LEGAL STRUCTURES OF EUROPEAN SECURITY AND DEFENSE POLICY AND WAR POWERS UNDER THE U.S. CONSTITUTION

by

HEIKO BUESING

(Under the Direction of Milner Ball)

ABSTRACT

The EU is developing new structures for its Security and Defense Policy and tries to achieve a more integrated security and defense policy. Currently, the principle of unanimity controls the conduct of the EU's Common Security and Defense Policy. This is one main reason why the EU is in some cases unable to speak with one voice.

In the U.S., the President and Congress are the main players in the area of war powers. The President is the most important actor in the area of foreign affairs. However, Congress has the power of the purse and the power to declare war. The role of the courts is rather limited.

A good understanding of the respective legal structures of the EU and the U.S. helps the reader to analyze why the U.S. acts in a certain way and why the E.U. may have difficulty to develop a response to a crisis.

INDEX WORDS: EU, Common Security and Defense Policy, Common Foreign and Security Policy, War Powers, President, Congress, Declare War

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HEIKO BUESING

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HEIKO BUESING

Major Professor:	Milner Ball
Committee:	Gabriel Wilner Milner Ball

Electronic Version Approved:

Maureen Grasso
Dean of the Graduate School
The University of Georgia
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CHAPTER

Chapter I

An Introduction to War Powers in the U.S. and Europe

A. The EU and the USA: A Comparison of two International Actors

One of the most important functions of the state is to provide external security for its citizens and to guarantee its own independence and sovereignty.[1] Most states have therefore established armed forces. The United States is currently seen as the sole military superpower in the world, whereas the Member States of the European Union are, due to their size, not yet in a position to compare themselves with U.S. military might.[2] This has led Europeans to the idea of establishing a common defense policy in the future.[3]

However, an actual European defense policy, or an even more ambitious common defense for the continent, likely will not be agreed upon in the immediate future. This thesis is consequently not a real comparative analysis, since the United States is a nation state with an established constitutional framework for the allocation of the military powers among the different branches of government.

The European Union can hardly be considered a nation state. The European Union is something new and its future and destination are uncertain today. Therefore, the discussion of the

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[1] *Cf.* Armin von Bogdandy, *The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty,* 6 COLUM. J. EUR. L. 27, 33 (2000); Gary M. Stern & Morton H. Halperin, *Introduction, in* THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR: HISTORICAL AND CURRENT PERSPECTIVES, 1 (Gary M. Stern & Morton H. Halperin, eds., 1994); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 70-77 (1998).

[2] *Cf.* Mark C. Anderson, *A Tougher Roe to Hoe: The European Union's Ascension as a Global Superpower analyzed through the American Federal Experience,* 29 SYRACUSE J. INT'L L. & COM. 83-86, (2001).

[3] *Cf.* Jeff P.H. Cazeau, *European Security and Defense Policy: European Union vs. United States: European Security and Defense Policy under the Gun,* 10 U. MIAMI INT'L & COMP. L. REV. 51 (2002); Asteris Pliakos, *The Common European Policy on Security and Defense: Some Considerations Relating to Its Constitutional Identity,* 6 COLUM. J. EUR. L. 275 (2000).

respective legal structures of the European Security and Defense Policy shows not a fixed structure, but depicts the process Europeans have developed to cooperate on a closer and closer level. However, a thorough assessment of the respective legal structures regarding war powers and security and defense policy enables the reader to gain a better understanding of the conduct of the United States in international affairs and also explains why the European Union is in some situations unable to react.

B. Defining War

Since the U.S. Constitition mentions the term "war", it is useful to define this notion. When the U.S. Constitution was framed, the term "war" was well understood in public international law.[4] The most important legal text today with respect to the concept of war is the Charter of the United Nations[5] which interestingly refrains from using the term "war" but instead prohibits the "use or threat of force".[6]

Article 2, sec. 4 of the U.N. Charter provides explicity: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

Conflicts which are not seen as "real" full scale wars are therefore also encompassed by the prohibition of the use of force. So-called measures short of war fall under Article 2, sec. 4 of the U.N. Charter, since "force" means in each case every use of military force, be it small or large.[7] It can be concluded that international law does not distinguish between "real" large scale

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[4] LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION, 98 (2nd ed. 1996).
[5] Charter of the United Nations, June 26, 1945, 59 Stat. 1031.
[6] HENKIN, *supra* note 4, at 98; KNUT IPSEN, VOELKERRECHT, 935-36, (4th ed. 1999).
[7] IPSEN, *supra* note 6, at 936.

wars and military actions of a less devastating degree, whereas the U.S. Constitution refers to "war" and may be interpreted as distinguishing between military involvements based on the extent of the military activities.[8]

[8] *Cf.* HENKIN, *supra* note 4, at 98-99.

Chapter II

European Defense and Security Policy: A Legal Analysis of Past, Present and Future Structures

After the end of World War II, Western Europe was economically, politically and morally exhausted. Winston Churchill in his famous Zurich speech on September 19, 1946, made it clear that a unification of Western Europe would be in the best interest of western European nations, in order to promote their economic and political status. He therefore proposed the foundation of a United States of Europe, with a strongly build cooperation between the two old enemies France and Germany at its center.[9] In the following decades, western Europeans were able to integrate their economies successfully by means of the Treaty Establishing the European Economic Community (EEC) and the Treaties Establishing the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (Euratom).[10] In the economic field, western Europeans were successful in establishing a concept of supranationality, thereby showing a willingness to abandon sovereignty in this area. In contrast with these developments, it was and still is extremely difficult for European states to pursue a Common Foreign and Security Policy.[11] Although some progress has been made in the area of foreign policy, it was and is still the greatest challenge for Europeans to agree on a common defense policy.[12] The reluctance of the EU Member States in this area is easily conceivable, since defense policy lies at

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[9] *See* P.J.G. KAPTEYN & P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES, 2-3, (Laurence W. Gormley ed.,3rd ed. 1998); THOMAS OPPERMANN, EUROPARECHT, 8-9 (2nd ed. 1999).

[10] *See* DERRICK WYATT & ALAN DASHWOOD, EUROPEAN COMMUNITY LAW, 3-8 (3rd ed. 1993).

[11] *See* ROY H. GINSBERG, THE EUROPEAN UNION IN INTERNATIONAL POLITICS: BAPTISM BY FIRE, 1-10 (2001); OPPERMANN, *supra* note 9, at 10-27.

the heart of national sovereignty.[13] Despite all the obstacles facing a Common Foreign and Security Policy and in particular facing a Common Defense Policy, the notion of further "European progress" in this important area has been on the political agenda of Europeans for a long time - sometimes more hidden, sometimes more prominent. Ideas of a Common European Security Policy may have their historic background and inspiration in ancient and medieval times, so that in this context, the Roman Empire and the Franconian Empire, created by Charlesmagne, are mentioned; furthermore, some historians also mention the Napoleon conquest as politically relevant to the current political process in the EU which aims at developing a real Common Security Policy.[14] Since World War II, European states have developed different kinds of cooperation with respect to the area of security and defense policy.

A. Defense Cooperation in Response to the German Aggression (1940-1949)

On June 16, 1940, the British Prime Minister Winston Churchill offered the creation of a Franco-British union as a response to the German invasion of France.[15] Churchill's idea contained the establishment of common institutions regarding foreign and defense policy, as well as economic and finance policy.[16] Most interestingly, Churchill also proposed a single war cabinet for the time of the war, which was supposed to lead the respective armies of the two countries.[17] France, however, never accepted this proposal; it has to be emphasized that, at the

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[12] *See* Donato F. Navarrete & Rosa Maria F. Egea, *The Common Foreign and Security Policy of the European Union: A Historical Perspective,* 7 COLUM. J. EUR. L. 41, 42 (2001).
[13] *See* Elizabeth Shaver Duquette, *The European Union's Common Foreign and Security Policy: Emerging from the U.S. Shadow?,* 7 U.C. DAVIS J. INT'L L. & POL'Y 169, 170 (2001).
[14] THE ECONOMIST, January 3rd –9th 2004, Special Report European Unity: The History of an Idea, at 20-22.
[15] Navarrete & Egea, *supra* note 12, at 42.
[16] *Id.*
[17] *Id.*

time of Churchill's proposal, the President of the French Council of Ministers, Paul Reynaud, resigned and was succeeded by Philippe Petain, who established the infamous Vichy regime.[18]

Two years after the war, on March 4, 1947, France and the United Kingdom concluded the Treaty of Alliance and Mutual Assistance[19] in Dunkirk, which inter alia provided for defense cooperation in the case of a German attack.[20] In 1948, the United Kingdom, France, Belgium, the Netherlands, and Luxembourg signed, upon a proposal made by British Foreign Secretary Ernest Bevin, the Treaty of Brussels[21], which inter alia established a defense agreement, which was not only directed against Germany, but also against the Soviet Union.[22] After the accession of West Germany and Italy, the Treaty of Brussels was changed from an anti-German pact into a west European treaty of collective security, which established the Western European Union (WEU).[23]

B. NATO[24] as the Guarantor of Western Europe's Security

1. Introduction to the NATO Treaty

On April 4, 1949, NATO was founded in Washington.[25] The original goal of NATO was quite interestingly described as "keeping the Americans in, the Russians out and the Germans down".[26] The founding members of NATO were Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom, and the United

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[18] *See id.* at 42-43.
[19] Treaty of Alliance and Mutual Assistance, Mar. 4, 1947, Fr.-U.K., 9 U.N.T.S. 187.
[20] Cheryl Swack, *Building a Bridge for Defense: The European Union's Common Foreign and Security Policy,* 6 YEARBOOK OF INT'L LAW 1, 6 (1997/1998).
[21] Treaty of Brussels, Mar. 17, 1948, Fr.-U.K.-Belg.-Neth.-Lux., 19 U.N.T.S. 51.
[22] Swack, *supra* note 20, at 6-7.
[23] OPPERMANN, *supra* note 9, at 900.
[24] North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 (hereinafter NATO Treaty).
[25] Swack, *supra* note 20, at 9-10.
[26] Gernot Erler, *Germany's Role in the Post-Cold War World,* 1 UCLA J. INT'L L. & FOR. AFF. 1, 3 (1996).

States.[27] In 1952, Turkey and Greece became NATO members.[28] In 1955, the Federal Republic of Germany was also admitted to NATO.[29] In 1982, Spain, and in 1999, the Czech Republic, Hungary and Poland, became NATO members.[30] It is expected that in May 2004, Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia and Slovenia will become NATO members.[31]

NATO was founded in order to encounter the threat posed by the Soviet Union on Western Europe and it is still the main contributor to security in Western Europe.[32] The NATO treaty is a collective defense agreement, which becomes clear when looking at the most crucial provision of Article V, which provides that "an armed attack against one or more of them in Europe or North America shall be considered an attack against them all".[33] In the case of an attack, the NATO members have agreed to assist the attacked party.[34] Article V of the NATO Treaty describes this kind of assistance as an "exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations".

The NATO treaty affirms in its preamble that the alliance recognizes the principles of the UN Charter.[35] NATO is not considered a regional organization in the sense of Chapter VII of the UN Charter, but a collective self-defense organization.[36] NATO invoked Article V only once in its entire history: this was after the Sept. 11, 2001, attacks on the World Trade Center.[37]

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[27] Michael M. Gallagher, Comment*: Declaring Victory and Getting Out of Europe: Why the North Atlantic Treaty Organization Should Disband,* 25 HOUS. J. INT'L L 341, 345 (2003).
[28] *Id.* at 346
[29] OPPERMANN, *supra* note 9, at 900.
[30] NATO Handbook, Chapter 1: What is NATO? The Origins of the Alliance, *at* http://www.nato.int/docu/handbook/2001/hb0101.htm. (last visited Mar. 2, 2004).
[31] NATO Issues, Nato Enlargement, *at* http://www.nato.int/issues/enlargement/index.htm (last visited Mar. 2, 2004)
[32] *See* Swack, *supra* note 20, at 14; Gallagher, *supra* note 26, at 344-346; Francis A. Gabor, *NATO's New Paradigm for European Security: International Legal Issues in Ethnic Self-Determination,* 26 SUFFOLK TRANSNAT'L L.REV. 39, 41 (2002).
[33] Gabor, *supra* note 32, at 41-42.
[34] NATO Treaty, *supra* note 24, art. 5.
[35] *See* Gabor, *supra* note 32, at 42.
[36] *Id.*

2. European Security and Defense Identity within NATO

Within NATO, the development of a European Security and Defense Identity becomes increasingly important. The Heads of State and Government of the NATO member countries in Washington in 1999 discussed, how to provide for means of consultation and cooperation between the EU and the NATO institutions, thereby using the already created mechanisms between NATO and the WEU; moreover, they addressed possibilities for EU access to NATO military capabilities and planning structures.[38]

Furthermore, the material improvement of the military capabilities of the European member states of NATO is of crucial importance, since Europeans want to be more responsible for their own security and depend less on the capabilities of the United States.[39]

The further development of a European Security and Defense Identity within NATO is of equal importance for both NATO and the EU, which tries to establish a Common Foreign and Security Policy that encompasses the idea of a possible framing of a common defense policy.[40]

In 2000, it was possible for NATO and the EU Council Secretariat to conclude an interim security agreement, which provided for rules addressing the mutual use of classified data.[41] On March 14, 2003, a final NATO-EU Security of Information Agreement was signed in Athens, which governs the exchange of classified information.[42] The EU-NATO Declaration on European Security and Defense Policy on December 16, 2002, serves as the basic legal document for the established cooperation between the two organizations. It provides inter alia for

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[37] EILEEN DENZA, THE INTERGOVERNMENTAL PILLARS OF THE EUROPEAN UNION; at 342 (2002).
[38] NATO Handbook, Chapter 4: The European Security and Defense Identity. Evolution of the ESDI, *at* http://www.nato.int/docu/handbook/2001/hb0401.htm (last visited Mar. 2, 2004).
[39] *See id.*
[40] *See id.*
[41] NATO Handbook, Chapter 4: The European Security and Defense Identity: NATO-EU Relations, *at* http://www.nato.int/docu/handbook/2001/hb0403.htm (last visited Mar. 2, 2004).
[42] NATO Press Release (2003) 022, 14 Mar. 2003: NATO-EU security of information agreement signed today, *at* http://www. nato.int/docu/pr/2003/p03-022e.htm. (last visited Mar. 2, 2004).

"effective mutual consultation, dialogue, cooperation and transparency", reaffirms the importance of the UN Charter, and most importantly states that NATO is enabling the EU access to its planning capabilities.[43]

C. The European Defense Community

The then French Defense Minister, Rene Pleven, made the proposal to create a European army on October 24, 1950, in the French National Assembly.[44] This so-called Pleven Plan was seen as the French reaction to the American idea to bring the Federal Republic of Germany into NATO.[45] The French position was described as an attempt to gain control over the German army, which would have been much more difficult solely within the structures of NATO.[46]

The European Defense Community Treaty (EDC) was signed on May 27, 1952, by France, the Federal Republic of Germany, Italy, the Netherlands, Belgium and Luxembourg.[47] All parties to the treaty except France were able to secure the ratification by their respective national parliaments.[48] In fact, the French National Assembly decided "to adjourn the debate on the acceptance of the EDC Treaty sine die".[49]

Among the reasons for the French refusal to ratify the treaty were: concerns about large American influence on the EDC; a reduction of the importance of the French arms industry; a reduction of French sovereignty; and problems in connection with France's continued ambition to create an empire and secure its colonial rule in Southeast Asia and Africa. Moreover, without

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[43] NATO Press Release (2002) 142, 16 Dec. 2002: EU-NATO Declaration on ESDP, *at* http://www.nato.int/docu/pr/2002/p02-142e.htm. (last visited Mar. 2, 2004).
[44] KAPTEYN &VERLOREN VAN THEMAAT, *supra* note 9, at 9; Navarrete & Egea, *supra* note 12, at 45.
[45] KAPTEYN &VERLOREN VAN THEMAAT, *supra* note 9, at 10.
[46] Navarrete & Egea, *supra* note 12, at 45.
[47] KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 9, at 10.
[48] Navarrete & Egea, *supra* note 12, at 45; KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 9, at 10-12.
[49] KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 9, at 12.

participation of the United Kingdom, it was seen as quite difficult by the French to control the West German army.[50]

The EDC treaty created a common defense agreement and provided for the establishment of a European army, which would have been commanded by a European defense commissioner.[51] The most crucial feature of the EDC treaty was the principal abolishment of national armies, while establishing a European army that would have included contingents from the Member States.[52]

After the failure of the EDC, Europeans concentrated in the following years on economic integration and left aside the idea of political cooperation in the fields of foreign and security policy.[53]

D. European Political Cooperation (EPC)

In 1970, the then six Member States[54] of the European Economic Community (EEC) adopted the Luxembourg Report and created the concept of European Political Cooperation (EPC). The European Political Cooperation established a consultation mechanism outside the legal structures of the Community for the EEC Member States for questions of foreign policy.[55] The process of European Political Cooperation was of an intergovernmental nature and was conducted outside the structures of the European Economic Community.[56] In some cases it was possible to establish common positions on foreign policy issues and common views at

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[50] *See* Navarrete & Egea, *supra* note 12, at 45-46.
[51] *Id.* at 45.
[52] *See id.* at 46.
[53] *See* Sergio Baches Opi & Ryan Floyd, *A Shaky Pillar of Global Stability: The Evolution of the European Union's Common Foreign and Security Policy,* 9 COLUM. J. EUR. L. 299, 302 (2003).
[54] In 1970, these were France, Germany, Italy, the Netherlands, Belgium and Luxembourg, *see* KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 9, at 17-21.
[55] *See* Duquette, *supra* note 13, at 171; Navarrete & Egea, *supra* note 12, at 49; Opi & Floyd, *supra* note 53, at 302-03.

international conferences. In certain situations, the Europeans were able to agree upon common actions.[57] The main goal of the concept of European Political Cooperation was to promote the position of the European countries in international politics.[58] In 1974, the Member States set up the European Council[59], thereby providing for an institutionalized relationship between the political, and especially, the foreign policy sphere on the one hand, and the community block on the other hand, which was dealing with economic integration.[60]

E. The Single European Act[61] (SEA)

The Single European Act (SEA), which was agreed upon in 1986 and entered into force in 1987[62], provided a legal basis for the European Political Cooperation in its Title III, which was consequently denoted "Treaty Provisions on European Co-Operation in the Sphere of Foreign Policy".[63] The SEA therefore established a "formalized link" between the foreign policy area and the system of the three communities, which dealt with economic integration in Western Europe.[64]

Article 2 of the SEA provided that the European Council consists of the Heads of State and Government of the Member States and the President of the Commision of the European Communities. The goal to make "concrete progress towards European unity" was set forth in Article 1 of the SEA for the European Communities and the European Political Co-operation.

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[56] Duquette, *supra* note 13, at 171.
[57] *See id.* at 171.
[58] *Id.*
[59] The European Council consists of the Heads of State and Government of the EEC countries and the President of th European Commission; they are supported by their respective Foreign Ministers and another Member of the Commission, *see* KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 9, at 183.
[60] Opi & Floyd, *supra* note 53, at 303.
[61] Single European Act, Jun. 29, 1987, O.J. (L 169) 1 (1987) (hereinafter SEA).
[62] Navarrete & Egea, *supra* note 12, at 50.
[63] SEA, title III.
[64] Opi & Floyd, *supra* note 48, at 303.

Article 30 (1) of the SEA states that the Member States of the European Communities agreed upon to „endeavour jointly to formulate and implement a European foreign policy“. The Member States with this provision established the possibility of consultations and information exchanges regarding foreign policy within the framework of European Political Cooperation.[65] The Contracting Parties agreed to do the utmost to avoid actions which would jeopardize them being an effective, united force in international politics.[66]

Article 30 of the SEA does not contain explicit provisions on a European defense policy, but nevertheless addresses the issue of European security in paragraph (6), which reads as follows:

“(a) The High Contracting Parties consider that closer co-operation on questions of European security would contribute in an essential way to the development of a European identity in external policy matters. They are ready to co-ordinate their positions more closely on the political and economic aspects of security.

(b) The High Contracting Parties are determined to maintain the technological and industrial conditions necessary for their security. They shall work to that end both at national level and, where appropriate, within the framework of the competent institutions and bodies.

(c) Nothing in this Title shall impede closer cooperation in the field of security between certain of the High Contracting Parties within the framework of the Western European Union or the Atlantic Alliance.”

This particular provision demonstrates that the states recognized the need for closer cooperation in the area of security policy and the possibility of enhanced coordination of positions. However, this provision does not establish concrete concepts of integration with

[65] SEA art. 30 (2) (a) (b).
[66] SEA art. 30 (2) (d).

respect to the conduct of foreign policy in general. From a practical point of view, the obligations entered into by the Member States through the SEA were described as quite weak.[67] Title III of the SEA, which referred to foreign policy issues, was totally characterized by the intergovernmental structure, which always required unanimity.[68]

In fact, the Member States very seldom recurred to foreign and security policy issues under SEA art. 30.[69] However, significantly, Europeans now had a legal document which for the first time in the history of the integration project made a reference to the possibility of common endeavours with respect to security matters.[70]

It has to be stressed that the Member States used "a rather firmer voice" with respect to their determination to keep the military technology and respective industry for Western Europe's security.[71] Article 30 (6) (c) of the SEA brings in a reference to closer cooperation among some Member States, thereby reflecting a realistic approach in this crucial area.[72]

Although the SEA exluded the area of defense,[73] this treaty contained some provisions as to security policy in a more general sense. Based on a retrospective view from the year 2004, the SEA was the first step towards the establishment of a Common Foreign and Security Policy in the EU, which now is on its way to eventually create even a common defense policy.

F. The Treaty of Maastricht[74]

The Treaty on European Union (TEU hereinafter) was signed on February 7, 1992 in the Dutch city of Maastricht and went into force on November 1, 1993.[75] The TEU established a

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[67] Duquette, *supra* note 13, at 172.
[68] *Id.* at 172; Opi & Floyd, *supra* note 53, at 303.
[69] OPPERMANN, *supra* note 9, at 904.
[70] DENZA, *supra* note 37, at 345.
[71] *Id.* at 345.
[72] *Id.*
[73] Navarrete & Egea, *supra* note 12, at 51.

three-pillar system consisting of the three European Communities, the intergovernmental area of the Common Foreign and Security Policy and the cooperation in the fields of justice and home affairs.[76]

Title V of the TEU contained almost all important provisions with respect to the Common Foreign and Security Policy. Art. J of the TEU (as in effect 1993) (repealed by the Treaty of Amsterdam) stated that "(a) common foreign and security policy is hereby established", thereby distinguishing the Maastricht approach from the SEA, which only provided that the establishment of a common foreign policy was a goal for the Member States.[77]

The provisions of title V are procedural in nature, because the substance of the Common Foreign and Security Policy has to be created by referring to the procedural framework of the TEU in this area.[78] However, the new provisons definitively can be seen as an important improvement compared to the SEA.[79]

1. General Provisions regarding the Common Foreign and Security Policy

a) General Goals

One of the aims of the EU is "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 defense policy, which might in time lead to a common defense."[80]

The goals of the Common Foreign and Security Policy are to protect „the common values, fundamental interests and independence of the Union", to promote the security of the Union and

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[74] Treaty on European Union, Jul. 29, 1992, O.J. (C 191) 1 (1992).
[75] Navarrete & Egea, *supra* note 12, at 52; Opi & Floyd, *supra* note 53, at 307.
[76] Daniel T. Murphy, *The European Union's Common Foreign and Security Policy: It is Not Far From Maastricht to Amsterdam,* 31 VAND. J. TRANSNAT'L L. 871, 874 (1998).
[77] *Id.* at 877.
[78] KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 9, at 55.
[79] *Id.*

the Member States, to keep peace and promote international security, thereby respecting the UN Charter, the principles laid down by the Helsinki Final Act and the goals of the Paris Charter, to support international cooperation, and to promote democracy and the rule of law, and to enhance human rights and fundamental freedoms.[81]

b) Obligations of the EU Member States

The Member States are expected to support the EU's foreign and security policy and avoid any action which hampers the interests of the EU.[82] Member States shall establish a process of mutual information and consultation within the Council regarding foreign and security policy.[83]

Moreover, the TEU addresses the specific situation of the French Republic and the United Kingdom as permanent members[84] of the UN Security Council: These two countries have the duty to inform the other EU countries and to promote the interests of the EU within the Security Council.[85]

c) Competences of the European Institutions

The EU and the Member States shall define a Common Foreign and Security Policy and act accordingly.[86] The importance of the Member States becomes apparent when reading this particular provision, since the EU is not responsible for defining the Common Foreign and Security Policy alone, but only in conjunction with the Member States.

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[80] TEU art. B (as in effect 1993) (now art. 2).
[81] TEU art. J.1 (2) (as in effect 1993) (now art. 11 (1)).
[82] TEU art. J.1 (4) (as in effect 1993) (now art. 11 (2)).
[83] TEU art. J.2 (1) (as in effect 1993) (now art. 16).
[84] U.N. Charter art. 23 (1).
[85] TEU art. J.5 (4) (as in effect 1993) (now art. 19 (2)).
[86] TEU art. J.1 (1) (as in effect 1993) (now art. 11 (1)).

The European Council is responsible for defining the general guidelines of the Common Foreign and Security Policy.[87] Based on theses previously adopted general guidelines, the Council has to decide upon the further means to define and implement the policy goals, thereby generally using the principle of unanimity.[88]

The Presidency of the Council was entrusted with the task of representing the EU in foreign and security policy affairs.[89] The Presidency is required to consult the European Parliament with respect to the main aspects of the foreign policy.[90] Moreover, the Presidency has to consider the positions taken by the European Parliament and inform the directly elected body, which in addition has the right to ask questions of the Council.[91] By explicitly granting Parliament the right to ask questions, the TEU codifies the existing practice.[92]

Finally, there shall be an annuall debate in the Parliament on the Common Foreign and Security Policy.[93] The European Parliament has one specific power with respect to "operational expenditures" of the Common Foreign and Security Policy: The Council has the competence to decide unanimously that the "purse" of the European Communities shall be charged with the expenses for a operation in the area of foreign and security policy.[94] However, if the Council decides so, the ordinary procedure of the Treaty Establishing the European Community is applicable.[95] In fact this means that the European Parliament has to approve such expenses, because the Parliament has the power to decide upon "non-compulsory funds".[96] It can be

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87 TEU art. J.8 (1) (as in effect 1993) (now art. 13 (1)).
88 TEU art. J.8 (2) (as in effect 1993) (now art. 13 (3)).
89 TEU art. J.5 (1) (as in effect 1993) (now art. 18 (1)).
90 TEU art. J.7 (as in effect 1993) (now art. 21)).
91 *Id.*
92 KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 9, at 59.
93 TEU art. J.7 (as in effect 1993) (now art. 21)).
94 TEU art. J.11 (2) (as in effect 1993) (now art. 28)).
95 *Id.*
96 Murphy, *supra* note 76, at 887-88; Opi & Floyd, *supra* note 53, at 308.

concluded that the position of the European Parliament is much weaker in the area of the Common Foreign and Security Policy, compared to the three European Communities.[97]

It is important to emphasize that the jurisdiction of the European Court of Justice is exempted in the area of the Common Foreign and Security Policy.[98] Since there is no judicial way to force a Member State to comply with specific obligations in the foreign policy area, there is a possible credibility gap with respect to the Common Foreign and Security Policy.[99]

d) Legal Instruments

The Maastricht Treaty established the three instruments of "systematic cooperation", "common position", and "joint action".[100] The concept of systematic cooperation means that the Member States are obligated to consult each other and provide information with respect to foreign policy issues.[101] The Council has to define common positions[102], thereby acting unanimously.[103] Common positions can be described as stating the Member States' position with respect to a certain foreign policy issue and often make sure that U.N. Security Council resolutions are complied with.[104] So-called joint actions are decided upon by the Council based on the more general guidelines provided by the European Council.[105] A joint action can be defined as "a specific action or activity undertaken by the Union in response to a foreign policy concern".[106]

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[97] KAPTEYN &VERLOREN VAN THEMAAT, *supra* note 9, at 59.
[98] TEU art. L (as in effect 1993) (now art. 46); c*f.* Opi & Floyd, *supra* note 53, at 311-12.
[99] Opi & Floyd, *supra* note 53, at 312.
[100] Murphy, *supra* note 76, at 878-881; KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 9, at 55-58.
[101] TEU arts. J.1 (3), J.2 (1) (as in effect 1993) (now arts. 12, 16,19)).
[102] TEU art. J.2 (2) (as in effect 1993) (now art. 15)).
[103] TEU art. J.8 (2) (as in effect 1993) (now art. 23).
[104] Opi & Floyd, *supra* note 53, at 312-3.
[105] TEU art. J.3 (1) (as in effect 1993) (now arts. 13 (1), 14 (1)).

2. Defense and Security Policy under the Treaty of Maastricht

The Common Foreign and Security Policy has to "include all questions related to the security of the Union, including the eventual framing of a common defense policy, which might in time lead to a common defense."[107]

It is important to distinguish between the terms "common defense policy" and "common defense": The former refers to a policy mechanism which would coordinate the individual defense policies of the Member States, whereas the latter denotes the possible concept of an integrated "European army".[108] A majority vote as to joint actions in this crucial area, which affects the core of national sovereignty, is not possible under the Treaty of Maaastricht, thereby emphasizing the principle of unanimity.[109]

The TEU established a link between the EU and the Western European Union: It provides that the EU may request the WEU to implement decisons with defense implications. The WEU is described as "an integral part of the development of the Union".[110] These provisions have to be seen before the background of the idea that the WEU may become the "European pillar" of NATO and the military wing of the EU at the same time.[111]

The security and defense policy of the EU is probably seen as subordinate to NATO, because the EU security policy "shall respect" the NATO obligations of some of the EU Member States.[112]

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[106] Murphy, *supra* note 76, at 880.
[107] TEU art. J.4 (1) (as in effect 1993) (now art. 17 (1)).
[108] Opi & Floyd, *supra* note 53, at 316.
[109] TEU arts. J.4 (3), J.3 (as in effect 1993) (now art. 23 (2)).
[110] TEU art. J.4 (2) (as in effect 1993) (repealed by the Treaty of Nice).
[111] *Cf.* Swack, *supra* note 20, at 28-29.
[112] TEU art. J.4 (4) (as in effect 1993) (now art. 17 (1)).

Bilateral defense cooperation between EU Member States in the NATO or WEU framework is compatible with the TEU as long as this process does not hamper the EU's Common Foreign and Security Policy.[113]

3. The Political Situation in the early 1990s with respect to Security Policy Issues

When referring to the EU's foreign and security policy, it is important to note that the EU Member States Austria, Finland, Ireland and Sweden are pursuing a policy of neutrality.[114] During the war in Bosnia-Herzegovina, the EU was not able to act decisively. As a consequence of this failure, the three European middle powers of France, Germany and the United Kingdom, together with the United States and Russia, took over so that as early as 1994 the EU was irrelevant. The five mentioned countries were known as the Contact Group, which tried to solve the crisis in former Yugoslavia.[115] The Bosnian Serbs aggression was finally stopped by NATO and essentially by the USA.[116]

In the early 1990s it had become clear that there was no longer the danger of a Soviet or Russian attack on Western Europe.[117] The main threat to international security was caused by so-called failing states and ethnic conflicts.[118] Such conflicts require a military approach, which is completely different from that relied on during the Cold War.[119] Therefore, the WEU Foreign and Defense Ministers acknowledged in the Petersberg Declaration in 1992 the importance of humanitarian and rescue tasks and the concepts of peacekeeping and peacemaking.[120] The WEU was consequently given access to the capabilities of the Franco-German Corps, which later

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[113] TEU art. J.4 (5) (as in effect 1993) (now art. 17 (4)).
[114] DENZA, *supra* note 37, at 342.
[115] *See* GINSBERG, *supra* note 11, at 57-104; Opi & Floyd, *supra* note 53, at 317-18.
[116] Opi & Floyd, *supra* note 53, at 317-18.
[117] DENZA, *supra* note 37, at 346.
[118] *Id.*
[119] *Id.*

developed into the Eurocorps.[121] The WEU was involved in the crisis in former Yugoslavia, because a WEU naval unit supervised the U.N. sanctions against Serbia.[122]

G. The Treaty of Amsterdam[123]

The Treaty of Amsterdam was signed on October, 2, 1997.[124] It went into force on May 1, 1999.[125] This treaty changed several provisions of the Treaty on European Union and of the European Communities treaties.[126]

1. Important General Provisions as to the Common Foreign and Security Policy

The Treaty of Amsterdam established the office of the High Representative for the Common Foreign and Security Policy.[127] Currently Javier Solana is the incumbent.[128] It is the duty of the High Representative to assist the Presidency and the Council in areas concerning the Common Foreign and Security Policy.[129] In particular, the High Representative must help develop and implement policy decisions and represent the Council while communicating with non-EU states.[130] The establishment of the High Representative has been decscribed as strenghtening the EU's operational capacity.[131] Furthermore, the High Represenative chairs a "Policy Planning and Early Warning Unit" which relies on personal ressources from the Member

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120 *Id.*
121 *Id.*
122 *Id.*
123 Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997 O.J. (C340) 1 (1997).
124 Philippe Manin, *The Treaty of Amsterdam,* 4 COLUM. J. EUR. L. 1 (1998).
125 EUR-lex, EU law definitions, *at* http:// europa.eu.int/eur-lex/en/about/pap/process_and_players2.html#1 (last visited Feb. 29, 2004).
126 *Id.*
127 TEU arts. 18 (3) and 26 (as in effect 1999)
128 High Representative for the Common Foreign and Security Policy, *at* http://ue.eu.int/solana/index.asp (last visited Mar. 4, 2004).
129 TEU arts. 18 (3) and 26 (as in effect 1999).
130 TEU art. 26 (as in effect 1999).

States, the General Secretariat, the Commission, and the WEU.[132] There are strong hopes that the new High Representative will enhance the visibility of the EU in foreign affairs.[133]

There is a new instrument in the area of foreign policy: the so-called common strategy.[134] The Presidency is required to "consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy".[135] Moreover, the Presidency has to consider the positions held by the European Parliament and inform it of the implemented foreign policy.[136] The Parliament still has the right to ask the Council questions regarding the Common Foreign and Security Policy.[137] Article 21 of the TEU in so far only repeats the provisions of Art. J.7 of the Maastricht Treaty.

Article 23 of the TEU (as in effect 1999) deals with the voting process and allows the Council to act by qualified majority when it adopts joint actions, common positions or another decision, provided they are based on a common strategy[138], which themselves are adopted by unanimity by the European Council.[139] This majority rule also applies to the adoption of a decision which itself implements joint actions or common positions.[140] Article 23 (1) of the TEU (as in neffect 1999) deals with abstentions and qualified abstentions, the latter being a possible way for a Member State to avoid being bound by a decision, which otherwise does bind the remaining Member States.

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131 Manin, *supra* note 124, at 16.
132 *Id.*; Giorgio Maganza, *The Treaty of Amsterdam's Changes to the Common Foreign and Security Policy Chapter and an Overview of the Opening Enlargement Process,* 22 FORDHAM INT'L L.J. 174, 178 (1999).
133 Maganza, *supra* note 132, at 178.
134 Manin, *supra* note 124, at 16; *cf.* TEU art. 12 (as in effect 1999).
135 TEU art. 21 (as in effect 1999).
136 TEU art. 21 (as in effect 1999).
137 *Id.*
138 TEU art. 23 (2) (as in effect 1999) (changed by Treaty of Nice).
139 *See* TEU art. 13 (2) (as in effect 1999).
140 *Id.*

The idea behind the introduction of majority voting is that it is acceptable when it regards areas which are "within the framework of another upstream decision".[141] The option of qualified abstention provides an avenue to get out of an otherwise unsolvable crisis among Member States, which are unable to agree upon a particular issue.[142]

2. Security and Defense Policy

Article 2 of the TEU (as in effect 1999), which is the substitute for Article B of the Maastricht Treaty, provides that it is the goal of the EU "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 defense policy, which might lead to a common defense". Here it is possible to identify a slight change towards a more serious commitment to the establishment of a common defense, because the former Art. B stated that a common defense policy only "might *in time* lead to a common defense".

Article 11 (1) of the TEU (as in effect 1999) added as an objective of the EU the preservation of security on external borders. This provision also contains the following interesting change: Now the Union alone, not together with the Member States[143], is in charge of defining and implementing the Common Foreign and Security Policy.

When defining the general guidelines of the Common Foreign and Security Policy, the European Council also may refer to areas concerning defense policy,[144] whereas Article J.8 (1) TEU (as in effect 1993) did not contain such a reference to defense policy.

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[141] Maganza, *supra* note 132, at 177.
[142] *Id.* at 177-78; Jean-Claude Piris & Giorgio Maganza, *The Amsterdam Treaty: Overview and Institutional Aspects,* 22 FORDHAM INT'L L.J. 32, 40 (1999).
[143] *See* TEU art. J.1 (as in effect 1993) (now art. 11 (1)).
[144] TEU art. 13 (1) (as in effect 1999).

The relatively far reaching procedures established in Article 23 (2) of the TEU for majority voting do not apply with respect to matters which relate to defense and military issues. This means that unanimity is required also in the Council of Ministers, when defense and military questions are at stake.[145]

Article 17 (1) of the TEU (as in effect 1999) provides for some changes in the wording of former Article J.4 (1). Now the Common Foreign and Security Policy is directed towards "the *progressive* framing of a common defense policy ... which might lead to a common defense, should the European Council so decide" instead of "the *eventual* framing of a common defense policy, which might in time lead to a common defense". The new wording resembles the change of Article 2 of the TEU and thereby reiterates a stronger commitment of the Member States with regard to European defense policy.

The Treaty of Amsterdam established therefore a "specific commitment" to the "progressive framing of a common defense policy".[146] Moreover, there is now a mechanism to get a European defense: Required is a unanimous decision by the European Council and ratification by the respective parliaments of the Member States.[147]

The Union is to improve the institutional relations with the WEU.[148] If the European Council had decided so, the full integration of the WEU in the EU system was under the Amsterdam Treaty possible.[149] Article 17 (1) of the TEU (as in effect 1999) described the WEU as "an integral part of the development of the Union providing the Union with access to an operational capability notably in the context of paragraph 2", which referred to the so-called

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[145] *Cf.* Mamedov Muschwig, *European Security and Defense Policy: European Union vs. United States: Crisis of Transatlantic Relations: Nato and the Future European Security and Defense Identity (Esdi),* 10 U. MIAMI INT'L & COMP. L. REV. 13, 28 (Carmen Klein trans., 2002).
[146] DENZA, *supra* note 37, at 352.
[147] *Id.*
[148] TEU art. 17 (1) (as in effect 1999) (art.17 (1) now changed by the Treaty of Nice).
[149] *Id* .

Petersberg tasks, e.g. peacekeeping and peacemaking. It has to be emphasized that it was not possible to integrate the WEU in the EU legal system during the negotiations of the Amsterdam Treaty, because the disagreement between the supporters of an autonomous WEU and the "integrationists" could not be overcome.[150]

The Member States have committed themselves to the process of establishing a common defense policy by endeavouring to bring about more cooperation in the area of armaments.[151] Moreover, it has to be emphasized that Article 17 (1) of the TEU (as in effect 1999) acknowledges the commitments made by some Member States under the North Atlantic Treaty: The EU's policy explicitly respect such obligations. This particular provision has been characterized as "presentional strenghtening of the deference to NATO".[152] Furthermore, Article 17 (1) of the TEU (as in effect 1999) takes fully into account the situation of the neutral Member States, because it states that "(t)he policy of the Union ... shall not prejudice the specific character of the security and defense policy of certain Member States".

The so-called Petersberg tasks, which in 1992 have been decided upon by the Council of Ministers of the WEU, are now integrated into Article 17 (2) of the TEU (as in effect 1999).[153] These tasks contain humanitarian and rescue tasks, peacekeeping tasks and the establishment of combat forces for crisis management, especially peacemaking.[154] The decision to include these kinds of military tasks in the Amsterdam Treaty has to be seen as a reaction to the devastating civil war in former Yugoslavia in the 1990s.[155]

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[150] Manin, *supra* note 124, at 17.
[151] TEU art. 17 (1) (as in effect 1999) (art.17 (1) now changed by the Treaty of Nice).
[152] DENZA, *supra* note 37, at 352.
[153] Muschwig, *supra* note 145, at 29; Maganza, *supra* note 132, at 178-79.
[154] TEU art. 17 (2) (as in effect 1999).
[155] Manin, *supra* note 124, at 17.

Article 17 (3) of the TEU (as in effect 1999, repeaaled by the Treaty of Nice) stated that the EU will use the WEU „to elaborate and implement decisions and actions of the Union which have defense implications“. Former Article J.4 (2) in contrast was less stringent, as it only said that the EU *requests* the WEU to implement defense related decisions. A very important provision can be found in Article 17 (4) of the TEU (as in effect 1999), which, in the framework of the WEU or NATO, enables an even closer cooperation of those Member States, which are willing to integrate more in the area of defense policy.

Common Foreign and Security Policy operations cause expenses. Article 28 (3) of the TEU (as in effect 1999) stated as a general rule that the budget of the Communities has to take this financial burden. However, there is an exception for operations which have “military or defense implications”. In this situation, the Member States have to cover the expenses. However those states, that have qualified their abstention with respect to a particular operation, do not have to share the financial burden of such a operation.[156]

It was very important for the credibility of the Common Foreign and Security Policy that the two currently most important European military powers, France and the UK, were able to present a Joint Declaration after their summit at St. Malo, which stressed that “the Union must have the capacity for autonomous action, backed up by credible military forces, the means to use them, and a readiness to do so, in order to respond to international crises”.[157]

H. The Rapid Reaction Force

The Cologne Summit of the EU’s Heads of State and Government, which started on June 3, 1999, addressed the Kosovo conflict: European leaders came to the conclusion that Europe

[156] TEU art. 28 (3) (as in effect 1999).
[157] DENZA, *supra* note 37, at 354.

itself must be able to handle such a devastating crisis, which entailed massive violations of human rights and caused numerous casualties among the civilian population.[158] The decision to establish a EU Rapid Reaction Force was made at the Helsinki summit in 1999 and can be seen as a direct reaction to the Kosovo conflict.[159] The Member States set themselves the goal to organize the Rapid Reaction Force by mid 2003; this military unit shall consist of 50,000 to 60,000 soldiers from EU countries and shall be able to fulfill the so-called Petersberg tasks, which means inter alia peacekeeping and peacemaking. The force shall be ready for deployment within 60 days and capable of operating at least one year.[160] It has to be emphasized that the Rapid Reaction Force is not a supranational European army, but will be a military force based on the decisions of the Member States to contribute to that unit.[161] During the Helsinki European Council, the Member States did not make detailed commitments regarding their individual contributions to the establishment of the Rapid Reaction Force. They only stated their Headline Goals.[162] The EU countries made specific commitments during a capabilities conference in Brussels in November 2000.[163]

I. The Treaty of Nice

The Treaty of Nice was signed on February 26, 2001 and amends inter alia the Treaty on European Union.[164] This treaty entered into force on February 1, 2003.[165]

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[158] *See* Audrey Baggett, *The Development of the European Union Common Defense and its Implications for the United States and NATO,* 31 GA. J. INT'L & COMP. L. 355, 362-63 (2003).
[159] *Id.* at 363-64; Opi & Floyd, *supra* note 53, at 324-27.
[160] Opi & Floyd, *supra* note 53, at 327; Baggett, *supra* note 158, at 364.
[161] Opi & Floyd, *supra* note 53, at 327.
[162] Baggett, *supra* note 158, at 365.
[163] *Id.* at 365; DENZA, *supra* note 37, at 356
[164] Treaty of Nice, Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 10.3.2001 O.J. (C80) 1 (2001). Consolidated Version of the Treaty on European Union, 24.12.2002 O.J. (C325) 5 (2002).

The Treaty of Nice deleted the reference to the WEU in Article 17 (1) and (3) of the TEU. However, Article 17 (4) TEU (as in effect 2003) allows for closer cooperation among some Member States in the framework of the WEU. The abolishment of the WEU reference in Article 17 (1) and (3) of the TEU shows that the European Council wants the EU itself to decide on military operations which are supposed to solve crisis situations and fulfil the so-called Petersberg tasks.[166] Moreover, it can be inferred that the EU is determined to use the military capabilities of NATO to implement ist military decisions.[167]

Article 25 of the TEU (as in effect 2003) now incorporates the Political and Security Committee, which has the duty to watch "the international situation in the areas covered by the common foreign and security policy and contribute to the definition of policies by delivering opinions to the Council at the request of the Council or on its own initiative". The Political and Security Committee, under the auspices of the Council, is supposed to have strategic responsibility of "crisis management operations". The competence of the Political and Security Committee to exert "day-to-day supervision" of such an operation was welcomed, because it grants operational responsibility to a body below the Council; a structure which has been described as crucial for an effective operation, especially in the area of the Petersberg tasks.[168] The Political and Security Committee was originally established by Council Decision of January 22, 2001.[169] It has the duty to analyze crisis situations and assess the options which may be chosen by the European Union to solve a particular crisis.[170] Furthermore, the Political and

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[165] The Treaty of Nice, available at http://europa.eu.int/comm/nice_treaty/ratiftable_en.pdf (last visited Febr. 29, 2004).
[166] DENZA, *supra* note 37, at 358.
[167] *Id.*
[168] DENZA, *supra* note 37, at 359.
[169] Council Decision of Jan. 22, 2001 setting up the Political and Security Committee of the European Union, (2001/78/CFSP), art. 1, 2001 O.J. (L27) 1.
[170] *Id.* Annex (2) at (L27) 2.

Security Committee is the body which has strategic direction over a military operation.[171] Therefore, the Committee assesses the strategic military options, in particular, the chain of command and the operational concepts and plans.[172] Moreover, the Political and Security Committee has to promote the consultation mechanisms with NATO and third States.[173]

By Council Decision of January 22, 2001, the Military Committee of the EU was established.[174] According to Art. 1 of this Council Decision, the Military Committee consists of the Member States' Chiefs of Defense, who are represented by their military representatives.[175] The Military Committee provides on the one hand advice concerning military affairs and recommendations to the Political and Security Committee, on the other hand it issues directions to the EU Military Staff.[176]

By Council Decision of January 22, 2001, the Military Staff of the European Union was established.[177] The Military Staff consists of military personnel from the Member States, which are seconded to the General Secretariat of the Council.[178] There are three crucial functions of the Military Staff: Those are early warning, assessment of crisis situations, and the planning of military strategies.[179]

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[171] *Id.*
[172] *Id.*
[173] *Id.* Annex (2) at (L27) 3.
[174] Council Decision of Jan. 22, 2001 setting up the Military Committee of the European Union (2001/79/CFSP), art. 1, 2001 O.J. (L27) 4.
[175] *Id.*
[176] *Id.* Annex (1) , at (L27)5.
[177] Council Decision of Jan. 22, 2001 on the Establishment of the Military Staff of the European Union (2001/80/CFSP), 2001 O.J. (L27) 7.
[178] *Id.* art.1 at (L27) 7.
[179] *Id.* Annex (2) at (L27) 8.

J. The Draft Constitution[180]

1. Introduction

The Nice Summit established the post-Nice process[181], which was supposed to deal with the relationship between the EU and the Member States with respect to their particular competences, the position the national parliaments should have within the EU, the legal future of the Fundamental Rights Charter, and the simplification of the existing treaties.[182]

By the Laeken Declaration, the "Convention on the Future of Europe" was established to develop a Constitution for Europe.[183] Former French President Valery Giscard d'Estaign was to become Chairman of the Convention, assisted by Vice-Chairmen Giuliano Amato from Italy and Jean-Luc Dehaene from Belgium.[184]

The European Convention presented a Draft Constitution, which was approved by a broad consensus during the plenary session of the Convention on June 13, 2003.[185] On June 20, 2003, the European Convention submitted the text of the Draft Treaty to the European Council, which had gathered in Thessaloniki, Greece.[186]

There was considerable optimism that the Draft Constitution would have been agreed upon by the European Council in Brussels in December 2003. However, mainly due to unsolved disputes regarding a reform of the weighing of the Member States' votes, it was not possible to reach an agreement on the Draft Constitution. Poland and Spain were seen as responsible for the

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[180] Draft Treaty Establishing a Constitution for Europe, 2003 O.J. (C169) 1 (hereinafter Draft Constitution).
[181] Treaty of Nice, Declarations adopted by the Conference, Declaration on the Future of the Union, 2001 O.J. (C80) 85-86.
[182] Markus G. Puder, *Constitutionalizing the European Union – More than a Sense of Direction from the Convention on the Future of Europe,* 26 FORDHAM INT'L L.J. 1562, 1573 n. 56 (2003).
[183] The Future of the European Union – Laeken Declaration, *at* http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm (last visited Mar. 5, 2004).
[184] *Id*.
[185] Preface to the Draft Constitution, *supra* note 180.
[186] *Id.*

failure.[187] It remains to be seen whether the Draft will be later accepted. The new government of Spain, led by the Socialist Party has articulated that it will change the position held by the former conservative government. Spain is probably going to support the Franco-German camp in the coming years. Nevertheless, the provisons in the Draft Constitution regarding the Common Foreign and Security Policy deserve to be assessed.

2. General Provisions regarding the Common Foreign and Security Policy

Aricle I-15 of the Draft Constitution states the general goals of the EU's foreign and security policy:

"1. 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 defense policy, which might lead to a common defense.

2. Member States shall actively and unreservedly support the Union's common foreign and security policy in a spirit of loyalty and mutual solidarity and shall comply with the acts adopted by the Union in this area. They shall refrain from any action contrary to the Union's interests or likely to impair its effectiveness."

It is evident that a common European defense under the Draft treaty is still considered as a far away future project. The wording does not depict a stronger commitment to the establishment of a common defense, compared with the Treaties of Amsterdam and Nice. There is also no discernable improvement of commitment of the Member States regarding the common defense policy. The Amsterdam Treaty had already contained almost the same wording.

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[187] EU Institutions Press Releases, President Prodi statement at the IGC final press conference, IP/03/1728, 15/12/2003, *at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/1728|0|RAPID&lg=en&display= (last

In the Draft Constitution, Articles III-195 to III-215 specifically deal with the Common Foreign and Security Policy of the EU. Article III-195 (1) provides that the EU "shall define and implement a Common Foreign and Security Policy covering all areas of foreign and security policy". The Member States are obliged to support the common policy and to avoid action which may hamper the results of the EU's foreign policy.[188] According to Article III-196 (1) of the Draft Constitution, the European Council is responsible for defining the general guidelines for the EU's foreign and security policy, including areas concerning defense policy.

Most interestingly, the Draft Constitution provides for the establishment of a Union Minister for Foreign Affairs, whose responsibility is inter alia to preside over the Council of Ministers for Foreign Affairs, to promote the Common Foreign and Security Policy and its implementation, and to represent the EU in the international community with respect to foreign and security policy, thereby being supported by a yet to be established European External Action Service.[189] It is the duty of the Union Minister for Foreign Affairs to consult the European Parliament with respect to the Common Foreign and Security Policy and the Common Security and Defense Policy, thereby making sure that the views of the European Parliament are considered. [190] Furthermore, the Parliament is informed by the Foreign Affairs Minister of the conduct of the foreign and security policy.[191] Article III-205 (2) of the Draft Constitution grants the European Parliament the right to interrogate the Council of Ministers and the Foreign Affairs Minister or submit recommendations to them. In contrast with Article 21 of the TEU, there has to

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visited Mar. 5, 2004); BBC News, Leaders play down summit failure, *at* http://news.bbc.co.uk/1/hi/world/europe/3317055.stm (last visited Febr. 28, 2004).

[188] Draft Constitution art. III-195 (2).

[189] Draft Constitution art. III-197.

[190] Draft Constitution art. III-205 (1).

[191] *Id.*

be now a debate on the development of the Common Foreign and Security Policy at least twice a year.[192]

A very interesting provision can be found in Article III-206 (2), which states that those Member States which are members of the UN Security Council "shall concert" and provide information to the other EU countries and the EU foreign minister. This provison further elaborates that the EU countries which are in the Security Council "will ... defend the positions and the interests of the Union". If the EU has defined its own position in an area which is subject of the UN Security Council's deliberations, the EU countries in the Security Council "shall request that the Union Minister for Foreign Affairs be asked to present the Union's position."[193] It remains doubtful, whether – after a future ratification of this Draft Treaty – the two permanent European members of the Security Council, the United Kingdom and the French Republic[194], will be willing to implement this decision.

3. Specific Provisions regarding the Common Security and Defense Policy

The Draft Treaty contains with Articles III-210 to III-214 specific provisions regarding the Common Security and Defense Policy. Moreover, Article I-40 of the Draft Constitution is important, because this provision refers to the implementation of the Common Security and Defense Policy.

One provision from the general section of the Common Foreign and Security Policy Chapter of the Draft Constitution is essential for the Common Security and Defense Policy:

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[192] Draft Constitution art. III-205 (2).
[193] Draft Constitution art. III-206 (2).
[194] U.N. Charter art. 23 (1).

Article III-201 (4) of the Draft Constitution makes it clear that there will be no qualified majority voting[195] by the Council of Ministers on decisions which relate to defense and military matters.

Article III-215 (2), which is in the "Financial Provisions"-section of the Common Foreign and Security Policy Chapter of the Draft Constitution, provides that operations related to military or defense issues must be financed by the Member States and not by the EU budget. Countries that have used the tool of qualified abstention with respect to a military operation are not required to participate in financing such military operations.[196]

The Common Security and Defense Policy is considered as an "integral part" of the more general common foreign policy of the EU.[197] The EU is supposed to engage in peace-keeping missions outside the territory of the EU, thereby emphasizing its desire to promote international security, while abiding by the rules of the UN Charter.[198] Article III-210 (1) of the Draft Constitution specifies the tasks of Artcle I-40 by listing the following operations: "(J)oint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention, and peace-keeping tasks, tasks of combat forces in crisis management, including peacemaking and post-conflict stabilisation." These tasks are commonly known as the Petersberg tasks. By implementing these tasks, the EU may support the fight against terrorism.[199] By unanimity, the Council of Ministers can adopt European decisions implementing the above mentioned tasks.[200]

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[195] Draft Constitution art. III-201 (1) makes unaninmity in CFSP matters the general principle but deviates from this general rule in paragraphs 2 and 3 for certain decisions and instruments.
[196] Draft Constitution art. III-215 (2).
[197] Draft Constitution art. I-40 (1).
[198] *Id.*
[199] Draft Constitution art. III-210 (1).
[200] Draft Constitution art. III-210 (2).

A common defense is possible, should the European Council, by unanimity, agree upon such a project.[201] The European Council shall make a recommendation to the Member States to adopt the decision to establish a common European defense. [202] The Draft Constitution explicitly acknowledges the constitutional requirements of the EU Member States, which have to be fulfilled before establishing a common European defense.[203] When looking at the divergent views within the EU as to the notion of an "ever closer Union", one might doubt seriously the prospects of a common European defense.

According to Article I-40 (3) of the Draft Constitution, the Member States are required to provide civilian and military capabilities for the fulfilment of the EU's Common Security and Defense Policy. The Council of Ministers can by unanimity, adopt a European decision, which executes the Common Security and Defense Policy.[204]

With respect to the involvement of the European Parliament, Article I-40 (8) provides that it "shall be regularly consulted on the main aspects and basic choices of the Common Security and Defense Policy, and shall be kept informed of how it evolves". This, in fact means, that EU military operations do not need approval by the European Parliament.

Since it is realistic to assume that not every Member State of the EU may have the capabilities and the political will to engage in military operations, Article III-211 of the Draft Constitution was created to expressly allow the Council of Ministers to entrust the fulfillment of a specific military task to certain Member States who are willing to engage in such operation.

Article III-212 of the Draft Constitution provides for the establishment of a European Armaments, Research and Military Capabilities Agency. The agency will have the duty to help

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[201] Draft Constitution art. I-40 (2).
[202] *Id.*
[203] *Id.*
[204] Draft Constitution art. I-40 (4).

to identify military capability goals, to support the development of compatible procurement by the Member States, to promote cooperation of the Member States with respect to improvement of their military capabilities, to contribute to research projects in the area of defense technology and to promote cooperation among the Member States in this crucial field, to support the development of military technology for "future operational needs", and to promote the industrial and technological situation of the defense industry.[205] If Europe really wants to play a larger role in international affairs, it definitively has to improve the military technology its national armies use. During the Kosovo war, the inferiority of the EU countries to the US armed forces was significant and led European leaders to be very concerned about that development.[206] Germany's Foreign Minister, Joschka Fischer, was cited as stating the following: "The Kosovo war was mainly an expression of Europe's own insufficiency and weakness; we as Europeans never could have coped with the Balkan wars that were caused by Milosevic without the help of the US."[207] Former Chairman of NATO's military committee, German General Klaus Naumann, said that soon Europeans and Americans "will not even be able to fight on the same battlefield".[208] These statements confirm the urgent need for Europeans to increase spending on the development of modern military technology. The establishment of the Armaments Agency is therefore a very important step forward.

Those EU Member States that have more advanced military capabilities and are ready to be involved in military operations of the highest level may establish so-called "structured cooperation" among them.[209] The Council of Ministers may request those countries taking part in

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[205] Draft Constitution art. III-212 (1).
[206] *Cf.* John C. Hulsman, *A Grand Bargain with Europe: Preserving NATO for the 21st Century,* 6 GEO. PUBLIC POL'Y REV. 71, 73 (2000).
[207] *Id.* at 71.
[208] *Id.* at 72.
[209] Draft Constitution arts. I-40 (6), III-213.

structured cooperation to execute a "Petersberg task operation".[210] Furthermore, the Draft Constitution provides for the concept of "closer cooperation on mutual defense": Participation in such close cooperation shall be possible for every Member State.[211] The concept of "closer cooperation on mutual defense" is deemed to be a temporary one, lasting until a true common European defense has been established.[212] The Member States, that are willing to cooperate in this area, are, by entering into closer cooperation, creating a defense agreement, since they are obliged to provide aid and assistance, including military help, to a participating country that had been attacked by a third state.[213]

Judicial review is still not going to be established in the field of the foreign and security policy: Art. III-282 of the Draft Constitution excludes the jurisdiction of the European Court of Justice with respect to the Common Foreign and Security Policy.

K. The European Union's Common Foreign and Security Policy Operations

So far, four Common Foreign and Security Policy operations have been launched. Three of them are related to the region of former Yugoslavia and reflect the EU's willingness to promote stability in its neighborhood. The remaining operation was conducted in the Democratic Republic of Congo and is an example of the EU's determination to take responsibility for peace and stability in Africa.

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[210] Draft Constitution art. III-213 (4).
[211] Draft Constitution art. III-214 (1).
[212] Draft Constitution art. I-40 (7).
[213] Draft Constitution at. I-40 (7).

1. EU Police Mission in Bosnia and Herzegovina

On January 1, 2003, the EU Police Mission in Bosnia and Herzegovina was launched, taking over the role of the UN International Police Task Force.[214] The Police Mission in Bosnia and Herzegovina was set up by Council decision from March 11, 2002, and was approved by UN Security Council Resolution 1396 from March 5, 2002.[215] The conduct of the Police Mission is supervised by Special Representative Lord Ashdown.[216] There is a three year time limit for this particular mission.[217] The purpose of the EU Police Mission is to set up "policing arrangements under BiH ownership in accordance with best European and international practice".[218] The EU itself describes its mission as important proof of the development of the European Security and Defense Policy.[219]

2. Operation Concordia

The European Union conducted a military operation, code-named Concordia, in the former Yugoslav Republic of Macedonia at the request of Macedonia's President Trajkovski.[220] The military operation replaced the NATO operation on March 31, 2003 and was legally justified by UN Security Council Resolution 1371.[221] The operation ended on December 15, 2003.[222] Thirteen of the EU Member States contributed to the operation, whose goal was to

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[214] European Union Police Mission in Bosnia and Herzegovina, *at* http://ue.eu.int/eupm/homePage/index.asp?lang=EN (last visited Febr. 25, 2004).
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] EU Military Operation in former Yugoslav Republic of Macedonia (FYROM), *at* http://ue.eu.int/arym/index.asp (last visited Febr. 25, 2004).
[221] *Id.*
[222] *Id.*

promote stability and security in Macedonia.[223] This military operation is also an important step for the former Yugoslav Republic of Macedonia to approach EU integration.[224]

3. Operation Artemis

The EU conducted a military operation in the Democratic Republic of Congo, named operation Artemis, relying on UN Security Coucil Resolution 1484 from May 30, 2003.[225] Within the EU, the legal basis for the launch of the operation was a Council decision on June 12, 2003.[226] The military operation lasted until September 1, 2003.[227] The Security Council Resolution allowed the "deployment of an interim emergency multinational force" to promote the security and humanitarian situation in Bunia, Democratic Republic of Congo.[228] The "Framework Nation" for this military operation was France.[229]

4. Proxima Mission

On December 15, 2003, the EU launched an EU Police Mission in the former Yugoslav Republic of Macedonia, which followed the military operation in that country.[230] The so-called Proxima Mission will last one year and aims at helping the country to establish European policing standards by advicing and mentoring the country's police.[231]

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[223] *Id.*
[224] *Id.*
[225] EU Military Operation in Democratic Republic of Congo, *at* http://ue.eu.int/pesd/congo/index.asp (last visited Febr. 25, 2004).
[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] *Id.*
[230] European Union Police Mission in the former Yugoslav Republic of Macedonia (PROXIMA), *at* http://ue.eu.int/pesd/proxima/index.asp (last visited Febr. 25, 2004).
[231] *Id.*

Chapter III

War Powers under the U.S. Constitution: An Analysis of the Legal Framework

A sound analysis of the legal framework regarding the war powers under the U.S. constitution has to start with the text of the Constitution itself.[232]

A. The Language of the Constitution regarding War Powers and Defense Policy

1. The Constitution and Congress

Article I, section 8 of the Constitution provides inter alia that Congress shall have the power to "provide for the common Defense", to "declare War", "to raise and support Armies", to "provide and maintain a Navy", "to make Regulation of the ...land and naval forces", "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" and "to provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress".

2. The Constitution and the President

The powers granted to the President are to be found in Article II of the Constitution. Article II, section 1, clause 1 states that "the executive power shall be vested in" the President. With respect to the war powers of the Constitution, Article II, section 2, clause 1 of the

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[232] ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER, 1 (1976) (hereinafter SOFAER, WAR).

Constitution has to be considered the most important provision: It makes the President the Commander-in-Chief of the Army and Navy of the United States.

3. Assessment

After a short glance, one might come to the conclusion that the President is more or less the "agent of the legislature", who only executes the will of Congress regarding military operations.[233] But, in fact, the President, and not Congress, has evolved as the dominant figure in the American political system when it comes to the area of war powers and foreign affairs in general.[234] The Supreme Court has characterized the President "as the sole organ of the federal government in the field of international relations".[235]

B. The Role of the President with Respect to War Powers and Security Policy

1. The Executive Power of the President

Article II, section 1, clause 1 of the U.S. Constitution vests the executive power in the President. It was stated very early by Alexander Hamilton that the Constitution thereby granted to the President complete authority over the foreign affairs field, with the few express exceptions of the text of the Constitution.[236] However, the Supreme Court has so far not considered Article II, section 1, clause1 of the U.S. Constitution as providing the President with certain explicitly defined foreign affairs competences.[237]

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[233] *See* SOFAER, *supra* note 232, at 2-6.
[234] HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR, 117-133 (1990) (hereinafter KOH, SECURITY CONSTITUTION); HENKIN, *supra* note 4, at 31.
[235] HENKIN, *supra* note 4, at 31 (referring to 299 U.S. 304, 316 (1936)).
[236] HENKIN, *supra* note 4, at 39.
[237] *Id.* at 40.

2. The President as the "Sole Organ" with respect to foreign affairs

a) A Source of Presidential Foreign Affairs Power

The famous statement made by John Marshall in the House of Representatives that the President is the "sole organ of the nation in its external relations"[238] is often cited and used as a source to claim great Presidential powers.[239] That the President can claim foreign affairs powers under Article II, section 1, clause 1 of the U.S. Constitution might be widely accepted, however, it is very unclear what powers precisely this provision does grant to the Commander-in-Chief.[240]

b) Presidential Practice

In the past, Presidents have decided whether the United States should be neutral in armed conflicts involving other countries, but it is now Congress that issues resolutions on neutrality.[241] Nevertheless, Presidents have continued to argue that they have retained the right to decide neutrality.[242] Furthermore, Presidents have based the statement of security doctrines on their broad and general foreign affairs power.[243]

3. The President as the Commander-in-Chief

That the President is the Commander-in-Chief establishes civilian control of the armed forces.[244] It is up to the President to decide whether to be personally involved with the details of an ongoing military campaign.[245] After hostilities have started, it is up to the President to decide

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[238] 10 Annals of Cong. 613 (1800).
[239] HENKIN, *supra* note 4, at 41 (referring to Hines v. Davidowitz, 312 U.S. 52 (1941).
[240] *Id.* at 40-41.
[241] *Id.* at 43.
[242] *Id.*
[243] *Id.* at 44.
[244] LOUIS FISHER, PRESIDENTIAL WAR POWER, 10 (1995).
[245] *See* Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support them,* 25 HARV. J. L. & PUB. POL'Y 487, 497-98 (2002) (citing former Attorney General Robert Jackson's statement of the executive branch's interpretation of the war powers).

on the strategic and tactical aspects of the conflict and the direction of the armed forces.[246] It is nevertheless very important to bear in mind that Congress has – through its power to declare war – the possibility to identify the strategic goals of a campaign.[247]

As noted above, Congress was granted the power to declare war. This entails the conclusion that Congress was not given the power to "make war".[248] This interpretation can be butressed by the fact that an earlier draft of the Constitution explicitly granted Congress the power to "make" war.[249] As the U.S. Constitution refrains from using this wording, some constitutional lawyers argue that the framers changed their mind about who shall be in charge of conducting a military operation.[250]

However, it has been stressed that the unsatisfying experiences of war conducted by Congress, according to the Articles of Confederation, in the aftermath of U.S. independence, led the framers to the decision to establish Presidential control of military action.[251] It has to be emphasized that the President has been given only "tactical control" of a military operation and that such control does not entail the right to start hostilities.[252]

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[246] Michael D. Ramsey, *Exchange: War Powers: Textualism and War Powers,* 69 U. CHI. L. REV. 1543, 1619 (2002).
[247] *Id.* at 1619-20.
[248] *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 6.10 (5th ed. 1995).
[249] *Id.*
[250] *Cf.* Abraham D. Sofaer, *War and Responsibility: A Symposium on Congress, the President, and the Authority to Initiate Hostilities: The Power Over War,* 50 U. MIAMI L. REV. 33, 36 (1995) (hereinafter Sofaer, *Symposium*).
[251] HENKIN, *supra* note 4, at 45.

4. The President's Power to deploy U.S. troops and the Relationship with Congress

a) The Situation of an Armed Attack on the Territory of the U.S.

(1) The Presidential Right to Repel Sudden Attacks

It has been stated that the President has the right to "repel sudden attacks".[253] Such a right of self-defense cannot be found explicitly in the language of the Constitution, but it has been said that such power has been granted impliedly to the President by the framers.[254] The right to repel attacks on the United States has been described as originating from the law of nature and from the concept of self-preservation.[255]

(2) The Scope of such a Right

Although it is not doubtful that the President may launch a defensive war in the case of an attack, the question remains how far the President may go when repelling such an attack.[256] Justice Paterson said in United States v. Smith that the President has the right to send troops also to the attacking country if the previous attack was of a severe nature.[257] Such a broad conception of the President's power to repel an attack would be quite far reaching. However, since Congress has the spending power, it has the de facto possibility to stop an expanding defensive war launched by the President.[258] Moreover, the President cannot use the power to repel an attack to make an intervention in a foreign war or to start a military operation abroad which he deems to

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[252] JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH, 5 (1993).
[253] Peter Raven-Hansen, *Constitutional Constraints: The War Clause, in* THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR: HISTORICAL AND CURRENT PERSPECTIVES, 30 (Gary M. Stern & Morton H. Halperin,eds., 1994); FISHER, *supra* note 244 , at 6-7 (1995); RYAN C. HENDRICKSON, THE CLINTON WARS: THE CONSTITUTION, CONGRESS, AND WAR POWERS, 6 (2002).
[254] *Id.*
[255] United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.N.Y. 1806) (No. 16,342).
[256] Raven-Hansen, *supra* note 253, at 35-36.
[257] Smith, 27 F. Cas. at 1230.
[258] Raven-Hansen, *supra* note 253, at 36-37.

be in the best security interest of the United States.[259] The controversial War Powers Resolution[260] also acknowledges in Sec. 2 (c) such a defensive power of the President in the case of an attack on the U.S. soil or its troops.

Furthermore, it has to be mentioned that the President's defensive power has been cited to provide a legal basis for a rescue operation of U.S. citizens in foreign countries.[261] The reliance on this legal basis has been criticized as not accurate. Instead, one may look at diverse legislative acts of Congress, such as the so-called "Hostage Act", which deal with the problem and thereby establish proof of some kind of acquiescence by Congress for rescue operations.[262] The "Hostage Act" has been described as authorizing the President to resort to the use of U.S. armed forces for rescue operations.[263] Moreover, the whole bunch of legislation in this area was seen as providing "collateral evidence of congressional acquiescence".[264]

b) Military Actions "short of war"

Presidents have sent U.S. troops into military hostilities in over three hundred cases without any form of Congressional authorization.[265] However, in such events, Presidents have usually argued that the deployment of the troops was for goals "short of war".[266]

This line of argumentation leads to the question: what is the meaning of the term "war" in the U.S. Constitution? It has been argued that the Constiution used the term "war" only with respect to "real" and broad hostilities, where two nations are totally involved in such an armed

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[259] David Gray Adler, *The Constitution and Presidential Warmaking*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY, 189 (David Gray Adler & Larry N. George, eds., 1996).
[260] War Powers Resolution, 50 U.S.C. §§ 1541-1548 (2000) (hereinafter WPR).
[261] Patrick D. Robbins, Comment: *The War Powers Resolution after Fifteen Years: A Reassesment,* 38 AM. U.L. REV. 141, 147 (1988).
[262] Raven-Hansen, *supra* note 253, at 37-39.
[263] *Id.* at 39.
[264] *Id.*
[265] HENDRICKSON, *supra* note 253, at 1; *cf.* DAVID LOCKE HALL, THE REAGAN WARS: A CONSTITUTIONAL PERSPECTIVE ON WAR POWERS AND THE PRESIDENCY, 1 (1991).
[266] HENKIN, *supra* note 4, at 100-01.

conflict.[267] Another position taken with regard to this question is that "war" refers only to hostilities where there has been a declaration of war.[268]

An analysis of the whole text of the constitution provides help. Article I, section 8, clause 11 of the Constitution states that Congress has the power to declare war and the power to grant so-called letters of marque and reprisals. The term "marque" is of French origin and interchangeable with "reprisal"; both terms refer to the seizure of property, which belongs to an enemy, as a reaction to the conduct of the adversary.[269] Since the Constitution explicitly grants to Congress the right to declare war and the competence to issue letters of reprisals, it can be concluded that other powers, which may encompass actions short of a full scale war, belong to the President.[270] It has been argued therefore that all military powers not specifically mentioned fall within the scope of the general foreign affairs power of the President.[271]

Consequently, the President is empowered to use the military for actions short of war. However, also at this stage, it is necessary to define the meaning of the term "war". Here, an historic approach to the interpretation of the Constitution may find it appropriate to look at the understanding of this word in the 18th century by legal scholars.[272] In this particularly period, war was understood to denote the use of military force by one state against another.[273] As a result of his interpretation of this term of the Constitution, the President should according to Professor Ramsey not alone decide upon the invasion of another sovereign state.[274] Professor Ramsey mentions the following examples of Presidential action as justified: Military deployments that

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[267] *Cf.* Ramsey, *supra* note 246, at 1610; John C. Yoo, *Kosovo, War Powers, and the Multilateral Future,* 148 U. PA L. REV. 1673, 1696-97 (2000) (hereinafter Yoo, *Kosovo*).
[268] Ramsey, *supra* note 246, at 1610.
[269] *Id.* at 1612-15.
[270] *Id.* at 1618.
[271] *Id.* at 1619.
[272] *See id.* at 1610.
[273] *Id.*
[274] *Id.* at 1632.

are not an attack on a foreign nation as for example a peacekeeping operation upon the consent of the respective state; limited military operations to rescue U.S. citizens who are in danger in a foreign country; and the deployment of troops merely to threaten or intimidate another state.[275]

The practice of U.S. Presidents[276] indicates that they see themselves as having the sole responsibility to decide on the use of the armed fores for actions "short of war".[277] But this concept may be seen as a disguise, which allows Presidents to act without Congressional approval. Professor Henkin wrote that "the line between war and lesser uses of force is often elusive, sometimes illusory, and the use of force for foreign policy purposes can almost imperceptibly become a national commitment to war".[278]

c) Offensive Military Action

Much more controversial is the question of whether the President may wage an offensive military action without congressional approval. Among U.S. constitutional lawyers, there are at least two identifiable broad camps, which have different opinions regarding this very important legal and political question. On the one hand, there is a pro-Congressional view arguing that Congressional approval is absolutely necessary, on the other hand, there is a pro-Presidential or pro-executive position which generally does not see Congressional authorization as a necessary element for the constitutionality of the offensive deployment of U.S. troops.[279] The two groups

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[275] *Id.* at 1633-35.

[276] *E.g.* Operation Urgent Fury, conducted by President Reagan in Grenada in 1983: U.S. troops were deployed by President Reagan without Congressional declaration. The operation was characterized as a "paradigm of limited military actions". *See* HALL, *supra* note 265, at 167-200; another example is Operation Uphold Democracy, conducted by President Clinton in Haiti 1993: President Clinton ordered the deployment of U.S. troops. The operation was seen as a military involvement "short of war". *See* HENDRICKSON, *supra* note 253, at 43-67.

[277] HENKIN, *supra* note 4, at 99-101.

[278] HENKIN, *supra* note 4, at 101.

[279] *See* John C. Yoo, *Exchange: War Powers: War and the Constitutional Text,* 69 U. CHI. L. REV. 1639-42 (2002) (hereinafter Yoo, *War Powers)*; Ramsey, *supra* note 246, at 1543-46.

can be also distinguished by their understanding of the meaning and importance of a Congressional declaration of war.[280]

(1) Pro Congress View

(a) Historic Background

One view of whether the President can act unilaterally stresses that the Founding Fathers clearly distinguished between military actions of an offensive character and those of a defensive character.[281] The historic record is interpreted as granting the President the unlimited power only to "repel sudden attacks".[282] All other military actions which cannot be considered as self defense therefore require congressional authorization.[283]

(b) The War Powers Resolution and the Interpretation of the Constitution

The War Powers Resolution also states the view that there is a need for Congressional approval of military action of an offensive nature.[284] Constitutional lawyers who espouse the pro-Congressional view have put forward convincing arguments based on the Constitution and its framing history for their position:

The Constitution in Article I, section 8, clause 11 grants to Congress the power to declare war. Legal scholars interpreting this clause have pointed out that, already in the 16th century, the terms "declare" and "commence" were interchangeable, which means that it is up to Congress alone to decide upon the initiation of an offensive military action.[285] Proponents of this view hold that "declaring war" was understood in the 18th century as a formal statement not only of starting

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[280] *Id.*
[281] The Committee on International Security Affairs of the Association of the Bar of the City of New York, *Report: The Legality and Constitutionality of the President's Authority to Initiate an Invasion of Iraq,* 41 COLUM. J. TRANSNAT'L L. 15, 19 (2002).
[282] *Id.*
[283] *Id.*
[284] WPR , *supra* note 260, Section 2 (c).
[285] Adler, *supra* note 259, at 187; Ramsey, *supra* note 246, at 1543-46.

but also of waging war.[286] In this context, pro-Congressional lawyers cite John Locke's statement that war can be declared "by Word or Action".[287]

There are convincing reasons which led the Framers of the Constitution to give Congress the power to decide on the initiation of war: They often made it clear that they did not want such an important decision to be taken too easily.[288] By demanding Congressional rather than single Presidential approval, the Founders thought that there would be fewer military actions.[289] Another argument to require both the Senate and the House of Representatives to decide, is based on the fact that such a procedure takes more time and therefore allows for a more thorough debate.[290] Moreover, the requirement that especially the House of Representatives has to assent, was supposed to draw more popular support for a military operation.[291]

The pro-Congressional view therefore requires Congressional authorization for the start of a military operation.[292] The question remains whether Congress has the constitutional duty to make a formal declaration of war. Sidak argues that a formal declaration is necessary because it would promote political accountability and fulfil the "representative function" of Congress. A clear statement leaves no ambiguity and makes it much easier to verify whether the executive's conduct lives up to the purposes of the declared war.[293]

Henkin says that such a proposal goes too far: There is no basis for such demand. Congress has the right to make a formal or informal decision on the question of authorization of

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[286] Ramsey, *supra* note 246, at 1545.
[287] Ramsey, *supra* note 246, at 1545 (referring to John Locke, The Second Treatise of Government, in John Locke, Two Treatises of Government 265, § 16 at 278, Cambridge 1988, Peter Laslett, ed.).
[288] Ely, *supra* note 252, at 3.
[289] *Id.*
[290] *Id.* at 4.
[291] *Id.* at 4.
[292] *See* HENKIN, *supra* note 4, at 97; FISHER, *supra* note 244, at 11; Robbins, *supra* note 261, at 148-49 (1988).
[293] J. Gregory Sidak, *To Declare War,* 41 DUKE L.J. 27, 33 (1991).

a war.[294] Such approval can be issued explicitly or impliedly by legislation, resolution, or simply by providing the necessary funds for a military operation.[295] Henkin refers to the the undeclared Franco-American war in 1800.[296] During the Franco-American conflict, President Adams did not want to formally declare war on France.[297] Instead he made Congress authorize military action against France without a formal declaration of war.[298]

The Supreme Court in Bas v. Tingy[299] impliedly accepted that the United States was engaged in hostilities with a foreign power without a prior Congressional declaration of war: The Court had to decide whether France could be regarded as an "enemy" under a U.S. statute. It was argued that this cannot be said, because there was no declaration of war against France. The Court held that France was an "enemy" under the law, because there were hostilities, albeit the scope of the military conflict was limited. The war was deacribed as of a "limited nature".[300] It has been inferred from this decision that the Court therefore accepted the concept of "undeclared war".[301]

(2) Pro President View

The opposite view relies on Article II, section 1 and 2 of the Constitution to argue that the President has broad constitutional power to conduct military operations that he considers to be necessary to encounter possible threats to U.S. foreign policy.[302] It is asserted, that in the time period of the ratification of the U.S. Constitution, the executive was widely seen as responsible

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294 HENKIN, *supra* note 4, at 76.
295 *Id.*
296 *Id.*
297 SOFAER, WAR, *supra* note 232, at 139.
298 *Id.*
299 Bas v. Tingy, 4 U.S. 37 (1800).
300 *Id.* at 40-44.
301 HENKIN, *supra* note 4, at 76.
302 Delahunty & Yoo, *supra* note 245, at 489-90.

for starting and conducting military actions.[303] From this point of view, the President also has the right to engage in preemptive strikes against alleged threats to U.S. security interests.[304] The President can rely on his broad constitutional powers as the Chief-Executive and the Commander-in-Chief to use a preemptive strike to encounter a possible terrorist threat.[305]

Professor Yoo and Deputy General Counsel Delahunty cite inter alia the Supreme Court decision in the Prize Cases[306], which stated that President Lincoln's decision to erect a blockade was to be solely decided by himself.[307] The Supreme Court in Harlow v. Fitzgerald stated that taking care of the national security lies at the core of the Presidential duties and competences.[308] However, this case concerned the immunity of White House aides to President Nixon.[309] The cited statement is therefore only an obiter dictum.

Professor Yoo argues that an analysis of the language of the Constitution as a whole supports Presidential priority[310]: Article I, section 8, clause 11 of the Constitution which gives Congress the power to declare war and Article II, section 1 and 2, which make the President the Chief-Executive and the Commander-in-Chief, do not contain very detailed provisions with respect to the initiation of military action.[311] If the Framers intended to grant Congress the power to start hostilities, then they would have inserted specific language as they did, for example, with respect to the treaty power in Article II, section 2 and Article I, section 10, and

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303 *Id.*
304 *Id.* at 487.
305 *Id.* at 516.
306 The Brig Amy Warwick, 67 U.S. 635, 670 (1862).
307 Yoo & Delahunty, *supra* note 245, at 490.
308 Harlow v. Fitzgerald, 457 U.S. 800, 812 n.19 (1982).
309 *Id.* at 800.
310 Yoo, *War Powers, supra* note 279, at 1674-75.; Yoo, *Kosovo, supra* note 267, at 1691-92.
311 *Id.*

they would have used the verb "engage" instead of "declare", as they did in Article I, section 10, clause 3.[312]

It has also been emphasized that the Constitution of South Carolina, at the time of the creation of the federal Constitution, contained the requirement of legislative authorization for "warmaking" by the Governor.[313] This fact has been mentioned to argue that the Framers, if they really had the desire to secure Congressional approval of "warmaking", would have chosen to insert more detailed language in the U.S. Constitution.[314] A comparison with the Constitution of South Carolina does not really provides a convincing argument for the pro-Presidential position remains. The U.S. Constitution should be construed with respect to its historic background alone. According to Professor Yoo, the text of the Constitution amply demonstrates that the Framers were inserting explicit reference to a Congressional participation with respect to a particular executive conduct when they deemed that to be desirable.[315]

Although today's international lawyers use "declare" interchangeably with "commence", in the 18th century, the concept "to declare a war" was understood to be of an almost judicial nature, thereby making it clear that a "perfect" war under international law has been started, which entailed the notion that this "fully" transferred a peaceful relation into one of war.[316]

It has also been stressed that in the course of Anglo-American constitutional history the competence to start military action had always belonged to the executive branch.[317] The 18th century English Kings had the power to initiate hostilities, to declare war, and to be in charge of

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[312] *Id.*
[313] Delahunty & Yoo, *supra* note 245, at 492.
[314] *Id.*
[315] Yoo, *Kosovo*, *supra* note 267, at 1691.
[316] Delahunty & Yoo, *supra* note 245, at 492; Yoo, *War Powers, supra* note 279, at 1670-71.
[317] Yoo, *Kosovo*, *supra* note 267, at 1689.

the military command.[318] According to Professor Yoo, the framers of the U.S. Constitution were influenced by the English model.[319]

Professor Yoo criticizes the pro-Congressional position as contradictory: Pro-Congressional lawyers argue that "the power to declare war" entails the power to decide upon the start of hostilities, which makes some kind of Congressional authorization necessary for the deployment of U.S. troops to be constitutional. [320] These lawyers therefore rely on the one hand on the "declaration of war-clause", on the other hand they do not require a formal declaration of war by Congress, but are only demanding some kind of previous Congressional approval.[321] It has been proposed that Congress' "power of the purse" is instead an appropriate and effective means to guarantee legislative control over Presidential warmaking.[322]

Yoo interprets the Constitution as providing pragmatic flexibility in warmaking.[323] He and Delahunty say that "centralization of authority in the President" may guarantee "unity in purpose and energy in action".[324] Moreover, the Chief-Executive clause of Article II, section 1 is understood to grant all not specifically mentioned executive powers to the President; the power to send troops into combat is seen as belonging to the executive branch.[325] The use of military force is a "central tool for the exercise of the President's plenary control over the conduct of foreign policy".[326] Allowing the legislative branch the final say when it comes to the initiation of hostilities would hamper the President's responsibility in the area of foreign affairs.[327]

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[318] John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers,* 84 CALIF. L. REV. 167, 203, 217 (1996).
[319] *Id.* at 218.
[320] Yoo, *Kosovo*, *supra* note 267, at 1688-89.
[321] *Id.* at 1689.
[322] *Id.*
[323] *Id.* at 1691.
[324] Delahunty & Yoo, *supra* note 245, at 493.
[325] *Id.* at 495.
[326] *Id.* at 497.
[327] *Id.*

(3) Comment

An assessment of the two different positions has to emphasize the political nature of the issue. In the aftermath of the devastating war in Viet Nam, which led the U.S. into a identity crisis, the position of the President was weakened; Congress gained more political power. The enactment of the War Powers Resolution is an example for Congress becoming more confident. Currently, however, the attacks on the World Trade Center on September 11, 2001, have changed U.S. politics. Strong leadership by the President seems to be appreciated by the American people. This political background may influence the interpretation of the war powers of the Constitution in a way that strenghtens the position of the President.

C. The War Powers Resolution[328]

1. The Content of the War Powers Resolution

The Congress of the United States enacted the famous War Powers Resolution on November 7, 1973. The joint resolution by the Senate and the House of Representatives aims at making sure that the intent of the Framers of the Constitution is reflected in the practice of the respective organs of the U.S. political system.[329] It purports to secure that the "collective judgements" of both the President and Congress is sending U.S. troops into hostilities.[330]

According to Sec. 2 (c) of the War Powers Resolution, the President may deploy troops, where hostilities are expected to occur imminently only when war has been declared, when there is a specific statutory authorization, or when there has been an attack on the United States, its territories, or its troops.

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[328] Pub.L.No. 93-148, 87 Stat. 555 (1973), 50 U.S.C. §§ 1541-1548. (2000) (hereinafter WPR).
[329] WPR Sec. 2 (a).
[330] *Id.*

The President has a duty to consult with Congress before sending troops into military conflicts and continue to do so when the armed forces are engaged in hostilities.[331] When the President deploys U.S. armed forces in the absence of a formal declaration of war in "situations where imminent involvement in hostilities is clearly indicated by the circumstances", or sends them to a foreign nation with combat equipment, or substantially increases the number of already deployed troops, Sec. 4 (a) requires him to report to Congress within 48 hours on the cirumstances requiring the deployment of U.S. troops, the purported constitutional or statutory authority for such deployment, and the probable scope of the military engagement.

If within sixty days after submission of such a report, Congress has not declared war, enacted another form of legislative authorization, extended the time limit, or is unable to gather, the President shall withdraw the troops.[332]

The provision of Sec. 5 (c) of the War Powers Resolution makes the U.S. armed forces a "congressional army", since it provides that the President shall withdraw the troops if Congress demands so by concurrent resolution; however, this competence of Congress requires that there is no declaration of war or another legislative authorization.

The War Powers Resolution provides some guidance for its interpretation in Sec. 8: It shall not be possible to infer from any provision of a statute the authority to introduce troops into hostilities when there is no specific and clear statement in the law saying so.[333] Moreover, it is not possible to infer such authority from a ratified treaty, unless there is national legislation implementing such treaty and thereby specifically allowing for the deployment of U.S. armed forces.[334]

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[331] WPR Sec. 3.
[332] WPR Sec. 5 (b).
[333] WPR Sec. 8 (a) (1).
[334] WPR Sec. 8 (a) (2).

2. Comments and Critique on the War Powers Resolution

The War Powers Resolution was controversial from the moment it had been enacted.[335] It was enacted in light of the devastating experience in Viet Nam,[336] and President Nixon's weakness due to the Watergate affair.[337] President Nixon vetoed the War Powers Resolution.[338] The denotation as a "resolution" is misleading; in fact the War Powers Resolution is "real law", since the Senate and the House enacted it and overrode the President's veto.[339]

Presidents Ford and Carter complied with the provisions of the War Powers Resolution but did not openly state that it was a wholly constitutional law.[340] None of the U.S. Presidents in office since the enactment has accepted the sixty days time limit for withdrawal of U.S. forces.[341] President Reagan made no public statement that he was bound by the provisions of the resolution.[342] However, there is a record of Reagan Administration reports, which describe military action as "consistent with the ... Resolution".[343] President George H.W. Bush filed a report regarding the Panama operation in 1989 which also contained a reference to the War Powers Resolution.[344] The Clinton Administration also tried to comply with essential requirements of the resolution while emphasizing the legal opinion that the President does not need Congressional authorization for every kind of military operation.[345]

Professor Rotunda criticizes the Resolution for allowing the President to deploy troops only where there has been either a declaration of war or another kind of legislative authorization

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335 Stephen L. Carter, *The Constitutionality of the War Powers Resolution,* 70 VA. L. REV. 101, 102 (1984).
336 Martin Wald, Note*: The Future of the War Powers Resolution,* 36 STAN. L. REV. 1407 (1984).
337 Carter, *supra* note 335, at 102.
338 Ronald D. Rotunda, *The War Powers Act in Perspective,* 2 MICH. L. & POL'Y REV. 1 (1997).
339 *Id.* at 1, note 2.
340 Carter,*supra* note 335, at 104.
341 Lori Fisler Damrosch, *The Constitution under Clinton: A Critical Assessment: The Clinton Administration and War Powers,* 63 LAW & CONTEMP. PROB. 125, 128 (2000).
342 *Id.* at 130.
343 *Id.* at 130.
344 *Id.* at 130.

or a sudden attack on the United States.[346] However, there are countless other cases where the President has used the military: rescue operations of U.S. citizens in foreign countries, protection of U.S. embassies, enforcement of ceasefires, and the fulfilment of treaty obligations.[347]

Sec. 3 of the War Powers Resolution requires consultation with Congress prior to the introduction of U.S. armed forces only, when doing so, is "possible".[348] Professor Rotunda views this consultation requirement as a "sound one" because it lives up to the President's reponsibility to explain his actions to the U.S. citizens in an open and clear way.[349]

Sec. 5 (b) of the War Powers Resolution obliges the President to withdraw the troops if Congress does not authorize the deployment, but Rotunda stresses the fact that there are many cases where the President and Congress have simply ignored the provision.[350] He points out that Sec. 5 (b) allows Congress to achieve a significant political result by doing nothing, and grants the President two months to use the military as he sees fit.[351] At the end of the two months a concurrent resolution by Congress is according to Sec. 5 (c) sufficient to bind the President to withdraw the troops, and serves as what Rotunda calls a "legislative veto".[352] The Supreme Court held in INS v. Chadha that all legislative vetoes are unconstitutional.[353] Consequently, constitutional lawyers have concluded that Sec. 5 (c) of the War Powers Resolution may be seen as unconstitutional.[354]

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345 *Id.* at 131.
346 Rotunda, *supra* note 338, at 3.
347 *Id.* at 4.
348 *Id.* at 6.
349 *Id.*
350 *Id.* at 7.
351 *Id.*.
352 *Id.*
353 INS v. Chadha, 462 U.S. 919 (1983).

D. Judicial Control of the President's Use of the U.S. Armed Forces

As early as 1849, the U.S. Supreme Court held in Luther v. Borden that the President's decision to introduce armed forces to hostilities is a political question and is consequently not reviewable by the Court.[355] However John Hart Ely says he does not "recommend that judges decide what wars we should and shouldn't fight – not because I think they'd necessarily do it worse than anybody else, but rather (to risk sounding naive) because it simply isn't their job. ... But if the courts' relative insulation from the democratic process suggests that it is no business of theirs to decide what wars we fight, it does situate them uniquely well to police malfunctions in that process ... The courts have no business deciding when we get involved in combat, but they have every business insisting that the officials the Constitution entrusts with that decision be the ones who make it".[356]

During the first decades of U.S. constitutional history, the courts were important players in deciding the legality of executive branch decisions to initiate hostilities.[357] In the famous case Bas v. Tingy, for example, the Supreme Court upheld the decision made by John Adams to pursue an undeclared war with France.[358] The Court established a clearly deferential position in 1936 in United States v. Curtiss-Wright Export Corp.,[359] where it held that the President is the "sole organ" in foreign affairs.[360] During the Viet Nam war, courts held that warmaking is a "political question" and dismissed lawsuits challenging the war.[361] The following two decisions

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[354] Carter, *supra* note 335, at 129-132.
[355] Luther v. Borden, 48 U.S. 1 (1849); HALL, *supra* note 265, at 81.
[356] ELY, *supra* note 252, at 54.
[357] Harold Hongju Koh, *Judicial Constraints: The Courts and War Powers, in* The U.S. Constitution and the Power to Go to War, 122 (Gary M. Stern & Morton H. Halperin, eds., 1994) (hereinafter Koh, *Judicial Constraints*); KOH, SECURITY CONSTITUTION, *supra* note 234, at 135.
[358] Bas v. Tingy, 4 U.S. 37 (1800).
[359] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).
[360] Koh, *Judicial Constraints*, *supra* note 357, at 122.
[361] Hall, *supra* note 265, at 91.

by federal courts provide good examples of the judicial branch's current approach towards the question of judicial review in the area of war powers.

1. Dellums v. Bush

Dellums v. Bush involved events leading up to the 1991 Gulf war. There, in dicta, Judge Harold H. Greene of the U.S. District Court for the District of Columbia however, held open the possibility that courts can address certain aspects of the decision to initiate a war.[362] Fifty-three members of the House of Representatives and one United States Senator sought to enjoin the President from starting military action against Iraq without either a formal declaration of war or some other kind of authorization by Congress.[363]

The Department of Justice argued that the issue was a political question, since the "design of the Constitution is to have the various war- and military-related provisions construed and acting together, and ... their harmonization is a political rather than a legal question".[364]

Judge Greene responded that, if the executive branch could decide alone on military action Congress' power to declare war would depend on the mercy of the executive, a result that would "evade the plain language of the Constitution".[365] He thought, the fact that hundreds of thousands U.S. troops were massed at the border of Iraq made this a war in the sense of Article I, section 8 of the Constitution.[366] This being the case, a Congressional declaration of war would be necessary before initiating hostilities.[367] However, he refused to grant the injunction, because the action was not ripe for two reasons: First "Congress itself has provided no indication whether it

[362] Dellums v. Bush, 752 F.Supp. 1141 (D.D.C. 1990).
[363] *Id.* at 1143.
[364] *Id.* at 1144-45.
[365] *Id.* at 1145.
[366] *Id.*
[367] *Id.*

deems such a declaration either necessary, on the one hand, or imprudent, on the other".[368] Second, it was not clear whether the President had made the final decision to go to war with Iraq because there were still diplomatic efforts underway to solve the crisis peacefully.[369]

President George Bush subsequently asked on January 8, 1991 for congressional authorization.[370] Congress passed the "Iraq Resolution"[371], which granted authorization for the use of force.

Professor Koh welcomed the district court's decision but criticized Judge Greene for dismissing the suit. He argues that ripeness cannot be denied when "the Executive branch has clearly committed itself to a course of action".[372] He thought that the case was ripe for adjudication, since the chances of a military conflict were quite high in December 1990; as a remedy the district court might have remanded the case to Congress, thereby requiring the President to bring the question to Congress.[373]

John Hart Ely believed the most important part of Judge Greene's opinion was the statement that President Bush would violate the U.S. Constitution if he started hostilities without Congressional approval.[374] However, Ely stressed the fact that other courts may come to other, more deferential results, especially when one considers the latest appointments to the federal courts.[375]

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[368] *Id.* at 1149-50.
[369] *Id.* at 1151-52.
[370] Sidak, *supra* note 293, at 44.
[371] Pub. L. No. 102-1, 105 Stat. 3 (1991).
[372] Koh, *Judicial Constraints*, *supra* note 357, at 124.
[373] *Id.*, at 126.
[374] Ely, *supra* note 252, at 50.

2. Campbell v. Clinton

Twenty-six members of the House of Representatives sought a declaratory judgment that President William J. Clinton had violated the Constitution and the War Powers Resolution, when - without Congressional approval - he ordered U.S. forces to participate in the air attack on the Federal Republic of Yugoslavia, that began on March 24, 1999, under the auspices of NATO.[376] District Judge Friedman dismissed the suit on the grounds that the plaintiffs lacked standing.[377] He stated that a member of Congress can claim standing only when they "demonstrate that there is a true "constitutional impasse" or "actual confrontation" between the legislative and executive branches .[378]

He found that Congressional resolutions, bills, and acts of appropriation showed that there was no real confrontation between the President and the legislative branch.[379] The Court of Appeals affirmed the decision.[380] The Supreme Court denied the petition for writ of certioari.[381]

This case made it clear that it will not be easy for a minority of Congressmen to get a federal court decision on the merits of a dispute which is related to the President's decison to initiate hostilities.

E. The Power of the Purse

During the Constitutional Convention, George Mason emphasized that the purse and the sword should never be united.[382] Also, Madison and other delegates were convinced that it was

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[375] *Id.*
[376] Campbell v. Clinton, 52 F.Supp.2d 34, 35 (D.D.C. 1999), *aff'd,* 203 F.3d 19 (D.C. Circ. 2000).
[377] *Id.* a 45.
[378] Campbell, 52 F. Supp. 2d at 43.
[379] *Id.* at 43-45.
[380] Campbell v. Clinton, 203 F. 3d 19 (D.C. Circ. 2000).
[381] Campbell v. Clinton, 531 U.S. 815 (2000).
[382] Louis Fisher, *The Spending Power*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY, 228 (David Gray Adler & Larry N. George, eds. , 1996) (hereinafter Fisher, *Spending Power*).

beneficial for constitutional liberties to insure that the power of the Commander-in-Chief was not given to the same institution that has the competence to decide upon the funding of military operations.[383]

The spending power of Congress in Article I, section 9, clause 7 of the Constitution provides that "(n)o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time". Article I, section 8, clause 1 provides that Congress has the power "to lay and collect Taxes ... to ... provide for the common Defense", "to raise and support Armies" and "to provide and maintain a Navy".[384] The Constitution establishes a two-year time limit on the appropriation of money for the army[385], thereby securing congressional control over the military. It cannot be denied that the President has a "strong voice" regarding the particular amount of defense expenditures; nevertheless it is up to Congress to make the final decision as to the spending.[386]

Moreover, Congress can attach conditions to the use of the public money even if the funding is related to a situation which deeply involves the Commander-in-Chief.[387] Fisher cites examples which demonstrate the power of Congress with respect to the funding of military operations:[388] Among them is that of Congress utilizing its spending power to stop the U.S. involvement in Southeast Asia in 1973.[389] In 1993, Congress even set a deadline for the withdrawal of U.S. troops from Somalia by writing into the appropriation bill that no money can

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383 *Id.* at 228.
384 *See* HENKIN, *supra* note 4, at 114.
385 U.S. Const. art. I, § 8, cl. 12.
386 HENKIN, *supra* note 4, at 114.
387 Fisher, *Spending Power*, *supra* note 382, at 228-29.
388 *Id.* at 229.
389 87 Stat. 99, 129, § 307 (1973); 87 Stat. 130, 134 § 108 (1973).

be spent on military operations in Somalia after March 31, 1994, unless the President otherwise secures new congressional approval for such action.[390]

The requirement of Congressional funding also has great political importance. Seeking congressional support promotes public understanding and acceptance of military involvements.[391]

F. The USA and the United Nations

1. The United Nations as a System of Collective Security

As a response to World War II, several nations joined in creating the U.N. as a means of collective security, in hope of avoiding the failure of the League of Nations.[392] Art. 2 (4) of the U.N. Charter provides:

"All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

Art. 51 of the U.N. Charter nevertheless acknowledges the right of individual and collective self-defense. Art. 42 of the U.N. Charter provides that the U.N. "Security Council ... may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace or security".

This provision was accompanied by Art. 43 of the UN-Charter which stated that the member states should enter into agreements providing to the Security Council armed forces on a

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[390] 107 Stat. 1476, § 8151 (b) (2) (B) (1993).
[391] Fisher, *Spending Power*, *supra* note 382, at 237.
[392] *Cf.* Brian M. Spaid, *Collective Security v. Constitutional Sovereignty: Can the President commit U.S. troops under the Sanction of the United Nations Security Council without Congressional Approval?,* 17 DAYTON L. REV. 1055, 1061-62 (1992); John J. Kavanagh, Note: *U.S. War Powers and the United Nations Security Council,* 20 B.C. INT'L & COMP. L. REV. 159, 168 (1997).

permanent basis.[393] However, no such agreement was entered into and the Security Council must seek troops commitments by member states in each specific operation.[394]

A U.S. statute authorizes the President to negotiate such an agreement with the Security Council.[395] Such an agreement then needs Congressional approval.[396] Only those forces, which have been referred to in the Congressional act of approval, may be provided to the Security Council. [397] It is not likely that the Security Council will soon have its "own" military force. Therefore, it is appropriate to focus on the current legal situation, which raises important questions of U.S. constitutional law in the case that the U.S. is involved in a military operation, which is backed by Security Council resolution.

2. The Relation of the USA with the U.N. in the Area of Security Policy

a) The need for Congressional Authorization even if there is a Security Council Resolution

Although the U.S. is a Permanent Member of the Security Council and has veto power[398] the President retains the constitutional power to deploy troops even when the requirements of the U.N.-Charter are not met and so violates international law.[399]

One of the most interesting legal issues with repect to the role of the President, the U.S. Congress, and the U.N. Security Council focusses on the question of whether a U.N. Security Council resolution, authorizing the use of force, is a sufficient legal basis for the President of the

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[393] Jane E. Stromseth, *Treaty Constraints: The United Nations Charter and War Powers*, *in* THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR: HISTORICAL AND CURRENT PERSPECTIVES, 83 (Gary M. Stern & Morton H. Halperin eds., 1994) (hereinafter Stromseth, *Treaty Constraints*).
[394] *Id.* at 84.
[395] Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597, 615 (1993) (hereinafter Stromseth, *Rethinking*).
[396] *Id.*
[397] *Id.*
[398] U.N. charter, arts. 23 (1) and 27 (3) .
[399] HENKIN, *supra* note 4, 250-51.

United States to deploy troops and send them into combat, or if – even with there being a Security Council resolution – Congress still has to approve of the initiation of military action.[400]

(1) The Police Power Approach

After the North Korean attack on the Republic of Korea in June 1950, the Security Council of the United Nations issued a resolution which urged North Korea to withdraw its forces and further asked the Member States of the U.N. to assist in the execution of the goals of the resolution.[401] U.S. President Harry Truman referred to that resolution when he justified his deployment of U.S. troops to support the South Koreans,[402] by arguing the "police power model of presidential authority in the U.N. context".[403] He first employed the Commander-in-Chief clause to argue that the President has the broad power to secure the foreign interests of the U.S. including the functioning of the U.N. system.[404] He then stated that the U.N. Charter as a treaty had to be "faithfully executed" by the President, and that the President could deploy U.S. troops without Congressional approval if there is a authorizing Security Council resolution.[405] He then concluded that the use of force in the context of an U.N. operation is to be seen not as a "war" but as an "international police action".[406]

This position has been criticized. First, if the President can commit U.S. troops in large scale hostilities in the context of an U.N. operation, this power would undermine the Constitutional power of Congress to declare war.[407] Second, a U.N. Security Council resolution only authorizes the use of force and does not require a U.N. Member State to engage in military

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400 Stromseth, *Treaty Constraints, supra* note 393, at 84.
401 U.N. Document S/1501 (1950); Stromseth, *Treaty Constraints, supra* note 393, at 86.
402 Stromseth, *Treaty Constraints, supra* note 393, at 86-87.
403 *Id.* at 87.
404 *Id.*.
405 *Id.*.
406 *Id.*
407 *Id* at 91.

combat. There is no treaty obligation to provide troops if there is such a resolution.[408] Third, a large military operation like that in Korea was no mere "police action".[409]

(2) Political Accomodation

When Iraq invaded Kuwait in August 1990 the United Nations and the U.S. responded.[410] The U.N. Security Council agreed upon Resolution 678 which provided that the U.N. members may use "all necessary means" to oust Iraqi forces from Kuwait.[411]

As late as in December 1990, the Bush Administration held the view that it did not need Congressional approval before initiating combat in Kuwait and Iraq, and resolution 678 gave the President, as the Commander-in-Chief, the power to use the U.S. army.[412] In January 1991, it became evident that Congress was concerned with its constitutional war powers. And due to political concerns, President Bush asked Congress to agree upon a resolution which would support the use of all means to execute the goals of Security Council Resolution 678.[413] However, President Bush made it clear that he was determined to use the troops notwithstanding a possible negative decision by Congress.[414] Congress agreed on a joint resolution that authorized the President to use force to enforce Security Council Resolution 678.[415] Although Congress authorized the use of force to free Kuwait, it did not subscribe to the notion of an unlimited Presidential power regarding U.N. "police actions".[416] Congress rejected the "police power" approach, which had been used during the Korea crisis; instead Congress stressed that it alone had the constitutional competence to decide whether U.S. troops should be involved into

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408 *Id.* at 92.
409 *Cf. id.* at 92.
410 Kavanagh, *supra* note 392, at 174-75.
411 Sec. Counc. Res. 678, U.N. Doc. 5/RES/678 (1990).
412 Stromseth, *Rethinking, supra* note 395, at 645-46.
413 *Id.* at 648.
414 *Id.*
415 H.R.J. Res. 77, 102nd Cong., 1st Sess. (1991).
416 Stromseth, *Rethinking*, *supra* note 395, at 653.

hostilities.[417] President Bush did not consider Congressional approval to be constitutionally required. He made the statement "(i) didn't have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait."[418]

Professor Stromseth called the President's request for approval "political accomodation model", which requires the President to seek authorization by Congress if he wants to send a substantial number of U.S. troops into a combat operation, under the auspices of the U.N. Security Council.[419] The so-called "political accomodation approach" complies with the idea of shared war powers, which can be found in the U.S. Constitution and does not delete the requirement of Congressional approval when a large number of U.S. soldiers have to be deployed and face risky operations.[420] Under this model, smaller operations in the context of an U.N. Security Council resolution may be started with only the President deciding upon them.[421] This war powers model would therefore guarantee the required degree of flexibility.[422]

b) Comment

Treaties are inferior in rank to the U.S. Constitution.[423] A U.N. Security Council Resolution, which is based on the U.N. Charter, therefore cannot serve as a substitute for Congressional approval. Otherwise it would be possible for the President to avoid the constraints of the Constitution, which would negatively effect the system of checks and balances.

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417 *Id.*
418 *Id.* at 654-55.
419 *Id.* at 654.
420 Stromseth, *Treaty Constraints*, *supra* note 393, at 93.
421 *Id.*
422 *Id.*
423 Reid v. Covert, 354 U.S. 1, 16-17 (1957).

Chapter IV

Assessment and Concluding Remarks

It has to be emphasized that it is not possible to conduct a "real" comparative analysis between the legal structure of the EU's Common Foreign and Security Policy and the "War Powers" provisions of the U.S. Constitution. The U.S. is a sovereign state with clear responsiblities and structures with respect to the foreign affairs powers, whereas the European Union is not yet a sovereign entity, but can only be described as a "supranational federation"[424] of independent and sovereign states. The EU escapes the classical dichotomy of nation states and international organizations. It is something new, an entity which evolves out of slow progress towards a new form of government for the European nations.[425] The EU has currently not a constitutional structure that would allow a classical comparative analysis with the U.S. Constitution. However, the EU is integrating more and more, even in the field of foreign and security policy. Although this policy field is considered to be "high" politics, dominated by the concept of sovereignty, there is progress within the EU to achieve more cooperation in this field. This is due to Europe recognizing that without cooperation it will not have a major role in current international affairs.

In the EU, we see that unanimity is the dominant principle when it comes to questions having security and defense implications. It requires therefore consensus among the EU leaders to achieve progress in the security and defense area. This explains the slow movement towards an integrated common defense or a common defense policy.

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[424] von Bogdandy, *supra* note 1 (trying to classify the legal nature of the EU).
[425] *Id.*

However, as a response to the decade-long crisis in former Yugoslavia, the EU Member States have made considerable progress. They were able to include the so-called Petersberg Tasks in the Treaty on European Union and agreed upon the establishment of a Rapid Reaction Force to handle crisis situations.

In the U.S., the main question is the balance of power between the President and Congress. Both are the dominant players in the area of foreign affairs and war powers in particular. Although there are plenty of constitutional lawyers who argue that Congress has a much larger role when it comes to the war powers, in reality the President is the most important player. Only when U.S. military involvement went wrong, Congress was able to claim a bigger role. An example is the disastrous war the U.S. fought in Viet Nam. In the aftermath of this devastating experience, Congress passed the controversial War Powers Resolution, which tried to limit the powers of the President.

Today, however, it seems to be the case that the President has attained a much more important role again. It may be appropriate to say that the respective balance of power between Congress and the President depends on their current political power.

The U.S. Supreme Court usually does not interfere with this particular struggle of power between the Chief Executive and the lawmaking body, leaving it to the political branches to find a way to balance their respective competences against each other.

However, it has to be emphasized that, in the U.S., the Courts are disqualified from dealing with questions which have military or security related implications. In contrast with this approach, in the EU the Court of Justice has no jurisdiction over the Common Foreign and Security Policy. With respect to the power of the purse, it can be noted that in the U.S., Congress has such power. Thereby, Congress has a very important tool for exerting influence. In the EU,

military operations are financed by those Member States which are conducting them. The European Parliament has no power comparable to that of Congress.

Although it is not possible to conduct a real comparative analysis, this paper nevertheless may help the reader to understand why the U.S. on the one hand and the EU on the other hand act in a specific way. The depicted EU legal structures may explain why the EU was often not able to produce a swift, quick and unanimous response to a urgent crisis situation. After looking at the legal framework and the practical approach in the U.S., it is possible to conceive why the US can react decisively to a crisis situation. The concentration of power in the office of the President explains timely U.S. action and involvement.

However, as the recent EU practice in the Democratic Republic of Congo and the former Yugoslav Republic of Macedonia confirms, the EU Member States are able to agree unanimously on military operations. These examples should not lead one to be too optimistic, because these operations were of a lower level politically. In these cases, there were no extremely important national interests at stake.

As the latest Iraq conflict has proven, when there are massive national interests involved, it is not possible to achieve consensus among the EU Member States regarding a common approach to a severe political crisis.[426] Since Germany, France, Austria, Belgium and Luxembourg had a completely different view as to the Iraq crisis compared to the UK, Italy, Spain, the Netherlands and Denmark, the EU was not a significant player in the months before the U.S. invasion of Iraq.[427]

In early 2004, the EU is in a crisis: The Draft Constitution was blocked by Poland and Spain, which have the idea that they should continue to have almost the same voting power as

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[426] BBC News, Europe and Iraq: Who stands where? *at* http://news.bbc.co.uk/1/hi/world/europe/2698153.stm (last visited Febr. 28, 2004).

Germany and France, which have a much larger population.[428] The enlargement process will require enormous expenditures while the net payer states France, Germany, the UK, Sweden, the Netherlands and Austria are not willing to contribute more to the EU budget.[429] Finally the violation of the Stability and Growth Pact by Germany and France raises doubts as to the future stability of the Euro.[430]

It remains to be seen whether the EU will be able to overcome the current obstacles and move further towards more integration in the area of foreign policy. Maybe, the notion of a multi-speed Europe can be relied upon to solve the current deadlock. This would mean that those Member States which are willing to integrate more towards a political union may go ahead and form new structures within the EU to implement more ambitious ideas that may not yet be acceptable by traditionally reluctant countries such as the UK, Denmark, and Sweden.[431]

Moreover, there should be consensus that Europeans need to spend more on their defense in order to achieve a more just burden sharing between the U.S. and the EU states with respect to the task of providing security for Europe.[432] Therefore, improved cooperation among the Europeans in the area of defense is in the genuine interest of the US.[433] With the US being the only military superpower in the world, it remains to be seen what kind of status the EU will achieve and especially how the legal framework in the EU will evolve.

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[427] *Id.*
[428] BBC News, Leaders play down summit failure, *at* http://news.bbc.co.uk/1/hi/world/europe/3317055.stm (last visited Febr. 28, 2004).
[429] Deutsche Welle, After Constitution Split, EU Widens Dispute to Budget, 16.12.2003, *at* http://www.dw-world.de/english/0,3367,1433_A_1061732,00.html (last visited Febr. 28, 2004).
[430] *Cf.* Deutsche Welle, EU Likely to Sue Over Suspension of Euro Pact, 12.01.2004, *at* http://www.dw-world.de/english/0,3367,1433_A_1084887_1_A,00.html (last visited Febr. 28, 2004).
[431] BBC News, Leaders play down summit failure, *at* http://news.bbc.co.uk/1/hi/world/europe/3317055.stm (last visited Febr. 28, 2004).
[432] *Cf.* Hulsman, *supra* note 206, at 72-77.
[433] *Id.*

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