



The European External Action Service in Crisis Situations

-An Analysis of the Legal Challenges in the First Two Years after Lisbon.-



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Bachelor Thesis for European Studies

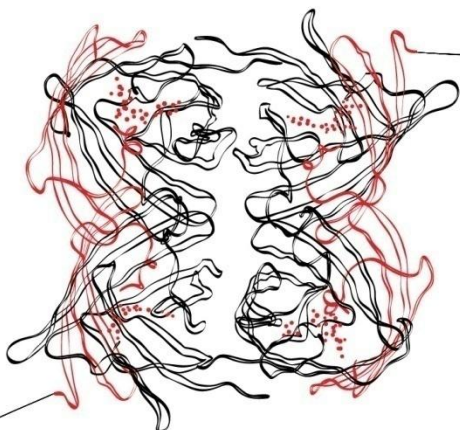
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Abstract

This article will address the legal challenges the EEAS has coped with in its first operational year, focusing on crisis management. The legal basis for the diplomatic service will be analyzed in both European and international law. On that basis, an analysis will be given of what the Lisbon Treaty changed about the initial situation and what possibilities and competences this gives to the EEAS. This structure of competences is somewhat confusing to a certain extent, resulting in questionable effectiveness of the EEAS in crisis situations. Another legal challenge is that the EEAS is not officially recognized as a full blown diplomatic service within international law. A few examples will show that the success is therefore highly dependent on recognition by the international community. Exactly that structure forms a risk for the EEAS of being abused. Being politically seen a player with limited power in combination with the current international legal structure may provide an opportunity for the international community to abuse this situation. Therefore a strong internal structure is essential; it will create a more coherent, and thus more powerful voice within the international arena in crisis situations.

Key Words: *EEAS - International Law – European Law - Crisis – Crisis Management – Coherence – Legal Challenges*

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List of abbreviations

CFSP	Common Foreign and Security Policy
ECJ	European Court of Justice
EEAS	European External Action Service
ENP	European Neighborhood Policy
EP	European Parliament
ESDP	European Security and Defense Policy
EU	European Union
EUNAVFOR	European Naval Force
HR/VP	High Representative of the Union for Foreign Affairs and Security Policy, Vice President of the European Commission and the Permanent Chair of the Foreign Affairs Council
NATO	North Atlantic Treaty Organization
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
VCDR	Vienna Convention on Diplomatic Relations

1. Introduction

“*Minister Rosenthal summons the ambassador in Belarus*” was the translated title of an article in the Dutch newspaper NRC-Next. The message concerns the summoning of many diplomats of the EU-member states as a result of a diplomatic fight after an EU decision on Tuesday 28th of February putting sanctions on Belarus.¹ Since about a year, these kinds of messages are becoming more common; the EU deciding on diplomatic issues in the name of member states.²

This article will discuss this new foreign policy of the EU. More precisely, the European External Action Service, its diplomatic ambitions and international law and the latest effects on crisis management. Before formulating a specific question, it is deemed useful to shortly look back into the developments of the last years in the EU’s foreign policies.

For many years, the EU has attempted to increase its influence. More and more, the EU seems to dedicate issues that used to be highly sensitive to a more supranational approach. One could say that an attempt is made to make EU policy as coherent as possible. As Portela and Raube (2011)³ state, the pillar structure within the EU has rapidly changed in the last decade, and with the disappearance of the original pillar structure on December 1, 2009⁴, a new era seems to have begun as a result of more and more inter-pillar decision making.

Nevertheless, one of the major aspects left behind in the scope of these significant changes, are the EU’s foreign policies. And exactly that is something to worry about. Was it not the EU that was supposed to bundle the powers of the Member States in to one coherent and effective international organization? As mentioned, in many field this development does indeed take place, slowly but steadily. Also when it comes to foreign policies, the EU attempts to send out a clear sign by ‘speaking with one voice’.⁵ Subsequently, the EU certainly tries its utmost to as well keep up this spirit within the international arena. The Lisbon Treaty has basically created one independent constitutional provision to realize more coherence of EU foreign policy. Putting this ambition into practice, a ‘multi-hatted High Representative of the Union for Foreign Affairs and Security Policy, Vice President of the European Commission and the Permanent Chair of the Foreign Affairs Council (from now on to be mentioned as HR/VP), was created.⁶ In this functioning, the HR/VP is to be supported by a newly

¹ For the Decision: Council of the European Union, 2012. Council reinforces restrictive measures against the Belorussian regime. Decision 6814/12. Brussels.:

http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/128246.pdf

² See “*Minister Rosenthal ontbiedt ambassadeur Wit-Rusland*” in NRC-Next, 2 March, 2012.

³ Portela and Raube (2011). Coherence in EU foreign policy: What kind of polity? *Working Paper No.68, June 2011, Leuven Centre for Global Governance Studies.*

⁴ Entry into force of the Lisbon Treaty

⁵ For a more elaborated report on the EU’s ambitions, see

<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0181&language=EN>

⁶ P.J.Kuijper, 2008. *Of ‘Mixity’ and ‘Double Hatting’, EU External Relations Law Explained’.* Amsterdam, Voissiuspers.

created diplomatic body of the EU, the European External Action Service (EEAS)⁷. The function of HR/VP is employed by Mrs. Ashton.

There are many discussions going on about the nature of the body. Although the competences seem to be relatively straightforward, scholars do not even agree on whether or not the EEAS is an institution.⁸ Let alone that the legal capacities of the institution are fully clear. Nevertheless a lot has been written on the EEAS; on its characteristics, functioning and legality within the EU, but also in the light of international diplomatic law.⁹ These analyses will be touched upon to a limited extent within this document, and will function as background information to be able to understand the analysis of the EEAS in the light of answering the main research question. This research question will namely concern the practical implications of the EEAS in crises. To a large extent there have been articles predicting the effects of the EU having this agency in crisis situations¹⁰. Nevertheless, being hardly a year, and several crises ahead, there is only little¹¹ analysis on what of these predictions has come true.

Within this document, an attempt will be made to contribute to the analysis of the functioning of this young body in practice. For that there will be a brief reference to previous academic literature on the EEAS; first of all a description of how the EEAS is developed and its structure will be given. Subsequently its actual position and ambitions within the international community is to be touched upon. This will be done on the basis of the EEAS in the context of international diplomatic law, answering the question on what of the diplomatic ambitions of the EEAS will survive when they are put into this context. All together this will create a common ground to analyze the legal challenges that have been in place for the EEAS in crises within the international community of the last two years. This will be done on the basis a few examples of case studies.

⁷ See Council Decision 2010/427/EU of 26 July 2010 establishing the organization and functioning of the European External Action Service, OJ 2010, L 201/30, 3 August 2010.

⁸ In 'Bart van Vooren, 2011. A Legal-institutional perspective on the European External Action Service. *Common Market Law Review* 48: 475-502' it is claimed that the EU diplomatic service is a real institution. On the other hand, the European Defense College emphasizes that the EEAS does not fulfill the criteria of being an institution, as stated by a representative during a lecture to European Studies Master students, European Commission, January 25, 2012, Brussels.

⁹ See for instance 'Bart van Vooren, 2011. A Legal-institutional perspective on the European External Action Service. *Common Market Law Review* 48: 475-502', 'Emerson, M. et al., 2011. *Upgrading the EU's role as global actor; institutions, law and the restructuring of European diplomacy*, Centre for European Policy Studies, Brussels' and many more articles that will come across in this document.

¹⁰ E.g. Steven Blockmans and Ramses A. Wessel, 2009. The European Union and crisis management: will the Lisbon Treaty make the EU more effective? *CLEER Working Papers 2009/1*.

¹¹ E.g. Steven Blockmans, 2012. The European External Action Service one year on: First signs of strengths and weaknesses. *CLEER Working Papers 2012/2*. Gives an analysis of the different new strategies of the EEAS in practice.

2. Methodology and Research Question

Research Question

Linking back to the introduction, the central research question for this document is:

What have been the legal challenges for the EEAS in terms of its depicted role in crisis management in the last two years?

To analyze these legal challenges, several sub-questions will be dealt with, as also broadly described in the introduction. To be specific, these will be:

What are the legal bases of the EEAS in European and International Law, and what purpose does this set out?

In order to identify the possible legal challenges for the EEAS in its functioning, it is essential to know what the law states about this, and what purposes are laid down within the law. This can be done by first of all looking at the legal-institutional provisions on the CFSP and especially the HR/VP and the EEAS within the Lisbon Treaty. Additionally looking at what international law states on the potentials of the EEAS, will provide a further basis for analyzing the challenges awaiting the EEAS. An attempt to answer this sub-question will be made in section four.

Referring to crisis management, what has the introduction of the EEAS changed in the EU's capacity to react effectively, and what legal challenges are therewith left?

Reflecting on the legal basis, the answer on this question will enhance an input to the debate on what legal challenges are inherent for the EEAS in crisis situations. This theory is to be tested by the next sub question. It therewith reflects on the theoretical capabilities of the EEAS in crisis situations, and thus also reflects on the challenges the EEAS may run into. This question will be dealt with in section five.

How have the theoretical implications and challenges been visible in practice after the first full year of functioning of the EEAS?

To come to a final judgment, which answers the main research question, the theoretical background is put into perspective by answering this sub-question in section six. This will highlight what practical and actual legal challenges have been present in the first period of the EEAS' existence. This purpose will be served by giving a few case-analyses. All together, the different sub-answers will allow for a complete conclusion on the legal challenges for the EEAS in crisis situations; they include what the legal challenges for the EEAS in terms of crisis management are in theory and how this has worked out after the first two years of Lisbon.

Methodology

The analysis to be carried out will be based on existing literature. This concerns a selection of the vast amount of literature on the EEAS as such, but also the limited literature available that evaluates the first real diplomatic actions of the EEAS. Moreover, the analysis will be based on literature on crises in the past two years in which the EEAS was, or maybe still is involved. This should give an

insight in how the EEAS is perceived by the international community as well as the Member States of the EU themselves.

Other significant documents to be analyzed are the treaties establishing the legal nature of the EEAS or regulating the latter's competences. These are mainly the Treaty of the European Union, the Treaty of the Functioning of the European Union and the Vienna Convention on Diplomatic Relations of 1961. Next to that, different statements of the different international organizations or states at stake will play a big role. This analysis is a content analysis and will be mainly descriptive.¹²

¹² For more information on content analysis, see Babbie, E. 2007. *The Practice of Social Research*. Belmont, USA. Thomson Higher Education.

3. Important Concepts

Within this report, several concepts play a key role in the analysis of legal constraints that have been inherent for the EEAS during crisis situations in the last year, but also before that. These concepts will be addressed specifically within this section. This is deemed necessary, since some of the concepts are contested for what they imply. The following description will make clear what assumptions are made within this document.

Effectiveness

An important aspect with regard to the EU's goal of 'speaking with one voice' and coherent representation (to be dealt with in the next chapter), is effectiveness. To see what legal constraints may play a role, the question may as well be asked how effective certain actions are. Within this article the concept of effectiveness will be an ever returning concept. Therefore it is important to know what effectiveness stands for. In the scope of this article, effectiveness is a broader aspect than just instrumental effectiveness. An action by any political body is perfectly effective if there is a right balance between (1) serving the goal of the action, (2) a broad basis of acceptance (think about democratic accountability) and indeed (3) a right speed to be able to respond to the problem at stake.¹³ Without one of these components, an action cannot be called truly effective.

It has to be kept in mind that this balance may differ per situation; a crisis situation for instance will need a high speed of action for it to still serve the goal of the action in the end. A broad acceptance is a difficult issue in that case, yet it has to be taken into account since often it has to be the society leading to the success of a policy implementation.¹⁴ To translate this into the scope of this article, Blockmans and Wessel (2009) argue that effectiveness in crisis management 'mainly depends on the potential of the EU to formulate and implement a security and defense policy'.

Crisis

In the light of this article, crisis is to be referred to as a crisis in the diplomatic sphere. It would be a situation in which immediate action or intervention is needed. In case of the EEAS, this would concern its role in carrying out the Common Foreign and Security Policy (CFSP) in times of crisis. These actions are therefore likely to concern military interventions.¹⁵

Crisis Management

Within this article, the crisis management capabilities of the EEAS are assessed on the basis of legal challenges that come along with the concept. Crisis management does not only include the prompt

¹³ See Park & DeShon (2010). A Multilevel Model of Minority Opinion Expression and Team Decision-Making Effectiveness. *Journal of Applied Psychology*. Vol. 95, No.5, pp. 824-833.

¹⁴ Lijphart, 1999. *Patterns of Democracy*. Yale University, United States.

¹⁵ See: Blockmans & Wessel. 2009. The EU and crisis management: Will the Lisbon Treaty make the EU more effective? *CLEER Workingpapers 2009/1*.

reaction to a crisis as such, but also the prevention of crisis situations and the long-term management of effects that occurred due to a crisis.

Legal Challenges

As the main focus of this article is to identify legal constraints or challenges, it would be wise to lay down a definition that describes what is actually looked for. A legal constraint would in this case be a burden within the legal framework. A burden in the sense that a challenge prevents the EEAS from carrying out its ambitions in an effective way.

International Law

Next to EU law, also international law plays a key role in regulating the actions that diplomatic agencies may take. The reason that this concept is mentioned within this section is that it is often unclear what is meant with international law, since it occurs in several forms. When international law is addressed within this article, it will to a large extent concern international diplomatic law, as laid down by the Vienna Convention on Diplomatic Relations¹⁶ (VCDR). This Treaty also includes the laws on international agreements, whether 'Status of Force Agreements' (SOFA) or 'Participation Agreements'.¹⁷

Next to international diplomatic law, which concerns the diplomatic relations of the EU as such, also other rules of international law are important in crisis situations. Especially when military or civilian operations are involved in the actions of the EEAS, International Humanitarian Law, Human Rights Law and other legal orders may be relevant.¹⁸ If this is the case, this will be mentioned within the document.

European Neighbourhood Policy

In 2004, the European Neighbourhood Policy (ENP) was officially established, following on a Commission communication.¹⁹ Within the light of the EEAS, the ENP is essential, since it contains a major part of its diplomatic relations. From 2004 on, the EU has tried to promote European values in its backyard; for it to benefit from a stable backyard, but also to promote for example human rights. From its creation onwards, it has had an effect on the neighbours which was far from what the Commission desired in its communication.²⁰ Therefore a great challenge is laid down for the EEAS to bring about change in this situation, as the new diplomatic service of the EU. With the Arab Spring

¹⁶ Signed April 18, 1961. Entered into force on April 24 1964.

¹⁷ For more elaboration on those forms of agreements in the light of EU diplomatic relations, see F.Naert, 2011. Legal aspects of EU military operations. *Journal of International Peacekeeping* Vol.15, pp. 218-242.

¹⁸ See also F.Naert, 2011.

¹⁹ COM (2003) 104 Final.

²⁰ For a good elaboration on why the 'European approach' failed, see Vasconcelos, A. (2012). *Listening to Unfamiliar Voices – The Arab Wave*. The European Union Institute for Security Studies, Paris, France.

taking place in the last year, the ENP will therefore be a major issue in the final assessment within this paper.

4. A legal basis for the EEAS; purposes and competences.

The current chapter will be the essential basis for the further analysis within this article. It will answer the question of legal bases, capacities and purposes which has been posed in the second chapter. By touching upon both the legal bases in EU law as well as international law, the answer will facilitate a thorough analyses of what legal challenges are ahead. Firstly it is to be laid down what the Lisbon Treaty implies for the capability of entering into diplomatic relations, followed by what international law states about the issue. The last part of this section will deal with the main purposes of the EEAS, as laid down by the Lisbon Treaty. Keeping this in mind, one will be better equipped to understand why certain legal issues can be seen as challenges. The reason for this chapter to also be relevant in the sense of crisis management, is that quick and coherent action will highly depend on the legal(-institutional) set up of the body.²¹

4.1 The Lisbon Treaty and the EEAS; legal basis and competences

“In fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the member states. The organization and functioning of the European External Action Service shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission.” Article 27(3) TEU.

This Treaty article has set out the legal basis for a Council decision establishing the EEAS.²² Looking at the pure legal basis for the EEAS and consistent foreign policy as such, the treaties seem to be relatively straightforward. Already in the pre-Lisbon era, coherent foreign policy was an issue taken care of within the treaties. Within the last Treaty on the European Union (TEU), Article 3 TEU sets out that the Union has to make sure that its external activity is consistent and that it should be especially the Commission and the Council cooperating to realize this. The current Article 26 TEU states that *unity, consistency* and *effectiveness* of the Unions actions should be ensured by the Council.²³ Where external representation normally is supposed to be realized by the Commission, in case of external representation for the CFSP, it is not.²⁴

The current responsibility is now somewhat unclear in certain situations. Both the HR/VP and the President of the European Council play a big role; the HR/VP shall represent the Union in CFSP matters, the President of the European Council should do the same, but without prejudice to the

²¹ This will be further discussed and explained throughout the article.

²² For the final Council Decision see: Decision 2010/427 EU of 26 July 2010, establishing the organization and functioning of the European External Action Service, OJ 2010, L 201/30, 3 August 2010.

²³ See Portela and Raube, 2011.

²⁴ Article 17 (1) TEU

powers of the HR/VP.²⁵ Especially for crisis situations, the also the Commission has a large share, as visible within the following quote:

“7. In order to enable the High Representative to conduct the European Security and Defence Policy (ESDP), the Crisis Management and Planning Directorate (CMPD), the Civilian Planning and Conduct Capability (CPCC) and the Military Staff (EUMS) should be part of the EEAS as defined in paragraph 16 while taking full account of the specificities of these structures and preserving their particular functions, procedures and staffing conditions. The Situation Centre (SitCen) should be part of the EEAS, while putting in place the necessary arrangements to continue to provide other relevant services to the European Council, Council and the Commission. These structures will form an entity placed under the direct authority and responsibility of the High Representative in his/her capacity of High Representative for Foreign Affairs and Security Policy. This arrangement will fully respect Declaration n° 14 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.

8. To enable the HR to fulfil his/her tasks in the crisis management area, preparations of actions related to the CFSP budget and the Instrument for Stability (Exceptional Assistance Measures and Interim Response Programmes) should be handled by the EEAS. The decision-making process will remain as today, with decisions taken by the Council (CFSP) and the Commission (IFS). The technical implementation of these instruments should be managed by the Commission.”²⁶

In combination with this text, one has to consider that the EU by now has legal personality. This has as a consequence that, now the EEAS has been established, things have changed when it comes down to the possibility to enter into diplomatic relations.²⁷ Since the legal personality and its implications for international (diplomatic) are essential for the further analysis, this will be dealt with in the next sub-section.

4.2 EU legal personality and diplomatic relations

The procedure for the EU to enter into international agreements is laid down in Art. 28 TFEU. But when it comes down to especially high politics, the following quote of Chalmers et al. (2010, p. 637)²⁸ is important to consider:

“The aim of Articles 21 and 22 is to enhance horizontal and institutional consistency. Regarding the former, these Articles provide for joined-up policy making; regarding the latter, giving the European Council a lead role in defining the Union’s international strategy may help bridge the gap between matters of low politics (trade, development, addressed in the TEU) and high politics (diplomacy, military intervention, addressed in the TEU”.

²⁵ See Articles 27(2) and 15(6) TEU

²⁶ Council of the European Union (2009). *The European External Action Service*. Note 14930/09 from the Presidency to the Council.

²⁷ See explanation of Art.47 TEU in Chalmers, Davies and Monti, 2010. *European Union Law*, p. 632. Cambridge University Press. Cambridge, United Kingdom, as well as its explanation of Declaration 24 concerning the legal personality of the European Union.

²⁸ Chalmers et al., 2010.

Although the Treaty sets out the capability of entering into international (diplomatic) agreements, this will always be on the basis of the principle of conferred powers, as laid down in Article 5 TEU. Next to that, it is essential to be reminded of the fact that these seemingly great competences of the Union still do not allow for as much action outside as inside, as nicely compared by T.Hartley (2004).²⁹ Considering the specific roles for the CFSP, laid down by the Treaty, one sees three different roles being apparent. First of them is safeguarding the EU's security. Next to that, and important in the light of this document, it is to promote international law, democracy and human rights. Subsequently, it will also play a role in securing the globe; international security.³⁰ With regard to crisis situations, the CSDP is, as an integral part of the CFSP, utmost important. Its tasks are still mainly the same as before, namely the 'Petersberg' tasks, which concern humanitarian intervention, conflict prevention and peace-keeping.³¹ Within these tasks, the commitments of individual Member States to e.g. the NATO have to be respected.³²

These Petersberg tasks are important to take a look at within this article, since these are exactly the tasks that concern the crisis management of the EU. The way the tasks were, and still are carried out, will become apparent later in this report. Within this section, focus lies on the EU legal basis for military operations, whether they concern peace-keeping missions, humanitarian aid or military intervention. Essential within the course of military interventions, is Article 42 (1) TEU, stating that "The common security and defense policy... shall provide the Union with an operational capacity drawing on civil and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter".³³ Military missions are an important aspect of the EU's crisis management. Also regarding the field of military missions, certain international agreements can thus be made. Since the EU has legal personality now, the status of the agreements has reinforced. Therefore there are some differences in the possibilities for the EU entering into international agreements on military missions.³⁴

All in all, one can say that the treaties certainly provide the HR/VP with promising new features, together with the EEAS to ensure more coherence in the EU's foreign policies. The only issue that seems to be able hinder any process, is the complicated design of competences, which makes it sometimes unclear who has the ultimate power, be it the Member States or the HR/VP, which highly affects the effectiveness of such process.³⁵ There are no substantial provisions on the issue of shared

²⁹ See T.Hartley, 2004. *European Union Law in a Global Context*. (Cambridge, Cambridge University Press, 2004) ch.12. Next to that, these implied powers are laid down in Article 216(1) TEU.

³⁰ See Article 21 TEU as well as Chalmers et al. as mentioned in No.15 (p.668)

³¹ Defined in 1992 by the Western European Union. Description taken from Chalmers et al. (No.15), p.670.

³² Article 42(2) TEU.

³³ An exact discription of what these tasks may include is incorporated in Article 43 TEU. See Naert, 2011. Legal aspects of EU military operations. *Journal of International Peacekeeping* Vol.15, pp. 218-242.

³⁴ See Articles 37 TEU and 318 TFEU, as well as Naert, 2011 for an extended review on the checks and balances of EU military operations.

³⁵ Article 4(2) TFEU and Article 2(4) TFEU.

competence; it is mainly based on key judgments of the European Court of Justice, including the principle of “sincere cooperation” that was incorporated in Article 4(3) TEU.³⁶

The latter has been a rather broad outline of the legal Treaty basis for EU external diplomatic relations. How this affects the actions of the EU’s diplomatic service acting on behalf of the HR/VP, will be analyzed within the rest of this essay. However, it has to be clear that the Treaty is not an obstacle for the EU to be represented by a diplomatic service in third countries, or to become a member of an international organization³⁷. Notwithstanding, the EU is represented in different forms in different states and international organizations, hence having different competences within these organizations. Next to that, the internal competences for external representation are also not always as clearly represented, although it has been improved by the setting up of the EEAS³⁸.

4.3 The EEAS within international legal orders

The success of the EU’s diplomatic service, and its capability to effectively respond to crisis situations, does not solely depend on its legal basis within EU law. Maybe even more important is its recognition by international legal orders, and hence the international community. This sub-section will therefore go deeper into the aspect of international law. Since the legal concept of international relations mainly lays within the scope of international diplomatic law, this is where the focus will be at. Additionally, it will also touch upon what the usual procedure is for EU diplomacy in crisis situations. The sub section aims for structures of international law that make the EEAS vulnerable in its actions, and will give a basis that may lead to determine what the legal challenges for the EEAS were until now.

International law on diplomatic relations has primarily been established under the Vienna Convention on Diplomatic Relations (VCDR).³⁹ As the focus within this document primarily lays on the EU’s diplomatic relations, with specific attention for crisis situations, the VCDR is the most significant legislator for regulating what competences the EEAS would be able to carry out and what position the EU may take in diplomatic relations. Looking at the fact that the VCDR only recognizes states within their contract, an odd situation arises when seeing that the EU as such, and not anymore solely the individual Member States, is autonomously entering into diplomatic relations with third states and international organizations. The question then is what the rules for such a body are and who is responsible for the actions of the body⁴⁰.

Although the EU more and more behaves like an autonomous state in the international arena, it still is not a state. It could therefore theoretically not exercise many dimensions of international

³⁶ Hayes, 2012. Horses for Courses: EU External Representation Post-Lisbon. *Paper delivered to a workshop at the ClingendaelInstitute*, The Hague, 22 February 2012.

³⁷ For a detailed outline, see Eric Hayes, 2012.

³⁸ As according to Naert, 2011.

³⁹ Was entered into force on on 24 April 1964, *United Nations Treaty Series*, vol.500, p.95, No.301.

⁴⁰ See Articles 48 and 50 VCDR. For a closer analysis, see: E.Denza, *Diplomatic Law: A Commentary on the Vienna Convention on diplomatic Relations*. Oxford: Oxford University Press, 2008; also R.A.Wessel and B.van Vooren. *The EEAS’ Diplomatic Dreams and the Reality of International Law*. Paper presented at the Workshop *U External Representation and the Reform of International Contexts: Practices after Lisbon*, Lisboaan Erasmus Academic Network, Clingendael, The Hague, 21-22 February 2012.

diplomacy. However, the EU certainly does undertake specific actions that normally would only be left to sovereign states and with the introduction of an EU diplomatic service representing the entire EU, this ambitious behavior has surely increased the state-like actions by the Union. The EU now has ambassadors with roughly the same competences as regular national ambassadors, though they do not possess diplomatic passports. Not possessing the diplomatic passports does have as an implication for the privileges that diplomats have, for instance that nothing is legally set down concerning the households of the diplomats, and more practical “factual and legal inequalities” between national and EU diplomats may occur.⁴¹ All this concerns 136 EU delegations that substitute the commission delegations.⁴²

Amongst various other scholars, Wessel and Van Vooren (2012)⁴³ correctly sum up some of the characteristics of the diplomatic presence of the EU within third states and at international organizations. Next to the different privileges as described above, also the presence of EU delegations within international fora often differs from individual, regular country representations. This has been taking place with mixed feelings of success; not everyone is convinced of the effective representation of the EU, though the most successful implementation of the EEAS as diplomatic service was recognized in bilateral delegations. One general pattern that is to be recognized is that the more complex the legal and competence issues, the smaller the effectiveness of the diplomatic service.⁴⁴

Referring to crisis situations, one basically looks at another case than simply ‘external representation’. When it comes to the EEAS, not only diplomatic representation in the political sense is concerned, but often also material interventions are at stake. Therefore a short notion has to be given about the legal aspects within international law in crisis situations. Already in the legal basis within the EU Treaties as such, it is said stated that any action should be in accordance with the United Nations Charter.⁴⁵ The actual mandate for EU interventions is usually given through UN Security Council (UNSC) resolutions. Either or both the consent of the host State government and a peace agreement will be a solid legal basis to act. Mostly the agreements concern either a SOFA or a Participation Agreement.⁴⁶

All in all, one sees that also at the international arena, the pure legal frameworks principally do not entail specific provisions on actors as the EU. On the other hand, they do not really keep the EEAS from carrying out its ambitions, as long as the international community recognizes the state-like

⁴¹ Wouters and Duquet, ‘The EU, EEAS, Union Delegations and International Diplomatic Law: New Horizons?’, Leuven Center for Global Governance Studies, *Working Paper 62*, May 2011.

⁴² Based on numbers given in Emerson et al., 2011. and R.A.Wessel and B. van Vooren, 2012.

⁴³ See Wessel and Van Vooren, 2012

⁴⁴ European External Action Service, ‘*Report by the High Representative to the European Parliament, the Council and the Commission*’, (22 december 2011), 8.

⁴⁵ See previous sub-section.

⁴⁶ See also Naert, 2011. He also states that until now the international legal basis has not been controversial so far in any of the EU military operations. Whether or not this is the case is exactly the core theme of this article, and this will be elaborated upon throughout the coming sections. Next to that, the article gives a good outline of different rules applicable for other types of international agreements.

actions of the EU.⁴⁷ Since the VCDR does not officially accept non-states, everything depends on the recognition of the EEAS by third states. Nevertheless, also here it is important to have a coherent framework of interaction and representation.⁴⁸ The EU attempts to realize this as much as possible, and hoped to increase this coherence by the installment of the EEAS. This succeeds more and more, but as discussed, issues of competence do make the lot relatively ineffective. One could in that respect wonder what the EU is then able to do in crisis situations.

4.4 The purposes of the EEAS

This sub-chapter will deal with the question of purposes fulfilled by the EEAS. These purposes concern coherence, consistency and efficiency⁴⁹ of EU external representation. Within the international arena, negotiations are merely based on power. Within this scope, much of international relations theory is involved. In this document, this will not be thoroughly analyzed; however, it certainly plays a large role in the general line of this analysis. There is one aspect that has to be carefully taken into account. Coherence in external representation is a precondition for having power within the international community. This can be a significant challenge, especially for federal states. Having raised this argument, one can imagine that the EU as international organization with a federal structure is placed into a difficult position here⁵⁰. This has certainly been recognized within the EU. All in all, this can lead to undesired situations when looking to the capacity to respond to crisis situations and can therefore be a key aspect within the analysis of the legal challenges that the EEAS faces. The latter will be better illustrated in a later section of this report.

One of the main motivations in setting up the EEAS was to create more coherence and effectiveness in the EU external representation to overcome this problem; to be able to really 'speak with one voice'.⁵¹ The question remains however whether this works in practice, and whether this suffices in crisis situations. Over the two years, speaking with one voice has improved rapidly, though it is claimed that it still lacks coordination.⁵² Opposing, others claim that speaking with one voice is not so much of a problem anymore for the EU, but that the main question is whether speaking with one

⁴⁷ See Wessel and van Vooren, 2012.

⁴⁸ See Wessel and Van Vooren, No.28. For information on coherence as such, see previous sections of this documents.

⁴⁹ See Portela and Raube, 2011.

⁵⁰ See e.g. Portela and Raube, 2011, p.5. Or; K. Lenaerts, "Federalism: essential concepts in evolution - the case of the European Union", 21 Fordham International Law Journal (1998), 746. Or; Wouters, J., Smet, de, L, 2001. The Legal Position of Federal States and their Federated Entities in International Relations; The Case of Belgium. Working Paper No.7, Institute for International Law. Retrieved February 27 from: <http://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP07e.pdf> . Or; Chalmers, Davies and Monti, 2010. European Union Law, p. 646. Cambridge University Press. Cambridge, United Kingdom.

⁵¹ As stated by the EU, see also: http://europa.eu/pol/cfsp/index_en.htm

⁵² See a statement by the diplomat Kovács & Kováts: <http://kovacsandkovats.blogspot.com/2011/04/eu-speaking-with-one-voice.html>. One also sees for example different facts in messages by the Presidency, Council, Commission and the EEAS on the Libya press release. See the afore mentioned document by Kovács and Kováts.

voice is the desired result. It does not always mean that the actions taken by the 'coherent body' are effective; which was the main purpose of setting up the EEAS.⁵³

The subject can be linked back to the way in which the EEAS is setting up diplomatic relations with third countries and the legal constraints that have possibly been inherent within developing these actions. To see what legal constraints have been playing a role in the last two years, whether the actions taken by the EEAS were actually ineffective and whether the legal constraints were a main cause for this, several aspects will need to be laid down. Therefore the next sections will look at how this worked in practice; based on a number of academic debates different practical cases of crisis will be brought forward. Based on these cases, a conclusion is to be drawn. Nevertheless, it has to be considered that this conclusion only covers the last one to two years. But seen the many forms in which the EEAS has already faced crisis (think about especially the Arab spring and recently the threat of war between Israel and Iran); there is quite a significant analysis possible.

In the next section, an outline will be given of what the theoretical implications are of the described legal systems in combination with the purposes the EEAS is to serve. It will therefore look at what different scholars predicted when the EEAS was about to be created. This will give significant background to make a comparison of what was theoretically possible and what was actually done in real crisis situations over the last two years.

⁵³ Stated by the European Council on Foreign Relations (2011), in *"Don't just speak with one voice: Act!"*. Retrieved February 27 from: http://ecfr.eu/content/entry/commentary_dont_just_speak_with_one_voice_act

5. The EEAS and effective crisis management: the legal challenges.

One of the sub-questions concerned the actual improvements brought by the Lisbon Treaty reflecting crisis management outside the Union. As described, the EEAS is to be one of the main improvements brought forward. Nevertheless, the question is whether the Lisbon Treaty changed things in such a way that the EEAS really has the capacity to effectively respond to crisis situations.

5.1 EU Competences in crisis situations

For the last two years, the HR/VP and later her EEAS were to be watched in their actual actions. But analysis has gone beyond these two years. Already immediately after the plan of introducing the diplomatic service, several academic debates started on the expectations of the EEAS; what will it bring in the sense of effectiveness? (One of the most burning issues in the EU's external representation at that moment) Or: What will this change on the institutional-political arena? And of course the question of what this will mean for crisis situations.⁵⁴ Attempts were made in masses to predict what would happen. Therefore, in this section only the most significant predictions concerning the EU's external representation in crisis situations will be tackled.

One of the core businesses of EU diplomacy concerns conflict prevention and resolution, or better, crisis prevention and resolution. In this aspect, the EU works in close cooperation with the NATO⁵⁵. In theory, the post-Lisbon era is to be one of coherence, one of enhanced consistency. The concentration of resources and, finally, a true leader should make the external representation of the EU not only more effective in its functioning, but also in a financial dimension. The only aspects that remain relatively unchanged are the weak decision-making procedures.⁵⁶ This sounds promising for the EU, especially in crisis situations. But was it not exactly that these decision-making procedures, so the dilemma of competences, that make the EU slow when it comes to external representation?⁵⁷ That may very well be a problem, since crisis situations often require quick and coherent responses.⁵⁸

Paul (2008) considered more positive aspects of the Lisbon Treaty. Terms like 'boosted continuity', 'increased visibility' and 'enhanced diplomatic professionalism' are a few of the promising terms that are supposed to make the post-Lisbon era, and make especially the HR/VP and the EEAS, a great success. The author does however also see problems that might arise. The first problem that arises is the loyalty of the HR/VP; does it majorly lie with the Commission or rather with the Council? The claim is made that, in order to be effective, the confidence of both institutions and even that of the European Parliament is to be attained. Now that exactly links back to the previous paragraph. Additionally, the unclear agenda setting power might lead to problems. Also here, the mixed competences between the intergovernmental Council and the HR/VP, raise questions about the

⁵⁴ Examples of academic literature and standpoints will be introduced throughout this section.

⁵⁵ Paul, 2008

⁵⁶ Based on an outline by: Paul, J. 2008. EU Foreign Policy after Lisbon: Will the New High Representative and the External Action Service Make a Difference? *Research Group on European Affairs*, No.2, June 2008.

⁵⁷ See e.g. Emerson et al., 2010

⁵⁸ See e.g. Giebels & Taylor, 2009. Interaction Patterns in Crisis Negotiations: Persuasive Arguments and Cultural Differences. *Journal of Applied Psychology*, Vol. 94. No.1, pp. 5-19.

actual effectiveness of the establishment of the function. Finally the exact size and scope of the EEAS could be a problem⁵⁹, but that has by now been set.

For the EEAS to respond to crisis situation, it is useful to look at what the EEAS is theoretically able to do in crisis situations, based on a figure 1.1.⁶⁰ As managing director, Agostino Miozzo, was to establish this platform based on Solana’s Crisis Response and Coordination Team. Its goal is to quickly coordinate and bring together the actors necessary when a crisis occurs. This platform has been extensively used and reshaped in its first months of existence during the Arab Spring. It is good to keep this platform in mind throughout the following analysis, as this platform might very well make a difference in the way the shared competences are an obstacle within the legal-institutional set up of the EEAS. Figure 1.2⁶¹ nicely shows how the reactions of the EEAS could work in practice.

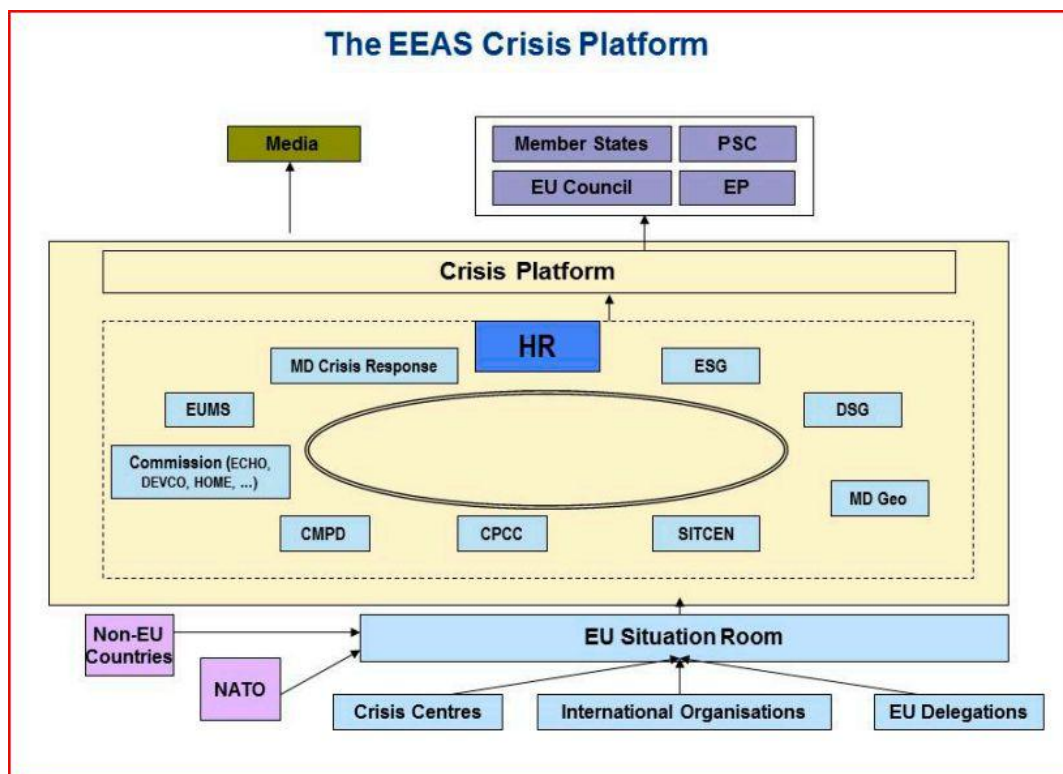


Figure 1.1: The EEAS Crisis Platform

⁵⁹ Paul (2008),

⁶⁰ Blockmans, 2012.

⁶¹ Blockmans, 2012.

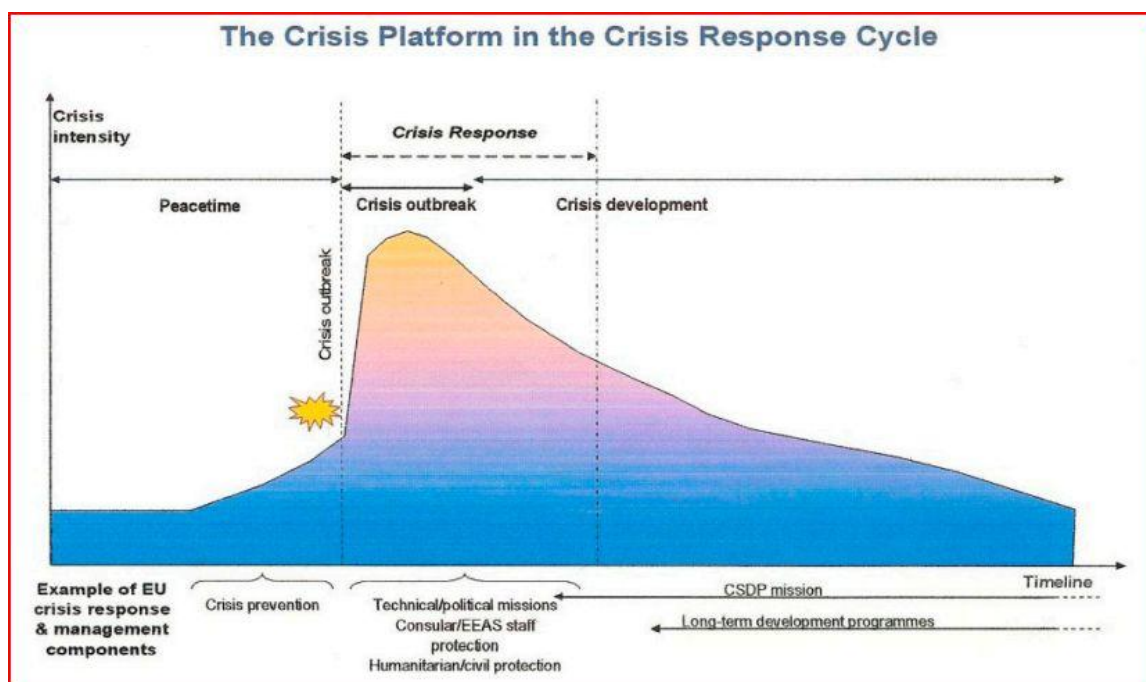


Figure 1.2: The EEAS Crisis Platform in the Crisis Response Cycle

5.2 Democratic Accountability

Another viewpoint to address the effectiveness of the European External Action Service, and therewith the challenges that the current legal set up facilitates (though unintended), is to look at the democratic accountability that comes along with effective decision making.⁶² When it comes to democratic accountability and the EEAS, Bátorá (2010) introduces three different scenarios in which the EEAS can be representing the EU externally.⁶³ It is considered highly relevant for answering the question about legal constraints in EU crisis management, since it is an integral part of efficient decision making as such. With the promotion of democracy for third states as one of its core activities, it would on the one hand be hypocrite if the EEAS lacked democratic accountability as such. On the other hand, an out-balancing amount of democratic accountability could be a threat to the effectiveness of a crisis response. Therefore the different scenarios as laid down by Bátorá are to be dealt with briefly; maybe the mixed competences are there for a reason?

In the first scenario, the EEAS functions as a support agency of member state diplomacy. This means a scenario in which the EEAS functions on a very intergovernmental basis, in which the Council of Foreign Minister is to be held accountable for the largest extent. Here democratic accountability is guaranteed by the national mechanisms of the Member States. This horizontally contested

⁶² See definition of effectiveness, p.8

⁶³ Bátorá, Jozef. (2010): A Democratically Accountable European External Action Service: Three Scenarios, In: Vanhoonacker, Sophie, Hylke Dijkstra and Heidi Maurer (eds.). Understanding the Role of Bureacracy in the European Security and Defense Policy. *European Integration Online Papers (EIoP)*, Special Issue 1, Vol. 14. Also read this article for a broader analysis on democracy and democratic accountability as such. This document does not allow for such an extended analysis, since it does not directly serve the research question.

accountability has already led to different scenarios in the past in which Member States have taken different position. Think for instance about the recognition of Kosovo. As Bátorá points out, this might well lead to several constrains in crisis situations, where 'actions need to be taken promptly'.⁶⁴ This can be seen as a legal constrain in the sense that the way in which the institutional competences are divided can lead to problems of effectiveness.

The second scenario is one in which the EEAS functions as federal foreign service of the EU. With the European Parliament having relatively much power in the sense that has major rights in being informed about and judging actions taken by the Council of Foreign Affairs ministers, the HR/VP and the EEAS⁶⁵, there are still some problems left with the democratic accountability in this scenario. First of all, legitimacy of foreign policy at the federal level may be different from that at the level of constituting the federation, resulting in a vertically contested representation.⁶⁶

The last scenario given by Bátorá concerns the EEAS as a 'cosmopolitan normative entrepreneur'. This would be a diplomatic network involving not only governmental, but also non-governmental civil organizations. This certainly maximizes the democratic accountability, but will not be an option for effective decision making during crisis situations.⁶⁷

What can be learned from the concept of democratic accountability is that it certainly plays a big role in effective decision making. As to be seen in the last scenarios, high democratic accountability does nevertheless require a high level of mixed competences. Therefore one can say that again legally seen, not many constrains are visible. These constrains only become visible when this legal setting is put in terms of other aspects of the diplomatic international arena. Democratic accountability is only one of those aspects playing a role. Nevertheless, the high desire for full democratic accountability within the EU may make the Union an inefficient partner in crisis situations.

5.3 Predicted challenges for the EEAS in crisis situations

At the early risings of Lisbon, many scholars started their predictions on what this Treaty could bring about and change about the implications of the former treaty, also when it comes to crisis management. Different scholars have used several examples to see what the legal-institutional drawbacks were until then, and compared these to what the Lisbon Treaty would change in a legal-institutional perspective for as well the European as the international legal orders. Since the exact competences of the EEAS were unclear until very close towards its actual realization, and some parts of the structure will only be set mid-2013, these predictions mainly concern the differences that would arise with the introduction of the Lisbon Treaty. In this case with the focus on what role the HR/VP would have in the improvement of coherent crisis management and (legal) constrains he could possibly run into.

One major concern at the early risings of the Lisbon Treaty was the question of leadership within the EU external representation. Despite of the repositioning of the High Representative as multitasking

⁶⁴ Bátorá, 2010.

⁶⁵ Bátorá, 2010., as well as Title V TEU.

⁶⁶ Bátorá, 2010.

⁶⁷ Bátorá, 2010..

octopus, the external representation of the Union remains an issue of mixed competence between the President of the Council, the President of the Commission and indeed, the HR/VP. Hence, even though Lisbon may have brought a more consistent, coherent attitude in the overall representation of the EU at the international stage, the Treaty provisions do not necessarily guarantee a possibility of prompt action in times of crisis.⁶⁸ Other scholars argue the other way and state that the three mentioned actors will simply have to find a way to cooperate with each other, and the EEAS is there to support and facilitate this cooperation. Especially the agenda setting power of the HR/VP should facilitate a pro-active foreign policy agenda.⁶⁹

Considering the purely diplomatic side of the EEAS, there are some legal constraints that may prevent the 'embassy' from functioning properly. This has mainly to do with the fact that the EU, although a legal person, is not a state. A further development of the EEAS is not out ruled by international law, but since the structure of the EU is theoretically seen not fitting into the international legal framework, the functioning of the EEAS as diplomatic service on behalf of the 'European citizen' will remain an issue up to the recognition of third states.⁷⁰ Also this could hinder quick and coherent response of the EEAS on behalf of the embassies of all 27 member states in crisis situations.

In response to that, one could also take a different approach. Although the 'EU-diplomats' within the EEAS are not to have a full diplomatic status in the sense that they represent a state, their creation still is a big step onwards in the European integration process. To give an indication; Emerson et al. (2011) give a high number of areas vulnerable to crises in which the EU had until 2010 no clear representation, or at least not one with any significant influence. Having a representative delivered by the EEAS may not be a perfectly effective solution for the EU in crisis management; the situation has certainly a high potential for improvement.⁷¹

This does, however, not mean that it is as simple as that. As indicated within the legal basis within the EU itself, the success within the EEAS will lie within its cooperation with the Council and especially the Commission. As both institutions still have part of the authority over external aspects of internal policies (mainly the Commission) and certain areas of shared competence. The latter in coordination with the EEAS. Result of this is that the EEAS has to watch to not become the '29th' foreign ministry instead of the '28th'.⁷²

⁶⁸ See Blockmans and Wessel, 2009. P.46.

⁶⁹ See Paul, 2008. P. 34.

⁷⁰ See Wessel and van Vooren, 2012, p. 15.

⁷¹ See Emerson et al., 2011. P.113. Think about EULEX in Kosovo, where used to be a double hated SR position, Macedonia with a SR being double hated with the Head of Delegation in Skopje, and more of those cases bringing with them the risk of conflicts of interest.

⁷² See Balfour, R. & Ojanen, H. (2011). 'Does the European External Action Service Represent a Model for the Challenges of Global Diplomacy?', 1117 /A/ *Working Papers*.

6. The EEAS and effective crisis management: the ultimate test.

For so far an elaboration has been given on what the law states on the EU entering into diplomatic relations. An indication has been given on the complicated decision-making structure within the EU and therewith the mixed competences that have, until the entering into force of the Lisbon Treaty, made the Union's external representation ineffective, inconsistent and incoherent. Many shared the opinion that this inconsistency would still hold, even after the introduction of the EEAS, mainly through the continuing separation of a large part of the CFSP from the Treaty. Although we are only one year ahead since the introduction of the EEAS, it was a year of extraordinary situations, and the EEAS was tested to the extremes⁷³. It is commonly known, that the main activity for the EEAS in 2011 was to develop its own internal diplomatic structure⁷⁴. A good initial purpose for a starting agency that is supposed to carry out a task that is unique in the world of international diplomacy. Nevertheless, the unexpected and extreme forms of crisis that arose in the past two years have put the entire functioning of the EEAS into a broad picture of need for dynamic and prompt reactions. Some first evaluations are available. Within this section an attempt will be made to give insight to a few of those evaluations and link these back to the legal challenges that were predicted for the EEAS in the early days of its creation.

6.1 Tunisia, the Arab Spring and the European Neighbourhood Policy

The Arab Spring, the European Neighbourhood Policy (ENP), and the EEAS. All three terms are very closely related to Tunisia. First of all, Tunisia is one of the close partners of the EU in the ENP. With reviewing the ENP as one of the major aims of the EEAS⁷⁵, one of the major tests of the EEAS came right at the moment of becoming operational. With the uprisings of the citizens of Tunisia for a democratic government, a domino effect has started in the Arab world, including many of the states that are part of the ENP.

Surprising was the speed in which Lady Ashton has been able to get an agreement through for a joint statement of the European Council, the EP, the Council, the European Economic and Social Committee and the Committee of the Regions, as according to the Commission itself. All of this steered into a coherent outcome with the help of the EEAS. Two documents followed shortly after each other. In March, 2011, the joint communication called "A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean" was launched⁷⁶. Shortly after that, in May 2011, a further elaboration followed.⁷⁷ Two main challenges were laid down within these communications.

⁷³ Think about the Arab Spring, humanitarian crises in Pakistan and Japan, Belarus and Ukraine ignoring the rule of law and piracy in the Horn of Africa.

⁷⁴ Steven Blockmans, 2012.

⁷⁵ The ENP has been criticized for its lack of effectiveness in realizing good diplomatic and economic relations with the EU's backyard since its set up in 2003/4. Therefore the EEAS with its diplomatic ambitions would be the perfect agency to deal with this in a 'more coherent and consistent way'. See also Blockmans, 2012.

⁷⁶ COM (2011) 200 final.

⁷⁷ European Commission and the EEAS. (2011). *A New Response to a Changing Neighbourhood: A review of European Neighbourhood Policy*. Joint communication by the High Representative of the Union for Foreign Affairs And Security Policy and the European Commission. Also referred to as: COM (2011) 303 Final.

The first is to ensure “deep democracy”⁷⁸, meaning that only having free elections and a democratic constitution are not enough; the set up of a democracy within the ENP countries should be complete in the sense that it should for instance include an “independent judiciary, a free press and a dynamic civil society”.⁷⁹ The second challenge is mutually reinforcing with the first; it namely concerns the ensuring of sustainable economic growth and development, particularly ensuring jobs. In order to realize that, the strategy of the ‘three M’s’ was introduced, including *money*, *mobility* and *markets*. An enhanced financial support as before, but better directed to the country specific needs.

All of this is highly intertwined within the Petersburg tasks and the goals that the EEAS strives to achieve. The ENP revisions can namely be seen as an economic conditionality pressuring the undemocratic regimes to bring about serious reforms. It is a start of a movement from a one-size-fits-all approach within the ENP towards a more differentiated approach. Next to the fact that this differentiated approach raises questions under Article 8 (1) TEU, the fact that the EU only employs soft power in this case may be a crucial aspect for the ENP to fulfill its goals. It has to be well considered that the states in question concern entities that experienced decades of suppression. The latter caused societies to be destroyed, meaning that the ENP, though a good alternative, will only have limited effect. With the relatively small amount of money available to realize the necessary developments for a stable and secure area, the “single area of prosperity and good neighborliness” still seems far away.⁸⁰

In addition, the EEAS and the Commission claim the reaction to be a strong and quick response. For sure the response was a success in the sense that it was a coherent response. Yet, a response that takes a few months in pressing issues as the Arab Spring does raise questions about the effectiveness of the EEAS in crisis responses. The legal-institutional structure, though still to be developed further in the coming years, did not sufficiently serve the purpose of quick crisis response according to several scholars.⁸¹ Notwithstanding, the question on whether this would have been different if the EEAS was not there, is not taken into account so much.

Reflecting on the statement that the start of the functioning of the EEAS was rumbling and to certain extend too slow, one can recognize the predicted problems within the legal-institutional perspective. Hence, this is also exactly the area in which the EEAS is still to be developed further. Concluding the analysis on the first reactions to the prime crisis that occurred, the legal challenges were indeed met with a painful start up for the EEAS. Unclear competences gave the need to take some time for establishing the EEAS’ own identity. Nevertheless, it is promising that the issues at stake are still open for improvement during the first revision in 2013.

⁷⁸ Next to the joint communication, it may also be useful to have a look at a closer elaboration on this concept. See e.g. : Vogel, T. (2011). A reflection on old, failed neighbourhood policies. *European Voice*. Brussels.

⁷⁹ Statement by the EEAS, retrieved from: http://eeas.europa.eu/top_stories/2011/171211_arabsprin_en.htm

⁸⁰ See also Blockmans, 2012. As well as Tina Freyburg, Sandra Lavenex, Frank Schimmelfennig, Tatiana Skripka & Anne Wetzel (2011): Democracy promotion through functional cooperation? The case of the European Neighbourhood Policy, *Democratization*, 18:4, 1026-1054

⁸¹ See Balfour & Ojanen (2011) and Blockmans (2012)

6.2 Further developments in the Arab World

The first year has certainly been a huge challenge for the EEAS, and the agency faced different facets undermining its authority, or at least, undermining its desired authority. The situation of Libya is an excellent example. Although the EEAS managed to add value to support international economic sanctions to the regime of Kaddafi, it did suffer from the fact that certain Member States participated in a military intervention. This intervention was legally seen one big question mark. The intervention based on UN Security Council Resolution 1973⁸², was a NATO mission. Notwithstanding, not all members of the NATO supported the intervention, and several UN-member claimed that the intervention was not what the actual mandate within the resolution allowed for.⁸³ This downside for the EEAS, namely not having a joint action in this case, is to be directly linked back to the Treaty on the European Union. This makes painfully clear what the stance of European unity is in the scope of controversial international crises. Article 42 (2) TEU states:

“The common security and defence policy... The policy of the Union in accordance with this section shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see the common defence realized in the North Atlantic Treaty Organization (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.”⁸⁴

At the end of 2011, with both the Arab Spring and the EEAS starting to get structure, Ashton was sure enough to state that the EEAS has moved from ‘payer to player’, referring to the influences the EEAS has been able to realize throughout the year. Certainly the footsteps of the EEAS are already by now visible within various international peace negotiations.⁸⁵ A tremendously good example is the EU position in the Middle-East peace process that has suffered highly under the rapidly changing tensions in the last weeks, as well within the Israeli-Palestinian conflict as such as the current hostility of Israel towards Iran. The efforts got paid back when the EEAS for example managed to guarantee a place for the Member States within the decision making process around the admission of Palestine into the UN. The EU has a large role within the Quartet, chaired by Tony Blair.⁸⁶ Nevertheless, the EU was divided when voting upon Palestine’s full membership into the UNESCO. One can imagine that this might very well harm the so much needed credibility within the

⁸² UN (2011). UN Security Council Resolution 1973. S/RES/1973: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/268/39/PDF/N1126839.pdf?OpenElement>

⁸³ See e.g. Rousseau, R. (2011). Why Germany Abstained on UN Resolution 1973 on Libya. *Foreign Policy Journal*. Retrieved March 4 from: <http://www.foreignpolicyjournal.com/2011/06/22/why-germany-abstained-on-un-resolution-1973-on-libya/>

⁸⁴ Article 42 (2) TEU.

⁸⁵ Blockmans, 2012. See also AFET Committee (2011). Press release A 511/11: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/dmag/dv/dmag20111220_06_/dmag2011220_06_en.pdf, remarks from the High Representative.

⁸⁶ At this moment the last document provided is the announcement for the next meeting, on March 21: http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/129018.pdf. For continuous updates and more information on the Quartet, consult the EEAS website: http://eeas.europa.eu/mepp/index_en.htm

international community; how will the EEAS be accepted as a full grown diplomatic service if the EU's own Member States fail to come up with a comprehensive opinion?⁸⁷

6.3 Iran and Nuclear Proliferation

Another topic that is especially raising attention at the very moment is indeed Israel's relation to Iran. The situation led to a direct threat of war by Israel in the beginning of March 2012, which was watered down as much as possible by the international community. When it comes to the issue of the danger of Iran with regard to the production of nuclear weapons, the HR/VP and the EEAS are right at the middle of the negotiation table. Just to put into context: the HR/VP is constantly in contact with the Iranian ministry of Foreign Affairs, on behalf of the international community, E3+3.⁸⁸ Different scholars see this as a success of the EEAS and the HR/VP.⁸⁹ Within this text, a more skeptical approach is taken. Consider the analysis given about the legal nature to act for the EEAS; technically seen it is unable to fulfill its ambitions under international diplomatic law, which officially only recognizes states, to call itself a full blown diplomatic service with the same privileges as national diplomatic services. Therefore the international diplomatic relations are highly dependent on the acceptance of the EEAS by the negotiating states.

Thinking rationally, it is visible that the EU here is basically negotiating on behalf of the P-5 of the UN Security Council and Germany. When referring to international relations theory, and the quest of power in one of the previous sections of this article, one sees that the EU is politically seen a dwarf for these six countries (especially for those not a member of the EU themselves). Therefore it seems to be nothing more than a compromise for the big players, with opposing views on the issue, to let the harmless political entity called European Union act on their behalf. The reason that this can be seen as a severe legal challenge is that the EEAS may start feeling too comfortable in this position, without realizing the fact that it is simply being used for purposes other than its own.⁹⁰ The main point to be derived from this argument is that although the international community may recognize the HR/VP as representative for the EU, or the EEAS as diplomatic service, the fact that they still lack the necessary political power and formal legal recognition makes them vulnerable.

⁸⁷ For an extended elaboration on the UNESCO-Palestine vote, see Voeten, E. (2011). The Palestine UNESCO Vote: Will the recent recognition of the country by UNESCO lead to full membership in the General Assembly? *The American Prospect*. Retrieved March 5, 2012, from: <http://prospect.org/article/palestine-unesco-vote>

⁸⁸ This is on behalf of China, France, Germany, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America. For an example of such a statement/letter, see e.g. the last letter by Ashton to the Iranian minister of foreign affairs: http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/128765.pdf

⁸⁹ See e.g. Blockmans, 2012.

⁹⁰ On the issue of power and the EU in the context of International Relations Theory, many articles have been written. For some basic understanding read e.g. Hill, C. & Smith, M. (2005) International Relations and the European Union. *European Journal of International Relations*, Vol.4625, pp.00-30, 1997, Oxford University Press. Or: Wagner, W. (2003) Why the EU's common foreign and security policy will remain intergovernmental: a rationalist institutional choice analysis of European crisis management policy. *Journal of Public Policy*, 10:4 pp.576-595.

6.4 Somalia and the Horn of Africa: a mix of everything

Speaking about crisis management and the EU, one is automatically also speaking about Somalia. Somalia is one of the most famous areas in which the EU is active on several areas.⁹¹ Operation ATLANTA and the Horn of Africa are the two main missions for EUNAVFOR (European Naval Force). The ATLANTA mission is the mission best known for its fight against piracy, but it does more. With the current humanitarian crisis going on in Somalia and other neighboring states, ATLANTA is an important spill in the humanitarian aid programs. It protects for example vessels of the World Food Program (WFP), the African Union Mission in Somalia (AMISOM) and other vulnerable shipping, mainly with humanitarian aid purposes. Additionally, ATLANTA is involved in the prevention of environmental crises by monitoring fishing activities. The Horn of Africa mission is more directed to monitoring and anti-piracy guidance.⁹²

With the current humanitarian crisis due to food shortages, mainly caused by political un will and tyranny, the missions have gained new importance. To give an indication, ATLANTA is therefore expended till December 2012. Both missions gain a relatively high support by the international community, and also the EU Member States share a broad consensus on the issue. Already in 2008, when the mission was officially launched, the EU was an effective player to that regard. Surprising is that also the EEAS, which is now largely in charge of the missions, is effectively dealing with the situation, although on paper the mission is highly complicated, involving practically all aspects described in the Petersburg tasks.⁹³

Again, the question arises why the situation is as it is, why is the EU effective in this case, and not in others? This report again links back to power and interests here. With the USA shifting its interests more towards Asia, and increasingly requiring the EU to tackle 'problems in its own backyard', the EU gains acceptance by the international community in this case. Additionally, everyone's interests are involved when referring to the problem of piracy. Every nation wants its own transports to be in safe waters. That is also one of the reasons why the EU, and now the EEAS can act efficiently, having a large back up from all the Member States.⁹⁴ As we saw, this is a lot different when it concerns controversial issues like in Libya.

⁹¹ The Mission at stake is called EUNAVFOR ATLANTA. It came forth out of several Council decisions, all resulting out of the initial UN Security Council resolution 1814/2008, and several that followed after that.

⁹² For a full description of the tasks carried out, see the website of EUNAVFOR: <http://www.eunavfor.eu/press-2/news/>

⁹³ For more technical Legal issues on the mission, read Roach, J.A. (2010). Countering Piracy off Somalia: International law international institutions. *American Journal of International Law*, Vol. 104: 3, pp.397-416.

⁹⁴ Also see Roach, 2010.

6.5 Conclusion

By now, several cases in which the EEAS is involved with crisis management have been described. One has to be very well aware that these are by far not all cases. There are more EU missions going on, and more crisis responses have taken place by the EEAS. Due to limited space within this report, not all can be touched upon. What has been attempted, is to as much as possible include the scenarios that may occur. This entails situations in which the EEAS had the opportunity to presumably act effectively, but also situations where they did not have a chance to beat the challenges of international law. The latter should have drawn the general picture clearly: if there is no clear legal basis for the EEAS to act within international law, it highly depends on its own political strength, institutional structure and competences. These determine its position within international diplomacy.

7. Conclusion

With a focus on crisis management, an attempt has been made to assess the legal challenges the EEAS is coping with. In order to come to a conclusion about these challenges and what they have brought the EEAS in practical terms, several aspects were pointed out within this report. This last section will give a brief overview of the conclusions that were derived from the assessment and provide a final conclusion on the matter. It has to be made very clear that these conclusions concern only one year of functioning of the EEAS, and that the EEAS is still to develop some significant parts of its internal structure in the coming year.

First of all, the legal nature of the EEAS was to be analyzed. A clear mandate is given on the basis of primary and secondary law, and the function of the HR/VP was properly set out. After the Council Decision that was asked for within the Treaty, the EEAS has been established. Nevertheless, the structures are somewhat confusing when it comes to authority. Looking to external competences on internal issues it is mostly the Commission to be responsible, in external representation as such it is the HR/VP and in practically all cases also the Council has to give its consent. Debates are going on about whether or not this is negatively affecting the functioning of the EEAS or whether it is exactly the task of the EEAS to streamline these, sometimes clashing, competences.

Within international (diplomatic) law, no clear rules are laid down on the EU having state-like diplomatic relations. In principle, non-states are not incorporated within the VCDR. Nonetheless, there is nothing that forbids the EU to enter into diplomatic relations with third states, although the EU will not enjoy the same privileges for its diplomats as real states do. Therefore the success of the EEAS as diplomatic service is highly dependent on the recognition by third states and the international community. This has several consequences for the EEAS' capabilities to effectively respond to eventual crisis situations.

With as main aim to provide the Union with a solid, single voice and creating unity within the Union's external representation, many challenges are ahead. Seen the legal-institutional structure, the different competences may indeed be an obstacle to consistent and effective representation, but the EEAS certainly provides for promising outlooks. An important aspect within the effective representation of the Union, is democratic accountability within the functioning of the EEAS. This is one of the main reasons for having this highly mixed set of competences. Seen the sensitivity of the issue of handing over sovereignty on external representation, the quest for a high democratic accountability is strong. It should however be clear that this might very well outbalance the effectiveness. Especially in crisis situations, a quick response is necessary, and therefore long lasting decision procedures will not serve the purpose of the EEAS.

Therefore, one of the major concerns of scholars was that the desire for strong and effective leadership would not be satisfied, despite the fact that this was intended to be one of the key aspects of the EEAS. The key for success of the EEAS therefore lies within the internal cooperation within the Union, but also within the EEAS itself. Only when the EEAS is fully recognized and trusted by the EU Member States themselves, it will be able to attain serious credibility within the international community.

In the first year of its functioning, high pressure was laid down onto the EEAS. With the body still developing its own identity, it was forced to come up with joint reactions to several crisis situations. The Arab Spring was one of the major incidents requiring the attention of the EEAS. The latter was carried out with mixed successes. Although the body came up with a joint revision of the ENP to cope with the challenges of the reforming Arab world, the substantial reaction came months after the outbreak of the demonstrations in the Arab world. One major issue is that military seen Member States started to carry out their own interventions under the NATO flag. Member States are certainly allowed to do this under EU law, but it does undermine the desired effectiveness of the EEAS. Another issue that has been important in profiling the EEAS is its presence in the peace negotiations between Israel and Palestine, as well as its role in the membership votes for Palestine into UNESCO. Again, it became painfully clear that Member States still have the opportunity to vote differently, despite the efforts of the EEAS.

Other issues have presumably led to successes for the EEAS. Think about the major position of the HR/VP in the negotiation talks with Iran and the already long lasting operations near the coast of Somalia. This article does take a critical approach to these successes. Taking into account international relations theory, one can clearly recognize the division of interests and the distribution of power in these cases. Seemingly, the international community makes use of the EU's external representation when it is in their interest, but as described, the politically weak Union is easily set aside when it is not needed. Even by its own Member States.

The conclusion of this article therefore is that the EEAS has great intensions and maybe even serves better purposes. Nevertheless, many aspects will have to be taken into account during its first revision in 2013. The body copes with legal challenges as well internally as externally. As long as there is a possibility for Member States to deviate from a common EU position, or at least act beyond the latter, it will be extremely hard to come up with a credible approach that is seriously recognized within the international community. This is to be linked back to the fact that international law does not officially recognize the EU as such. This is a major challenge in the sense that third states with which the Union practices international diplomatic relations, may abuse the Unions position within international law. For now the only thing that may help to strengthen its position is to work on the internal structure of competences around the EEAS. This means that there should be 'true leadership', and the HR/VP should have clear competences, especially when immediate response is required. The potentials for the EEAS are high, but there is certainly a large share of work to be done to realize them. Apart from that, the political struggles within the Union will have to be set aside. But this moment still seems decades away with the current political situation within the EU.

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