaida militant network in Afghanistan. The top Al Qaida leader is not yet caught. The US faced practical necessity of letting peace take hold. The US president still insisted that his goals were unchanged- a broad war against all terrorists with a global reach. The US would maintain a presence and continue its aid while Afghanistan would strive for stability and a semblance of normality .

On Jan. 03,2002,Defence Secretary Rumsfeld described the U.S. effort in Afghanistan as successful, citing the end of Taliban rule and the installation of an interim government publicly committed to ridding Afghanistan of terrorists. And he acknowledged that the war in Afghanistan would not be over until the fugitive top leaders were found.

The U.S. government had decided to rely , for the search of fugitive top leaders ,on local militias. This decision, not to insert large numbers of US forces for the manhunt, was reported to have been driven less by a fear of US casualties than by a determination to avoid the mistakes made during the Soviet occupation of Afghanistan in the 1980s. The US didn’t want to be perceived as an invading force, the US wanted to gain the trust and confidence of Afghans and others in the Muslim world. **33**

The US early success was routing the Taliban from Afghan cities, the Taliban being deposed and had then given way to a frustrating search for Taliban and Qaida leaders. The ability of Afghan local forces to complete the task set by President Bush of bringing the top fugitive leaders to justice remained uncertain.

Throughout 2006, however, the Taliban increased their resistant activities:nearly 140 suicide bombing assaults were counted. Mullah Dadullah, Taliban commander, was reported to have announced to start with an offensive in spring 2007, with 6000 to 10000 fighters against the international ISAF-forces operating under NATO command and against the US-led coalition Operation Enduring Freedom, both under US-generals’ command because the USA have deployed more than half of nearly 50000 foreign soldiers, four times as much than in December 2001 when the US-led international military forces started deployment in Afghanistan.

At present, in early March 2007, the Taliban have regained strong positions in Eastern and Southern Afghanistan, and the regional warlords in Northern Afghanistan prove the weakness of the Central Government in Kabul. While the NATO led ISAF is waiting for the German Airforce reconnaissance Tornado aircrafts to support the anti-Taliban offensive.

32: Pfaff ,William : “ In its quest for supremacy, US may squander partnerships “, in: IHT Dec. 15-16,2001,p.6); see also **Clark, Wesley K.**,(2001).Waging Modern War : Bosnia, Kosovo and the Future of Combat , (New York : Public Affairs) .

33: IHT Jan.07,2002, p.6

In 2002, however, when the Taliban's return appeared unreluctant, the ultimate success of the **proxyforce approach** was carefully being watched because of the **implications beyond the war in Afghanistan** since the Afghan model of US military success in the early stages of the operation had been considered as a possible template for American military action against Iraq or other terrorist-supporting states.

2. New US military strategy of using new configuration of forces causing the early military success in Afghanistan : the „ war in the computer age „, reducing US reliance on foreign bases and risking sustainable military success through neglecting sufficient manpower resources in the battle-field

In Afghanistan , initially, at the outset of the US led strikes against the Taliban , small numbers of the US Special Operations forces worked closely with CIA agents . Both were organizing offensive operations by the Northern Alliance and other opposition groups and to direct the US air strikes that shattered the Taliban army. ³⁴ The US warfare in Afghanistan used permanent high-altitude air strikes in which bombs came out of the blue with uncanny accuracy:the „ War in the Computer Age „,³⁵

The „ **war in the computer age** „, was described to be the new style of US warfare using high-tech weapons **changing the dynamics and the scope of battle the long-term impact of which is still uncertain for foreign policy , especially alliance related foreign and security policy :**

The US coordinated small US combat special forces teams operating on the ground and high-performance aircraft – very-long-range B-2 and B-52 bombers with precision-guided weapons , digital communications underpinning the US forces and a new battlefield weapon: small , expendable unmanned predator drones .³⁶

Pilots and special forces teams on the ground communicated directly with air force pilots patrolling overhead and practiced an highly improved cooperation inventing new tactics. With target coordinates going directly to pilots via satellite, the US airforce often cut its response time to less than 20 minutes between the moment a Taliban target was spotted and its destruction. This new configuration of forces – a few hundred men scattered in roving teams, a dozen heavy bombers rotating over the country , accurate target spotting, fast transmission of complex data and precision-guided bombs as well as improved combat power by unmanned aircraft , drones, monitoring the vast and remote airspace with no nearby bases for US strike aircraft, the drones seeing potential threats and discreetly operating from neighbouring countries :

³⁴ see comment by The New York Times on “ Special Operations “ , in :IHT Jan. 28, 2001,p.6 .

³⁵ Fitchett,Joseph (2001) :“War in the Computer Age „ , in: International Herald

³⁶ Tribune,Dec.28,2001, p. 1.

– this new combination of forces was reported to mark a breakthrough in reducing US reliance on military bases in nearby countries close to or surrounding the warfare theatre. ³⁷ At the same time the war in the computer age underestimated the needs of sufficient battlefield manpower and civil reconstruction workers to prevent the Taliban's comeback.

3. Individual EU member states' and US military success backing peacekeeping in Afghanistan. Peacekeeping a matter of international security and credibility , international legitimacy

The EU Heads of State or Governments had decided on their summit on Dec. 14-15,2001, in Laeken , to send 3,000 to 4,000 peacekeepers to Afghanistan to serve as stability force for the new government in Kabul as a matter of concern about international security and credibility through peacekeeping and assistance given to civilian reconstruction.

The deployment of peacekeepers was and is an effort done by individual EU member countries and not an effort done by the European Union as organisation of the collectivity. ³⁸ Britain contributed 1.500 soldiers to the force, limited to Kabul and the immediate vicinity, a soft profile mission of patrol and of support, agreed by NATO and operating distinctly from the US effort operation "Enduring Freedom" to hunt down Taliban fighters and members of the Al Qaida terror group.

The US force offered the peacekeepers , essential enabling support to deploy and sustain the force“,and to provide airpower , special forces and Marines , as British Defence Secretary Hoon reported to the House of Commons. ³⁹

Among the countries to make up the rest of the force initially were France, Germany, Jordan and Turkey, subject to an overall command by the United States.

A small British contingent 200 soldiers arrived in Kabul by December 22,2001, for the induction of an interim government. They operated on the basis of rules worked out with the local authorities. The objective was supporting the induction of an interim government, then to settle on an military technical agreement with the newly installed local political leaders that would outline the force's powers before the rest of the troops could take up position.

On December 19,2001, the UK Government had sent a letter to the UN secretary-general, Kofi Annan, outlining Britain's plans in an effort to obtain a Security Council's resolution by December 21 that would authorize the force **ISAF** to back civilian reconstruction and give it international legitimacy. Britain led the force for three months and was expected to turn that role to Turkey.

³⁷ IHT Dec. 28, 2001,p.4 .

³⁸ IHT Dec. 15-16,2001 , pp. 1, 5 : “ European Union plans a peace force for Kabul”

³⁹ IHT Dec. 20, 2001,p.1 .

4. How to win the peace in Afghanistan and in Iraq?

US military troops and other nations' troops exposed to guerilla assaults and suicide bombing assaults in Afghanistan and in Iraq : Afghanistan's and Iraq's reconstruction at stake, political and economic stability of the regions at risk , dangers to international security

At present time,it is impossible to say how long the International Stabilization Forces-ISAF- in Afghanistan including the US military presence in Afghanistan will have to continue. This is also true for the US military presence in Iraq:

The US Government has not yet presented any plausible long-term exit strategy for the withdrawal from Iraq without even more destabilizing the whole region in view of the pending conflict between the US and Iran concerning the issue of Iran's ambitions to develop nuclear technology and concerning Iran's influence on the .Shiites in Iraq and on the Hisbollah Shiites in Libanon.

Since the war on Iraq began in March 2003,after having smashed Saddam Hussein's military troops' structure within weeks ,the USA were and are still challenged by the open question of .how to win the peace in Iraq. **After the Democrats' victory in the US elections to the US Congress held in autumn 2006** and after the confession of **the new Defence Secretary, Robert Gates**, made in the Senate's hearing on his nomination in Decemer 2006, answering the question whether he believed the war in Iraq could be won: "No,Sir, it cannot.", it is worth to remember that it was still on November 3,2003, that the US Congress had given a , then, final approval to the US President 's request for a further \$70 billion in military and civil spending on Iraq. And it is worth remembering the prophecy made when the USA appeared to settle down for what the US Defence Secretary Rumsfeld in 2003 had acknowledged would be " in a long,hard war we are going to have tragic days, as this is." **40**

"Following a truck bombing of the UN compound on August 19,daily attacks on American soldiers in Iraq continue to mount. The missile attack, launched November 02, on an Chinook military transport helicopter ,shooting down it over Ameriya,near Falluja, a city where Anti-American residents clash almost every day with American soldiers."**41**

The killing of 16 US soldiers and wounding of 20 others in November 2002, was one example of countless numbers of subsequently growing American casualties.Iraqi guerillas opposed to the American occupation had been using mortars with great effectiveness across central Iraq, US soldiers were and are killed by roadside bombs planted by insurgents in Baghdad and across the country, the area known as the Sunni Triangle and the heart of the resistance, mortar attacks on the headquarters of the American civilian authorities in Baghdad, explosions were and still are shaking buildings in Iraq, suicide bombers are permanently striking targets across Baghdad : all those actions were and are adding to a growing sense of insecurity in Baghdad and across the country.

40:IHT,The International Herald Tribune,Novemver 3,2003, p.9:" Attack in Iraq puts Rumsfeld on the defensive " .

41: ibid.,supra,note 40,The International Herald Tribune,November 3,2003,p.1,9.

In view of the strong pressure, starting in November 2003 and even stronger today in the United States and worldwide, for a military withdrawal from Iraq, a US rush for the exits would leave Iraq chaotic and a danger to neighbouring countries and the international security as a whole. **42** And this is why the new US Defence Secretary, Gates, admitted end of February 2007 in Washington, that the US Government is not planning permanent military presence in Iraq, a military US presence would continue in Iraq on a reduced scale of US military units, at least in the longer term, similar to the reduced US military presence in Germany and in South Korea.

Facing that disastrous military situation in Iraq it is still an open question how to win the peace in Iraq. It may be a perspective that the US Government now, in early March 2007, appears to accept the recommendation made by the independent US “Iraq Study Group”-the Baker Commission- to assume direct talks with Syria and Iran on ways to peace in Iraq. The US Secretary of State, Condoleezza Rice had announced during a hearing in the US Congress that she was willing to meet the Syrian and the Iranian Foreign Ministers in an international conference on Iraq to be held on March 10, 2007, in Baghdad.

What rests for the European Union to be done for the time being, facing that situation: it is a stand-by position to see what might be the Union’s contribution to reconstruct Iraq for stability and security in the Iraq and in the whole region as soon as the military and political situation will allow.

C. Collective international security policy facing dilemmata problems after Sept.11: the revival of the nation states’ behaviour and the impact on NATO’s and the European Union’s role in international security and cooperation

I. Security dilemma : US military unilateralism – danger of splitting the anti-terrorist alliance ?

Growing technological gap in armament and the US military strategy’s impact on the US Alliance policy risking a volatility of US alliance policy moving from multilateral cooperation to US military unilateralism and back again

42: Brooks, David: “Why the U.S. can’t walk out of Iraq yet”.in: The International Herald Tribune, Wednesday November 5, 2003, p.8

After Sept.11, 2001, the core question in the field of international security and cooperation was whether it took only an attack against the United States to arrive at a new foreign and security policy of maintaining peace and order . Miller raised the question whether the Sept. 11 attacks led to „ The End of Unilateralism or Unilateralism Redux ?“ **43a** Delpech underlined : „ U.S.security will depend increasingly on its ability to keep alliances alive,to build coalitions, and to sustain multilateralism.“ **43 b**

US foreign and security policy was and still is facing **two different issues of military strategy oriented dilemmata:**

-- **The one issue** is the question whether the US foreign and security policy might cause a split in the Alliance , **a split caused by the ever faster growing technological armament** of the USA , while the NATO Members fall too far from being on an equal technological level with the USA. **The realities of the US administration's priorities given to technological development and military capacities compared to the defence budgets spent in European Union Member States continuously are risking to widen the growing technological gap in weapons between the USA and Europe. It is an issue that is traditionally under discussion not only in the yearly held Munich conference on international security. The growing technological gap is risking to have ill effects on international security and cooperation: leading to a volatility of US alliance policy moving from multilateral cooperation like ISAF military actions in Afghanistan to US military unilateralism and back again**

- - **The other issue of dilemma facing collective security policy is the possible impact the new US military strategic doctrine may have on the future Alliance policy of the USA :**

Due to the **US military strategic doctrine designed and implemented under the former Defence Secretary , Rumsfeld, for the first phase of the war on the Taliban**, the US were using high-tech weapons,long-range transport aircrafts , satellite based communication systems , small groups of special forces teams operating on the ground and cooperating with local forces: focussing on waging wars on own US account and mainly outside the scope and institutional framework consultation procedures of NATO : The US intention was **not to depend any longer on bases in countries neighbouring the war theatres**. The US preferred to **count on coalitions that might be flexible and changing in composition and thus reducing the need for counting on support given by NATO alliance .**

43a: Miller , Stephen E. , in: The Washington Quarterly,Winter 2002,pp. 15 – 29 .

43b: Delpech , p. 39 : „ The World will be policed collectively or not at all ,,,

Counting on own military power ,US military strategic doctrine raised fears within the Western Alliance that the US military strategic doctrine would further destroy any hopes that existed in the Post-Cold-War period , after the collapse of Communism , to strengthen multilateralism . What was practised right at the end of 2001 and in 2002, was the **US tendency towards unilateralism** , the conclusion of which was that the USA ,, should move from unilateralism to multilateralism ,, **43c** . And **what was practised , too , was a revival of the nation state behaviour as proved by individual EU and NATO Member States.**

1. US military unilateralism through a growing *technological gap* in weapons - risking a split anti-terrorist alliance

In view of the existing technology level of the US military capacities Stephen E. Miller said:

“ This coalition will not be easy for Washington to preserve or manage.“ **43d**

1.1 The US lead in military technologies risked a split alliance – and still risks. Dangers to multilateralism through scientific research on biological weapons ?

The US lead in military technologies, growing faster , as proved by the US performance in the Early stages of the wars in **Afghanistan** and **Iraq**, risked a split alliance , with US forces fighting wars aided by local allies, and the Europeans confined to peacekeeping and other infantry roles. The US lead in military technology risked and still is risking (US vs. Iran ?) that the USA will fight alone in major battles , such as it was feared after the military strikes on the Taliban in Afghanistan, and then happened to be an attack on **Iraq** .

New dangers to multilateralism were emerging through scientific research on biological weapons: absolutely dominating US military power was not a mere vision yet, but reaching close to reality . According to reports on TV, USA scientific research institutes were developing genetically manipulated biological weapons aiming at destroying any existing weapons belonging to potential adversaries: **43 e**

Genetically manipulated weapons are supposed to destroy.e.g. the protective plastic material covering the anti-radar protective shield of aircraft bombers , or they may be capable of destroying the concrete layers of airfields thus keeping off the enemies' aircrafts from taking off and getting airborne.

43c: Miller , p. 26 .

43d: Miller , p.25

43e: German Monitor, TV report November 29,2003.

1.2 Fears about US unilateralism – a blueprint for global governance in the 21st century ?

Risto E.J. Pentilla pointed out “ what we see, concerning the war against terrorism , may well be a blueprint for global governance in the 21st century .” **44**

Pentilla compared the unity proved in the war against terrorism to the 19th century Concert of Europe ,including the victors of the Napoleonic Wars(Austria,Britain,Prussia and Russia) maintaining, on the basis of the Vienna Congress in 1815 , peace and prosperity in Europe .

Another serious observer , Thomas L. Friedman, however, had warned that the role of NATO was at stake and that **Europeans would have no credibility when they complain about US unilateralism , but keep on being reluctant to better invest in the planes and equipment needed in modern warfare.**

Friedman recalled the four key assets needed to fight a modern war. But he focussed on **purely military assets only and lost out of sight the real challenge which,** after the first powerful military strike,is **winning the peace.** Friedman’s military key assets are:

- many large transport aircraft to deploy troops to far-flung battlefields;
- precision-guided bombs and missiles that can hit enemy targets with a high degree of certitude, thereby shortening the war and reducing civilian casualties ;
- large numbers of Special Operations teams that can operate at night using night-vision equipment; and
- secure, encrypted communications so that ground and air units can be knit together in a hightech war without the enemy listening in.**45**

The reason why other NATO countries than the USA fell short of these technological assets , is , as Friedman recalled , the fact that Europeans don’t feel threatened by countries like Iran, Iraq and North Korea and therefore are reluctant to spend much on defence .

Meanwhile,in March 2007, the US demonstrate, by planning to install, in Poland and in the Czech republic, a radar supported anti.missile protection shield, the intention to protect Europe against Iranian middle-range missiles, and, thus are influencing the European concerns about security.

The result is that US allies fear growing US tendency for military unilateralism and Europe’s dependence on US unilateral acts unless the European contribution to a multilateral burdensharing is not subject to steady and constructive review.

44: Pentilla, Risto E.: “ The Concert is back , and it seems to be working “,in: International Herald Tribune, IHT ,December 28, 2001,p. 8 .

45: Friedman, Thomas L. : “ The End of NATO ? Europe had better catch up “,in: IHT Febr.04,2002,p.6 .

As Friedman has put it : “ ...we are increasingly headed for military apartheid within NATO. America will be the chief who decides on the menu and cooks all the great meals, and the

NATO allies will be the busboys who stay around and clean up the mess and keep the peace – indefinitely. “ 46

„ Those who join the U.S. team are clearly expected to follow the U.S. lead ;“, says Miller .47

2. US military unilateralism enhanced through new US military strategy and impact on US Alliance policy

2.1 The US military strategy’s success in Afghanistan and the impact on the US Alliance policy - bypassing NATO ?

Following the first stages of US military success to remove the Taliban regime from power in Afghanistan, widespread fears expressed in Europe were focussing on the political risk that US military unilateralism might bypass NATO and diminish the hopes of getting multilateral political backing for US antiterrorist actions . The US government was reported to have decided that „ there will not be a single coalition but rather different coalitions for different missions „, in which US units will hope to work with local forces against terrorists or regimes that back terror. 48

The US lead in military technologies growing faster , as proved by the US performance in the war in Afghanistan , risked a split alliance , with US forces fighting wars aided by local allies and the Europeans confined to peacekeeping and other infantry roles. The US lead in military technology risked and still risks –in the case of USA versus Iran- that the USA will fight alone in major battles , such as USA allies feared US government’s military action against Iraq and other countries of the “ axis of evil “.

The secretary general of the North Atlantic Alliance, Robertson, warned that trans-atlantic solidarity was threatened if " the Americans do the cutting edge while the Europeans are stuck at the bleeding edge, if the Americans fight from the sky and the Europeans fight in the mud .“, he was reported saying that in a conference in Munich on international security on February 03,2002. 49 The issue of Europe’s contribution to the Alliance is a permanent item on the conference’s agenda. It was still under the impression of the Sept.11 attack that the February 2002 Munich conference raised concern about Europe’s failure to spend more and put more political push behind reshaping and modernizing the NATO member countries’ armed forces along lines compatible with US-style warfare. **NATO General Secretary Robertson warned that Europe risked being reduced to the status of a “ military pygmy “ and Europeans could not expect to have political influence on Washington if they had no effective military power to bring to a coalition . That’s still true in 2007.**

46: IHT,Febr. 4,2002,p.6 .

47: Miller , Stephen E. „ The End of Unilateralism.....“in: The Washington Quarterly, Winter 2002, p. 19 .

48: Fitchett,John, report „ Pentagon in a League of its own“, IHT Febr. 04,2002, pp. 1,3 .

49:IHT report February 04,2002, pp.1,3 .

What was meant about the concepts of burden-sharing in the US – European transatlantic relationship became apparent when a German participant in the February 2002 Munich

conference was talking about **his uneasiness about US threats against Iraq** , US senator John McCain from Arizona was reported to have snapped back : “ I would tell our German friend to go out and buy some weapons before questioning US intentions or power .” **50**

2.2 US alliance policy at stake - uncertainties about extending the fight against terrorism

Alliance policy of the USA were at stake , as USA’s NATO allies demonstrated reluctance to US ideas of extending the war on terrorism in Afghanistan to the countries Iran , Iraq and North Korea, countries called by US President George B. Bush as an „ axis of evil „, that could provoke preemptive US action . **51**

The US lead in military technologies and risks about a US split alliance policy were and still are endangering European prospects of influencing US policy on fighting terrorists .

European political leaders in Britain, France ,Germany and Russia expressed concern about the three countries’ depiction as “ axis “ intent on developing weapons of mass destruction. At the conference on international security matters, held in Munich on February 02-03,2002, European security officials were reported to have expressed alarm about what they saw as the US president’s “ aggressively unilateral stance “ . **52**

And consequently, the European security officials’ alarm turned out to be right when the US Government had to admit that the evidence presented to the UN Security Council by US Secretary of State,Colin Powell, on the existence of arms of mass destruction in Iraq had been faked.

The involving of allies had already faced the same problems in times of the Korean war in the early 1950ies when the USA facing the opposition of the US allies refused any expansion of the Korean War .

50:IHT February 04,2002, pp.1,3.

51:IHT February 04,2002, pp.1,3.

52:IHT February 04, 2002, p.1 .

II. Affecting the Union's interests: Security dilemmata, revival of nation states and consistency of coalition-building

1. The anti-terror coalition in the case of Afghanistan : revival of nation state behavior

The hegemonial power of the US, had , in the course of the events after Sept. 11 , sent a politically decisive signal to Europe: the Member States did not pick it up to strengthen Co - operation within the institutional structure of the Treaty on European Union. Instead, they appeared to give more importance to single action by nation states outside the Union's policy-making, thus giving the impression of a **revival of the nation state concept**.

1.1 Nation states joining the anti-terror coalition in self-defence and avoiding the ire of the United States

In the period after the collapse of the Soviet Union , it was the phenomenon of the globalization which gave the impression that the role of the nation state had become obsolete due to transnational crossbordering effects of transnational flows of capital and data communications and international investments going beyond reach of nation states' powers to influence the transnational movements of financial flows and the global reach of globally acting international companies .

And as to the role of the nation state in security policy of war prevention and warfare in the times of globalization , Campbell said: „Perhaps we have unintentionally sub-scribed to the persistent optimism of the prophets of globalization who either inferred or explicitly stated that conditions of globalization made a major, sustained conflict most unlikely.“ 53

The events following the Sept. 11 attacks had proved the five hundred years old nation state to be still alive :The Al Qaeda terror while attacking actors and symbols representing globalization did use the instruments of globalization as well as devices of modern technology as weapons : long-range jets , the mobile phone , anonymous orders given for transnational cash-flows.

But the nation states' effective response detected hidden cash-flows , orbit based satellites detected terrorist strongholds, intelligence agencies detected the commanding key-people of the terrorists. Due to American bombs, to Russian supplies in weapons delivered to the Northern Alliance , support given by Pakistan and due to consent given by China , the Taliban had been defeated.

53: Campbell, Kurt M. ,, Globalization's First War ? ,,The Washington Quarterly, Winter 2002, p.8.

The nation states did become members of the coalition because they had instantaneously realized that the global reach of the terrorists were threatening the dominant role of the nation states to set up the basic rules of the international actors in power politics . And it was, basically, not friendship with the United States that the respective states wanted to join the coalition club, they were ,, avoiding the ire of the United States ,, , Miller comments . 54

The nation states also strengthened their role of being the master within NATO and the European Union, both trying to pool nation states' sovereignties in the field of foreign, security and defence policy:

-- The NATO , after having invoked Article 5 of the Washington Treaty declaring the attack hit against the NATO member USA to be an attack against the collectivity , against the alliance, NATO, then, had played rather a marginal role in the field of decisive contributions made to the warfare theatre . NATO as organization was no decisive actor . Individual member states of NATO made the decision and took action to contribute to the US led war in Afghanistan : the big member states were the actors : USA,Britain,France and Germany .

1.2 Anti-terror coalition of nation –states : the European Union experienced its own limits in the case of the war on the Taliban in Afghanistan

The European Union , as a matter of fact , in the course of the events following the Sept. 11 attacks , had to experience its own limits . The leading people of the European Union , neither the President of the Commission, Prodi, nor the High Representative for the Common Foreign and Security Policy of the EU , Solana , did take decisive action in matters of deciding on policy-oriented common- positions and joint actions for military contributions to the US led war in Afghanistan .

The Heads of State or Government , individually and not as members of the European Council did take action . The nation states' democratic , directly elected sovereign Parliaments and the national Governments were and are still the ones to decide on matters of life and death , war and peace : what they missed,however, was what they definitely should have done : to decide within the EU's Council and according to the provisions of the Treaty on European Union ruling the Common Foreign and Security Policy under title V . 54a

54: Miller, Stephen E. ,, The End of Unilateralism or Unilateralism Redux ,, ,,The Washington Quarterly, Winter 2002, pp.15 – 29 (22) .

54a: Treaty on European Union, Official Journal of the European Communities, 24 December 2002, C 325/05 (13) .

Individual European Union Member States (here: the Netherlands , Germany etc)-**and not the European Union's Rapid Reaction Force**- which still remained to be set up - had taken command over the peacekeeping forces in Afghanistan. As Wessels said : "The EU as an organisation was not regarded as a central actor." 54b .

The high-tech weapons' performance in Afghanistan had changed the dynamics and the scope of battle and influenced the strategy of NATO and EU : a Rapid Reaction Force of 60.000 soldiers under the complicated institutional system of the EU appeared not to meet the requirement of NATO and EU for an *independent strategy design and strategic capabilities for strategic military actions on an own account and on the basis of own access to strategic high-tech devices of long-range aircraft transport facilities , teledetection and satellite based data communication systems* .

Democratic societies fear losses of lives , they fear T.V. reports on dead soldiers arriving home . That's still the background for the growing critics concerning the " safe " deployment of German military forces in Northern Afghanistan, Mazar-i- Sharif and Konduz, where they did not have casualties killed in military action until now in March 2007, while Germany's partners deployed in Southern Afghanistan namely US,Canadian and British Forces have deployed soldiers killed in action in increasing fights with Taliban forces.

If democratic societies want to avoid their soldiers to come into close contact with enemies , the consequence must be to increase the national defence budget for the purchase of expensive military facilities far beyond the German defence budget of 1,5 percent share in grossnational product.

2. The war on Iraq coalition : the Iraq coalition of nation-states assuming to act in prevention and self-defence.

USA and the case of Great Britain's joining the war outside the European Union's institutional policy making framework : The EU again experienced its own limits

In the case of the US led war on Iraq, the European Union had to experience its own limits again.As a matter of fact , the US Government , on the eve of the war on Iraq , failed to push the UN's Security Council to endorse a strike on Iraq, and felt free to act unilaterally, launching a US led coalition mainly held by the USA and Great Britain. The leading people of the European Union , **neither the President of the Commission, Prodi, nor the High Representative for the Common Foreign and Security policy of the EU , Solana , did take decisive action to cause Great Britain to consult within the institutional structure of the European Union on the basis of Articles 16 and 3 Treaty on European Union.. It was Great Britain , individually and not as Member State of the European Union that took action joining the USA, without the endorsement by the Council of Ministers of the European Union:**

54b: Wessels,Wolfgang:"Security and Defence of the European Union.",contribution to the 6th ECSA Conference in Brussels, November 2002, p. 24.

The fact that the European Union did not act as an organisation has had the ill effect that the Member States of the European Union did not use the Union's potential to exert political influence in order to mitigate the negative consequences arising out of the disastrous wars on the Taliban and on Iraq: the severe security dilemmas as follow below:

3. Security dilemmas facing the consistency, sustainability of coalition building - The EU, western values and Islamic World clashing ?

Perceptions in the Islamic world concerning the fight against international terrorism after the September 11 attacks tried to make the US-led coalition against the Taliban and Al Qaeda appear to start a clash between Western values and the Islamic world. Bin Laden declared war on the Western world. AL Qaeda terrorists were and are claiming they were defending the Islam against Western aggression and humiliation.

There were those in the Islamic World who judged the terrorist attacks to be a just revenge for real or imagined injustice, even if they did not approve of terror tactics.

In view of the issue of a real or potential confrontation between the Islamic world and the hegemonial power, the USA and their Allies, there appear two points demonstrating that the **US-led coalition was and still is facing a substantial security dilemma :**

3.1 Security dilemma –coexistence of people with fundamentally different world views?

In the course of the events following the Sept. 11 attacks and the anti-Taliban/Al Qaeda coalition building and increasingly throughout the disastrous situation in Iraq there was and is facing the European Union and affecting its international security interests the crucial issue concerning the international security : defenders of worldly oriented universal values of freedom and defenders of spiritual, religious oriented „ absolute truth „ : can they coexist ?

„ The strength of an absolute ideology against our moderate societies“, Delpech comments. **55** Western values are in conflict with absolute truth oriented positions held by extremists :

Since the Sept. 11 attacks, launched by non-state terrorism, we can no longer examine terrorist violence for traces of good, utopia or even the folklore of national, cultural or religious liberation. It is less possible than even before, to characterize terrorist violence as mistaken and wrongful, but nevertheless understandable response to hardship and oppression: terrorist violence is, in fact, unacceptable.

Western values: rooting in the enlightenment fundamental rights of human dignity, basic freedoms, respect for life, rule of law, tolerance, freedom of opinion and speech, however, appear to be in conflict with religion oriented defenders of a truth taken as absolute. The problem is the lack of a common basis between extremist fundamentalists and defenders of Western values.

55 Delpech, Thérèse, The Imbalance of Terror, The Washington Quarterly, Winter 2002, p.38.

The one security dilemma issue is that the US and the US led international coalition claimed that they did not fight war against the Islam, but that they defended common universal values by fighting Islamic extremists who don't mind using violence.

The security dilemma is that, on the one hand, as respect of different opinion is at the core of Western values, civilized people in Western societies duly respect those of other faiths or different views at the world. In Islamic countries, however, the public or published *perception* of Western values is often different from Western understanding and Western practice, on the other:

Western liberal ways of life and so-called "cool" attitudes are often felt to miss the proper manner of respect for other cultural traditions, namely in Islamic countries. This is why US strategy has recently acknowledged deficits in the US practice of US soldiers' approach to Islamic civilians in Afghanistan and in Iraq and is training US units to prove more respectful behavior and to avoid the deliberate or unconscious violation of Islamic values and traditions.

Western values defended by response to Sept. 11 attacks is the ethic of individual freedom and tolerance that opportunities for all do exist in the country, that is the source of a nation's unity and strength. Western civilization, western values tend to make believe that its enlightenment based ideas about human rights, individual freedom and (in US formulation) the individual pursuit of happiness - through 'opportunities do exist for all' - were valid for all the rest of the world.

But people in the Western world have, on the other hand, expressed doubts as to whether Islam in general can be reconciled with Western form of society, fundamental rights, individual freedom and tolerance, pluralism. They wonder how people with different world views will coexist in Western societies in the future. For, if it is true that Islam is primarily a way of life handed down in religious laws, a way of life whose authority comes from the undiminished, unquestioned word of God, then a sort of coexistence appears to be unthinkable:

The theocratic order, which Islam as a whole still appears to be, holds up divine law against mere human law. Sovereignty of the people, an idea of the European rooted Enlightenment, conflicts with divine sovereignty and an order laid down in law for all situations and all time.

The claim to absolute truth of the Koran collides with the farewell to absolute truth in worldly matters that are not related to religion that characterizes the West. Truth is something to be discovered, and not something fixed once and for all. Democracy is open to truth in the sense that all views and beliefs are supposed to take part in peaceful and open discourse. Many in the West doubt about whether both ends can meet. **Whereas Mahathir bin Mohamad**, prime minister of Malaysia, in his comment, adapted from an address on the World Economic Forum meeting in New York, pointed out that "the real Islam is not about extremist politics". **56**

It is in that sense true to speak of a clash of cultures. But it is not a matter of „the West against the Rest“, as Samuel Huntington puts it. It is a matter of Islamic claim to an absolute truth. Respect of different opinion is at the core of Western values. But fundamental rights, freedom of opinion cannot, must not accept a position that denies tolerance and the pluralism of different views.

Due respect for a sovereign nature of Islam would be a solution to the security dilemma. A sovereign Islam would be characterized as an Islam that is duly to be respected for the historical corpus of religious law, whose conceptions guide the Muslims' lifelong daily routine, presenting no problems in the field of religious rites and that would be compatible with democracy.

And as to the evolutive effect of the individual's pursuit of happiness, according to William Pfaff "immigration changes the face of the West", sheer numbers of immigrants had decided the matter of adaptation to values in the USA by the American society adapting to the immigrants, implying continued evolution of American society away from its Western European origins .57 .

This evolution may be a perspective for getting solutions to the security dilemma facing western values by demonstrating how Islamic religion oriented way of life may well coexist with Western values of pluralism and tolerance, in a way to see an Islamic enlightenment that ends religious intolerance, as Thomas L.Friedman underlines . 58

Difficulties, however, may still arise where, in Islamic practice and rites, principles of self-determination and individual rights to freedom are restricted in favor of collective rules of behavior, including Islamic penal practice.

The security dilemma facing the Western world, however, even if there might emerge perspectives to reconcile, in Islamic practice and rites, individual rights and collective rules of behavior, the **security dilemma still will be** :

any efforts to discredit bin Laden and his pseudo-Islamic program appear to create little opposition against the pseudo-ideas of bin Laden in the Islamic states. Governments and state media in the Arab Middle East are still blaming Israel and the USA for all the troubles of the Muslim world, and the Islamic states have done little to counter bin Laden's message by improving their own peoples economic and social situation .59

3.2 Security dilemma : conflict between fighting against terrorist extremists and different perceptions of worldwide US dominating powers

It is a dilemma facing international security and the global role of the USA that fighting against terrorist extremists is in conflict with perceptions of worldwide US dominating powers :

57: Pfaff, Wilhelm, in: IHT, Febr. 7, 2002, p.7 .

58: Friedman Thomas L., in: IHT, Dec. 17, 2001, p.6 .

59: see on western values and Islamic religion: IHT, Dec. 24-25, 2001, p.6 ; "The war on ideas", editorial comment IHT Dec. 29-30, 2001, p. 6; see: Friedman on: Islamic religion, IHT, January 07, 2002.

Americans always believed that American society including Americanization of global popular culture represents what is best and most advanced („, the Best against the rest „). That is the background for the common, even mistaken, American notion that other peoples hate the USA because they envy it. Before Sept. 11, the USA had a sort of universal influence and domination of international society uncomparable to any empires in history.

After Sept. 11, the question is, as raised by Pfaff, “ Will the new world order rest solely on American might?”, how the US will, in the next two or three decades, make use of its power and whether the US will, without imposing itself, be intellectually and culturally dynamic enough to induce, in the society, a consent on values to be of identity –shaping ethic and moral orientation. **60**

Western values were described by Robert Hunter to be USA’s “ empire rules “ dominating an unbalanced world. **61**

Hunter insisted that the structures dominated by US rules and that replicate a grossly unequal world should have to be redesigned so that markets working within a new framework were to produce more equitable results and thus to avoid, in the long run, that more cohorts of partly educated young people grow up in anger and despair and to feel justified to act as vengeful fundamentalists that feel entitled to attack the USA or other industrialized Western countries directly.

What is meant by Hunter’s description of Western values to be „ empire rules „, was called „ the new Roman empire“ role of the USA : under the headline „ Wir und die anderen“, an US American writer, Jedediah Purdy, had published in the German weekly “Die Zeit”, August 2001, before the Sept. 11 attacks happened. She raised the question why the USA was hated and why Islamic people, even if abhorrent of war, could not help but have a sense of humiliation when thinking of the US dominant role in foreign policy, international law, economics and culture throughout the whole world. Her answer was that the US had no understanding of what Islamic religion means. **61 a**

An improved political culture of mutual understanding is a prerequisite of strategic dimension: A stable relationship between the anti terror coalition and the Islamic world requires comprehensive actions to ensure international security. Kai Bird and Martin Sherwin may be interpreted in that sense :

Bird and Sherwin called for a „ smart foreign policy that addresses the underlying grievances that foster suicidal rage .“ Referring to U.S. policymakers, who, since the collapse of the Soviet Union, have pursued a „ triumphalist „ stance based on Amerika’s belief in invulnerability and invincibility as the world’s only superpower, Bird and Sherwin pleaded for a „ radically new foreign policy „, committed to „ sound moral principles „, and based on human rights, a foreign policy “ to encourage the weak and afflicted to take their grievan -

60: William Pfaff : “ Will the new world order rest solely on American might?”, in: IHT Dec. 29-30, 2001, p.6 .

61: Robert Hunter Wade’s article on the Roman empire like dominant role of the USA in world economics and world politics, in: IHT Jan. 3, 2002, p. 7 .

61 a Jedediah Purdy, Fellow of New America Foundation, Washington: " Wir und die anderen" ,in : DIE ZEIT, Nr. 35, August 23, 2001, p. 3.

ces to the United Nations , the World Court and the new International Criminal Court ,, , thus calling for a new design in political culture in the conduct of foreign and security policy . **62**

Bird and Sherwin recalled Oppenheimer's insistence ,, that the purposes of this country in the field of foreign policy cannot in any real or enduring way be achieved by coercion. ,,

I would add that foreign policy should not be reduced to the use of force , but should include comprehensive actions of diplomatic, economic, cultural and political dialogue and technical and financial assistance policy for civil reconstruction in war affected countries like Afghanistan and Iraq.

Unless foreign and security policy conducts that comprehensive approach, international security will continue to destabilize. And fighting Islamic extremists, the USA continue to risk , through extending their war on the Taliban and Al Qaeda to Iraq and other countries, to forge a coalition between moderate and extremist Islam people. **The crucial security issue of how to avoid coalitions between moderate Islamic and fundamentalist extremists Islamic people and of how to hold the anti terror coalition together is whether the US-led anti terror coalition will be in the position to take comprehensive actions to make common values to be accepted as convincing driving force behind the anti terror fight .**

The real challenge the USA and allies are facing is, therefore, to take comprehensive action: proving respect for different religious and cultural traditions in Afghanistan and in Iraq, implementing a comprehensive approach to restore peace by civilian reconstruction and encouraging selfdetermination , thus **enhancing credibility of common values beyond the use of purely military instruments – and thus contributing to international security.**

3.3 Security dilemma : consistency of the anti terror coalition and the role of the Israeli – Palestinian conflict

There is still another specific issue characterizing the security dilemma in the light of Western positions conflicting with positions held in Islamic countries : the Israeli – Palestinian conflict

Abhorrent of terrorism , there was a growing feeling of confusion in the Arab world about the US role after Sept. 11 , and there was a growing criticism of US bias toward Israel . The Israeli-Palestinian conflict had become a core issue for the international security policy including the anti-terrorist coalition building policy, and the unresolved Israeli – Palestinian conflict is continuing to be the core issue for the international security in the perception also and just of Islamic countries.

62 Kai Bird and Martin Sherwin : ,, A fair foreign policy is the best defense ,, ,in: IHT Dec. 13,2001 , p. 7.

Many in the Arab world hoped that Sept. 11 was a turning point in the way the USA deals with terrorism , in a way that would also move US policy toward bridge-building with the Arab world by better taking care of the Israeli-Palestinian conflict , which many in the Arab region view as central to US.-Arab relations.

The Arab world appears to be disappointed that the USA could live through Sept. 11 and not move more forcefully to resolve a dispute that has inflamed and continues to inflame suicide bombers and increased the popularity of radical groups in the Islamic Resistance Movements, known as Hamas in Palestine and known as Hizbollah (Shiites) in Libanon..

The war on terrorism , according to Crown Prince Abdullah ibn Abdulaziz, Saudi Arabia's de facto ruler , was undermined by what he called , in an interview , the indefensible position of the United States in the Israeli-Palestinian conflict : “ In the current environment , we find it very difficult to defend America, and so we keep our silence. Because, to be very frank with you, how can we defend America ?” **63**

It should not to be forgotten that it was a growing sort of feeling of humiliation expressed by Arab commentators and officials who said it was as if the marginalization of Mr.Arafat had become a metaphor for the region as a whole. “ Everybody is baffled, including the leadership in the Arab world. Nobody understands the US policy. They don't know how to deal with it. If they tried to convince the public that by following a pro-American stance they can exert some influence,it is now out in the open that their influence is near zero .”, a Jordanian political scientist,Radwan Abdullah was reported to have expressed his deep concern .**64**

At present, in March 2007, the impact the unresolved issue of the Israeli-Palestine does have on the security in the Middle East and on international security has even worsened since Sept. 11, 2001, in view of the disastrous situation in Iraq which fully makes the US Government inoperative and weaker than before to prove responsibility through visible determination to resolve the Israeli-Palestine conflict.

3.4 Security dilemma : long-term fight against terrorists and the danger of abusing the basic principles and losing legitimacy

The US- led coalition in Afghanistan was and still is meant to fight a long-term war against terrorists .**64 a** The survival of the – now NATO led ISAF called coalition- requires the principles to be respected , basic principles in the name of which the coalition fights the war under the mandate of the United Nations.As the NATO led ISAF units fighting against the reinforced Taliban groups in Afghanistan's southern parts are under the command of US Generals as well as the US led military operation “Enduring Freedom “ are under US Generals' command, there is a security dilemma:

63 IHT report Jan. 30,2002,p. 1: “ Saudi Leader Reaffirms Alliance with US“

64 IHT report by Howard Schneider, Febr.4,2002,p.5.

64a:The President of the German Intelligence Agency – BND -,Ernst Urlau, in a public interview, 05 March 2007, Bonn, said that he is uncertain about the outcome of the long-term fight against fundamentalists' terrorism.(General Anzeiger Bonn).

-- the notion „ terrorism „ is ambiguous and risks being abused to cover any measures against minorities in other parts of the world.. There is a need for creating a convention on what terrorism is.

-- Any fights against terrorists as individuals should respect the rule of international law to have a Court to decide whether prisoners are entitled to treatment under the Geneva Convention on Prisoners of War .

3.41 Security dilemma : Consistency in the anti terror fight and the ambiguity of the term „ terrorism „

The security dilemma in the conduct of coalition policy is that the ambiguous notion of terrorism may have an ill effect on attempts to hold international coalitions together :

International cooperation on international peace and security are challenged by the fact that the term “ terrorism “ is ambiguous . A legally binding common definition of the term does not exist .

The war on terrorism is allowing governments to use the term terrorism to seek the protection of national sovereignty against any attempts made on behalf of national minorities to claim their rights of self-determination. This is the motivation guiding for example the Russian Government’s reluctant position on the Kosovo’s striving for independence from Serbia on the basis of the right of self-determination. This is only one example out of a number of other examples demonstrating the conflict existing between the minorities’ right of self-determination and national governments’ temptation to accuse minorities of terrorism.

The ambiguity of the term “terrorism” , the deliberate or unconscious abuse of the fight against international terrorism is the political background of the fact that the US led coalition’s efforts to free Afghanistan from bin Laden’s Qaida organization had become a diffuse campaign of global reach. As the conflict between Pakistan and India about Kashmir demonstrated , it is the ambiguity of the term terrorism that each of the longtime rivals accused the other of state-sponsored terrorism and threatened cross-bordering retaliation. However, after the terrorists’ assault against a “ peace” train from Pakistan in February 2007, the Governments of India and Pakistan are just improving cross-border cooperation, both countries uniting in the fight against terrorism. That’s another example to demonstrate the crucial issue of the term “terrorism “ and the impact the practical use of that term does have on international security.

Consistency in the war against terror, however, needs to recognize the difference between legitimate democratic movements from rogue groups using violence to promote their objectives . What is needed for holding the international anti-terrorist coalition together is a Convention to define and fight terrorism.⁶⁵

⁶⁵ David L. Philipps “ Wanted , a Covenant to define and fight terrorism”, IHT Jan. 4 ,2002, p.6 .

3.42 Security dilemma : Security issues in cases of emergency (terrorists' attacks prevention) and respecting the rules of international law (treatment of Taliban and AL Qaeda detainees, treatment of prisoners in Iraq)

The US were risking international credibility and consistency in the war against terror as the US, initially, refused to apply the procedural protections of the Geneva Convention on the Treatment of Prisoners of War to former Taliban and Al Qaida fighters to be or not to be prisoners of war .

Claims of prisoner of war status cannot be decided by a government but must be resolved by the kind of legal hearing by a " competent tribunal " that the Convention requires , and that detainees shall remain protected under the convention until their status has been decided – concerning the suspected terrorists held captive at the US Navy base at Guantanamo Bay in Cuba.⁶⁶

The initial decision of the US administration that Taliban and Al Qaida fighters were not entitled to the procedural protections of the Geneva Convention had alarmed most of US allies .⁶⁷

The allies called for applying America's standards of justice in the name of which and for the purpose of defending the Western standards of values and of the rule of law the US led coalition had fought against the terrorists . The **allies reasoned that lack of due respect for the rules of the Geneva Convention would endanger international security by undermining the credibility of the USA** and also potentially endangering future Western troops who may fall into enemy hands.⁶⁸

The US government, actually, responded to the allies' pleas and excluded AL Qaeda terrorist network detainees from the protection under the Geneva Convention, but included detainees who had fought for Afghanistan's Taliban.

At stake was and still is the credibility of the USA, by respecting International Law , on the one hand , and the international security , on the other : International Security may , in specific cases , require to interrogate detainees held at Guantanamo in order to get informations on pending terrorists' plans to further launch attacks. Interrogating , under the rules of the Geneva Convention , on other issues than name , rank and military unit , is not allowed , but appears to be justified if , in cases of apparent emergency , interrogating is the only option to prevent severe damages to lives of the people targeted by terrorists.

It is also a credibility issue applying America's standards of justice to the Guantanamo detainees' rights to trial in a court of law. And no doubt : the inhuman treatment of Iraqi prisoners in US military prisons (tortures in Abu Ghraib) was contradictory to the rule of law the US led coalition had and has fought to depose Saddam Hussein and to help installing the rule of law.

⁶⁶ IHT Jan. 29,2002,p.3 on dispute over detainees ; US government split on detainees' status and the applicability of Geneva Conventions see IHT report , Jan. 28,2002,p.1,3 .

⁶⁷ IHT Jan. 30,2002, p. 8 , editorial comment " Prisoners of War " .

⁶⁸ see also Lee Dembart's article " A law-abiding America is safer " in: IHT, Jan. 30,2002,p.8.

4. Security dilemma : winning the war and winning the peace

4.1 Winning the war on Taliban and peacekeeping for reconstruction in Afghanistan

Stability , peace and security in Afghanistan will depend on a successful civil reconstruction in Afghanistan. Military, social and economic instabilities foster extremist groups and encourage them to organize local and regional revolts against the central Government under President Hamid Karsai and against the ISAF , the

It was readily seen in December 2001 what at present, in March 2007, is still apparent under the return of the Taliban to organize military resistance and suicide-bombings against the US-led ISAF/NATO operations in Afghanistan:

Winning the war on Taliban will take not to ignore the reconstruction work while peace-keeping is not easy.⁶⁹.

The security dilemma throughout the last five years is:

- the administration's reluctance to accept that reconstruction requires increasing numbers of foreign peacekeepers ,
- the Taliban has benefited from that reluctance and returned back to Afghanistan, but civilian reconstruction requires peace-keeping through improved military presence e.g. by the planned deployment of German Tornado reconnaissance aircrafts in 2007,
- by laying out ambitious goals but refusing to provide the necessary civil reconstruction funds and investments, the administration is risking the total loss of national prestige that the initially successful military campaign had generated. „American credibility in attacking the next sponsor of terrorism would be compromised „, without massive reconstruction efforts.

The war on Taliban is not won yet: there are southern provinces with major security problems because of increased amounts of armed attacks and suicides' bombings, with major security problems namely because of the announcement of a Taliban led military offensive expected for spring 2007. No doubt, increased military operations would further delay the progress of civil reconstruction assistance projects in Southern provinces of Afghanistan for rebuilding the state under the United Nations' sponsored Bonn Accords (27 November until 05 December 2001) and on the basis of the Constitution, in force since 26 January 2004.
.. 70

The core requirement for successful reconstruction is peace. As to the intentions of the still existing Taliban groups , as well as to the intentions of the different powerful warlords ruling in Afghanistan, there is still uncertainty about restoring stability and peace in Afghanistan.

⁶⁹: IHT, Dec. 13,2001, editorial comment,p.6.

⁷⁰: IHT, November 4, 2003,p.5 “ Afghans'blueprint for future”.

4.2 Winning the war in Iraq : winning the peace through reconstruction ?

The disastrous security situation in Iraq is worldwide well-known. The new US defence Secretary, Robert Gates, shares the nationwide common opinion that the war in Iraq cannot be won. Civil war like violent conflicts between Sunnites and Shiites, daily suicide bombings with lethal casualties among civilians and among the US led coalition soldiers do not stop. While winning the war – who exactly was and is in the eyes of the US led coalition the enemy?- is not imaginable, winning the peace in Iraq would depend on:

- finding out who is ready and able to be speaker of the Shiites and Sunnites and to talk together on ways to peace in Iraq, and
- integrating Iraq's main neighbours, Syria, Iran, Saudi.Arabia, in international talks on Iraq's security and cooperation for civil reconstruction.
- International assistance to civil reconstruction.

Winning the peace in Iraq may require even more than successful “ mere “ economic, social reconstruction works : **it may require to win the Iraq War III :**

The USA, in summer 1990, had thought it won the first Iraq war in 100 hours, but lost the peace to Saddam Hussein and his Baathist followers. The USA,in November 2001, thought the US led coalition won the second Iraq war decisively in one week, but Saddam Hussein, his murdering Baathist party and his imported terrorists chose to run away from the open battlefield and to fight from underground. The US led coalition lost the peace to Saddam Hussein before and after his execution end of Dcember 2006: the world , obviously,was and still is watching the war theatre of Iraq War III. The US led coalition is fighting on several war fronts:

the people of Iraq's Shiite south and Kurdish north – 80 percent of the population of 23 million – are making progress toward **reconstruction and self-governance.**

During Saddam Hussein's lifetime and after his execution end of December 2006, the main battle field of Iraq War III was the Sunni triangle, the area around Baghdad,where Saddam Hussein's sons and secret police long victimized other Iraqis. The terrorist's aim was to increase suffering by driving out the United Nations amd Red Cross relief workers. Another aim was to assassinate Iraqi leaders and police officers who dared to cooperate with the liberation forces of the US led coalition. The key goal appered to kill enough Americans to cause the US public to want the US withdrawal from Iraq. Public pressure on the US Iraq policy increased even more after the elections to the US Congress in autumn 2006. A premature and total withdrawal of the US appears unrealistic and would worsen the civil war like situation: risking Iraq to split apart : Shiites in the south would set up a nation under the protection of **Iran**. Kurds in the north would try to break away into an independent Kurdistan. That would probably induce **Turkey**,worried about separatism among its own Kurds, to seize the Iraqi **oil fields of Kirkuk** And as to the **Sunni triangle**, Baghdad would then become the **arsenal of terrorism, importer and exporter of nukes, bioweapons and missiles.**

The strategic question to be answered by the USA and by all those concerned with international security is what are the alternative options to be chosen in order to prevent what may happen as described above. Either the US troops stay in Baghdad until winning the Iraq war III and winning the peace by fulfilling the prerequisites for Iraq's political and economic stability including stable federal structures guaranteeing minorities. Or the USA withdraw too soon, thereby encouraging terrorism.

The strategic objective that may be agreed upon on both sides of the USA – EU transatlantic relationship is:

any actions to be taken by the military and civilian authorities of the US led coalition to win the Iraq War III and **to win the peace in Iraq** should not encourage terrorism.

The open question is how to achieve this strategic objective?

What are the adequate tactical actions and instruments ?

Both questions should be discussed **within the framework of a transatlantic USA-EU partnership**. The basics of that partnership should be identified in view of common challenges to international security. This includes the willingness and readiness of both sides to agree on common criteria for adequate burden-sharing related to military contributions and to civil reconstruction contributions.

D. Conclusion :

Chapter IX exemplifies this study's method of applying the lesson taken from European integration history to current issues and to future challenges to the European Union, here in the field of the Common Foreign and Security Policy focussing on the Union's experience made in the years 2001-2003 after the September 11 attacks and on the current crucial issue of international security and cooperation politics of how to overcome the deadlock in Iraq and the serious prospect of another deadlock in Afghanistan.

1. The facts displayed in Chapter IX demonstrate the way of response given by the European Union to the international security situation in the years 2001 – 2003 after the Sept. 11 2001 attacks, namely to the international coalition building under the US leadership. Apart from joint political solidarity addresses immediately given by the European Union as organization, this was the only contribution the European Union made as an organization. In the field of common foreign and security policy, namely in the field of defence policy, Europe's contribution to the international military response of the anti terror coalition in 2001/2002/2003 after the Sept. 11 attacks was the individual nation states' contribution. Although the Treaty establishing the European Union clearly required Member States to consult one another within the Council of Ministers before undertaking action, single Member States joined the US led wars, and the European Union as well as NATO as organizations of their Member States' collectivity had been bypassed.

NATO's initial military contribution –surveillance AWACS aircrafts to help secure US territory – did not play any decisive role in the Afghanistan theatre . Nor did NATO's

anti-terrorist (Al Qaida) surveillance operations run by NATO (German) navy vessels deployed around Somalia play any decisive role for the course of the Iraq War II. And the present military contributions made, actually, by NATO, in the case of Afghanistan, and led by US Generals largely depends on the dominating US military strategy and capacities, including the German Airforce Tornado reconnaissance aircrafts. The point is that no formal consultation is being made within the European Union's Council though this is a crucial matter of the European Union's " Common Foreign and Security Policy".

In view of the disastrous "security" situation in Iraq, international coalition building , after initial widespread rhetoric of unlimited solidarity, is facing , at present , a crucial period of uncertainties about the further development of the USA foreign and security policy . It is a still open question whether international security policy will build coalitions and sustain multilateralism , whether the world will collectively police international security or not at all .

2. This is the European Union's chance to contribute to influence the further policy making in international security politics, especially to influence the strategies on winning the peace in Afghanistan and in Iraq, and , actually, to influence further the political decision-making on extending anti -terror actions to other potential war theatres , e.g. Iran, by pleading for negotiations on the basis of mutual respect. Taking the lesson from the European "friendly" behaviour of some EU Member States formerly excluding the Union's institutions, the Member States should now properly respect their own legal and political commitment under the Treaty on European Union and consult each other before undertaking any action concerning winning the peace in Afghanistan and Iraq.

The European Union will have to design a comprehensive foreign and security policy including defence policy for common strategies, positions and joint actions that are not limited to military actions only (the whole range of EU's instruments available for contributions to civil recon-struction in Afghanistan and Iraq).

For, what the European Union, beyond purely military contributions made by single EU Member States after consultation within the Council and beyond the Union's joint capacities of Member States' and Union's technical and financial assistance to civil reconstruction, can contribute to international security:

It is a political invaluable know-how: developed since the signing of the Treaty establishing the European Community for Coal and Steel and on larger scale since the signing of the Treaty of Rome, exactly 50 years ago, on March 25, 1957, after the experiences made in World War II , it is the basic and well practiced idea of cooperation: to show countries like the shattered Iraq how to overcome the disastrous situation starting from zero:

- by designing and constructing the cooperation of different nationalities through
- safeguarding the identities of different nationalities and
- establishing a Community, a federation by
- pooling parts of sovereignties and
- jointly exercising them
- to achieve common objectives
- through common institutions and decisions

- according to common rules
- agreed upon on the basis of equality and solidarity.

What the European Union can contribute- in terms of high political added value - is the experience that international security cannot be achieved against each other, but through cooperation only :

The European Union developed common political objectives and instruments to implement a security policy that is including cooperation policies and instruments reaching beyond a mere military oriented approach to international security and covering a variety of political, economic, social, diplomatic and military security policies. The common security policies are implemented by interdependent and complementary cooperation of Union level and Member States' levels :

practicing a combined system of integration and cooperation, thus balancing the needs of national sovereignty and common objectives that can better be achieved by the Community of Member Countries than by single nation state action and better be achieved within a Union created among the peoples of Europe who can identify themselves with the democratic, transparent Union that is close to the citizen and decisive to guarantee the citizens' rights to peace, security and freedom.

Whatever the residuals of national sovereignty just in the field of defence policy are: the Member State is committed to prove solidarity and to consult within the Council before undertaking single nation state action.

General Conclusion

It is this study's method to apply the lesson taken from the dynamically gradual stages in European integration history to the evaluation of current issues challenging the European Union, namely the issue of how to overcome the present deadlock of the Treaty establishing a Constitution for Europe. Improving the European Union's identity by making the enlarged Union work, improving the Union's constitutional essentials - democracy, transparency and decisiveness: whether

- through political intervention by establishing a formal text labelled "Constitution" and, by doing so, thus giving the impression to invest a new order, a static order similar to the static nature of nation state's Constitution, or
- through improving the existing Founding Treaties on European Union and European Community along the traditional line of the dynamic, gradual involvement of the European integration and cooperation-

that's the focal issue of the present study.

The study's method of applying the lesson taken from European integration history is exemplified in chapter IX also, applying the findings to the Union's role played in the field of the Common Foreign and Security Policy focussing on the Union's experience made in the years 2001-2003 after the September 11 attacks and on the current crucial issue of international security and cooperation politics of how to overcome the deadlock in Iraq and the serious prospect of another deadlock in Afghanistan.

This study has undertaken to describe the dynamic nature of the stepwise, gradual development of the European integration through further improving the constitutional quality essentials under the Founding Treaties, namely the principles of democracy, transparency and decisiveness. The European integration has owed its successes to the Monnet method of integration, gradually, dynamically developing the European Community and the European Union as an ever closer Union among the peoples of Europe, but intentionally keeping open the exact final design of the Union, its “finalité”, and just due to this openness facilitating the integration policy. The openness about the Union’s final design helped to avoid the revitalization of, in some Member States, still existing misunderstandings concerning the nature of the European Union, still believing that any federal or quasi federal nature of the European Union would be synonymous with “central state “ or would lead the Union to become a European Superstate.

The Monnet integration method, therefore, also experienced its limits, facing a dilemma of how to continue the successful integration process without giving a clear final design of the European Union. The more the EU enlarged with now twentyseven members, the more the doubts about the Union’s identity, namely its decisiveness, increased, and thus the Union’s need of legitimacy increased requiring broad democratic approval by the European citizens. The European citizens’ broad approval, however, requires the citizens to understand the nature of the European Union. This does not necessarily mean to present a final design of the Union to the citizens.

Surely, a European identity feeling would be difficult to develop and maintain if the citizens are facing an technocrat’s integration method only. Establishing a constitution can be taken as giving an European identity building political impulse. But establishing a Constitution can also be taken as an act of political intervention, it can be misunderstood, in the view of the citizens, as a final design of the European Union.

A final design of the European Union, if undertaken at the wrong time, would risk to raise misunderstandings about what the European Union is. The European identity is still being shaped, still having to sharpen a common conviction of an European Union which is balancing liberal economic market policy and social responsibility and solidarity policy as well to cope with the globalization challenges. The European identity shaping is still ongoing, there does not yet exist a Europeanwide common conviction of the constituting common basic objectives and values concerning the basic correlation between economic liberties and social responsibilities and solidarity. Within the Member Countries of the European Union there is still continuing the dynamic process of creating an ever closer Union among the peoples, and not of the Member States, according to the tradition and to the well established procedures under the Founding Treaties. This identity shaping dynamic process should not severely be damaged by a political intervention in the way of establishing a “constitution” at the wrong time and in the wrong way. Presenting such a legal document formally called “constitution”, would give the impression of establishing a static nature of the European Union, thus confusing the dynamic nature of the European identity which is still “under construction” and successful just due to the openness of the Union’s final design.

The European Union, therefore, should leave the formal issue of how to achieve entire ratification of the Treaty establishing a Constitution for Europe. and should continue

with the still existing essentials of a constitutional quality of the European Union, thus avoiding the misunderstanding potential the term “constitution” still does arise as far as the nature of the European Union is concerned. Improving the essentials of the Union’s constitutional quality and incorporating them in a text should, in any case, avoid labelling any new text with the term “constitution”, and thus following the wisdom of the Founding fathers of the European Community/European Union using a legal and political framework’s openness necessary to gradually unite the peoples of Europe.

The enlargement of the European Union –now the Union of the Twentyseven- had rightly once been conceived that enlargement *b e f o r e* being implemented should be preceded by a fundamental reform of the way in which the EU institutions operate, being democratically accountable, transparent, with a view to both the efficiency and decisiveness of the Union in its various policy fields . A deepening of the European Union, not in the sense of adding new policy powers but of maintaining the Union’s capacity to act effectively, both inwardly and outwardly, close to the European citizen: that had been considered to be necessary, constituting the common consent reached among the Union’s Member States after the Maastricht Treaty on European Union had entered into force and when the Copenhagen summit of the Union’s Heads of State and Government had given perspectives for Central and Eastern European Countries to accede to the Union.

The Member States, however, did not what they had promised: they did not deepen the European Union before enlargement, they were not ready to make the Union more efficient. The Member States had lost their basic momentum: they did not take the chance given by the IGC which had been supposed to make sufficient progress to achieve reforms of the decision-making namely in the Council of the European Union. Nor did the Amsterdam Treaty on European Union, nor did the Nice Treaty on European Union make comprehensive contributions to the needs of the Union’s democratic accountability, transparency and both decisiveness and efficiency.

The Member States even failed to let the Treaty establishing a Constitution for Europe be ratified and thus failing to take the chance of deepening the Union first by strengthening the Union’s democratic accountability and decisiveness before enlarging when the Union became the Union of the Twentyfive on January 1st 2005. Now, the Union being a Union of the Twentyseven, since January 1st, 2007, it is facing the challenge to rescue the essentials of the Treaty on Constitution as outlined above. And it is still not clear how and when the essentials of the Treaty on Constitution can be rescued, whether by a concise amendment to the Treaty on Constitution, but without labelling it “constution” or by amendment to the existing Treaty on EU. Both options have a chance of being accepted by the public in the European Union if the text is concise enough and contains constitutional quality essentials only, by drawing up

- the objectives of the Union (*raison d’Etre*): anchor of stability for the peoples in the Union: to ensure peace, security, respect for human life and dignity
- safeguarding fundamental rights and the rule of law
- basic tasks and instruments
- guided by basic principles : democracy, transparency and decisiveness
- institutions, basic tasks
- procedures subject to implementing European laws(regulations)

throughout a newly run procedure of an Intergovernmental Conference. An Intergovernmental Conference will have to ensure the professional political approach including the respect for democratic accountability of a European Union close to the citizens: ratification procedures will be successful if a European public will be encouraged to accompany the discussions of experts and to realize if and why the citizens of Europe can identify with the European Union- as democratic, transparent and decisive to meet the vital needs of the peoples of Europe.

The following main findings of the study's method of applying the lesson taken from European integration history to the Union's role played in the field of the Common Foreign and Security Policy in the years 2001-2003 after the September 11 attacks and to the current crucial issue of international security and cooperation politics of how to overcome the deadlock in Iraq and the serious prospect of another deadlock in Afghanistan through the European Union's contributions to multilateral actions determined to help winning the peace in Afghanistan and Iraq focussing on civil reconstruction beyond merely military actions.

The European Union may contribute by using the developed common political objectives and instruments to implement a security policy that is including cooperation policies and instruments reaching beyond a mere military oriented approach to international security and covering a variety of political, economic, social, diplomatic and military security policies. The common security policies are implemented by interdependent and complementary cooperation of Union level and Member States' levels :

practicing a combined system of integration and cooperation, thus balancing the needs of national sovereignty and common objectives that can better be achieved by the Community of Member Countries than by single nation state action and better be achieved within a Union created among the peoples of Europe who can identify themselves with the democratic, transparent Union that is close to the citizen and decisive to guarantee the citizens' rights to peace, security and freedom.

Whatever the residuals of national sovereignty just in the field of defence policy are: the Member States are committed to prove solidarity and to consult one another within the Council before undertaking single nation state action, and this legal obligation to consult one another should be reaffirmed and incorporated in a Treaty text containing the above mentioned other essentials of the constitutional quality of the European Union.

Bibliography

Agamben, Giorgio, *Homo Sacer: Sovereign Power and Bare Life*, Stanford University Press, Stanford, California, 1998.

Algieri, Franco (2001): “Die europäische Sicherheits- und Verteidigungspolitik - erweiterter Handlungsspielraum für die GASP”, in: Weidenfeld, Werner (ed.): *Nizza in der Analyse*, Gütersloh: Verlag Bertelsmann Stiftung, pp. 161-201.

Annan, Kofi, “*In Larger Freedom*“, Report of the Secretary-General of the United Nations for Decision by Heads of States and Government in September 2005, United Nations, New York, 2005. identifying the larger freedom as development, security, human rights, all going hand in hand in a world of interconnected threats and challenges:

<http://ochaonline.un.org/DocView.asp?DocID=3803>

Appelbaum, Richard, William Felstiner, & Volkmar Gessner (eds). *Rules and Networks: The Legal Culture of Global Business Transactions*, Oxford: Hart Publishing, 2001. 320pp. ISBN: 1841132950

Arendt, Hannah, «The Decline of the Nation-State and the End of the Rights of Man», cited in Agamben, *Homo Sacer*, p.126

Ashgate, B. Lucarelli. (1999). *The origins and evolution of the single market in Europe*. Burlington, VT: Ashgate Publishing Company.

Axworthy, Lloyd, Foreign Minister, (University of Winnipeg, Manitoba): *A New Scientific Field and Policy Lens*; in: *Security Dialogue* Vol. 35, No. 1, Oslo 2004, pp 62–78.

Balmer, Simon and Geoffrey Edwards, “Foreign and security policy”, in: Simon Balmer, Stephen George and Andrew Scott (eds), *The United Kingdom and EC Membership Evaluated*, London, Pinter, 1992, pp 145-60

Beck, Robert J. & Thomas Ambrosio. *International Law & the Rise of Nations*, London: Chatham House Publishers, 2001. 304pp. ISBN: 188911930X

Bird, Kai and Sherwin, Martin (2001), „, A fair foreign policy is the best defense „,in: International Herald Tribune (IHT) December 13, 2001,p.7

Booth, Ken & Tim Dunne. How Might We Live? Global Ethics in the New Century, Cambridge: Cambridge University Press, 2001. 275pp. ISBN: 0521005205

Borawski, John & Thomas-Durell Young. NATO after 2000: The Future of the Euro-Atlantic Alliance, Westport, CT: Praeger Publishers (Greenwood), 2001. 184pp. ISBN: 0-275-97179-1

Brennkmeijer, Olivier. Internal Security beyond Borders: Public Insecurity in Europe and the New Challenges to State and Society, Bern: Peter Lang, 2001. ISBN: 3906765644

Breuer, Michael, The United States and the European Security Identity, in: Praeger/CSIS The Washington Papers, October 1998, pp.144, ISBN 0-275-96497-3(pb)

Brooks, David: "Why the U.S. can't walk out of Iraq yet".in: The International Herald Tribune, Wednesday November 5, 2003, p.8

Broughton, David, and Steve Marsh, "European Union Security, From Cold War to Terror War", Routledge, London, 2006, 272 pp. Hb: 0-415-34122

Bulletins of the European Union ,texts on Common Foreign and Security Policy and on enlargement, <http://europa.eu.int/abc/doc/off/bull/en/new/relext.htm>

Burgess, Michael, "Federalism and the European Union", London, Routledge, 1989

Caldor, Mary, "The Power of Terror", *Re-ordering the World*, p.21, in: Global Civil Society Yearbook 2002, edited by Marlies Glasius, Mary Caldor and Helmut Anheier, 0199251681, paper, 416 pages Apr 2003, Stock Oxford University Press

Calleo, David P. "Rethinking Europe's Future." Princeton University Press. 2001.

Cameron, Fraser (2004), " The Future of Europe ", Integration and Enlargement, edited by Fraser Cameron, European Policy Centre, Belgium, Routledge, London, February 2004: 184pp: Hb: 0-415-32483-1, Pb: 0-415-32484-X: eB: 0-203-35799-X

Campbell, Kurt M.(2001): "Globalization's First War ?", in: The Washington Quarterly,

Winter 2002, pp. 7 - 14

Centre for European Reform, CER, „Can Britain lead in Europe ?“, London, September 1998

Centre for European Reform. (2003, June 24). The CER guide to the draft EU constitution. *Briefing Notes*. London: Author, pp. 1-6. Also available online at http://europa.eu.int/futurum/documents/other/oth010603_4_en.pdf

Church, Clive, and Phinnemore, David (2005), “Understanding the European Constitution”, Routledge, London, July 2005: 224pp, Hb: 0-415-36339-X: £60.00
Pb: 0-415-36340-3: £19.99

Clark, Wesley K., General (2001). ” Waging Modern War : Bosnia, Kosovo and the Future of Combat”, New York : Public Affairs, 479 pp

Cosgrove-Sacks, Carol. Europe, Diplomacy and Development: New Issues in EU Relations with Developing Countries, London: Palgrave (Macmillan Press), 2001. 320pp. ISBN: 0333920325

Council of the European Union , documents on Common Foreign and Security Policy (CFSP),
<http://ue.eu.int/pesc/default.asp?lang=en>
2376th Council meeting ECOFIN and Justice, Home Affairs and Civil Protection, Oct 16, 2001 ,
statement 364 No. 12831/01;
2372nd Council General Affairs, Brussels, Oct 08-09, 2001, statement 337 –No. 12330/01 on terrorist attacks in the USA and action against the Taliban,
<http://ue.eu.int/newsroom/main.cfm?LANG=1>

Craig, Paul and Gráinne de Búrca (eds), The Evolution of EU Law, Oxford University Press, April 1999

Crossick, Stanley. (2003). The Europe we need. Brussels: The European Policy Centre. Draft Treaty Establishing a Constitution for Europe. (2003, July 18). Retrieved October 7, 2003, from http://european-convention.eu.int/doc_register.asp?lang=EN&Content=DOC

Danspeckgruber, Wolfgang (ed). The Self-Determination of Peoples: Community, Nation, and State in an Interdependent World, Boulder, CO: Lynne Rienner Publishers, 2001. 350pp. ISBN: 1555877680/7931

Davis, Laura & Trumellini, Luisa. (2000, September 2-8). Federalism, nationalism and patriotism. *The Altiero Spinelli Institute for Federalist Studies Seventeenth International Seminar: European Union, federalism and international democracy*. Pavia: The Altiero Spinelli Institute for Federalist Studies. Seminar agenda available online at http://www.federaleurope.org/en/news/prog03en_2.rtf

Delpech, Thérèse (2001): "The Imbalance of Terror", in: *The Washington Quarterly*, Winter 2002, pp. 31 - 40.

Dembart, Lee, "A law-abiding America is safer" in: *International Herald Tribune, IHT*, Jan. 30, 2002, p.8.

Di Fabio, Udo. *Der Verfassungsstaat in der Weltgesellschaft (The State Governed by a Constitution in the Global Society)*, Tübingen: Mohr Siebeck, 2001. 150pp. ISBN: 3-16-147612-3

Donais, Timothy. 2005. "A tale of two towns: human security and the limits of post-war normalization in Bosnia-Herzegovina". *Journal of Southern Europe & the Balkans*. 7, 2005, pp19

Editorial on Facing Terrorist Threats, *The Journal of World Affairs & and New Technology* Vol. 4, No. 4, Quarterly October 2001, ISSN 1098-4216

Edwards, Geoffrey (1997): "The Potential and Limits of CFSP: The Yugoslav Example", in: Regelsberger, Elfriede/de Schoutheete de Tervarent, Philippe/Wessels, Wolfgang (eds.): *Foreign Policy of the European Union. From EPC to CFSP and Beyond*, Lynne Rienner Publishers, London, p. 173-197.

Ehlermann, C.-D. (1998) : Differentiation , Flexibility , Closer Co-operation : The New Provisions of the Amsterdam Treaty (*European Law Journal* 1998, pp 246- 270)

Enlargement of the EU : Fourth European Conference on the Enlargement of the EU: Prerequisites for successful Conclusion of the Accession negotiations, Conference Proceedings : 19-20 February 2001 to be ordered on reference No. 34201 EIPA , European Institute for Public Administration, Maastricht; http://eipa-nl.com/public/public_publications/working-index.htm

Europa: The European Union Online. (n.d.). *The Treaty of the European Union*. Retrieved November 4, 2003, from http://europa.eu.int/eur-lex/en/treaties/dat/eu_cons_treaty_en.pdf

European Commission(2001) : Regular Reports 2001 on enlargement , November 13,2001;
http://europa.eu.int/comm/enlargement/report_11_01/index.htm

European Commission : Regular Reports on enlargement : EXPLAINING ENLARGEMENT
 A PROGRESS REPORT ON THE COMMUNICATION STRATEGY
 FOR ENLARGEMENT,

http://europa.eu.int/comm/enlargement/communication/pdf/explaining_enlargement.pdf

PROGRESS REPORT 13 [MARCH 2003] :

http://europa.eu.int/comm/enlargement/communication/pdf/report_march_2003.pdf

European Council (2001): Conclusions and Plan of Action of the Extraordinary European
 Council Meeting on 21 September 2001, Brussels, SN 140/01.

European Institute for Public Administration, Maastricht (EIPA) (2001) :Enlargement of the
 European Union,

Conference Proceedings : 19-20 February ,2001 ,

http://eipa.nl.com/public/public_publications/working-index.htm

European Institute for Public Administration, Maastricht (EIPA) :Summary of Proceedings,
 Fifth European Conference :Enlargement of the EU: Last Lap or Last Chance?4-5 March
 2002, Maastricht

http://www.eipa.nl/activities/02/34201_14Feb/ConferenceProceedings.htm

Europe's constitutions. (2003, June 21). *The Economist*.

The European Union's constitution: Tidying up or tyranny? (2003, May 21). *The Economist*.

Fitchett,J.(2001) : “War in the Computer Age”,in: International Herald Tribune,IHT,
 Dec.28,2001

Fitchett, J. (2002), report ,, Pentagon in a League of its own”, IHT Febr. 04,2002, pp. 1,3

Fligstein, Neil, Alec Stone Sweet, & Wayne Sandholtz. (2001).

“The Institutionalization of Europe”,Oxford: Oxford University Press, 2001. 400pp. ISBN:
 019924796X

Forster, Anthony/Wallace William (2000): “Common Foreign and Security Policy”, in:

Wallace, Helen/Wallace, William (eds.): *Policy-making in the European Union*, 4th edition,

Oxford: Oxford University Press, pp. 461-492.

Fransen, Frederic J. (2001). *Supranational politics of Jean Monnet: Ideas and origins of the European Community*. Westport, CT: Greenwood Publishing Group.

Friedrich, Carl J., *Constitutional Government and Democracy*, p. 584, quoted in Agamben, *State of Exception*, p. 8.

Friedman, Thomas L. : “ The End of NATO ? Europe had better catch up “,in: *International Herald Tribune*,IHT;Febr.04,2002,p.6 .

Gillingham, John (2006) “Design for a New Europe”University of Missouri, St. Louis,Paperback (ISBN-13: 9780521686648 | ISBN-10: 0521686644)

Gillingham, John. (2003). *European integration 1950-2003: Superstate or new market economy?* New York: Cambridge University Press

Glaser, Charles L. , *Realists as Optimists: Cooperation as Self-Help* ;in *International Security*, Winter 1994/95;vol. 19,no.3 ,pp. 50-90.

Goldstein, Leslie Friedman (2001) : *Constituting Federal Sovereignty: The European Union in Comparative Context* [The Johns Hopkins Series in Constitutional Thought](The Johns Hopkins University Press).ISBN: 0801866634

Grabbe, Heather. *Policy brief: Preparing the EU for 2004*. London: Centre for European Reform.

Groom,A.J.R. and Taylor,Paul(eds), “ Frameworks for International Cooperation”, London,Pinter,1990.

Hallenberg,J., and H.Karlsson (2005), ,, **The Iraq War**“,European Perspectives on Politics, Strategy and Operations. Routledge,London,2005, Hb: 0-415-36293-8, 272 pp.

Henderson, Karen (1998) : *Back to Europe* (Routledge, London, October 1998)ISBN 1857288866 (Eastern enlargement Challenges)

Hill, Christopher, Smith,Karen E. (eds)(2000) : *European Foreign Policy*.(Routledge , London, July 27, (2000) Pb. ISBN 0415158230

Hill,Christopher, (1996)“The Actors in Europe’s Foreign Policy”, Routledge ,London, 1996

Hill, Christopher, 'Shaping a federal foreign policy for Europe', in Brian Hocking (ed), Foreign Relations and Federal States, London, Leister University Press, 1993, Chapter 15, p.275

Hill, Christopher: "The capability – expectation gap", in Journal of Common Market Studies, vol. 31, no.3, September 1993.

Hill, Christopher, "The background: past and Present in British foreign policy", in: Smith, Michael, Steve Smith and Brian White (eds), British Foreign Policy: Tradition, Change and Transformation, London, Unwin Hyman, 1988, pp. 25-49 .

Hill, Christopher, "The political dilemmas for Western governments", in Lawrence Freedman, Christopher Hill, Adam Roberts, R.J. Vincent, Paul Wilkenson and Philip Windsor, "Terrorism and International Order", London, Routledge/Royal Institute of International Affairs, 1986, pp. 77-100.

Hill, Christopher (ed), "National Foreign Policies and European Political Cooperation", London, George Allen and Unwin for RIIA, 1983;

Hough, Peter, "Understanding Global Security", Routledge, London, 2004, 288 pp.

Human Security Report 2005, War and Peace in the 21st Century

Human Security Centre

0195307399 , paper, Nov 2005 Modeled on the UN's Human Development Report, the first Human Security Report providing an annual mapping of the incidence, intensity, causes, and consequences of global violence and policy responses to that violence.

Huntington, Samuel P., "The Clash of Civilizations", München, 1996

Jachtenfuchs, Markus : Democracy and Governance in the European Union, European Integration online Papers (EIoP) Vol. 1 (1997) N° 2; <http://eiop.or.at/eiop/texte/1997-002a.htm>

Joffe , Josef „The future of European security :an Atlanticist perspective ` ,in: Charles L. Barry, The search for Peace in Europe. Perspectives from NATO and Eastern Europe, Washington DC, National Defence University Press, 1993

Kamp, Karl-Heinz, "Ein Spaltpilz für das Atlantische Bündnis? Das deutsch-französische „Eurokorps“", Europa-Archiv, 15-16, 1992, pp. 445-452

Kamp, Karl-Heinz, "The German Bundeswehr in out-of-area operations: to engage or not to engage?", in: The World Today, vol. 49, no. 8/9, August-September 1993.

Karmon, Ely (2001): "The War on Terrorism, Who is the Enemy and What is the Coalition?", The International Policy Institute Counter Terrorism-ICT, October 15, 2001; <http://www.ict.org.il/>

Kasto, Jalil (ed). New International Order and International Law After the Millennium, Hounslow: Jalil Kasto, 2001. ISBN: 0951771361

Kennedy, Paul, "The Realities Behind Diplomacy: Background Influence on British External Policy 1865-1980", London, George Allen and Unwin, 1981

Kissinger, Henry A. (1957): Nuclear Weapons and Foreign Policy, 1957, London: Oxford University Press, pp. 463

Kreiger, Heike (ed). The Kosovo Conflict and International Law: An Analytical Documentation 1974-1999, [Cambridge International Documents Series 11] Cambridge: Cambridge University Press, 2001. 600pp. ISBN: 1-521-80071-4

Kreijen, Gerard & et al. (eds). The Changing Concept of Sovereignty in International Law, Oxford: Oxford University Press, 2001. 600pp. ISBN: 019924538X

The Laeken Declaration. (2001, December 15). Retrieved October 7, 2003, from http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm

Laursen, F., and Vanhoonaeker, S. (eds), The Intergovernmental Conference on Political Union, Maastricht, EIPA, 1991

Lieshout, R. Elgar, Edward. (1999). The struggle for the organization of Europe: the Foundations of the European Union. Edward Elgar Publishing.

Mahncke, Dieter (ed) (2001): "Old Frontiers - New Frontiers: The Challenge of Kosovo and its Implications for the European Union", (Bern: Peter Lang, 2001) ISBN: 3906765679

McAllister, R. (1997). *From EC to EU: An historical and political survey*. London: Routledge.

McCormick, John. (1999). *Understanding the European Union*. New York: St. Martin's Press.

McRae, Rob Hubert Don. *Human Security and the New Diplomacy*, North Carolina: McGill-Queen's University Press, 2001. 304pp. £52.50/Pbk £19.95 ISBN: 077352200X/Pbk 0773522182

Mearsheimer, John, 'Back to the future : instability in Europe after the Cold War', *International Security*, vol. 15, no. 1, Summer 1990, pp. 5-56.

Miller, Steven E. "The End of Unilateralism or Unilateralism Redux ?", in: *The Washington Quarterly*, Winter 2002, pp. 15 - 29.

Monar, Jörg (1997): "The European Union's foreign Affairs System after the Treaty of Amsterdam. A strengthened capacity for external action?", in: *European Foreign Affairs Review*, no. 2, pp. 413-436.

Monitor, German TV report November 29, 2003: USA scientific research institutes were developing genetically manipulated biological weapons aiming at destroying any existing weapons belonging to potential adversaries

Monnet, Jean, Working Papers (2001 : No.1/01 Xénophon A. Yataganas, The Treaty of Nice: The sharing of Power and the Institutional Balance in the European Union-A Continental Perspective ; <http://www.jeanmonnetprogram.org/papers/99/990701.html>;
No.3/01, Xénophon A. Yataganas, Delegation of Regulatory Authority in the European Union The Relevance of the American Model ;

No.6/01, Symposium: The Commission White Paper on Governance:
Scharpf, Fritz W., European Governance: Common Concerns vs. the Challenge of Diversity
Neil Walker, The White Paper in Constitutional Context, RTF Version

Erik O. Eriksen, Governance or Democracy? The White Paper on European Governance.

Philippe Schmitter, What is there to legitimize in the European Union ... And how might this be accomplished?,

Jo Shaw, European Union governance and the question of gender: a critical comment .

Möttöla, Kari, Prospects for Cooperative Security in Europe: The Role of the CSCE; in: Michael R. Licas, *The CSCE in the 1990's : Constructing European Security and Cooperation*; Nomos, Baden/Baden, 1993, pp. 1-29

Nectoux, Francois. (1996). *The politics of European integration after Maastricht*. In Philippe Barbour (Ed), *The European Union handbook*. Chicago: Fitzroy Dearborn Publishers.

Netherlands Institute of International Relations, The Hague:
 “ The Intergovernmental Conference on Political Union, Institutional Reforms,
 New Policies and International Identity of the European Community, Maastricht, European
 Institute of Public Administration, 1992.

Nicolaidis, Kalypso & Robert Howse (eds). *The Federal Vision: Legitimacy and Levels of
 Governance in the US and EU*, Oxford: Oxford University Press, 2001. 400pp. ISBN:
 0199245002

Niskanen, William. (2003, August 14). Comparing the U.S. and EU constitutions.
 Washington, DC: The Cato Institute. Also available online at <http://www.cato.org/dailys/08-14-03.html>

Nolan, J. E., et al., „ The Concept of Cooperative Security „, in J.E. Nolan (ed.), *Global
 Engagement, Cooperation and Security in the 21st Century*“, Brookings, Washington DC, 1994

Nugent, Neill. (1994). *The Government and Politics of the European Union* (3rd ed.). Durham:
 Duke University Press.

Nuttall, Simon J., „European Political Cooperation “, Oxford Clarendon Press, 1992,
 pp. 302-7 on the central place of the UK in EPC activities on terrorism

Oberleitner, Gerd, (2005), “ International Security: A Challenge to International Law?
 “, in: *Global Governance: A Review of Multilateralism and International Institutions*, vol. 11,
 2005, pp. 185-203.

Patten, Chris, European commissioner for external relations, comments on the EU’s
 potential of the common foreign and security policy, : International Herald Tribune,
 IHT, Jan. 02, 2002, p. 8.

Pena, Chales V. , A bigger Military is not the Solution to terrorism”, Cato Institute,
 September 13, 2001, <http://www.cato.org/.../terrorism/pubs/pena.html>

Pentilla, Risto E.J. (Dec. 2001): “ The Concert is back ..., (on the Group of Eight)”, in:
 International Herald Tribune, Dec. 28, 2001

Perry, W., J., Military Action: When to use it and how to ensure its effectiveness , in: J.E.
 Nolan (ed.), *Global Engagement*, pp. 235-241

Pfaff, William : “ In its quest for supremacy, US may squander partnerships “, in: International Herald
 Tribune, IHT Dec. 15-16, 2001, p. 6

Pfaff, William: “ Will the new world order rest solely on American might ?”, in: IHT Dec. 29-30,2001,p.6

Philipps, David L., “ Wanted , a Covenant to define and fight terrorism”, IHT Jan. 4 ,2002, p.6 .

Pijpers, Alfred/Regelsberger, Elfriede/ Wessels, Wolfgang (eds.) (1988): *A common foreign policy for Western Europe? European political cooperation in the 1980s*, Dordrecht: Nijhoff.

Pinder,John (1991), .”The European Community and Eastern Europe”, London,Pinter,1991

Pletsch,Michael(1980),thesis on the EEC’s external treaty-making power demonstrated in the field of international agreements on energy research and technological development cooperation within the International Energy Agency, dissertation Bonn University, 1980:the author had contributed the basic theory to the European Court’s obiter dictum (verdict in the so-called AETR-case) that the EEC has, except explicitly attributed treaty-making powers, additional tacitly attributed, implied powers to conclude international agreements in order to prevent the undermining of the internal legal acquis of the Union through single actions of the Member States outside the Union’s procedures.

Purdy, Jedediah(2001), Fellow of New America Foundation,Washington: " Wir und die anderen" ,in : DIE ZEIT , Nr. 35 , August 23, 2001, p. 3

Quinn, Gerard & Leo Flynn. (2001): “ The EU Charter on Fundamental Rights: Issues and Perspectives”,Oxford: Oxford University Press, 2001. 280pp. ISBN: 0199245401/Pbk 019924667X

Radan, Peter. *The Break-Up of Yugoslavia and International Law* , [Routledge Studies in International Law 2] London: Routledge (Taylor & Francis), 2001. 288pp. ISBN: 0415253527

Regelsberger, Elfriede (2000): „Gemeinsame Außen- und Sicherheitspolitik“, in: Weidenfeld, Werner/Wessels, Wolfgang (eds.): *Jahrbuch der Europäischen Integration 1999/2000*, Bonn: Europa Union Verlag, pp. 233–242.

Regelsberger, Elfriede (2001): „Die Gemeinsame Außen- und Sicherheitspolitik nach ‚Nizza‘ - begrenzter Reformeifer und außervertragliche Dynamik in der ESVP“, in: *integration 2/01*, pp. 156-166.

Regelsberger, Elfriede/Schmalz, Uwe (2001): “The common foreign and security policy of the Amsterdam treaty: towards an improved EU identity on the international scene”, in: Monar, Jörg/Wessels, Wolfgang (eds.): *The European Union after the Treaty of Amsterdam*,

London/New York: Continuum, pp. 249-266.

Richardson, Jeremy (2001): European Union (Routledge, London, June 07, 2001) Pb. ISBN 041522165x (for students comprehensive coverage of how EU policy is made)

Rice, Condoleezza (2000) "Promoting the National Interest - life after the Cold War", Foreign Affairs, January/February 2000, <http://www.foreignaffairs.org/search/document/briefings.asp?i=20000101FAEssay5xML&nb=0>

Ruggie, John G. "Consolidating the European Pillar: Key to NATO'S Future", The Washington Quarterly, Winter 1997.

Salmon, Trevor C. "European Union Structures and Institutions and their Powers." The European Union Handbook. Philippe Barbour, Ed. Fitzroy Dearborn Publishers, 1996.

Schneider, Heinrich, "Europäische Sicherheitsarchitektur-Konzeptionen und Realitäten, Frankfurt/M. and New York, 1996

Schwarze, Jürgen (ed.) (2000): "Die Entstehung einer europäischen Verfassungsordnung", Nomos Verlagsgesellschaft Baden-Baden, 2000, ;
Birkinshaw, Patrick, British Report, in: Schwarze, pp. 205-286;
Garcia de Enterría, Eduardo/Alonso Garcia, Ricardo: Spanish Report, in:
Schwarze, pp. 287-338; Bernitz, Ulf, Swedish Report, in: Schwarze, pp. 389-459.

Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed (a.k.a. the 'Tipton Three'), «Composite statement: Detention in Afghanistan and Guantanamo Bay», paragraph 252. Available at <http://www.cageprisoners.com/articles.php?aid=2741>

Simma, Bruno, (ed), (1994), "The Charter of the United Nations – A Commentary", Oxford 1994, p. 695, no. 44 on the issue of mixing of collective self-defense measures and autonomously undertaken regional measures for the pacific settlement of disputes

Sjostedt, Gunnar: "The External Role of the European Community", Farnborough, Saxon House, 1977, for the definition of actorness (as one of identity shaping essentials)

Sloan, Stanley R., "Collective Security", definition, in: Stanley R. Sloan, J. Michelle Forrest, NATO: What is it?, in: CRS Report for Congress, Congressional Research Service, Washington July 17, 1997, no. 97-708F, pp. 4-6

Solana, Xavier, “ On capabilities for EU access to NATO , a rapid reaction force and a conflict prevention System, in: *"Where does the EU stand on Common Foreign and Security Policy"*, speech at the Forschungsinstitut der Deutschen Gesellschaft für Auswärtige Politik, Berlin, November, 2000.

Spillmann, Kurt R. & Krause, Joachim (eds.) (2001): *Kosovo: Lessons Learned for International Cooperative Security* (Bern: Peter Lang, 2001)

Spillmann, Kurt R. & Andreas Wenger (eds) (2001): *Towards the 21st Century: Trends in Post-Cold War International Security Policy* (Bern: Peter Lang, 2001) ISBN: 3906764311

Terrorism and international security : European Symposium ,, NATO 2010 :A Strategic Vision ,, Transnational Threats to NATO in 2010, February 10-11, 1998, National Defence University , 1998, pp.2 .

The Government of the Netherlands, Ministry of Foreign Affairs, Foreign Affairs Information Department, (1996), Memorandum: “ The Netherlands and Europe. The Intergovernmental Conference 1996”, Den Haag, 1996.

Timmins, Graham; Smith, Martin (eds) (2001) : *Uncertain Europe* (Routledge, London, July 19, (2001), ISBN 0415237351 (enlargement processes of EU and NATO)

van den Bempt, Paul, and Greet Theelen. (1996), “ From Europe Agreements to Accession: The Integration of the Central and Eastern European Countries into the European Union .” Brussels: European Interuniversity Press, Brussels 1996

van Eekelen, Willem, (1998), “ Debating European Security 1948-1998, Center of European Policy Studies (CEPS), Brussels and SDU Publisher, Den Haag, 1998 , on European security and defence policy in the view of the US Government

Vanhamme, Thomas. (2001), *Ambiguity in the Rule of Law: The Interface Between National and International Legal Systems*, Groningen: Europa Law Publishing, 2001. 150pp. ISBN: 9076871051

Verosta ,Stefan (1971): on the term " international security " in the Charter of the United Nations, in: *Internationale Festschrift für Alfred Verdross*, München 1971, pp. 533-547

Vetschera , H., (1982), “ International Law and International Security: The Case of Force Control”, in: Jost Delbrück (ed.), *German Yearbook of International Law*, vol. 24/1981, Berlin, 1982, pp. 144-165 (pp. 151).

Vogel, Heinrich, ,, *Integration and Disintegration : das europäische Dilemma* ,, Europa-Archiv, 15-16, 1992, pp. 433-438

Wade, Robert Hunter: article on the Roman empire like dominant role of the USA in world

economics and world politics, in: *International Herald Tribune*, IHT, Jan. 3, 2002, p. 7

Wandycz, Piotr S. (2001), "The Price of Freedom", Routledge, London, April 19, 2001, ISBN 0415254914 (present day East Central Europe)

Weiler Joseph/Wessels, Wolfgang (1988): "EPC and the challenge of theory", in: Pijpers, Alfred/Regelsberger, Elfriede/Wessels, Wolfgang (eds.): *A common foreign policy for Western Europe? European political cooperation in the 1980s*, Dordrecht: Nijhoff, pp. 229-258.

Wessels, Wolfgang (2002), "Security and Defence of the European Union . The institutional Trends and Perspectives", Contributions to the 6th ECSA conference , December 6th, 2002, Brussels.

WEU, Western European Union, ,, WEU and European Defence beyond Amsterdam", document 1636 WEU Assembly, p.8 (Prime Minister Tony Blair on ,, Diplomacy and a credible threat of force ,, ,in Edinburgh 13 November 1998 .

Wiarda, Howard, J. (Ed.). (2001). *European politics in the age of globalization*. New York: West/Wadsworth Publishing.

Wiener, Antje/Shaw, Jo (2000): *The Paradox of the 'European Polity'*, in: Harvard Law School, Cambridge, Harvard Jean Monnet Working Paper 10/99

Wiener, Antje / Shaw, Jo (2000): on subsidiarity and constitutionalism of the European Community and the issue of assertion of international legal identity of the European Union, in: Harvard Law School Jean Monnet Working Paper 10/99

Wijk, Robert de, "NATO on the Brink of the New Millennium, I," *The Battle for Consensus A. Brasse's Atlantic Commentaries*, London/Washington 1997, I, pp. 2- 18, 53 - 63

Wilson, Gordon, "WEU's operational capability – delusion or reality ?", in: Guido Lenzi (ed.) "WEU at Fifty", Institute for Security Studies, Paris, 1998.

Wind, Marlene (2001) : *Sovereignty and European Integration: Towards a Post-Hobbesian Order*, (Palgrave (Macmillan Press), London , ISBN: 0333678435

World Economic Forum (2002) ,,New York , concerning post-Sept.11 threats and globalization risks, report *International Herald Tribune* (IHT) , Febr. 4, 2002, pp.1, 8

Wyatt, Derrick (Ed.). (2002). *Rudden and Wyatt's EU treaties and legislation*. Cambridge: Oxford University Press.

Young European Federalists. (2003, March 12). *File 1: What Federalism Is*. Retrieved October 29, 2003, from <http://www.jef-europe.net/federalism/archives/000928.html>

Zürn, Michael(1999) on the concept of the nation state's sovereignty ,in: The State in the Post-National Constellation -societal denationalization and multi-level governance, in: ARENA Working Papers WP 99/35

Documents

Treaty establishing a Constitution for Europe

Official Journal of the European Union, 16 December 2004, C 310/01

THE EUROPEAN CONVENTION, THE SECRETARIAT, Brussels, 18 July 2003
CONV 851/03, Report from the Presidency of the Convention to the President of the European Council on a draft Treaty establishing a Constitution for Europe.

***Draft* TREATY ESTABLISHING A CONSTITUTION FOR EUROPE**

Adopted by consensus by the European Convention on 13 June and 10 July 2003

SUBMITTED TO THE PRESIDENT OF THE EUROPEAN COUNCIL IN ROME

— 18 July 2003 — **Official Journal of the European Union, 18 July 2003, C 169/01**

The Future of the European Union. Laeken Declaration of the Heads of State or Government, 15 December 2001, Laeken, Belgium, in:

http://europa.eu.int/constitution/futurum/documents/offtext/doc151201_en.htm

EUROPEAN UNION — CONSOLIDATED VERSIONS OF THE TREATY ON EUROPEAN UNION AND OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY (consolidated text)

Official Journal of the European Union , 29 December 2006, C 321 E/1

Treaty on European Union (consolidated text)

Official Journal of the European Community, 24 December 2002, C 325/05

Treaty establishing the European Community (consolidated text)

Official Journal of the European Community, 24 December 2002, C 325/33

Treaty of Nice , AMENDING THE TREATY ON EUROPEAN UNION,

THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS

Official Journal of the European Communities, 10 March 2001, C 80/01

Amsterdam Treaty on European Union, (Consolidated version 1997)
Official Journal of the European Communities, 10 November 1997, C 340/02

Treaty establishing the European Community (Consolidated version 1997)
Official Journal of the European Communities, 10 November 1997, C 340/03

Maastricht Treaty on European Union (1992),
Official Journal of the European Communities, 29 July 1992, C 191/01

Treaty establishing the European Community (Consolidated version 1992)
Official Journal of the European Communities, 31 August 1992, C 224/01

Treaty establishing the European Economic Community (1957)

Treaty establishing the European Atomic Energy Community (1957)

Treaty establishing the European Coal and Steel Community
 (1951):http://europa.eu.int/eur-lex/lex/en/treaties/treaties_founding.htm

Annual Report of the Council to the European Parliament 1998, <http://ue.eu.int/pesc/>

Annual Report of the Council to the European Parliament 1999, <http://ue.eu.int/pesc/>

Annual Report of the Council to the European Parliament 2000, <http://ue.eu.int/pesc/>

Court of Auditors: “Special Report No 13/ 2001 on the management of the Common Foreign and Security Policy (CFSP), together with the Council’s replies and the Commission’s replies”, *Official Journal of the EC* C338 , 30 November 2001.

European Commission (2002): Communication from the European Commission. A Project for the European Union, 22 May. 2002,
http://europe.eu.int/futurum/documents/offtext/com220502_en.pdf.

European Council (2001): Laeken Declaration – The Future of the European Union,
http://europa.eu.int/futurum /documents/offtext/doc151201_en.htm.

German Constitutional Court 1993 (1995). “Judgement of October 12, 1993”, in: Oppenheimer, Andrew (ed.), *The Relationship between European Community Law and National Law: The Cases*, Cambridge: Cambridge University Press.

Joint Declaration (2001) by the Heads of State and Government of the European Union, the President of the European Parliament, the President of the European commission, and the High Representative for the Common Foreign and Security Policy, Brussels, 14th September 2001.

NATO Press Release (2001)124 , Sept. 12, 2001.on “ Invocation of Article 5 Washing-
 ton Treaty”

NATO Press Release , PR/CP(2001)121 , Sept. 11, 2001: Statement by the Secretary General of NATO, Lord Robertson, Sept. 11, Brussels, NATO

NATO press release on briefing by US Ambassador to NATO Council, Frank Taylor, Oct. 02, 2001, and Supreme Headquarter of the Allied Powers in Europe (SHAPE) News Release, Oct. 10, 2001.

Press and Information Office of the Federal Government (ed.) (1982): "First Report of the Foreign Ministers to the Heads of State and Government of the European Community of 27 October 1970 (Luxembourg Report)", in: *Ibid.*: European Political Cooperation (EPC), Wiesbaden, p. 30.

Press and Information Office of the Federal Government (ed.) (1982): "Second Report of the Foreign Ministers to the Heads of State and Government of the Member states of European Community of 23 July 1973 (Copenhagen Report)", in: *Ibid.*: European Political Cooperation (EPC), Wiesbaden, p. 43.

Verdun, Amy/Croci, Osvaldo (eds.): *Institutional and Policy-making Challenges to the European Union in Wake of Enlargement.* (forthcoming)