UNION MEMBERSHIP: ACCESSION, SUSPENSION OF MEMBERSHIP RIGHTS AND UNILATERAL WITHDRAWAL. SOME REFLECTIONS.

by
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This short contribution aims at presenting some comments on three important questions raised by the Constitution and related to the participation of the Member States to the European Union. It does not in any way pretend to propose an exhaustive commentary of Articles I-58 on accession, I-59 on suspension of the right of participation and I-60 on the external withdrawal of the Union. There are obvious links between those three provisions which all relate to the nature of the Union's legal order.

I. Accession

Under Articles 237 EEC, O EUT (Maastricht) and 49 EUT (Amsterdam), the accession process was dominated by the « *acquis-cum-transition* » approach[1]. The accent was on the acceptation of the "acquis communautaire"[2] and a minimal interpretation was given to the "adjustments" of the treaty required by the accession, as it appears from the opinions of the Commission, the successive accession treaties and the 1993 Copenhagen conclusions.

Although the so-called *political conditionality* first appeared in the Amsterdam Treaty through a reference in Article 49 EUT to the principles of Article 6, §1, this conditionality was implicit before; it was present in the Preamble of the Rome Treaty by the invitation made to "the peoples sharing this ideal (of freedom)". The political conditionality played in fact an important role in the sixties in the answer given to the neutral or so-called "neutralist" States, like Austria or Sweden, requests

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1 B. de Witte, « The impact of Enlargement on the Constitution of the European Union", in M. Cremona (ed.), *The Enlargement of the European Union,* Oxford U.P., 2003, p. 209.

2 The doctrine seems to have been first outlined in the conclusions of the famous Summit of 1 and 2 December 1969, at The Hague. See P. Gerbet, *La construction de l'Europe,* 2e éd., Paris, 1993, p. 305, quoted by G. Soulier, « Quand disparaît la Communauté reste le droit communautaire », in *Les Dynamiques du droit européen en début de siècle,* Etudes en l'honneur de Jean-Claude Gautron, Paris, 2004, p. 513, 516.

to conclude association agreements with the EEC that possibly would lead to accession. This conditionality was linked to the cold war context but had also a larger connotation. Association with a European State could no be an obstacle to the building of a political union, a preoccupation shared by the Hallstein Commission and personalities like Paul-Henri Spaak.

There was and still is an asymmetry between some elements of the political conditionality and the obligations requested from the present members[3]. The EU is, in principle, free to impose conditions for the access of new members[4]. Accession remains an inter-States process so there is no problem of limitation of Union's competences in the definition of the conditions requested from a candidate[5]. This feature of the accession process can, of course, raise political arguments based on double standards: the EU would be more requiring for the new Member States than for the existing ones[6].

One can mention at this regard the respect of minority rights and good neighbourliness policies requested from the CEECs. A set of political conditions was also proclaimed for a possible accession of the countries of Western Balkans which are potential candidates to the EU, as it was confirmed by the Thessaloniki European Council in June 2003. Not only should these countries meet the Copenhagen political, economic and institutional criteria but also the specific criteria of the Stabilization and Association process (SAP) as set out in the Council of General Affairs in April 1997, in the Commission Communication of May 1999[7] and in the final Declaration of the 2000 Zagreb Summit. These criteria include full cooperation with the International Criminal Tribunal for the former Yugoslavia, respect for human and minority rights, the creation of real opportunities for refugees and internal displaced persons to return and a visible commitment to regional co-operation. The principle of "own merits" will be applied, in parallel with the regional approach.

In its Communication of 6 October 2004 to the Council and the European Parliament, *Recommendation of the European Commission on Turkey's progress toward accession*[8], the Commission proposes a monitoring of the progresses of the political reform process realised by Turkey, during the negotiations with this country. "The pace of the reforms will determine the progress in negotiations". This permanent monitoring would represent an important step in the field of conditionality.

What is new on accession in the Constitution? The reference in Article I-58 §1 to the values included in Article I-2 covers a larger spectrum than the reference to Arti-

3 On political conditionality, see Karen E. Smith, "The Evolution and Application of EU Membership Conditionality", in M. Cremona (ed.), op.cit., p. 105 et s.

4 Although the view has been expressed that there are some limits to the discretionary power of the Member States under Article 49 EUT on accession. See Juli Zeh, "Recht auf Beitritt", *ZEuS,* 2004, p. 174, 209 and note (140).

5 de Witte, *op. cit.,* p. 234.

6 Karen E. Smith, *op. cit.,* p. 119.

7 COM(99) 235 final.

8 COM(2004) 656 final.

cle 6 §1 in Article 49 EUT. The IGC has enriched the Convention's draft in this respect by including the rights of persons pertaining to minority groups and the equality among men and women. A comparison between the content of Articles F.1 (Maastricht), 6 §1 (Amsterdam) and I-2 (Constitution) would demonstrate the steps accomplished in this field.

The division of Article I-2 in two sentences allows preserving the operational values to the first paragraph of this Article while giving satisfaction to the proponents of these other values which could be used in the interpretation of paragraph 1[9]. The Charter which refers to "individual and universal values" in its Preamble[10] can also be of some help. There is an interesting reference to the values in Article I-57 on neighbourliness agreements. Also remarkable is Article III-292, which states the principles to be promoted in the external action. This provision, that extends the objectives of external action laid down in Article I-3, para.4, refers to the principles which have presided to its (of the Union) creation, to its development *and to its enlargement*, adding to the values already mentioned "the respect of international law in conformity with the principles of the UN Charter".

New members are not only asked to respect the values but they must commit themselves to promote them in common (Articles I-1, §2 and I-58 §1). As Christian Lequesne puts it:

> "L'adhésion à l'Union européenne ne saurait …être régie par des critères qui emprunteraient de manière stricte à la géographie, à la culture et à la religion. Elle renvoie forcément à un autre registre qui est *l'acceptation d'un projet politique transcendant l'histoire*." [11]

This corresponds to the vision of a "*Europe* of the values", a theme so popular within the Convention[12]. One should ask the question if this represents a complete

9 See E. de Poncins, *Vers une Constitution européenne,* Paris, 10/18, p. 86.

10 It is remarkable that the values are not claimed to be universal in Article I-2. See E. de Poncins, *op. cit.* , p. 87. For A. Lamassoure, *Histoire secrète de la Convention européenne,* Paris, 2004, p. 340: "Un élément fort de l'identité européenne n'est pas la liste de ses valeurs, mais le fait qu'elle se refuse désormais à les proclamer universelles." This author sees therein « le début d'une sagesse plus habile que l'arrogance passée est la meilleure réponse au fanatisme de notre temps. » One could argue, on the other hand, that the Constitution calls for promoting these values in its external action, giving them a universal value. See, Article I-3, paragraph 4.

11 Ch. Lequesne, "Adhérer à l'Union européenne: réflexion sur les critères", in *Les dynamiques du droit européen en début de siècle,* Paris, 2004, p. 745, 748. Italics are ours. The author observes that presently accession is based on the acceptance by the candidate of pluralist democracy, the rule of law and, on the economic field, of the market economy. How in these conditions, he asks, could the Union refuse the accession to those States complying with these requirements? He considers that the delimitation of the frontiers of Europe can only be decided on the basis of a necessarily arbitrary political decision and he calls for an evolution towards a "differentiated conception of accession", which would allow for the participation of some non Member States to specific policies, a very difficult legal concept indeed.

12 And a very important one, see, for ex., A. Euzeby, "Constitution de l'Union européenne: des valeurs à défendre", *Revue du Marché commun et de l'Union européenne,* 2004, p. 566.

picture of the *Union.* There should be no confusion with the Council of Europe. For us, the "*projet politique*" is the continuation and development of the integration process started more than fifty years ago, this "ever closer union" that the members of the Convention decided to mention only in the Preamble of the Constitution and not in the text of its articles.

What is in any case missing in Article I-58 of the Constitution? We submit that at least two main elements are lacking in this provision of the Constitution:

a. a reference to the acceptance of the objectives of the Union summed up in Article I-3. A surprising lacuna if one looks for example, at the first sentence of the Athens Accession Treaty which precisely refers to the objectives;
b. a reference to the "*acquis communautaire*". The only mentions of the acquis are to be found in the Preamble, as modified by the IGC, and very discreetly in Article I-44 §4, concerning the closer cooperation as well as in Article IV-438 §4 on the continuity of the jurisprudence of the Community jurisdictions. One should consider that the principles laid down in the 1993 Copenhagen conclusions, there included the "political" acquis, are part of Constitutional law of the Union.

If we have to establish a hierarchy of the criteria in order to evaluate their respective role in the negotiation, one can be tempted to follow the analysis of Karen E. Smith[13]. Political criteria, in a broad meaning, were given priority on the take over of the acquis, at least in the last stage of the negotiation with the CEECs. The tension between discrimination among the candidates and compliance with the acquis was resolved in favour of non discrimination. Despite of the principle of the examination of each application on the basis of its own merits, the big *bang* approach was considered as the only reasonable possibility and ten new Member States were admitted in one operation. Perhaps, and *mutatis mutandis*, a parallel could be suggested between the conditionality as applied for the change over to the euro in 1998 and the enlargement process. Convergence criteria had an important weight during the preparatory phases but the final decision was a crucially political one. In both cases, the question was: Could we possibly leave such or such country behind? The compliance with the criteria was one (important) element in that choice. To be sure, technical considerations will play a bigger role for the future enlargement of the euro area, taking into account the different context and the unique momentum of the 1998 decision.

The accession process which started after Copenhagen was not based on a democratic debate. There was an evident fear for such a debate. It is not strange if one looks at the opinion polls in the Union about enlargement. The decisions of principle were taken at the level of the European Council and no preparation of the opinions took place. The reference in Article I-58 to the information of national parliaments

13 Karen E. Smith, *op. cit.,* p. 128.

about a request for accession constitutes only part of the answer to this concern. It is interesting to observe that the IGC has reintroduced the necessity of the assent of accession treaties by the European Parliament with the vote of the *majority of its members;* this last requirement had been dropped in the Convention's draft. It is also meaningful that the French President has decided to submit to a referendum the accession of Turkey to the Union, like France did, in the past, for the accession of the UK but the context is really different.

Article 49 EUT (as former provisions) refers to "the conditions of accession and the adjustments to the treaties" as the scope of an accession treaty. New Article I-58 points to the "conditions and *arrangements*" for accession. This new provision appears as a codification of the restrictive interpretation given to the former articles 237 EEC and 49 EUT. The word "adjustments" was indeed interpreted quasi as referring only to arithmetical adjustments[14]. It has been suggested that the word "arrangements" (in French: "*Modalités*") was a broader term than "adjustments" that is used in the present version of this provision. This wording would open the way to more substantial treaty amendments being introduced as part of an Accession treaty[15]. We cannot agree with such a perspective. The revision of the Constitution can only happen following procedures provided by it, which, in principle, include the intervention of a Convention (Article IV-443). This would justify an interpretation that would not allow for substantial amendments of the Constitution on the occasion of accession negotiations. Our interpretation of the article on accession appears to us as the more so justified that the Constitution has in principle provided for an automatic adjustment of the institutional provisions to future enlargements. Of course, the question remains if such automatism will resist to the challenge of Turkey accession.

I will conclude these short remarks on accession to the Union, as provided in the Constitution by observing that the role of the Commission in the accession negotiation process is not duly acknowledged[16]. It only appears as its consultative capacity. This is not in line with the reality and the requirement for transparency.

14 I.e., the impact of the accession on the composition and the voting modalities of the institutions. See J.-V. Louis, Article 237, in *Le droit de la Communauté économique européenne, « Commentaire J. Mégret »,* vol. 15, Brussels, 1987, p. 545 et s.

15 D. Phinnemore, "The European Convention, the 2003 IGC and the Future of Enlargement", The Federal Trust, *Online Papers,* 04/04*,* February 2004, p. 7.

16 Comp. with Article 102 of the so-called Penelope project drafted by a group of officials of the Commission at the initiative of President Prodi, see Varii Auctores, *"Pénélope". Projet de Constitution de l'Union européenne,* sous la direction d'A. Mattera, Paris, Clément Juglar, 2003, p. 212.

II. Suspension of Membership rights (Article I-59)

The origin of this provision – already introduced in the Spinelli draft[17] – is to be found in Article 7 EUT, as inserted by the Amsterdam Treaty and revised in Nice. It covered both "a clear risk of serious violation" (§1) and a "serious and persistent violation of the values of Article I-2" (§2). A right of appeal before the Court is opened to the Member State concerned against a decision of the European Council or the Council under Article I-59, but only for the violation of procedural prescriptions (Article III-371). We refer to the text of the provision for the detailed procedural requirements, especially for what concerns the voting rules in both the European Council and the European Parliament.

"Suspension" has been preferred to "expulsion". For some, it is a '*demi-mesure*'[18] which does only make sense if the State culprit could be expelled from the Union. It is submitted that this provision is in line with the idea of shared destiny of the Member States of the Union (referred to in the Preamble) and that expulsion is contrary to the specificity of the link created by the participation to the Union which qualitatively differs from one based on international law. It implies that all the Member States are, except for some temporary wrongdoings, committed to the same values. Is it a too optimistic view?

Opinions differ in the literature on the possibility for (all) the Member States to decide the expulsion of a Member State as a consequence of the violation of basic principles (democracy, fundamental rights and freedoms) which are conditions for the membership of the Union. But all authors underline the necessity to take into account the specificity of the existing legal remedies in the Community legal order.[19] Will the international law based right of expulsion as a last resort be the price for the lack of trust in potential new Members in the Union?

17 See Article 44 of the draft Treaty establishing the European Union. This Article was also applicable to serious and persistent violations of the provisions of the Treaty. Under Article I-59, only violations of the values are taken into account.

18 Ph. Moreau Defarges, *La « Constitution » européenne en question*, Paris, 2004, p. 68

19 For this possibility, as a last resort, after the exhaustion of the legal remedies, see M. Waelbroeck, Article 240, in *Commentaire J. Mégret,* vol. 15, *op. cit.,* p. 566. *Contra*, R. Adam, Article 312, in A. Tizzano (ed.), *Tratati dell'Unione Europea e della Comunità Europee,* Milan, 2004, p. 1394, because of the interindependent features of subjective legal situations attributed to Member States and the existence of control and guarantee procedures in the exclusive hands of Community institutions. See for an excellent synthesis of the arguments in this regard and for the view that the introduction of the right of suspension in Article 7 EUT by the Amsterdam Treaty makes obsolete the debate on a possible expulsion of a Member State in case of "*hypothetische Extremfälle*" on the basis of the *exceptio non adimpleti contractus* (article 60, Vienna Convention), Zeh, *op. cit.,* p. 185-186.

III. The unilateral withdrawal (Article I-60).

Article I-60 provides for the right of unilateral withdrawal of the Member States from the Union. It is a long provision. We will not proceed to exhaustively analyse this Article of the Constitution[20]. But before to proceed to the comments on the meaning of this provision for the integration process and the nature of the Union' legal order, we have to expose the main features of this Article.

The State, wanting to withdraw, has to decide it "in accordance with its own constitutional requirements". This provision has been defined as "a meaningless reference to internal procedures"[21]. The idea behind this wording could be the intention to avoid impulsive or party politics initiatives of the Executive branch of power by requiring an association of the Legislative or the people in the same way as for the accession to the EU or the ratification of a revision treaty. In that sense, the exit decision has to be a democratic one. Remarkably enough, the European Council will have to look at the respect of this (internal) requirement. The exiting Member State will indeed notify its intention to the European Council which will give guidelines for a negotiation of an agreement setting out the arrangements for its withdrawal "taking into account of the framework of its future relations with the Union". This agreement will be concluded by the Council at a qualified majority with the consent of the European Parliament. It is true that the wording of this paragraph could give the wrong impression[22] that without this agreement, no secession is possible. But, under the next paragraph, the Constitution ceases to apply to the State in question from the date of the entry into force of the agreement or, failing that, two years after the notification referred to above, unless there is a common agreement between the (unanimous) European Council and the Member State concerned, to extend this period. If this State wants to rejoin the Union, the procedure for accession will apply. As it has been observed[23], the Article is silent on the way to solve in the absence of an agreement all the problems raised by the withdrawal for the Union and the exiting Member.

The right to exit is a new element in the EU legal order. The unilateral withdrawal was considered to be contrary to Article 312 (ex 240) EC Treaty, which paradoxically remains as such in the Constitution (Article IV-446). Most of the literature considers that the absence of a provision on denunciation of the Treaty means that a unilateral denunciation of the Treaty by a Member State should be considered as excluded, a solution confirmed by Article 56 of the Vienna Convention on the law of treaties, because the right of unilateral withdrawal could not be derived from the

20 See the remarkable analysis by J. Zeh, *op. cit.,* p. 199 et s.
21 See Zeh, *ibid.,* „*ein sinnloser Verweis auf innerstaatliche Beschlussmöglichkeiten*".
22 See Zeh, *ibid.,* who finds the provision "*irreführend*".
23 See Zeh, *op. cit.,* p. 200. For a list of the questions to be resolved, see *ibid.,* p. 200-201.

nature of the treaty, quite the opposite[24]. On the other hand, the "*clausula rebus sic stantibus*" provided by Article 62 of the Vienna Convention on the law of treaties could only be invoked in cases where all remedies offered by Community law would have been exhausted and it has been put in doubt that the strict conditions required by international law for invoking this clause will ever been met in the Union (Community)'s legal order[25].

The Greenland case repeatedly mentioned as a precedent in favour of the existence of a right of unilateral withdrawal is not such a precedent. The change in the legal status of this depending territory pertaining to Denmark was achieved in 1984 by a treaty revising the Community Treaty. The threats to withdraw made in the past by the UK (1974) and Greece (1981) after their accession in order to get better terms than those obtained by an anterior Government cannot be mentioned as arguments in favour of the *right* to withdraw and the absence of legal reactions of their partners cannot be considered as a conviction that indeed the conduct of the States concerned was legal[26]. It was based on the idea that a legal action would worsen the conflict and that the situation was to be solved following the principles of dialogue and understanding central to being part of the Community.

The more or less explicit motivations given to the introduction of a Member State's right of unilateral withdrawal are political ones. One can mention at least some of them among the most meaningful. In the eyes of its promoters and of those who accepted it, the insertion of this right would,

a. underline the democratic or voluntary feature of the integration process[27];
b. and in particular, make easier the acceptance of the Constitution in countries supposed to have an important part of Eurosceptics among their population[28], and more especially in the new Member States where what appears as a loss of sovereignty is often negatively regarded for understandable historical rea-

24 See M. Waelbroeck, Article 240, in *Commentaire J. Mégret,* vol. 15, *op. cit.,* p. 564 and the authors quoted. See for the literature in German, Zeh, *op. cit.,* p. 179, notes 23 and 24. *Contra*, see R. Mehdi, « La 'double hiérarchie' normative à l'épreuve du projet de traité établissant une Constitution pour l'Europe », in *Les dynamiques du droit européen…, op. cit.,* Paris, 2004, p. 443, 461.

25 See Zeh, *op. cit.,* p. 184 and Waelbroeck, *op. et loc. cit.*

26 *Contra*, L.S. Rossi, « The IGC and Institutional Reform", *European Policy Centre,* 5 July 2004, p.7: "Although the answer (to the British referendum on the participation to the EC in 1975) was affirmative, nobody seemed to doubt the sovereign right of the United Kingdom to withdraw." In our opinion, the decision to withdraw would have been contrary to both international and Community law.

27 See Mehdi, *op. cit.*, p. 460 and Duhamel, *Pour l'Europe. Le texte de la Constitution expliqué et commenté,* Paris, 2003, p. 237. It is one of the reasons why reference is made to the observance – controlled by the European Council - of the constitutional requirements of the exiting Member State for the taking of the decision to withdraw.

28 Zeh, *op. cit.,* p. 198 observes that the representatives of the new Member States did not ask for amendment of the formula as it was first presented by the Presidium and some insist on the necessity of such a clause.

sons; for the Presidium, the existence of such a provision would constitute an important political signal for those who would support the view that the Union is a rigid entity of which it would be impossible to exit[29];

c. open a possibility of (individual or collective) exit in case of undesirable developments of the Union, a consideration valid for both old and new Member States and which perhaps explains that the opposition to the new clause has not met with more vigorous resistance among the fifteen[30], although the idea met with the opposition of the most "integrationists" among the existing Member States;
d. provide for the uncontested continuity of the Union in case of a unilateral withdrawal and so avoiding any kind of reasoning based on "*rebus sic stantibus*" claiming for the dissolution of the Union in case of unilateral withdrawal; as Olivier Duhamel writes it, to provide for the possibility of unilateral withdrawal allows for organising it and giving it a frame[31]; but it can also work as an incitement and the frame presents some important lacunas, as observed earlier;
e. allow, in the absence of a right of expulsion, to push to the exit Member States having become undesirable[32]. The withdrawal appears in this view as a substitute for expulsion. In that case, unilateral withdrawals are in fact semi-voluntary exits.

I will not comment further on these diverse considerations and motivations for the insertion of an exit clause or the orientation of the debates within the Convention. The future will tell if indeed the provision proofs to be useful or if it only gives a bad signal on the legal irreversibility of the commitments implied by the participa-

29 CONV 734/1/03, p. 131, quoted by R. Mehdi, *op. cit.*, p. 460. See also O. Duhamel, *op. cit.,* p. 236.

30 On the debate within the Convention, see Zeh, *op. cit.,* p. 196-199. As it is well-known, the possibility of unilateral withdrawal was foreseen in article 46 of the first "skeleton" of a Constitution presented by the Presidium in October 2002. The chairman of the Convention, Valéry Giscard d'Estaing, was a convinced supporter of the right to withdraw.

31 « *Cela permet de l'organiser et de l'encadrer* », O. Duhamel, *loc. cit.*

32 For Claude Blumann, « Quelques réflexions sur le projet de constitution de l'Union européenne », *Revue du droit public,* 2003, p. 1269, 1272, the right of withdrawal pleads in favour of a more effective Union, one which could get rid of the « *poids morts* » ("dead weights") and of those who satisfy themselves with the role of a spectator not always with good intentions. Those are criteria difficult to manage. This author adds that this right could also lessen the importance of the clauses on opting out or differentiation which are burdensome and risk to profoundly altering the Community system.

tion to the integration process, not to mention the specific case of the possible (but not inevitable) exit of the euro of a withdrawing Member State[33].

One cannot draw conclusions on the nature of the Union legal order from the existence of a right of unilateral withdrawal[34]. It would be an error to oppose, using this criterion, the Union to a State-like type of organisation (cf. the reasoning of the Supreme Court of Canada in the 1998 Quebec secession case[35]), despite the different constitutional context.

The exit right, as provided by the Constitution, cannot be considered as of such a discretionary nature than what apparently derives from the letter of Article I-60. One has to take into account the loyalty obligation of the Member States, the existence of legal remedies against adverse decisions and the rights and obligations acquired by citizens under Union law[36]. But if there is a (reciprocal) obligation to negotiate *bona fide*, there is no remedy against a persistent will of a State to exit[37]. On the other hand, the State concerned cannot impose its will on the others for the future definition of its relations with the Union.

Exit right is not what makes a Federation of Nation States different from a (federal) State, as it has been proclaimed. The argument seems to neglect the conditions required for invoking the *rebus sic stantibus* exception to the respect due to international treaties. Many authors consider that this rule cannot be invoked in the context of the European Union. Each State can ask for a revision of the Treaty or for another kind of arrangement, and, taking into account the obligation of the others to negotiate *bona fide*, solutions could normally be found – and the History demonstrates that they are indeed found - in order to restore the lost balance.[38] By introducing the right of unilateral withdrawal, the Convention reveals a lot about the lack of confidence in

33 As underlined by René Smits. See his presentation on "The European Constitution and Economic and Monetary Union", at a seminar held at the Österreichische Nationalbank, on November 5, 2004, to be published. The existence of a right of withdrawal could encourage the development of so-called "disaster clauses" in private contracts providing for the (partial or total) unwinding of the euro area, an evolution that would not be favourable to monetary stability.

34 For Ph. Moreau Defarges, *op. cit.,* p. 73, the right of unilateral withdrawal would be what distinguishes the Union, a Federation of Nation States, from a Federal State.

35 [1998] 2 R.C.S. 217.

36 The possible consequences for the rights and obligations of physical and moral persons are to be taken into account by the Council in its decision of suspension under Article I-59. See also, Zeh, *op. cit.,* p. 199.

37 See D. N. Triantafyllou, *Le projet constitutionnel de la Convention européenne. Présentation critique de sas choix clés,* Bruxelles, 2003, p. 132 : « *il s'agit d'un retrait libre et inconditionnel, qu'aucune institution ne peut arrêter, même pas la non-conclusion de l'accord régissant les relations mutuelles avec l'Union.* » For Zeh, *op. cit.,* p. 201, this provision opens a free possibility of denunciation by a Member State without submitting it to specific material or formal legal obligations. We believe that one has to adopt a less exegetic interpretation, which allows limiting, at least marginally, the discretion of the exiting Member State in conformity with the nature of the belonging to the Union.

38 See M. Waelbroeck, *op. cit.,* p. 567.

the partners of an enlarged Union and in the institutional framework which organises their relations.

It is to be regretted[39] that the unilateral right of withdrawal was not linked either to the adoption of qualified majority voting for the revision of the Constitution[40] or, more generally, whatever the voting requirements, in the case of a fundamental disagreement with a new direction opened by an undesired and *de facto* irresistible revision.[41]

The absence of an exit clause would not have been a recipe for civil wars among the Europeans as it has been pretended by some authors invoking the US history[42]. Democratic principles are anyway to be opposed to the use of force against secession as the generalised opposition in our countries to the policy of Russia in Chechnya demonstrates.

The future will say if the prevision of unilateral withdrawal will be a "source of pressures and blackmailing against the general interest"[43] or prove to be a useful way out in case of undesirable changes in the working and orientation of the European Union. Juli Zeh concludes her in-depth analysis of the right of withdrawal by quoting an Esthonian member of the Convention who expressed the "hope that this clause will never be used"[44]. And indeed, she is right. We would like to suggest that the Union should conceive and put into practice an accession policy for the future in order to avoid experiences of unilateral withdrawals.

39 D.N. Triantafyllou, *op. cit.,* p. 133.

40 A. Lamassoure, *Histoire secrète de la Convention européenne,* Paris, 2004, p. 420 and 338. The author, as an active member of the Convention, appeared to be one of the most convinced protagonists of a right of withdrawal, seeing in it « *une garantie fondamentale qui rassurera tous ceux qui sont attachés à la souveraineté nationale* », but, for him, the decision should not be unilateral, an agreement being necessary on the common acquis and the external commitments, *ibid.,* p. 338. See also Article 103 of the Penelope draft Constitutional Treaty, *loc. cit.*, p. 213 which connects the possibility of withdrawal to the revision of the Constitution by a majority of Member States. The agreement with the exiting Member State should bear on the future relations of this State and the Union.

41 A solution proposed by D. de Villepin, the representative of the French Government at the Convention.

42 Robert McGee, « Some Comments on the Draft EU Constitution's Exit Proposal », *Policy Briefing,* The Adam Smith Institute, www.adam-smith.org, July 2003. See also E. de Poncins, *Vers une Constitution européenne,* Paris, 2003, p. 233.

43 D.N. Triantafyllou, *op. cit.,* p. 134. The Member States could appear less incline to compromise. Zeh, *op. cit.,* p. 193 and 204, sees a possibility of what she calls a "*Hinausekelungstaktik*". The necessity for the exiting Member State to take its decision in conformity with its constitutional requirements is at least partially justified , as we observed, by the preoccupation to avoid pressures or blackmailing attitudes by a Government for party politics or other unilateral reasons. It is true that radical and (or) Europhobic parties can seize any opportunity to request from the Government in place to unilaterally withdraw but these requests have no chance to be successful if they do not find the support requested under Constitutional and Union law, under Article I-60.

44 *Op. cit.,* p. 210.

IV. Final reflections

The problems raised by the provisions we have briefly commented are, as we observed at the beginning of this contribution, linked with the basic problem of the nature of the integration process. It is not by chance that the wording of Article I-58 on accession is so laconic in the description of the conditions for the membership. Although the Convention has done a good job in trying to sum up the objectives of the Union, it could not but take note of the divergences on the conceptions concerning the Union among the Member States, old and new. Hence the poor definition of the Union found in Article I-1, the dropping of the reference to the "ever closer Union", introduced in the EUT by the Maastricht Treaty as a substitute for the word "federal", the insistence of the role of the Member States, which for many, are still "*die Herren des Vertrages*", etc.

On the other hand, Article I-59 on suspension, is in direct line not only with the acquis – it is almost unchanged in comparison with the wording of Article 7 of the EUT in the version of the Treaty of Nice - but also with the Spinelli draft treaty on the European Union. There is continuity in the will of avoiding to insert in the Constitution an expulsion clause. The question remains, now as it did before, is it possible to base on the subsidiary application of international law, a last resort right of expulsion. Opinions diverge.

Article I-60 on unilateral withdrawal was introduced on the basis of such diverse, explicit or implicit, and often contradictory considerations that it is difficult to foresee the role it will have in the future. It surely gives *prima facie* a wrong view of the meaning of the participation to the Union which is not an organisation from which the exit is either in conformity with its basic principles or easy to put in practice, taking into account the intertwining links created by the process of integration. It comforts the wrong view of a Union seen as an international organisation like others, a concept which could seem attractive in the short term for countries which have only recently (re)acquired their sovereignty and are fed up with the idea and the reality of the so-called "limited sovereignty" of the Brejnev area. The paradox is that this approach is based on a restrictive view of international law obligations, which, put to its extreme logic, could be destructive of the international legal order. The spectrum of unlimited sovereignty is as dangerous as the use that has been made of the limited sovereignty in the after-war Central and Eastern Europe.

We have tried to point to the in-built limit that the participation to the EU legal order places on the unilateral right of exit. Not only there is an obligation to negotiate *bona fide* the agreement on the future relations with the Union but the exit State should exhaust the legal remedies offered by the EU legal order and take into consideration the rights acquired under the Union by its and the other citizens of the Union.