

A Constitution for Europe – amendments and legal make-up to the Convention’s draft

by
Ingolf Pernice, Berlin*

I. Introduction

The European Council meeting in Brussels in June 2004 has finally adopted the Treaty on a Constitution for Europe.¹ Though a number of difficult political questions had to be resolved and at the end of the Intergovernmental Conference established in October 2003 the Brussels summit of December 2003 has failed to achieve agreement,² thanks to the diplomacy of the Irish Presidency and the change of government in Spain the Treaty on a Constitution for Europe could be concluded at the Brussels summit in June 2004 and was signed at a solemn ceremony in Rome on 29th October 2004. It has 448 Articles, 36 Protocols, 2 Annexes and 48 Declarations included in the Final Act of the IGC, altogether 852 pages.

Contrary to strong doubts and scepticism by those who believed that the Convention’s Draft would not be taken as a basis for the negotiations of the IGC or would have to undergo substantial changes before an agreement of the Heads of State and Government could be reached³ – if any – the final outcome of the IGC is surprisingly in line with the original Draft submitted to it by the Convention.⁴ The fundamental steps towards a Constitution for Europe proposed by the Convention,

* Prof. Dr. jur., Lehrstuhl für öffentliches Recht, Völker- und Europarecht der Humboldt-Universität zu Berlin, geschäftsführender Direktor des Walter Hallstein-Instituts für Europäisches Verfassungsrecht der Humboldt-Universität zu Berlin (www.whi-berlin.de). The Author is most grateful to Matthias Hücke for his assistance in completing and updating this contribution.

1 For the text of the Treaty: <http://ue.eu.int/igcpdf/en/04/cg00/cg00087.en04.pdf>, for the Protocols and Annexes I and II see: <http://ue.eu.int/igcpdf/en/04/cg00/cg00087-ad01.en04.pdf>, for declarations see: <http://ue.eu.int/igcpdf/en/04/cg00/cg00087-ad02.en04.pdf>.

2 See: Ingolf Pernice, Nach dem Gipfel von Brüssel: Ist die "Verfassung für Europa" gescheitert? WHI Paper 2/04, online at www.whi-berlin.de/verfassungsgipfel.htm; see also Klaus Hänsch, Der Verfassungsentwurf für die Europäische Union nach der Regierungskonferenz, online at www.whi-berlin.de/haensch.htm.

3 For the discussion between Germany’s Chancellor Schröder and the Prime Ministers of Poland and Spain, Miller and Aznar, see: “Polens Schwäche, Spaniens Härte“, *Der Spiegel* of 13 December 2003, <http://www.spiegel.de/politik/ausland/0,1518,278260,00.html>.

4 The amendments to the Convention’s Draft and the Final Treaty establishing a Constitution for Europe are indicated in the synopsis, online at www.rewi.hu-berlin.de/whi/synopse/verfassung.pdf; see also the overview of the French Senate, “Constitution européenne – comparaison avec les traités en vigueur”, available under http://www.senat.fr/europe/cig_2003/index.html, with the final text of the Treaty establishing the Constitution for Europe compared to the TEC and TEU.

went far beyond what was believed politically possible some years ago, including the notions of *Joschka Fischer* in his Humboldt-speech of May 2000⁵ and in the Laeken-Declaration of December 2001,⁶ have finally been endorsed by all the 25 old and new Member States:

- Instead of the complex set of Treaties and the three pillar-structure of the Union, there is now one single and systematic text of a “Constitution for Europe”, adopted in the form of a treaty but established in the name of the citizens and the States of Europe;⁷
- A change of paradigm has occurred: Not only the States are the foundation of the Union any more, but both, citizens and States, are expressly referred to as those in the name of whom the Union is established, who provide a “double legitimacy” to the Union. Accordingly, the European Parliament is now said in Article I-20 § 2 to be composed by representatives of “the Union’s citizens” – not any more of the “peoples of the Member States”;⁸
- In addition to, and based upon the established jurisprudence of the European Court of Justice⁹ the Charter of Fundamental Rights of the Union is included

5 Joschka Fischer, "Vom Staatenverbund zur Föderation - Gedanken über die Finalität der europäischen Integration" - FCE Spezial 2/00, para. 47, <www.whi-berlin.de/fischer.htm>; Fischer stated that solving the democracy deficit and the reorganisation of the competencial structure could only be reached through a new constitutional foundation. The Member States which would be willing to go on further integration could form a „avantgarde group“ and a „gravitation centre“.

6 The Declaration’s cautious wording was: “The question arises to whether this simplification [of the Treaties] and reorganisation might not lead in the long run to the adoption of a constitutional text“, the entire document can be found under <www.eu2001.be>.

7 See Article I-1 (1): “Reflecting the will of the citizens and States of Europe to build a common future [...]“; all articles refer to the consolidated text of the Treaty establishing a Constitution for Europe, document CIG 87/04, *supra* note 1.

8 Article I-20 (2): “The European parliament shall be composed of representatives of the Union’s citizens“; leaving open whether this change of concept can lead to a common European identity: Armin von Bogdandy, *Europäische Verfassung und Europäische Identität – Potenziale und Gefahren im Entwurf des Vertrages über eine Verfassung für Europa*, in: Olivier Beaud/Arnaud Lechevalier/Ingolf Pernice/Sylvie Strudel (eds.), *L’Europe en voie de Constitution – Pour un bilan critique des travaux de la Convention* (2004), p. 657 et seqq.

9 Case C-29/69, *Stauder* (1969), ECR 419, 425; Case C-4/73, *Nold* (1974), ECR 491, 507, Case C-44/79, *Hauer* (1979) ECR 3727, 3744. See also: Ingolf Pernice/Franz C. Mayer, in: Eberhard Grabitz and Meinhard Hilf (eds), *Das Recht der Europäischen Union, Kommentar* (2002), nach Art 6 EC, note 3 et seqq.

in this Constitution as a legally binding instrument giving clear guidance to the individuals on their rights;¹⁰

- Instead of a rotating presidency and a complex parallelism of bodies representing the Union externally and towards its citizens, the Constitution creates the office of a permanent President of the European Council and a Minister for Foreign Affairs;¹¹
- Instead of a great number of different forms in which the Union acted, the Constitution provides for a limited set of legal acts of the Union which are named as what they are: European laws, framework laws, European regulations and European decisions;¹²
- A further increase of the powers of the European Parliament, which is now generally co-legislator together with the Council,¹³ which, as a rule, takes its decisions by double-majority-vote and meets in public when acting as a legislative body;¹⁴
- The President of the Commission is elected by the European Parliament, on a proposal of the European Council acting in account of the elections to the European Parliament and after appropriate consultations with it.¹⁵

Though the new Treaty is far too long and complex, it takes the form and language of a Constitution for the citizens of the Union, is indeed an important step forward in terms of democracy,¹⁶ and it will permit the enlarged Union’s institutions to continue to function.¹⁷ After several failures to deal with the “Amsterdam left-overs” by the traditional IGC, this is a great success not only of the Convention but also of

10 The Charter in several aspects goes beyond the case law of the Court of Justice, e.g. the „solidarity rights“ of Article II-87 to II-98; for the relationship to constitutionalism in Europe: Volker Röben, Constitutionalism of the European Union after the Draft Constitutional Treaty: How much hierarchy?, *Colum. J. Eur. L.*, (2004) 339 at 369; see also Ingolf Pernice, Integrating the Charter of Fundamental Rights into the Constitution: Practical and theoretical Propositions, *Colum. J. Eur. L.*, (2004), 5.

11 Articles I-22 and I-28; compare also my proposals for a President of the Union in: Ingolf Pernice, Democratic Leadership in Europe: The European Council and the President of the Union, José María Beneyto/Ingolf Pernice (eds.), *The Government of Europe – Institutional Design for the European Union*, ECLN-Series vol. 3, 2004, p. 31, also as WHI-Paper 1-03, p. 18 et seqq., <<http://www.whi-berlin.de/pernice-leadership.htm>>.

12 Article I-33; for an overview of the new typology including the applicable decision-making procedure see Andreas Maurer, Orientierung im Verfahrensdickicht? Die neue Normenhierarchie der Europäischen Union, *Integration* 2003, 440 at 444 et seqq.

13 Articles I-20 and I-34 (1).

14 See Article I-23 (1) and (3), Article I-24 (6) and Article I-25.

15 Article I-27 (1).

16 On the democratic deficit issue see Stephen C. Sieberson, The proposed European Union Constitution – Will it eliminate the EU’s democratic deficit?, *Colum. J. Eur. L.* (2004), 173 et seqq.

17 Peter-Christian Müller Graff, Strukturmerkmale des neuen Verfassungsvertrages für Europa im Entwicklungsgang des Primärrechts, *Integration* 2004, 199.

the new Convention method as such.¹⁸ And the success is underlined by the very fact that the IGC has not even touched the basic structure and characteristics of the Convention's Draft.

This conclusion should suffice to convince the citizens of all Member States of the need to ratify and bring this Constitution into effect. For us lawyers, however, a closer look on the final text of the Constitution as compared with the original Draft is interesting in order to detect a number of amendments of different value and implication the Convention's Draft has undergone before the agreement could be reached. Some of these amendments are worth while to identify with a view to show the importance of the work done not only by the Convention and the IGC, but also by the Secretariat's Legal Experts¹⁹ who in providing the "legal make-up" of the text have nevertheless added quite a lot to the substance and – in part – quality of the Constitution (see II. below). Regarding the work of the IGC up to the Brussels summit of June 2004, the strategy chosen by the Irish presidency further allows to distinguish such amendments which, after some diplomatic action at the capitals of the Member States were submitted to the summit as being of minor importance and not requiring discussion (see III. below) and other points which had to be discussed as well as the agreement on which finally the summit adopted the Constitution altogether (see IV. below).²⁰

II. The "legal make-up": Amendments included by the Secretariat of the IGC

Generally, one should expect that it is the Secretariat's job to suggest drafting improvements, correct spelling errors, bring inconsistencies of the texts to the attention of the Conference etc. Also „formalities“, such as the traditional reference

18 A reflection on the Convention method in: Franz C. Mayer, *Macht und Gegenmacht in der Europäischen Verfassung. Zur Arbeit des Europäischen Verfassungskonventes*, *ZaöRV* 63 (2003), 59 to 76; see also Bruno de Witte's thoughts on the political impact of the domestic phase on the international phase of treaty revision in his contribution "The national dimension of European treaty revision: Evolution and recent debates", p. 6 ## et seq., in this volume.

19 The Legal Expert Group consisted of an equal number of national lawyers under the guidance of the Council's legal service whose assignment was to work up the Convention's Draft in legal terms. Their task was to clear the draft in legal-technical terms, but not on political aspects, and the national delegations had to report to their governments (so explained by Pascal Hector, deputy director of the Sekretariat for matters of the European Constitution in the German Foreign Office); the Draft Treaty including editorial and legal adjustments by the Working Party of the IGC Legal Experts is published as document CIG 50/03, online at <<http://ue.eu.int/igcpdf/en/03/cg00/cg00050.en03.pdf>>.

20 In fact the delegations at the IGC were given two sets of texts, one of which contained the issues the presidency believed to (and did) find consensus on before the Summit started. A separate and much smaller document comprised the outstanding issues which needed further discussion. The delegates therefore found themselves in a position where it was hardly possible to open a discussion on a point of the first set of text without a specific justification.

to the plenipotentiaries of the Member States having „agreed as follows“ may be taken as technical improvements of this kind, though they underline a matter of principle: This Constitution is still drafted in the form of an international treaty. Consequently, but also amazingly for a Constitution, its Preamble as completed by the Services, starts with listing the authors of this Treaty: The list commences with „His Majesty the King of the Belgians“, and concludes with „her Majesty the Queen of the United Kingdom of Great Britain and Northern Ireland“ – who have „designated as their plenipotentiaries...“ those who (same list of persons) „have agreed as follows...“. Needless to say that such drafting is strange for a republic kind of supranational polity, and it underlines the „treaty-face“ of the new text, as opposed to the „Constitution-face“ which is expressed more clearly in other provisions. And the new Final Clauses in Part IV (Articles 437 to 448), as made-up by the Secretariat’s experts, refer to „the Treaty establishing the Constitution“ (Article 437 or simply to this „Treaty“, as opposed to the normal reference “this Constitution” used throughout Part I to III (e.g. Articles I-1 § 1, I-29 § 1, II-111 § 1, III-122, III-239, III-360, III-416, III-425, III-436), with exceptions like Article III-243 on a specific regime for Germany in the area of transport referring to „the Treaty establishing a Constitution for Europe“.²¹ The drafting changes mentioned are presumably in conformity with the intentions of the „authors“ of the Treaty, referred to above, who still may feel like the „masters of the treaty“. But it contrasts the intention of the Convention and other parts of the „Treaty“, in particular its part I, where both, the „citizens and States of Europe“ are highlighted as those, „on behalf of“ whom the European Convention has prepared the „draft of this Constitution“ (last recital of the Preamble). Likewise Article 1 (1) states: „Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union...“.²² The special reference to the “Treaty” in the final provisions could also be explained by their technical nature relating to contractual form of the Constitution²³. But at least Article IV-438 § 1 would still be inconsistent with Article 1 § 1: It states that the Union „established by this Treaty“ shall be the successor to the EU established by the Treaty on the EU and on the EC, while Article I-1 § 1, clearly states that not this Treaty, but „...this Constitution establishes the European Union“.

21 In this context see also Bruno de Witte’s thesis of a „trend towards the constitutionalization of international law and the internationalization of constitutional law”, *supra* note 18, p. 2.

22 See the Franco-German „Elysée Proposals“, CONV 489/03 of 16 January 2003, <<http://register.consilium.eu.int/pdf/en/03/cv00/cv00489en03.pdf>>.

23 See Article IV-438 § 4 and 5, where the „Constitution“ is referred to in a more material meaning, while the provisions use the term „Treaty“ with regard to the formal – contractual – side of the Constitution.

At least the documents available in the internet²⁴ permit the assumption, therefore, that – apart from many useful drafting changes which need no special mention here – the Legal Experts have exercised an important influence on the understanding and substance of the Constitution: The following examples may suffice:

- It is on the initiative of the IGC Secretariat's Legal Experts that a reference to the continuity of the Community acquis, the *acquis communautaire*, was included into the Preamble, stating that this is „to continue the work accomplished within the framework of the Treaties establishing the European Communities and the Treaty on European Union“. It follows that the Constitution, like the other Treaties, is meant to be a step in a process of integration as referred to in the third recital: „Convinced that, while proud of their own national identities and history, the peoples of Europe are determined to transcend their ancient divisions and, united ever more closely, to forge a common destiny“.
- Certain institutions have been renamed by the Secretariat, such as, in Articles I-29 and III-356 of the Constitution on the European Court of Justice: The Court of First Instance which the Convention had called „High Court“, is now the General Court, as opposed to other „specialised Courts“ for what was under the Treaty of Nice the „judicial panel“.²⁵ Another case of renaming is that of the „European Armaments, Research and Military Capabilities Agency“, which is now called “European Defence Agency” (Article I-41 (3) and Article III-311).
- A very far-reaching amendment to the Convention's Draft has been made with regard to the jurisdiction of the Court of Justice, which did not extend to decisions of the European Council. Thanks to the Secretariat's initiative, this lacuna is filled by the simple mention of the European Council among the institutions whose acts are subject to judicial review under Articles III-365 (1) and III-367. Other amendments introduced by the Secretariat's experts are: The procedure under Article I-59 (suspension of certain rights) is subject to judicial review under Article III-371 (former Article III-276), but now with a time limit of one month which applies to the request of the Member State concerned.²⁶ On the other hand access to the ECJ for judicial review of “European decisions providing for restrictive measures against national or legal persons adopted by the Council on the basis of Chapter II of Title V” is

24 See the documents CIG 50/03, CIG 50/03 COR 7, 5, 4, 2, CIG 50/03 ADD 3 to ADD 1, see <http://ue.eu.int/cms3_applications/applications/igc/doc_register.asp?cmsid=576&num_page=7&lang=EN&content=>>.

25 Article 220 TEC.

26 The new version of Article III-371 corresponds to former Article 46 lit. e TEU.

now expressly granted,²⁷ while other measures in the area of CFSP are exempt from the ECJ’s jurisdiction.

- Moreover, by replacing the words „respect for the law“ to be ensured by the ECJ with its task to ensure that „the law is observed“²⁸ the Secretariat has brought this important phrase back to the wording of Article 220 EC and, thus, excluded any doubt upon the question whether or not, under the Constitution, the general task of the ECJ has changed.²⁹ Replacing the phrase „rights of appeal“ by „remedies“ to be provided,³⁰ under the same general provision, by the Member States and which shall be „sufficient to ensure effective legal protection in the fields covered by Union law“ seems to be a mere technical change. Yet, such clear legal language is of great importance in a provision which is fundamental to the decentralised system of judicial review of the Union. It is more than a technical adjustment, finally, that in Article III-292 on general provisions for the external action of the Union the reference to „the respect for the principles of the UN-Charter“ was completed by that to „international law“, and the provisions on cooperation for peace and conflict prevention by a reference to the „principles of the Helsinki Final Act and [...] the aims of the Charter of Paris“.
- Regarding Part I Title VI, on the democratic life of the Union, Article I-46 (2) underlines what is also stated in Article I-20 (2): that the citizens of the Union, not any more the peoples of the Member States, are represented in the European Parliament. What was added in the second phrase of the Convention’s Draft is that „the Member States are represented in the European Council and in the Council of Ministers by their governments, themselves accountable to national Parliaments, elected by their citizens“. This could have implied that parliamentary democracy is the only accepted system for the Member States. The Secretariat has now excluded such a conclusion by adding that the Heads of State or Government and the governments are “themselves democratically accountable either to their national Parliaments or to their citizens”.
- As the European Council has decided to insert in Article II-112 a rather strange clause referring to the explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights to “be given due regard by the courts of the Union and the Member States”, the Secretariat’s services now reiterate and strengthen its role in the Preamble of

27 Article III-376.

28 Article I-29 (1).

29 For the prospective developments in the relationship between national and European Courts compare Franz C. Mayer, *The European Constitution and the Courts, Adjudicating European constitutional law in a multilevel system*, Jean Monnet Working Paper 9/03 (2003), Symposium: *European Integration - The New German Scholarship*, p. 39 et seqq., online at <<http://www.JeanMonnetProgram.org/papers/03/030901-03.html>>.

30 Article I-29 (1).

the Charter saying that the explanations were “prepared *under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention*.”³¹ Not only the mere existence of a separate Preamble for the Charter looks strange in a Constitution,³² but also the fact that its provisions refer to the Secretariat’s guidelines for its interpretation. To repeat and underline this important achievement of the Secretariat even in the Preamble raises the question of seriousness.

- More serious and useful is the reintroduction in Article III-127 on the diplomatic and consular protection of citizens of the Union in third countries, of the Member States’ duty to “commence the international negotiations required to secure this protection”.³³ It were the Secretariat’s experts who, on the other hand, rearranged the institutional provisions on the Economic and Monetary Union. While the Central Bank and its Governing Council are now dealt with in Chapter 1 of Part III, Title IV of the Constitution on “Provisions governing the institutions”, right after the Court of Justice (Article III-382), the Economic and Monetary Committee (Article III-192) is now heading in Title III regarding internal policies Chapter II on economic and monetary policy, Section 3 on “Institutional Provisions” – which is not very logical.
- In the area of environmental policies the *passerelle* in Article III-234 (2) from unanimity for certain fields of action to qualified majority was subject to an unanimous decision of the Council; it is the Secretariat’s service who helpfully added that the Council adopts such a European decision “on a proposal from the Commission” and thus enables the Commission to take this initiative. Regarding procedures, it is interesting to note that also the power, in Article III-283 (3) lit. b), of the Council to adopt recommendations in the area of vocational training, has been added by the Secretariat’s experts. In Article III-291 they added European laws and framework laws to regulations and decisions as possible forms for “detailed rules and the procedure” for the association of the overseas countries and territories with the Union. In Article III-319 which was Article III-221 of the Convention’s Draft, the unanimity requirement for “association agreements [...] and for the agreements with the States which are candidates for accession to the Union” has been deleted; it is already stated in Article III-325 (8).
- With a view to the intention to strengthen the role of the national Parliaments under the new Constitution and its protocols, it is surprising that the Secretariat’s experts have deleted in Article III-259 the provision that “Member States’ national Parliaments may participate in the evaluation

31 New wording here in italics.

32 In this context see a synopsis of the preambles of TEU, TEC and the Charter as well as a drafting proposal for a merged preamble in Ingolf Pernice, *supra* note 10, p. 19 et seqq.

33 The amendment of Article III-127 revokes the modifications concerning Article 20 TEC.

mechanisms” on measures taken in the area of freedom, security and justice. On the other hand, the Secretariat’s experts have added in Article III-325 (6) a provision for consultation of the European Parliament on decisions regarding the conclusion of international treaties (lit. b) as far as its consent is not expressly required (lit. a). This was already the rule under Article 300 (3) EC. They have also reintroduced among the provisions on the European Parliament – as it was provided for in Article 200 EC – its obligation to “discuss in open session the annual general report submitted to it by the Commission”.³⁴ These are important readjustments to what the Convention had produced.

- Some apparently minor, but practically important changes have been introduced by the Secretariat’s experts in the provision of Article III-396 (4) and (7). If the Council approves, after the first reading, the position of the Parliament, it is added that “the proposed act shall be adopted in the wording which corresponds to the position of the European Parliament”. And if, in the second reading, the Parliament approves the position of the Council, “the act concerned shall be deemed to have been adopted in the wording which corresponds to the position of the Council”. This clarification may be a consequence of a case still pending before the ECJ regarding difficulties arising from subsequent changes to the text which was approved by the European Parliament, where the applicant questions the very existence of an agreement between the institutions on a common text.³⁵
- The final clauses of the Treaty establishing the Constitution for Europe, finally, have been widely redrafted and completed by the services of the Secretariat, clearly with the intention to secure legal certainty regarding the transition from the EU-Treaty to the Constitution.³⁶ Among the relevant provisions, attention may be drawn in particular to Article IV-438 (1) stating that:

„The European Union established by this Treaty shall be the successor to the European Union established by the Treaty on European Union and to the European Community”.

Does this not recognise retroactively the legal personality of the European Union, which was so long and strongly in dispute since the Treaty of Maastricht? How could the new Union otherwise be successor of the old Union, but on the basis of the recognition that this Union has legal capacity and personality? Many important provisions on the continuing validity of the prior law, unless expressly repealed or modified, are included in that detailed provision, including the case law of the Court of Justice which, under Article IV-438 (4), „shall remain, *mutatis mutandis*, the source of interpretation of

34 See Article 337 (3).

35 Case C-380/03 – *Germany v. Parliament and Council*, concerning the renewed refutation of the *Tabakwerberichtlinie*.

36 See *supra* note 19.

Union law and in particular of the comparable provisions of the Constitution“. Did the Secretariat’s services overlook this mention of the Constitution, or was it retained by purpose? The provision for ratification of the Constitution is now contained in Article IV-447, which even sets a date for the entry into force: On 1 November 2006. But the provision on what may happen if one or more Member States do not ratify – the matter shall be referred to the European Council – is not included in this Article, but in Article IV-443 (4) on the „ordinary revision procedure“, and therefore will be applicable only after the entry into force of the Constitution. But, of course, Declaration no. 30 to the Constitution repeats this provision for the case of ratification.³⁷

III. „Minor“ issues for consensus without discussion at the summit

No discussion was felt necessary at the summit for amendments to the Convention’s Draft on a number of important points, some of which shall be discussed here.

- Some Member States have made a strong case during the full process of the IGC on the introduction in the Preamble of an „*invocatio Dei*“, but this request was finally rejected.³⁸ Is it an element of a compromise, that instead of the first recital of the Convention’s Preamble, which was deleted, the Preamble of the Constitution now begins with stating that the authors of this Treaty,

„...DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law...“ ?

It is clear that this amendment already existed in the papers of the Irish Presidency among the points which did not need discussion,³⁹ but at least the word „religious“ now ranges at a very prominent place. Similarly, in the Preamble, probably as a reaction to criticisms regarding the lack of any reference to the true and lasting historic reasons for European integration since *Jean Monnet* and *Robert Schuman*, the words „reunited after bitter experiences“ now included in the second recital may recall that this „joint venture“ of Europe is based on a new approach leaving behind the ideologies of sovereign nation-states as conceptualised in the post-Westphalian era and

37 See the comments on this provision and the possible scenarios in case of non-ratification of one or more Member States in the paper of Jo Shaw, Failure to ratify the Constitutional Treaty: What next? , p. ## et seqq., in this volume.

38 To the discussion see *EU-Nachrichten* No. 20 of 27 May 2004, p. 3.

39 See document CIG 81/04.

having proved unable, as *Walter Hallstein* has rightly stated, to preserve peace⁴⁰.

- An important change regards the very foundations of the Union and nevertheless could be passed without further debate: Article I-10 of the Convention’s Draft was transferred from Title III on competencies to Title I (Definition and objectives of the Union). It was, indeed, wrongly placed among the provisions on competencies, because it states a matter of principle which was clear from the jurisprudence of the Court of Justice,⁴¹ but not accepted in all Member States.⁴² By the way, the Declaration on Article I-6 expressly states that this provision reflects the existing case law of the ECJ. The former Article I-10 is now split into Article I-6, providing for the primacy of the Constitution, and the law adopted by its institutions of the Union in exercising competencies conferred on it, over the law of the Member States, and Article I-5 (2) on sincere cooperation and the loyal fulfilment of the obligations arising from this law of the Union by the Member States.
- Another amendment relates to the Council’s meetings where it acts as a legislative body. Article I-49 (2) of the Convention’s Draft already stated that, as a matter of transparency, the „Council of Ministers when examining and adopting a legislative proposal“ shall meet in public – as does the European Parliament. This provision was somewhat hidden at an unexpected place and difficult to be found, while now after a slight redrafting (Article I-50 (2)) it is repeated where it has its right place, among the provisions on the Council in Article I-24 (6), and here it reads: „The Council shall meet in public when it deliberates and votes on a draft legislative act“.⁴³

40 Walter Hallstein, *Der unvollendete Bundesstaat* (1969), p. 16; see also Helmuth Steinberger, Die Europäische Union im Lichte der Entscheidung des Bundesverfassungsgerichts vom 12. Okt. 1993, in: *Festschrift für Rudolf Bernhardt* (1995), p. 1313 (1326): „Das System der Nationalstaaten hat den wichtigsten Test des 20. Jahrhunderts nicht bestanden: es hat sich in zwei Weltkriegen als unfähig erwiesen, den Frieden zu bewahren“; Günter Hirsch, Nizza: Ende einer Etappe, Beginn einer Epoche?, *Neue Juristische Wochenschrift* (2001), p. 2677 (2678).

41 See case C-6/64, *Costa/Enel* (1964), ECR 1251, 1269; Case C-106/77, *Simmenthal II* (1978), ECR 629, 644; Case C-213/89, *Factortame* (1990), ECR 2433, 2473.

42 General Report on the XX. F.I.D.E. Congress 2002 by Jacqueline Dutheil de la Rochère and Ingolf Pernice, European Union Law and National Constitutions, in: (2003) BICL British Institute of International and Comparative Law (ed.), *F.I.D.E. XX Congress London 2002*, p. 3, online at <<http://www.fide2002.org/pdfs/euroreportgeneral.pdf>>, p. 27.

43 The virtues of this transparency are not always seen in such positive way, see to the necessary limitation of transparency Christoph Sobotta, *Transparenz in den Rechtssetzungsverfahren der Europäischen Union*, 2001, p. 83 et seq.; for a general reflection on the Council within the institutional reform compare Andreas Maurer, Der Rat der Europäischen Union: Zwischen Legislative, Regierung und Arena, in: *L’Europe en voie de Constitution* (*supra*, note **Fehler! Unbekanntes Schalterargument.**), p. 369 et seqq.

- Regarding the Union Minister for Foreign Affairs (Article I-28) a new paragraph 3 was inserted stating his or her role to preside the Foreign Affairs Council, and in a new paragraph 4 his tasks to „ensure the Union’s external action“ is more clearly defined.⁴⁴ In Article I-26 (8) and in Article III-340 on the motion of censure, a new paragraph now states that in such case also the „Union Minister for Foreign Affairs shall resign from duties that he or she carries out in the Commission“.
- Agreement before the Brussels summit was reached also on new provisions regarding the policies of the Union, such as in Article III-117, a horizontal clause for the sake of employment, social protection, a high level of education, training and protection of human health. Regarding agriculture and fisheries, transport, internal market and other policies, a provision on the respect of „the requirements of animal welfare“ is now included, and even a reason is given as if this were necessary: „since animals are sentient beings“.⁴⁵ And the general clauses are completed by a clarification on services of general economic interest in Article III-122 which preserves the „competence of Member States, in compliance with the Constitution, to provide, to commission and to fund such services“.
- To preserve certain specific traditions or provisions within a Member State, new clauses for referring the matter to the European Council have been introduced as an „emergency break“ in sensitive policy areas, such as social security (Article III-136 (2)) or measures in the area of judicial cooperation in criminal matters (Article III-270 (3) and III-271 (3)). In the clear will to maintain control of the Member States on legislation in certain other sensitive areas, possibilities of decision of the Council by qualified majority have been deleted: So in the area of taxation (Article III-171, former Article III-62 (2) and Article III-63 deleted), and for specific new tasks for the European Central Bank under Article III-185 (6) the unanimity-requirement has been introduced.⁴⁶ On the other hand, Article III-223 (2) limits the unanimity required for provision on the Structural funds and the Cohesion funds to the first provisions „to be adopted following those in force on the date on which the Treaty establishing a Constitution for Europe is signed“. It is not clear what would happen if, after that date, provisions are adopted, but the Constitution not yet being in force.

44 For the challenges of the future Union Minister for Foreign Affairs regarding the claim that the Union should speak with „a single voice“, see Daniel Thym, *The Institutional Balance of European Foreign Policy in the Treaty establishing a Constitution for Europe*, WHI-Paper 13/04, p. 14 et seqq., online at <<http://www.whi-berlin.de/institutional-balance.htm>>.

45 Article III-121.

46 Articles III-171 and III-185 (6) correspond to former Articles 93 and 105 (6) TEC.

- The new competence for the creation of a European Public Prosecutor’s Office to combat crimes,⁴⁷ as proposed by the Convention, has been limited to crimes „affecting the financial interests of the Union“ (Article III-274), though the European Council may extend this competence by a European decision, to „include serious crime having a cross-border dimension“.
- Where European legislation to deal with restrictive tax measures of Member States is missing, a new procedure for authorisation by the Council has been introduced by a new Article III-158, to ensure both, compliance with the principles of the Constitution and the respect to national needs.
- No further discussion was needed at the Summit also for a new provision in the area of research policy: Under Article III-248 (1) the objective of „achieving a European research area in which researchers, scientific knowledge and technology circulate freely“ is introduced „to encourage it to become more competitive, including its industries...“. Difficult to establish what will be the practical consequences of this amendment, but it clearly seems to be related to the objectives set in the Lisbon-process.
- New provisions on cooperation have been introduced on health policies (Article III-278 (1) lit. b) and (2), standards for medicinal products and devices (Article III-278 (4) lit.c) and d), and the protection of health regarding tobacco and alcohol (paragraph 5), while Member State’s responsibilities in health services and medical care shall not be affected (paragraph 7). Also a whole new Section on tourism is now included in the Constitution, without further debate (Article III-281). Some more detailed provisions in Article III-296 describe the structure of the future European External Action Service,⁴⁸ and the provisions on the „permanent structured cooperation“ referred to in Article I-41 (6) are fully redrafted in Article III-312 and now allow for the suspension of a participating Member State (paragraph 4).
- Finally, there are new provisions on a simplified revision procedure for a switch from unanimity to qualified majority, or from special legislative procedures to the ordinary procedure. It may be decided by the European Council and has to be notified to the national Parliaments, which may make known their opposition and so block the entry into effect of such decisions

47 The power to establish a European Public Prosecutor under Article III-274 is an compromise between the Franco-German desire to create this function as soon as possible, and the position of the British government to refrain from any federalising tendency in this respect, see Daniel Thym, *The Area of Freedom, Security and Justice in the Treaty establishing a Constitution for Europe*, WHI-Paper 12/04, p. 13 et seqq., online at <www.whi-berlin.de/thym-dtc.htm>.

48 For an evaluation of the European External Action Service (EEAS) as a synergetic institutional momentum gathering strength from each of its three pillars Council, Commission and national staff see Daniel Thym, *Reforming Europe’s Common Foreign and Security Policy*, *ELJ* (2004), 5 at 18.

(Article IV-444).⁴⁹ Another „simplified revision procedure“ has been introduced under Article IV-445 with regard to internal Union policies and action: The decision of the European Council in these areas must be ratified by the Member States and shall „not increase the competences conferred on the Union“.

IV. „Final key-points“ agreed upon after long debate by the chefs

The amendments mentioned so far are certainly not of minor importance, but the Irish Presidency managed to settle these issues before the European Council met in Brussels to deal with certain important final issues: First, the request for a reference to God, which was rejected. Secondly, the struggle on the double majority, a solution was finally found in the change of percentage-figures and blocking minorities.⁵⁰ This is now reflected in Article I-25, and many consequential changes have been made in such Articles of the Constitution which redefine qualified majority for decisions to which not all Member States participate: Article III-179 (4) in the area of economic policy, Article III-184 (3) to (7) on recommendations and other decisions in case of excessive deficits, III-194 (2) and III-196 (3) on Council decisions specific to Member States whose currency is the Euro, including such regarding international matters, Article III-312 (3) on permanent structured cooperation in the defence policy etc.⁵¹

A third issue of great discord was the composition of the Commission. The new rules are laid down in Article I-26 (5) and (6) as amended, and in Article I-27 (2). For a few years to come, the Commission will be composed by one Commissioner for each Member State, later Commissioners from only 2/3 of the Member States will be part of the College, unless the European Council decides to alter this formula.⁵² For the case of a vacancy caused by resignation, compulsory retirement or death the conditions for replacement are slightly modified in Article III-348 (2), and the possibility of the Council, acting on a proposal of the President of the

49 See for more details the paper of Ana Martins, Amendment of the Constitution: procedural and political questions, p. ##, in this volume.

50 The outstanding issues are summarized in document CIG 84/04, available in the internet, <<http://ue.eu.int/igcpdf/en/04/cg00/cg00084.en04.pdf>>; see for a general discussion on the institutional reform of the Commission and the Council under the aspect of democracy, Stephen C. Sieberson, *supra* note 16, 219 et seqq.

51 See also Article III-197 (4) on the suspension of voting rights in Member States with a derogation and Article III-198 (2) on the decision procedure concerning the abrogation of the derogated Member States.

52 Wolfgang Wessels, Die institutionelle Architektur der EU nach der Europäischen Verfassung: Höhere Entscheidungsdynamik – neue Koalitionen? *Integration* 2004, 171, believes that - taking into account the interests of the Heads of Government - this means the return to the current system of one Commissioner per State in the year 2014.

Commission, to decide that such „vacancy need not be filled, in particular when the remainder of the member’s term of office is short“.

Other amendments decided at the Brussels-summit are less spectacular but by no means less important: In general they are aiming at an increase of the powers of the Member States and their governments in relation to that of the Union and, in particular, of the Commission. In Article I-12 (3) the “Union” is replaced by the “Member States” regarding the duty to coordinate the economic policies. A real decision of principle was the reintroduction of the unanimity requirement for laying down the multiannual financial framework in Article I-55 (2), and it will be for the European Council – not simply for the Council – under paragraph 4 of this Article, to authorise the Council to take decisions by qualified majority. Also for international agreements on „trade in social, education and health services“ unanimity is now required, as far as „these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them“. ⁵³ Unanimity has finally been introduced for the decision of the Council on the accession of a Member State to enhanced cooperation in progress in the area of CFSP (Article III-420 (2)). This requirement for unanimity may not be abrogated by the Council under Article III-422 (3) for decisions having military or defence implications. ⁵⁴

Some new provisions also aim at preserving the Member States’ freedom of action, such as in the new area of Energy policy (Article III-256 (2)). In part they clarify institutional provisions, such as the resignation of the Minister for Foreign Affairs in case the President of the Commission so requests (Article I-27 (3) lit. c). Amendments decided at the Brussels summit also concern:

- the provisions in the Constitution giving Germany a special regime with regard to economic disadvantages caused by the division of the country are subject, by a new paragraph inserted at the Brussels summit, to review after five years following the „entry into force of the Treaty establishing a Constitution for Europe“ (Article III-167 on state aids, Article III-243 on transport policy);
- the inclusion in Article III-243 (3) on state aids of the regions of Guadeloupe, French Guiana, Martinique, Réunion, the Azores, Madeira and the Canary Islands as potential areas where state aids may be considered compatible with the internal market because of serious economic problems;
- the already mentioned explanations drafted and updated “under the authority of the Presidium” on the fundamental rights in the Charter, as a guidance for

⁵³ Article III-315 (4) lit. b.

⁵⁴ To the prospect of an developing European Security and Defence Policy and the meaning of the franco-german cooperation with regard to the British position Udo Diedrichs/Mathias Jopp/Sammi Sandawi, *Möglichkeiten und Grenzen militärischer Integration im Rahmen der ESVP, Integration* 2004, 223 at 232.

the interpretation of the Charter by the European and national courts (Article II-112 (7)),⁵⁵

- the exemption of Member States with a derogation from the Euro, of the application of European decisions regarding international financial institutions and the representation of the Euro-Group within such institutions and conferences (Article III-197 (2) lit. i) and j);
- the identification of „least favoured regions“ being subject to measures under the cohesion regime provided by Article III-220;
- the competence of the Union to define, by European laws, the tasks of Eurojust, including the power to propose „the initiation of prosecutions conducted by competent national authorities...“.⁵⁶

V. Conclusions

What can be drawn from this colourful picture of a multitude of amendments added by the IGC and the Brussels summit to what the Convention had proposed for a „Constitution for Europe“? The distinction of the three categories of amendments, according to their origin, is telling on the work which had to be accomplished by the IGC, and the conclusions may be summarised as follows.

1. With a view to really achieve some result at the end of the Nice-process, in view also of the pressure put on it by the imminent or even achieved enlargement of the Union,⁵⁷ the European Council had no choice to basing its work on the Convention’s Draft and follow not only its general approach, but

55 On the judicial review for fundamental rights in the European multilevel judicial system see Ingolf Pernice, *supra* note 10, p. 37.

56 Article III-273 lit. a.

57 What accession of the new Member States means for the constitutional process is discussed by Vilenas Vadapalas, EU Constitutional Treaty in the Context of Enlargement, in: Ingolf Pernice/Miguel Poires Maduro (eds.), *A Constitution for the European Union: First Comments on the 2003-Draft of the European Convention*, ECLN-Series Vol. 4 (2004), 113 et seqq.; for the reciprocal impact of the accession upon the new Member States’ process of democratisation after the fall of Communism compare Wojciech Sadurski, Accession’s Democracy Dividend: The Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe, *ELJ* (2004), 371 et seqq.; see also Günther Verheugen, Die Europäische Union nach der Erweiterung, *Sicherheit und Frieden* (2004), 57 et seqq.

to leave it as it is in most of its provisions. Basically, and assuming ratification, the Convention so has forged the „future of Europe“.⁵⁸

2. Both, the IGC and the European Council were completely overtaxed by the amount of work necessary to align the Draft to what the governments may have wished to see in the new Constitution. This explains why many points passed without any political debate at all – the amendments introduced by the Secretariat’s experts – or though the diplomatic efforts made by the Irish Presidency before the summit was opened.
3. Contrary to what was originally intended, neither the Convention nor the IGC have deeply discussed the manifold amendments which have been introduced in Part III of the Draft which was meant to take over the existing provisions of the EC-Treaty on the policies of the Union. Yet, it is Part III which, in defining precisely the conferred competencies of the Union and the procedures of decision-making, represents the constitutional core of the new treaty.⁵⁹
4. The fact that the debate at the Brussels European summit focussed on the definition of qualified majority at the Council and the composition of the Commission, and that other final amendments of the Draft were decided with a view to reintroduce unanimity in several areas and, particularly for deciding on the multiannual financial framework of the Union, shows that the Heads of State and Government did not question any more the characteristic of the new basis of the Union as a Constitution of the citizens, but rather worried about their individual representation within the Union and their power to veto and block decisions of the Union which may be felt adverse to their national interest.

The Union, so, will continue to operate – at least in part – as a instrument of the Member States to pursue their policies in common as far as they can agree. But the dynamics of the new language in the “Constitution” as well as the new emphasis given to the citizens of the Union as those who give legitimacy to it and exercise democratic control over its institutions - be it through the European Parliament, be it through the national parliaments or even directly with regard to their representatives

58 The “finalité” was evaluated in diverse ways after the IGC even among the Heads of Government: The French President Chirac spoke of a „fédération d’Etats-nations“ while the British Prime Minister Blair stated that „the constitutional treaty makes it clear that Europe [...] is not a superstate, not a federal state but a group of nations“; Jaques Chirac, *Constitution pour l’Europe*, Paris 19 June 2004, <<http://diplomatie.gouv.fr/actu/article.asp?art=42838>>; Tony Blair: *Statement to Parliament on the EU Constitution Treaty*, 21 June 2004, <<http://www.britischebotschaft.de/en/news/items/040621.htm>>; reprinted in: Wolfgang Wessels, *supra* note 52, at 175.

59 The answer to who is responsible for what, better to define clearly the competencies and to provide procedural devices for establishing the limits helps to make a democratic multilevel system functioning, Ingolf Pernice, *Eine Rechtsgemeinschaft: Die neue Verfassungsgrundlage für die Europäische Union*, in: *L’Europe en voie de Constitution* (2004), 147 et seq.

in the European Council and at the Council - will raise the citizens's awareness of their ownership on this "strange animal" which is often called a *sui generis* organisation and has been established – at the supra-national level – to serve their common interests.⁶⁰ It does not really matter, whether it is called a Constitutional Treaty or a Constitution, as long as it is clear to everybody, that it is, like the original European Treaties, an expression of the common will of the citizens of the Member States in who's name the national representatives negotiate and come to an agreement at the IGC, and on behalf of whom national parliaments finally approve the treaties (if approval is not given by referendum), the new Treaty establishing a Constitution for Europe will serve its purpose.

60 Ingolf Pernice, The Draft Constitution of the European Union: A Constitutional treaty at a Constitutional Moment? , in: *A Constitution for the European Union: First Comments on the 2003-Draft of the European Convention*, ECLN-Series Vol. 4 (2004), p. 18; indeed 61.6 % of EU-citizen's think that the Union needs a Constitution, source: Eurobaromètre 59.1, mars/avril 2003, found in: Bruno Cautrès, Les opinions publiques européennes et la Constitution, in: *L'Europe en voie de Constitution* (2004), p. 262.