Fordham International Law Journal

Volume 27, *Issue* 2 2003 *Article* 2

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Anthony Arnull*

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Abstract

The purpose of this Article is to consider the implications for the European Union's ("EU") Member States of the Draft Union Constitution published in the summer of 2003. The Article begins by briefly describing the process which led to the production of the Draft Treaty and considers the formal status it would enjoy if adopted. The Article then focuses on provisions of the Draft Treaty which: 1. deal with its relationship with the domestic law of the Member States; 2. affect EU decision-making, particularly the functioning of institutions in which the Member States are directly represented at the political level or the overall institutional balance in the EU; 3. affect Member States' freedom of action, especially in areas which might be regarded as touching core aspects of national sovereignty; or 4. affect the functioning of national institutions or their role in the activities of the EU. The Article concludes with an attempt to appraise the overall significance of the Draft Treaty on the relationship between the Union and its Member States. The assessment offered throughout the Article is of necessity, provisional. The Draft Treaty is a long and complex document and its full implications are unlikely to be immediately apparent.

THE MEMBER STATES OF THE EUROPEAN UNION AND GISCARD'S BLUEPRINT FOR ITS FUTURE

*Anthony Arnull**

INTRODUCTION

The purpose of this Article is to consider the implications for the European Union's ("EU") Member States of the Draft Union Constitution published in the summer of 2003. The Article begins by briefly describing the process which led to the production of the Draft Treaty and considers the formal status it would enjoy if adopted. The Article then focuses on provisions of the Draft Treaty which:

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* Professor of European Law and Director of the Institute of European Law, University of Birmingham, United Kingdom (U.K.). This Article is based on evidence submitted by the author in September 2003 to the House of Lords Select Committee on the Constitution in connection with its inquiry into the constitutional implications for the U.K. of the proposed European Union (EU) Constitution. The comments of Dr. Panos Koutrakos of the University of Birmingham are gratefully acknowledged. The author is solely responsible for any errors or misunderstandings.

I. *PROCESS AND STATUS*

In a declaration on the future of the Union adopted in Nice, the Member States recognized "the need to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, to bring them closer to the citizens of the Member States."[1] To that end, they called for "a deeper and wider debate"[2] on four questions in particular:

> - how to establish and monitor a more precise delimitation of competencies between the European Union and the Member States, reflecting the principle of subsidiarity;
> - the status of the Charter of Fundamental Rights of the European Union, proclaimed in Nice;
> - a simplification of the Treaties with a view to making them clearer and better understood without changing their meaning;
> - the role of national parliaments in the European architecture.[3]

It was agreed that a new intergovernmental conference ("IGC") would be convened to make the necessary changes to the Treaties.[4]

At the Laeken Summit in December 2001, the Member States took the process forward by issuing a further declaration fleshing out the questions identified in Nice. In relation to the issue of simplifying the Treaties, the Laeken Declaration stated: "[t]he question ultimately arises as to whether this simplification and reorganization might not lead in the long run to the adoption of a constitutional text in the Union. What might the basic

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1. DECLARATION ON THE FUTURE OF THE UNION TO BE INCLUDED IN THE FINAL ACT OF THE CONFERENCE, TREATY OF NICE ¶ 6, *available at* http://europa.eu.int/futurum/informations_en.htm#txt (last visited Dec. 30, 2003) [hereinafter DECLARATION ON THE FUTURE OF THE UNION].

2. *Id.* at ¶ 3.

3. *Id.* at ¶ 5.

4. *See* Consolidated version of the Treaty on European Union, art. 48, O.J. C 325/5, at 31 (2002), 37 I.L.M. 67, at 78 (ex Article N) [hereinafter Consolidated TEU], *incorporating changes made by* Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Feb. 26, 2001, O.J. C 80/1 (2001) [hereinafter Treaty of Nice] (amending Treaty on European Union ("TEU"), Treaty establishing the European Community ("EC Treaty"), Treaty establishing the European Coal and Steel Community ("ECSC Treaty"), and Treaty establishing the European Atomic Energy Community ("Euratom Treaty") and renumbering articles of TEU and EC Treaty). Article 48 provides for the procedure for amending the Treaties on which the Union is based. *Id.*

features of such a constitution be?"[5] The innovative step was taken of establishing a Convention on the Future of Europe with the task of paving the way for the IGC by considering the key issues raised by the future development of the Union. Modelled on the body which drew up the Union's Charter of Fundamental Rights,[6] the Convention was to be chaired by Valéry Giscard d'Estaing, a former French President. It would also comprise of one representative of each Head of State or Government, two members of each national parliament, sixteen members of the European Parliament, and two representatives of the Commission. In addition, the candidate countries[7] would be represented. The Convention's final document would provide the basis for discussion at the IGC, where the final decisions would be made.

The Convention on the Future of Europe began its work in February 2002.[8] A series of working groups was established to examine, in detail, certain important themes. In May 2003, the Convention Praesidium, or steering group, comprised of the Convention's Chairman and two Vice-Chairmen plus a small team of Convention members, published[9] a Draft Union Constitution divided into four parts.[10] A broad consensus on the first

5. THE FUTURE OF THE EUROPEAN UNION — LAEKEN DECLARATION, *at* http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm (Dec. 15, 2001) [hereinafter LAEKEN DECLARATION].

6. For the text of the Charter, see Charter of Fundamental Rights of the Union, O.J. C 364/1 (2000).

7. The candidate countries include: Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia (now the Slovak Republic), Slovenia, and Turkey. All except Bulgaria, Romania, and Turkey are due to accede to the Union on May 1, 2004 pursuant to The Treaty of Accession 2003 signed in Athens on April 16, 2003. *See* Treaty of Accession to the European Union 2003, Apr. 16, 2003, *available at* http://www.europa.eu.int/comm/enlargement/negotiations/treaty_of_accession_2003/index.htm [hereinafter Accession Treaty].

8. A great deal of information about the Convention is available on its website. *See* http://european-convention.eu.int.

9. *See* The European Convention, Draft Preamble to the Treaty establishing the Constitution, CONV 722/03, *available at* http://register.consilium.eu.int/pdf/en/03/cv00/cv00722en03.pdf (May 28, 2003); The European Convention, Draft Constitution, Volume I — Revised Text of Part One, CONV 724/03, *available at* http://register.consilium.eu.int/pdf/en/03/cv00/cv00724en03.pdf (May 26, 2003) [hereinafter Revised Text of Part One]; The European Convention, Draft Text of Part IV, with Comments, CONV 728/03, *available at* http://register.consilium.eu.int/pdf/en/03/cv00/cv00728en03.pdf (May 26, 2003) [hereinafter Draft Text of Part IV].

10. The number of each Article is prefaced by a roman numeral denoting the Part in which it is located. Parts I to III are sub-divided into Titles, some of which are further

two Parts (and a number of protocols) was achieved at a plenary session of the Convention on June 13, 2003. The agreed text was submitted to the European Council meeting in Thessaloniki on June 20, 2003, where it was welcomed as "a good basis for starting in the Intergovernmental Conference."[11] The European Council gave the Convention more time to complete "some purely technical work" on the remainder, which was adopted by consensus on July 10, 2003. The final text of the complete Draft Treaty was submitted to the President of the European Council on July 18, 2003.[12]

The scope of the Convention's final document is enormous.[13] It merges and reorganizes the Treaty establishing the European Community ("EC Treaty") and the Treaty on European Union ("TEU") (though not the Treaty establishing the European Atomic Energy Community ("Euratom Treaty")), dispensing with the opaque three-pillar structure[14] and abolishing the European Community as a separate entity. Among other things, it seeks to enhance the democratic character of the Union by expanding further the role of the European Parliament and involving the national parliaments of the Member States more closely in the Union's affairs. It aims to simplify the Union's legislative instruments and clarify the division of competences between the Union and the Member States. It seeks to improve the functioning of the Union's institutions. The Draft Treaty is now under consideration by the fifteen Member States and the ten candidate countries due to accede in May 2004[15] at an IGC, which opened on October 4, 2003. The product of the negotiations is intended to be signed by all twenty-five Member

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sub-divided into Chapters. These are occasionally broken down into Sections and even Subsections.

11. Thessaloniki European Council Conclusions (June 19-20, 2003).

12. *See* Draft Treaty establishing a Constitution for Europe, July 18, 2003, O.J. C 169/1 (2003) (not yet ratified) [hereinafter Draft Treaty].

13. For a brief overview of the Draft Treaty and the process by which it was drawn up, see the report from the Convention Presidency to the President of the European Council, which accompanied the final text. *See* European Convention, Report from the Presidency of the Constitution to the President of the European Council, July 18, 2003, CONV 851/03 [hereinafter Report from the Presidency].

14. On the second and third pillars, which were grafted on to the original Community pillar at Maastricht, see EILEEN DENZA, THE INTERGOVERNMENTAL PILLARS OF THE EUROPEAN UNION (2003).

15. Bulgaria, Romania, and Turkey are taking part in the Intergovernmental Conference ("IGC") as observers.

States as soon as possible after enlargement takes place, possibly on Europe Day (May 9, 2004).

What will be the formal status of the instrument which emerges for the IGC? The full title of the final document issued by the Convention is "Draft Treaty establishing a Constitution for Europe."[16] Although the word "Constitution" in that title has understandably attracted more attention, it is the word "Treaty" which has the greater legal significance. The European Union already has a constitution comprising the Treaties on which it is founded.[17] These set out the Union's aims and objectives and how they are to be achieved, but as a constitution the Treaties are deficient. They occupy many pages and have been amended many times. They are the subject of a large body of case law of the Court of Justice, some of it constitutional in character. The result is that a lay reader, if he or she could get through them, would find it almost impossible to understand their effect.

The Convention on the Future of Europe decided that the best way to deal with the issues raised in the Nice and Laeken declarations was to produce a simplified and reorganized text called a Constitution. It is true that the Convention method has not been used before to prepare changes to the Treaties. Nonetheless, the final text, once it has been agreed upon by the Member States, will need to be ratified by each of them in accordance with their own constitutional requirements before it can enter into force.[18] Thus, the fact that the new Treaty, which eventually emerges, might be called a Constitution will have no formal significance in itself. It will have the same legal status as all previous Union Treaties and its significance will depend entirely on what it actually says.

16. *See* Draft Treaty, *supra* note 12, O.J. C 169/1 (2003).

17. *See* Parti écologiste "Les Verts" v. European Parliament, Case 294/83, [1986] E.C.R. 1339, ¶ 23; Draft Agreement Relating to the creation of the European Economic Area, Opinion 1/91, [1991] E.C.R. I-6079, ¶ 21 (stating that the Court of Justice described the European Economic Community Treaty as the Community's "constitutional charter").

18. *See* Consolidated TEU, *supra* note 4, art. 48, O.J. C 325/5, at 31 (2002), 37 I.L.M. at 78 (ex Article N). In some Member States, this may entail recourse to a referendum.

II. *THE RELATIONSHIP BETWEEN THE DRAFT TREATY AND THE DOMESTIC LAW OF THE MEMBER STATES*

A. *Primacy*

Article I-10(1) of the Draft Treaty provides: "[t]he Constitution, and law adopted by the Union's Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States."[19] In a White Paper on the Draft Treaty, the British Government said that the doctrine of primacy was "consistent with the principle of international law whereby a State may not plead its national law obligations to escape its international law obligations, and prevents countries from going back on commitments they have made to each other."[20] However, Article I-10(1) seems intended to be more far-reaching. It reflects the case law of the Court of Justice on primacy beginning with *Costa v. ENEL*, a case decided as long ago as 1964.[21] The effect of that case law is that, where there is a conflict in a national court between a national rule and a European rule, precedence must be accorded to the latter. The relevance of the case law on primacy to the interpretation of Article I-10(1) is confirmed by Article IV-3, according to which: "[t]he case-law of the Court of Justice of the European Communities shall be maintained as a source of interpretation of Union law."[22]

There are, however, at least two problems with Article I-10(1). The first problem is that the existing doctrine of primacy can only apply where the European rule is sufficiently clear to be suitable for application by a court, a quality known as direct effect. The Draft Treaty may be regarded as defective in not making this principle clear.[23] More importantly, the existing doctrine of primacy does not extend to Titles V and VI of the TEU, the so-called second and third pillars, which deal respectively with the Common Foreign and Security Policy ("CFSP") and with Police and Judicial Cooperation in Criminal Matters. Because the Draft Treaty would abolish the Union's pillar struc-

19. *See* Draft Treaty, *supra* note 12, art. I-10(1), O.J. C 169/1 at 10 (2003).

20. *See* BRITISH SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS, A CONSTITUTIONAL TREATY FOR THE EU: THE BRITISH APPROACH TO THE EUROPEAN UNION INTERGOVERNMENTAL CONFERENCE 2003, at 12 (Cm5934, Sept. 2003) [hereinafter British White Paper].

21. *See* Costa v. ENEL, Case 6/64, [1964] E.C.R. 585.

22. *See* Draft Treaty, *supra* note 12, art. IV-2, O.J. C 169/1, at 57 (2003).

23. *See id.* art. I-10(1), O.J. C 169/1, at 10 (2003).

ture, the effect of Article I-10(1) would be to make the doctrine of primacy applicable across the entire range of the Union's activities. However, while matters currently falling under Title VI of the TEU would for the most part be brought within the scope of the classic powers of the Court of Justice,[24] most of the provisions on the CFSP would remain outside the jurisdiction of the Court.[25] In nearly all cases concerning the CFSP, it is therefore unclear whether a national court would be able to ask the Court of Justice for guidance on the effect of Article I-10(1). If national courts are left to their own devices, there will inevitably be divergence between Member States. The solution to this problem is either: (a) to delete the provision excluding the CFSP from the jurisdiction of the Court, or (b) to exclude the CFSP from Article I-10(1). In a Union which will include the rule of law among the values on which it is based,[26] the former would seem preferable. Regrettably, the latter is likely to prove more politically acceptable.

B. *The European Framework Law*

Many of the Community's existing powers to act involve the use of the directive. According to Article 249 of the EC Treaty: "[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."[27] The Draft Treaty recasts and rationalizes the catalogue of acts available to the Union. The directive is to be replaced by the European framework law, which, according to Article I-32(1), shall be "binding, as to the result to be achieved, on the . . . Member States to which it is addressed, but leaving the national authorities entirely free to choose the form and means of achieving that result."[28]

The difference in wording strongly implies that Member States are intended to enjoy greater leeway in implementing framework laws than they do at present in giving effect to direc-

24. *Contra id.* art. III-283, O.J. C 169/1, at 81 (2003).

25. *See id.* art. III-282, O.J. C 169/1, at 81 (2003).

26. *See id.* art I-2, O.J. C 169/1, at 8 (2003).

27. *See* Consolidated version of the Treaty establishing the European Community, art. 249, O.J. C 325/33, at 132 (2002), 37 I.L.M. 79, at 128 (ex Article 189) [hereinafter Consolidated EC Treaty], *incorporating changes made by* Treaty of Nice, *supra* note 4.

28. *See* Draft Treaty, *supra* note 12, art. I-32, O.J. C 169/1, at 16 (2003).

tives. That in turn suggests that framework laws may have to be less prescriptive than many directives now are. A possible result could be that provisions in framework laws that are sufficiently precise to produce direct effect will no longer be permitted. If they are, however, it may follow from Article I-10(1) that such provisions might be invoked in the national courts in proceedings both against the State and its organs, sometimes called vertical direct effect, and against private parties, sometimes called horizontal direct effect. If so, that would represent a significant departure from the present position. The Court of Justice has held that, because Article 249 EC only makes directives binding on the States to which they are addressed, they may not be invoked directly before the national courts in proceedings against private parties.[29] Article I-10(1) says that law adopted by the Union's institutions has primacy over national law. While that provision should probably be read as applying only to Union law which is sufficiently precise for application by a court, it does not in itself permit a distinction to be drawn according to the status of the defendant. That result might be achieved by treating Article I-32(1) as a special rule which derogates from Article I-10(1), but the position should be clarified, ideally by the insertion of a provision dealing expressly with the concept of direct effect.

C. *Infringement Proceedings Against Member States*

Ensuring that Member States implement directives properly and within the deadline they contain has been a perennial problem for the Union.[30] Many infringement actions brought by the Commission before the Court of Justice concern alleged failures by Member States to give effect to directives. If framework laws confer a wider margin of discretion on the Member States than directives, the number of such actions might be expected to decline. Where the Commission does bring proceedings, the Draft Treaty would reinforce the procedure in two ways, one of which would be targeted specifically at the implementation of frame-

29. *See, e.g.*, Faccini Dori v. Recreb, Case C-91/92, [1994] E.C.R. I-3325 (1994).

30. *See* European Union Commission, Internal Market Scoreboard and Related Documents, *available at* http://europa.eu.int/comm/internal_market/en/update/score/ (last visited Dec. 30, 2003). The Commission maintains an "Internal Market Scoreboard" showing the progress of Member States in implementing internal market directives.

work laws. Both of them would curtail the rights of respondent Member States to defend themselves.

Where the Commission's complaint is that "the State concerned has failed to fulfill its obligations to notify measures transposing a European framework law," it may, in the course of the same proceedings, ask the Court to impose a financial penalty on the State concerned.[31] At present, such a request may only be made in the course of a fresh application to the Court where the State concerned has not taken the steps necessary to comply with a previous judgment. This is, in principle, a welcome reform of a cumbersome procedure. However, the reference to *failure to notify* the national implementing measures must be a mistake. It would catch States who have in fact implemented but merely failed to notify where required to do so. Clearly no penalty would be justified in such a case. If there is to be a special rule for European framework laws, failure to transpose is surely the real mischief it should tackle.

In other cases of alleged infringement by a Member State of its obligations, the Commission will not be able to ask the Court to impose a financial penalty in its initial application to the Court. As at present, the Commission will only be able to do so if the State concerned fails to take the steps necessary to comply with the Court's judgment. The Draft Treaty envisages that, in such a case, the administrative procedure would be streamlined. The Commission would have the power to bring the State directly before the Court once it had been given the opportunity to submit its observations.[32] The requirement, currently laid down in Article 228(2) of the EC Treaty, that the Commission should also issue a reasoned opinion before applying to the Court would be inapplicable.[33] This is a rather half-hearted reform. It is unclear why the Commission should not be given a general right to ask the Court in its initial application to impose a financial penalty.[34]

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31. *See* Draft Treaty, *supra* note 12, art. III-267(3), O.J. C 169/1, at 79 (2003).

32. *See id.* art. III-267(2), O.J. C 169/1, at 79 (2003).

33. *See* Consolidated EC Treaty, *supra* note 27, art. 228(2), O.J. C 325/33, at 125 (2002), 37 I.L.M. at 125 (ex Article 171).

34. *See* The European Convention, Final Report of the Discussion Circle on the Court of Justice, CONV 636/03, at ¶ 11, *available at* http://register.consilium.eu.int/pdf/en/03/cv00/cv00636en03.pdf (Mar. 25, 2003) [hereinafter Final Report on Court of Justice] (showing how this idea seems to have been supported by a majority of the

III. *MEMBER STATES' FREEDOM OF ACTION*

A. *Division of Powers*

The existing Treaties make it hard to establish who is responsible for what: they do not make clear which powers belong to the Union and which powers belong to the Member States. It is for this reason that the need to establish "a more precise delimitation of powers between the European Union and the Member States" was identified in Nice.[35] The question is dealt with in Part I, Title III, of the Draft Treaty, especially Articles I-12, I-13, and I-16. The task those provisions seek to perform is a useful one, but they may require further attention at the IGC.

Article I-12 lists the areas in which the Union is to have exclusive competence, in other words, where the Member States would have no power to act unless empowered to do so by the Union.[36] The list is remarkably short, comprising only five areas, all of which were understood by the Convention to fall within the exclusive competence of the Union at present.[37] The wording of Article I-12(1) — "to establish the competition rules necessary for the functioning of the internal market" — is, however, problematic.[38] The Court of Justice accepted, in a famous case decided in 1969, that "one and the same agreement may, in principle, be the object of two sets of parallel proceedings, one before the Community authorities under . . . the EEC Treaty, the other before the national authorities under national law."[39] That interpretation, the Court said, was confirmed by what is now Article 83(2)(e) of the EC Treaty, which authorizes the Council to determine the relationship between national laws and the Community rules on competition. Article 83(2)(e) is in substance reproduced in Article III-52(2)(e) of the Draft Treaty. The continued existence of domestic competition rules also un-

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members of a so-called Discussion Circle on the Court of Justice set up within the Convention).

35. *See generally* Armin von Bogdandy & Jurgen Bast, *The European Union's Vertical Order of Competences: the Current Law and Proposals for its Reform*, 39 COMMON MKT. L. REV. 227 (2002); Bruno de Witte & Gráinne de Búrca, *The Delimitation of Powers Between the EU and its Member States*, *in* ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION 201-22 (Anthony Arnull & Daniel Wincott eds., 2002).

36. *See* Revised Text of Part One, *supra* note 9, at 8-9.

37. *Id.*

38. *See* Draft Treaty, *supra* note 12, art. I-12(1), O.J. C 169/1, at 10 (2003).

39. Walt Wilhelm v. Bundeskartellamt, Case 14/68, [1969] E.C.R. 1, ¶ 3 (concerning art. 85(1) EEC (now 81(1) EC), but the same logic applies to art. 82 EC).

derlies the new Council Regulation[40] on the implementation of the Treaty competition rules. The reference to such rules in Article I-12 should therefore be deleted.[41]

Indeed, it is doubtful whether the subject needs to be mentioned expressly in Title III of Part I since it is an aspect of the internal market, which Article I-13(2) refers to as an area of shared competence. However, the drafting of that provision is not entirely satisfactory, as we shall see.

Article I-16 lists five areas in which the Union may take "supporting, coordinating or complementary action."[42] Such action would not supersede the competence of the Member States to act in the areas concerned and must not entail harmonization of national laws.

Where the Draft Treaty gives the Union a competence which is not covered by Articles I-12 or I-16, it is to share that competence with the Member States. This means that both the Union and the Member States will be able to act. The Member States will normally be able to do so only where the Union "has not exercised, or has decided to cease exercising, its competence."[43] The main areas in which shared competence applies are listed in Article I-13(2), though the list is not intended to be exhaustive.[44] Not surprisingly, the Convention had some difficulty in deciding which areas of competence should be included.[45] In some areas, specified in Article I-13(3) and (4), the exercise by the Union of its competences will not prevent the Member States from exercising their own competences.

The idea that the competence of the Member States should be restricted once the Union has acted is not new. However, it might be sensible to make it clear that, as in areas of exclusive Union competence, the Member States would not be precluded by Union action from acting themselves if permitted to do so by Union law. A draft submitted to the Convention by a team from

40. Council Regulation No. 1/2003, O.J. L 1/1 (2003).

41. *See* Michael Dougan, *The Convention's Draft Treaty: Bringing Europe Closer To Its Lawyers?*, 28 EUR. L. REV. 763 (2003).

42. *See* Draft Treaty, *supra* note 12, art. I-16, O.J. C 169/1, at 11 (2003).

43. *See id.* art. I-11(2), O.J. C 169/1, at 10 (2003).

44. *See id.* art. I-13(2), O.J. C 169/1, at 11 (2003).

45. *See* Revised Text of Part One, *supra* note 9, at art. 74-75.

the University of Cambridge[46] used a different formula to describe the duties of the Member States when the Union has acted in an area of shared competence, speaking of the Member States respecting "the obligations imposed on them by the relevant Union measures."[47] However, the precise impact on national competence of Union action will be affected by its legal basis in Part III of the Draft Treaty.[48]

Articles I-14 and I-15 deal respectively with the Union's competence to coordinate the economic policies of the Member States and in matters of common foreign and security policy. The Convention considered this to be justified by the "specific nature" of those areas.[49] Both are already the subject of provisions in the EC Treaty or the TEU which are developed in Part III of the Draft Treaty.

B. *The Charter of Fundamental Rights and Union Accession to the European Convention on Human Rights*

The provisions of the Draft Treaty on the Charter of Fundamental Rights and Union accession to the European Convention on Human Rights ("ECHR")[50] are undoubtedly of significance for the Union, but their importance for the Member States is more limited than is sometimes supposed.[51] Article I-7 provides as follows:

> 1. The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II of the Constitution.

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46. *See* Alan Dashwood et al., *Draft Treaty of the European Union and Related Documents*, 28 EUR. L. REV. 3, 17 (2003).

47. *Id.*

48. *See* Draft Treaty, *supra* note 12, art. I-13, O.J. C 169/1, at 11 (2003); Dougan, *supra* note 41.

49. *See* Draft Treaty, *supra* note 12, art. III-2, O.J. C 169/1, at 29 (2003).

50. This is effectively excluded at present by Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221 [hereinafter European Convention for the Protection of Human Rights] (holding that the European Community had no jurisdiction to accede).

51. For a more detailed analysis, see HL Report of the Select Committee on the European Union, *The Future Status of the EU Charter of Fundamental Rights* (HL Paper No. 48, 2003), *available at* http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldeucom/48/48.pdf (last visited Jan. 25, 2004) [hereinafter HL Paper 48]; Anthony Arnull, *From Charter to Constitution and Beyond: Fundamental Rights in the New European Union*, P.L., Winter 2003, at 774.

> 2. The Union shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution.
> 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.[52]

Five points are worth making here:

1. The Charter is addressed principally to the institutions, bodies and agencies of the Union. It applies to the Member States only when they are implementing Union law.[53] Its effect on the Member States is therefore more limited than that of the general principle of respect for fundamental rights, which the Court of Justice has applied for many years.[54] That general principle applies to the Member States not only when they are implementing Community law[55] but also when they are acting under a derogation for which Community law provides.[56]
2. The Charter "does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution."[57]
3. Although the Convention did not reopen the substantive provisions of the Charter, it revised the so-called horizontal provisions, which deal with its interpretation and application.[58] Particularly worthy of note is the new Article

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52. *See* Draft Treaty, *supra* note 12, art I-7, O.J. C 169/1, at 9 (2003).

53. *See id.* art. II-51(1), O.J. C 169/1, at 28 (2003).

54. Roquette Frères v. Directeur général de la concurrence, de la consommation et de la répression des frauds, Case C-94/00, [2003] 4 C.M.L.R. 1, ¶ 25. *See also* Steffensen, Case C-276/01, [2003] 2 C.M.L.R. 13. The right of the Court to continue to apply the general principle would not be affected by the Draft Treaty. *See* Draft Treaty, *supra* note 12, art. I-7(3), O.J. C 169/1, at 9 (2003).

55. *See* Wachauf v. Federal Republic of Germany, Case 5/88, [1989] E.C.R. 2609, ¶ 19.

56. *See* ERT, Case C-260/89, [1991] E.C.R. I-2925, ¶ 43.

57. *See* Draft Treaty, *supra* note 12, art. II-51(2), O.J. C 169/1, at 28 (2003).

58. *See* Grainne de Búrca, *Fundamental Rights and Citizenship*, *in* TEN REFLECTIONS ON THE CONSTITUTIONAL TREATY FOR EUROPE 11, 20-25 (Bruno de Witte ed., 2003); Erich Vranes, *The Final Clauses of the Charter of Fundamental Rights — Stumbling Blocks for the First and Second Convention*, 7 Eur. Integration Online Papers 6 (2003), *available at* http://eiop.or.at/eiop/.

II-52(5), which provides: "The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by Institutions and bodies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality."[59] In other words, Charter provisions containing principles, as opposed to rights, may only be invoked before a court where the interpretation or validity of an act intended to give effect to them is in issue.[60]

4. EU accession to the ECHR ought not in principle to affect the reservations which individual Member States have entered in relation to particular provisions. The need not to prejudice Member States' reservations is sometimes cited as an obstacle to accession. However, the House of Lords EU Committee has pointed out that: "Since Union accession would be restricted to matters within Union competence it is not apparent why Union accession should affect Member States' reservations."[61] As the Committee explained: "If the EU were to consider accession to the ECHR, the Member States would have to agree on the reservations (if any) to be made by the Union. The EU would also have the right under Article 15 ECHR to make specific derogations. These, too, would have to be agreed by Member States. But any such reservations or derogations would apply only in relation to European Union law."[62]
5. Notwithstanding the apparently imperative wording of Article I-7(2), the opening of negotiations and the con-

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59. *See* Draft Treaty, *supra* note 12, art. II-52(5), O.J. C 169/1, at 28 (2003).

60. There may of course be an argument over whether a particular provision lays down a right or a principle. An updated version of the "explanations" of the text of the Charter, originally prepared at the instigation of the Praesidium of the body which drafted the Charter, gives Articles II-25, II-26 (although those Articles use the language of rights), and II-37 as examples of principles recognized in the Charter. According to the updated "explanations," the following provisions contain elements of both rights and principles: Articles II-23, II-33, and II-34. *See* European Convention, Updated Explanations relating to the text on the Charter of Fundamental Rights, CONV 828/03, at 51, *available at* http://register.consilium.eu.int/pdf/en/03/cv00/cv00828en03.pdf (July 9, 2003). The courts of both the European Union and the Member States are to pay "due regard to the explanations" when interpreting the Charter, although they do not purport to be legally binding.

61. HL Paper 48, *supra* note 51, at ¶ 122. The Committee's report contains a table setting out the reservations made by Member States. *See id.* at ¶ 43-44.

62. *Id.* at ¶ 123.

clusion of an agreement for Union accession to the ECHR would require authorization by the Council of Ministers, acting unanimously.[63] Accession would also require the consent of the European Parliament.[64]

C. *Withdrawal*

Article I-59 contains a procedure for Member States to withdraw from the Union.[65] It represents a considerable break with tradition, no such provision having been included in the Treaties so far, and underlines the voluntary nature of membership and the continuing sovereignty of the Member States.

IV. *DECISION-MAKING AND THE INSTITUTIONAL BALANCE*

A. *Decision-making*

The Draft Treaty contains important provisions on decision-making. Their significance in the present context lies in their effect on the capacity of individual Member States to influence the outcome of deliberations, particularly in the Council of Ministers, and on the balance between the Council and the European Parliament.

Article I-22(3) changes the default rule for decision-making in the Council from a simple to qualified majority.[66] In theory, this works in favor of the larger Member States, because under qualified majority voting ("QMV") the number of votes attributed to a Member State varies according to its population. In practice, the existing default rule rarely applies.

Article I-24(1) says that, when the Council of Ministers, or the European Council, makes decisions by QMV, "such a majority shall consist of the majority of Member States, representing at least three-fifths of the population of the Union."[67] That would represent a radical departure from the existing system. The

63. *See* Draft Treaty, supra note 12, arts. III-227(2), III-227(9), O.J. C 169/1, at 72 (2003). The Commission has proposed that the Council should act by qualified majority. *See* Commission of the European Communities, Opinion on the Draft Treaty, COM(548) (Sept. 2003), at 7 [hereinafter Commission Opinion].

64. *See* Draft Treaty, *supra* note 12, art. III-227(7)(b), O.J. C 169/1, at 72 (2003).

65. *See id.* art. I-59, O.J. C 169/1, at 22 (2003).

66. *Cf.* Consolidated EC Treaty, *supra* note 27, art. 205(1), O.J. C 325/33, at 118 (2002), 37 I.L.M. at 121 (ex Article 148).

67. Two-thirds of the Member States representing at least three-fifths of the population of the Union where the Council is not acting on the basis of a proposal from the

beauty of the dual majority formula lies in its clarity, objectivity, and durability. It would not need to be adjusted each time a new Member State joined the Union. It is also consistent with the idea of the Union as a polity of both States and peoples.[68] However, the voting element of the formula would, for example, give Malta the same weight as the U.K., while the population element would mean that France, for example, had considerably less weight than Germany, a State with which it currently enjoys parity.[69] Moreover, because no two Member States would have precisely the same weight, the dual majority formula could complicate the process of building a qualified majority. In addition, the populations of the Member States would need to be reviewed regularly.

A dual majority formula, although requiring only a simple majority of the Union's population rather than three fifths, was advocated by the Commission and by several delegations at Nice.[70] It was ultimately rejected in favor of the traditional system of weighted votes, although the process of agreeing on the re-weightings to be applied in an enlarged Union proved acrimonious. The larger Member States were not content with a mere extrapolation of the existing system because they felt it had become increasingly biased with successive enlargements in favor of small and medium-sized Member States. That had produced a progressive decline in the minimum percentage of the Union's population represented by a qualified majority. That decline, it was argued, needed to be halted or reversed if the legitimacy of qualified majority votes was not to be undermined.[71]

No doubt mindful of the outcome at Nice,[72] the authors of the Draft Treaty provided that the dual majority formula would

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Commission or the initiative of the Union Minister for Foreign Affairs. *See* Draft Treaty, *supra* note 12, art. I-24(2), O.J. C 169/1, at 13 (2003).

68. *Cf.* Draft Treaty, *supra* note 12, art. I-1(1), O.J. C 169/1, at 8 (2003).

69. *See* DAVID GALLOWAY, THE TREATY OF NICE AND BEYOND 71-72 (2001) (the account here draws heavily on this book).

70. Not surprisingly, the Commission has welcomed the inclusion in the Draft Treaty of such a formula, describing it as simpler and more democratic. *See* Commission Opinion, *supra* note 63, at 2.

71. See GALLOWAY, *supra* note 69, at 66-72; Bela Plechanovová, *The Treaty of Nice and the Distribution of Votes in the Council — Voting Power Consequences for the EU after the Oncoming Enlargement*, 7 EUR. INTEGRATION ONLINE PAPERS (2003), *available at* http://eiop.or.at/eiop/.

72. *See* Treaty of Nice *supra* note 4, Protocol A, O.J. C 80/1, at 49-52 (2001). Arti-

not take effect until November 1, 1999, after the European Parliament elections scheduled for that year had taken place. Until then, the vote weightings set out in Article 2 of a Protocol annexed to the Draft Treaty[73] would apply.[74] Where the Constitution requires the European Council or the Council of Ministers to act on a proposal from the Commission, decisions will be adopted where at least 232 votes out of 321 are cast in favor by a majority of members.[75] The Draft Treaty also embodies a population test that would enable any Member State to ask for a check to be made to ensure that States comprising a qualified majority represent at least 62% of the Union's total population.[76] If they do not, their decision will not take effect.

The rule that a qualified majority must in most cases be cast by a majority of the Member States does not currently feature in the Treaty, although at least half the Member States are always involved in a qualified majority under the present system. At Nice, the less populous States insisted on the inclusion of such a rule after enlargement as part of the price for their agreement to an increase in the relative weighting of the larger States. The new rule preserves the legitimacy of qualified majority decisions in terms of both people and States. In other words, it prevents qualified majority decisions from being taken by a minority of the Member States, however populous they are. The requirement only seems likely to be of practical importance, however,

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cle 3(1) of Protocol A is repealed by Article 26(2) of the Accession Treaty. *See id.* Protocol A, art. 3(1), O.J. C 80/1, at 50-51 (2001); Accession Treaty, *supra* note 7, art. 26(2).

73. Draft Treaty, *supra* note 12, Protocol on the Representation of Citizens in the European Parliament and the Weighting of Votes in the European Council and the Council of Ministers, O.J. C 169/1, at 96 (2003) [hereinafter Protocol on Representation]. Article 2 of the Protocol on Representation corresponds to the scale that will take effect on November 1, 2004, by virtue of Article 12 of the Accession Treaty. *See id.* art. 2, at 96; Accession Treaty, *supra* note 7, art. 12, at 36-37. Different weightings will apply for the period until October 31, 2004. Under that transitional arrangement, the present system will simply be extrapolated with the votes of the fifteen existing Member States remaining unchanged. *See* Accession Treaty, *supra* note 7, art. 26.

74. Article 2 of the Protocol on Representation assumes a Union of twenty-five Member States. *See* Protocol on Representation, *supra* note 73, art. 2, at 96. A declaration attached to it deals with the consequences of Romanian and Bulgarian accession. *See id.*

75. In other cases, decisions will be adopted if at least 232 votes are cast in favor by at least two-thirds of the members. *See id.* art. 2(1), at 96.

76. Such a test is featured in the Treaty of Nice and also appears in the Accession Treaty. *See* Treaty of Nice, *supra* note 4, Protocol A, art. 3(1), O.J. C 80/1, at 50-1 (2001); Accession Treaty, *supra* note 7, art. 12(1).

where all the most populous States vote in favor of a measure and the entire least populous vote against it. In reality, this is unlikely to occur.[77]

The main effect of the population clause is to enhance the capacity of Germany to block QMV decisions to which it is opposed. The clause emerged at Nice as a compromise between Germany's wish to see its greater relative size reflected in the vote weightings and France's unwillingness to accept that it should have fewer votes than Germany, even though Germany's population is greater by more than 23 million. It also helped to satisfy larger Member States who were not content with the extent to which their relative voting weights had been increased.[78] At present, qualified majorities typically represent well over 62% of the Union's total population, but the clause will come into play whenever Germany is in a minority. Paradoxically, if Germany had been given more votes, this would have assisted the process of building a qualified majority. Concealing Germany's extra weight in the population clause means that it only becomes relevant in constructing blocking minorities.[79]

A good deal of number-crunching will be needed to establish how the systems envisaged by the Draft Treaty compare with the present system.[80] Table 1 offers a simple comparison between the present position and the systems that are intended to apply until the dual majority formula takes effect.[81]

77. GALLOWAY, *supra* note 69, at 90-91.

78. Plechanovová, *supra* note 71, at 14.

79. GALLOWAY, *supra* note 69, at 91.

80. Although enlargement may well alter the dynamics of decision-making.

81. Tables 1 and 2 are based on data contained in Plechanovová, *supra* note 71, and GALLOWAY, *supra* note 69, at 66, ch. 4.

Table 1

	Total number of votes	*Qualified majority*		*Blocking minority*	
		Votes required	*Minimum number of States*	*Votes required (percentage of total)*	*Minimum number of States*
Now (EU-15)	87	62	8	26 (29.89%)	3
Accession to Oct. 31, 2004 (EU-25)	124	88	13	37 (29.84%)	4
Nov. 1, 2004 (EU-25)	321	232	13 (subject to population criterion)	90 (28.04%)	4

Table 2 shows the evolution of the QMV threshold with successive enlargements expressed as a percentage of the votes required.

Table 2

EU-6	***EU-9***	***EU-10***	***EU-12***	***EU-15***	***EU-25 (to Oct. 31, 2004)***	***EU-25 (from Nov 1, 2004)***
70.59%	70.69%	71.43%	71.05%	71.26%	70.97%	72.27%

After November 1, 2004, a qualified majority will become more difficult than ever to achieve. Nor does it seem likely that the introduction of the dual majority system from November 1, 2009 onwards would have a significant effect on the ease with which a qualified majority could be built.[82] A majority of the Member States would still be required and the population threshold — albeit lowered marginally — would be elevated from

82. The main effect of the dual majority system would appear to be on the relative weight of individual Member States.

a facility available to States in the minority to part of the very definition of a qualified majority. It is against that background that the further extension in the use of qualified majority voting contemplated by the Draft Treaty needs to be viewed.

One important reason for that extension is the elevation of the so-called co-decision procedure, currently described in Article 251 of the EC Treaty, into the Union's "ordinary legislative procedure."[83] This means that the Union's legislative acts, European laws[84] and European framework laws, will normally be adopted jointly by the European Parliament and the Council of Ministers.[85] The ordinary legislative procedure is set out in Article III-302. The text has been simplified, but the substance remains essentially unchanged from Article 251 of the EC Treaty. The Council will act by qualified majority throughout except in one situation. Where the procedure starts with a Commission proposal, the Council must act unanimously if it wishes to approve amendments proposed by the European Parliament at second reading on which the Commission has delivered a negative opinion.[86]

Although, like the co-decision procedure, the ordinary legislative procedure will normally be launched by the submission of a proposal by the Commission, Article I-33(1) envisages the adoption of legislative acts at the initiative of a group of Member States. The circumstances in which this will be permitted are set out in Article III-165, which refers to Section 4 ("Judicial Cooperation in Criminal Matters") and Section 5 ("Police Cooperation") of Chapter IV ("Area of Freedom, Security and Justice") of Part III. This incursion into the Commission's right of initiative is intended to balance the use of the ordinary legislative procedure in that field.[87] A corresponding provision has been inserted into Article III-302 to take account of cases where the ordinary legislative procedure is not triggered by a Commission

83. *See* Consolidated EC Treaty, *supra* note 27, art. 251, O.J. C 325/33, at 133-34 (2002), 37 I.L.M. at 129 (ex Article 189b).

84. Corresponding essentially to regulations under the current system.

85. *See* Draft Treaty, *supra* note 12, art. I-33, O.J. C 169/1, at 16 (2003).

86. *See id.* art. III-302(9), O.J. C 169/1, at 84 (2003).

87. *See* The European Convention, Draft Sections of Part Three with Comments, May 27, 2003, CONV 727/03, at 29; *cf.* Consolidated EC Treaty, *supra* note 27, art. 67(1), O.J. C 325/33, at 60 (2002), 37 I.L.M. at 91 (ex Article 730) (with the temporary incursion expiring on May 1, 2004).

proposal.[88]

B. *The Presidency of the European Council and the Union Minister for Foreign Affairs*

A provision is made in the Draft Treaty for the European Council to elect its President by a qualified majority for a term of two and a half years, renewable once.[89] The function of the President, who would not be permitted to hold a national mandate, would be to facilitate the work of the European Council and to "ensure the external representation of the Union on issues concerning its common foreign and security policy."[90] Article I-24(5) makes it clear that neither the President nor the President of the Commission would vote where the European Council acts by qualified majority. The reason seems to be that no votes are attributed to them under the QMV formula. What is perhaps less clear is whether the same rule is intended to apply where the European Council acts by unanimity.[91] If it is, the result would be that either President could block a decision taken by consensus, that is, without recourse to a vote, under the default rule laid down in Article I-20(4),[92] but not one taken by unanimity, which implies the taking of a vote.[93] The extreme subtlety of that distinction suggests that Article I-24(5) should be regarded as confined to QMV, which would mean that the President of the European Council, as well as the President of the Commission, would have a vote when the Constitution requires the European Council to act unanimously. This might usefully be clarified.

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88. *See* Draft Treaty, *supra* note 12, art. III-302(15), O.J. C 169/1, at 84 (2003).

89. The Draft Treaty also provides for the Member States that have adopted the Euro to elect a president for two and a half years. *See* Draft Treaty, Protocol on the Euro Group, July 18, 2003, art. 2, O.J. C 169/1, at 97 (2003). The Commission has suggested that the duration of the presidency of the Euro Group should coincide with that of the presidency of the Economic and Financial Affairs (or Ecofin) Council. *See* Commission Opinion, *supra* note 63, at 10 n.7.

90. See Draft Treaty, *supra* note 12, art. I-21, O.J. C 169/1, at 12 (2003).

91. *See id.* art. I-24(5), O.J. C 169/1, at 13 (2003). This Article is a free-standing paragraph in a provision headed "Qualified majority".

92. *See id.* art. I-20(4) (providing: "Except where the Constitution provides otherwise, decisions of the European Council shall be taken by consensus").

93. *See* JAN WERTS, THE EUROPEAN COUNCIL 130-32 (1992). The terms "consensus" and "unanimity" would both permit decisions to be blocked by a single Member State. *See also* Alan A. Dashwood, *Decision-making at the Summit*, 3 CYELS 79 (2000); DENZA, *supra* note 14, at 138.

The provisions concerning the President of the European Council, together with new arrangements for determining the Presidency of the Council of Ministers,[94] are designed to avoid the disruption caused by the present system, under which the presidency of the Council of Ministers rotates every six months and the European Council meets under the chairmanship of the Member State holding the presidency of the Council of Ministers. In a Union of twenty-five Member States, the present system would mean that each State held the presidency only once every twelve and one-half years. The creation of the post of President of the European Council has encountered opposition from the Commission, which has warned against creeping extension of his or her responsibilities and emphasized the limited democratic legitimacy the President would enjoy. The Commission has also underlined the need for the status of the President[95] to be spelled out in the Constitution more clearly.[96]

The Draft Treaty would, in addition, endow the Union with a Minister for Foreign Affairs with the responsibility of conducting the CFSP. Appointed by qualified majority vote of the European Council with the agreement of the President of the Commission,[97] the person chosen would be one of the Vice-Presidents of the Commission. He or she would also chair the Foreign Affairs Council (one of the formations of the Council of Ministers)[98] and "take part" in the work (without being a member) of the European Council.[99] The Minister would be assisted by a European External Action Service working in cooperation with the diplomatic services of the Member States. The Minister

94. The Draft Treaty envisages that the Presidency of most Council of Ministers formations (all except that of Foreign Affairs) will be held by different Member States for periods of at least a year. *See* Draft Treaty, *supra* note 12, art. I-23(4), O.J. C 169/1, at 10 (2003). The Foreign Affairs Council would be chaired by the Union Minister for Foreign Affairs. *See infra* notes 98-99 and accompanying text.

95. *E.g.*, Nationality, duty of independence, ban on engaging in another occupation, replacement in the event of death or resignation. *Cf.* Draft Treaty, *supra* note 12, arts. III-250 - III-253, O.J. C 169/1, at 76-77 (2003) (concerning members of the Commission).

96. *See* Commission Opinion, *supra* note 63, at 10. *See also* European Parliament Resolution on the Draft Treaty and the IGC, 11047/2003 - C5-0340/2003 - 2003/0902(CNS), ¶ 20, Sept. 24, 2003 [hereinafter European Parliament's Resolution of Sept. 24, 2003].

97. *See* Draft Treaty, *supra* note 12, art. I-27(1), O.J. C 169/1, at 14 (2003).

98. Draft Treaty, *supra* note 12, art. I-23(3), O.J. C 169/1, at 13 (2003).

99. *See id.* art. I-20(2), O.J. C 169/1, at 12 (2003).

would represent the Union in matters relating to the CFSP, "conduct political dialogue on the Union's behalf and . . . express the Union's position in international organisations and at international conferences."[100] He or she would have the right to "refer to the Council of Ministers any question relating to the common foreign and security policy," and to submit proposals to it.[101]

These arrangements are designed to alleviate some of the problems caused by the present division of functions between the Secretary-General of the Council of Ministers, who also exercises the function of High Representative for the CFSP, and the Commissioner for External Relations. In its White Paper on the Draft Treaty, the British Government said that a merger of those two posts

> would make the European Union more effective in areas where we have a common foreign policy, such as in the Balkans and the Middle East Peace Process. On such issues, our own influence is enhanced by having a common European approach, and a single EU spokesman will both strengthen and streamline this European role.[102]

The establishment of a Foreign Minister has also been welcomed by the Commission.[103] Whether the Minister's bicephalous nature will prove workable may be questionable, however, and the precise nature of his or her relationship with the President of the European Council and the Member States is not easy to discern.[104] There are also concerns about the accountability of the Minister for Foreign Affairs, whose democratic legitimacy would only be indirect.[105]

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100. *See id.* art. III-197(2), O.J. C 169/1, at 66 (2003).

101. *See id.* art. III-200(1), O.J. C 169/1, at 67 (2003). The right of the Council of Ministers to act by qualified majority vote when acting on the basis of a proposal put to it by the Minister is discussed below.

102. *See* British White Paper, *supra* note 20, at ¶ 87.

103. *See* Commission Opinion, *supra* note 63, at 3, 11.

104. The British Government says in its White Paper: "We will of course want to ensure that this representative is properly accountable to Member States in the Council." British White Paper, *supra* note 20, at ¶ 87.

105. The nomination of the Minister for Foreign Affairs would be subject to a vote of approval by the European Parliament along with the rest of the Commission. *See* Draft Treaty, *supra* note 12, art. I-26(2), O.J. C 169/1, at 14 (2003). The Minister could in the last resort be dismissed by the European Council, acting by qualified majority with the consent of the President of the Commission. *Id.* art. I-27(1), O.J. C 169/1, at 14 (2003). *See also* HL Report of the Select Committee on the European Union, *The*

C. *External Action and the Solidarity Clause*

Article I-6 provides: "The Union shall have legal personality."[106] That provision complements the abolition of the pillar structure and contributes to the simplification of the Treaties. It probably does not change the existing position: Article 281 of the EC Treaty expressly confers legal personality on the European Community and it is strongly arguable that the Union already possesses implied legal personality as a matter of public international law.[107] Moreover, the question of legal personality is separate from both the question of competences and that of the procedure for entering into international agreements. This was made clear in the final report of Working Group III, where it is noted:

> Explicit conferral of a single legal personality on the Union does not *per se* entail any amendment, either to the current allocation of competences between the Union and the Member States or to the allocation of competences between the current Union and Community. Nor does it involve any amendments to the respective procedures and powers of the institutions regarding in particular the opening, negotiation and conclusion of international agreements.[108]

The external competence of the Union is dealt with in Articles III-225 and III-226. In addition, Article I-12(2) provides: "[t]he Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union, is necessary to enable the Union to exercise its competence internally, or affects an internal Union act." That provision seems intended to give effect to the case law of the Court of Justice,[109] but there is con-

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Future of Europe: Constitutional Treaty — Draft Articles on External Action, at ¶¶ 6-7 (HL Paper No. 107, 2003) [hereinafter *Draft Articles on External Action*].

106. *See* Draft Treaty, *supra* note 12, art. I-6, O.J. C 169/1, at 9 (2003).

107. This was acknowledged by the British Government in its White Paper. *See* British White Paper, *supra* note 20, at ¶ 47. *See also* Alan Dashwood, *Issues of decision-making in the European Union after Nice*, *in* ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION 17-21 (Anthony Arnull & Daniel Wincott eds., 2002).

108. The European Convention, Final Report of Working Group III on Legal Personality, Oct. 1, 2002, CONV 305/02, at 6.

109. *See* THE GENERAL LAW OF EC EXTERNAL RELATIONS (Alan Dashwood & Christophe Hillion eds., 2000); T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW ch. 6 (5th ed. 2003).

cern that it does not do so accurately[110] and it may need to be revisited at the IGC. Following a recommendation by Working Group III, the Draft Treaty contains a general provision dealing with the procedure for negotiating and concluding international agreements.[111]

The provisions of the Draft Treaty on external action with the greatest significance for the Member States are perhaps those dealing with the CFSP. The provisions in question fall into three main groups. In ascending order of detail, they are: (a) Article I-15; (b) Articles I-39 to I-40; (c) Chapter II of Title V of Part III (Articles III-195 to III-215). Article III-282 excludes most of those provisions from the jurisdiction of the Court of Justice. The only exceptions are Articles I-15 and III-209.[112]
Article I-15 provides as follows:

> 1. The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy, which might lead to a common defence.
> 2. Member States shall actively and unreservedly support the Union's common foreign and security policy in a spirit of loyalty and mutual solidarity and shall comply with the acts adopted by the Union in this area. They shall refrain from action contrary to the Union's interests or likely to impair its effectiveness.[113]

The power of the Court of Justice to review compliance by Member States with the second subparagraph of that provision is particularly significant. It might lead the Court to be called

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110. *See* Dougan, *supra* note 41.

111. *See* Draft Treaty, *supra* note 12, art. III-227, O.J. C 169/1, at 72 (2003). There is a special provision for the conclusion of agreements concerning exchange rates for the euro in relation to currencies other than those that are legal tender within the Union. *Id.* art. III-228, O.J. C 169/1, at 73 (2003).

112. The Court would also have jurisdiction to review the legality of restrictive measures against natural or legal persons adopted pursuant to the Common Foreign and Security Policy ("CFSP") under Article III-224(2). *See* Draft Treaty, *supra* note 12, art. III-282(2), O.J. C 169/1, at 81 (2003). The wording of that paragraph suggests that the Court would not have jurisdiction to review the legality of restrictive measures interrupting or reducing economic and financial relations with third countries adopted pursuant to the CFSP under Article III-224(1). That would involve removing from the Court a power it currently enjoys and is undesirable as a matter of principle. For further discussion, see Final Report on Court of Justice, *supra* note 34.

113. *See* Draft Treaty, *supra* note 12, art. I-15, O.J. C 169/1, at 11 (2003).

upon to consider whether action by a Member State complies with an act adopted by the Union in this area or is contrary to the Union's interests or likely to impair its effectiveness. At least some of those issues could well be considered justiciable, though the Court might find its position slightly uncomfortable. If it were to take too broad a view of its jurisdiction to apply Article I-15, the effect might be to undermine Article III-282 so far as the obligations of Member States are concerned. If, on the other hand, it were to take a narrow view, the effect might be to undermine the apparently deliberate exclusion of Article I-15 from Article III-282.

Article III-209, first subparagraph, provides:

> The implementation of the common foreign and security policy shall not affect the competences listed in Articles I-12 to I-14 [exclusive competence, shared competence, coordination of economic and employment policies] and I-16 [supporting, coordinating or complementary action]. Likewise, the implementation of the policies listed in those Articles shall not affect the competence referred to in Article I-15.[114]

That provision is a refinement of Article 47 TEU, according to which the TEU shall not affect the Community Treaties. The Court of Justice has jurisdiction to apply Article 47 of the TEU and it did so in the "Airport Transit Visas" case. The Court stated it was responsible for ensuring that "acts which, according to the Council, fall within the scope of the . . . Treaty on European Union, do not encroach upon the powers conferred by the EC Treaty on the Community."[115] Article III-209 would prevent the provisions on the CFSP from being used to interfere with other competences enjoyed by the Union under the Draft Treaty and vice versa. Its purpose is to stop a power or a process applicable in one field from being used to take steps which ought properly to be regarded as falling within a different field. It is an application of the principle of conferral, according to which "the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution."[116] The fundamental na-

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114. *See id.* art. III-209, O.J. C 169/1, at 68 (2003).

115. Commission v. Council, Case C-170/96, 1998 E.C.R. I-2763, ¶ 16 (Airport Transit Visas).

116. *See* Draft Treaty, *supra* note 12, art. I-9(2), O.J. C 169/1, at 10 (2003).

ture of that principle explains the grant to the Court of jurisdiction to apply Article III-209.

Article I-39 provides that the CFSP shall be "based on the development of mutual political solidarity among Member States, the identification of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States' actions."[117] The necessary European decisions[118] are to be adopted by the European Council and the Council of Ministers, acting unanimously, except in the cases referred to in Part III. The European Council and the Council of Ministers will act on a proposal from a Member State or from the Union Minister for Foreign Affairs, acting alone or with the Commission's support. Recourse to European laws and European framework laws is specifically ruled out in this context. The European Council may unanimously decide that the Council of Ministers should act by qualified majority in cases other than those referred to in Part III.

Article I-40 states that the Common Security and Defense Policy ("CSDP") shall be an integral part of the CFSP.[119] The CSDP is to include the progressive framing of a common Union defense policy. In language stronger than that of Article I-15(1), the first subparagraph of Article I-40(2) says that this "*will lead* to a common defense," (emphasis added), but only when the European Council, acting unanimously, so decides. Moreover, the decision of the European Council will have to be recommended to the Member States for adoption in accordance with their respective constitutional requirements.

That particularly heavy variant of the decision-making process, involving what amounts to national ratification of a Union act,[120] represents an acknowledgment of the momentous character such a decision would have. The House of Lords EU Committee noted of a previous version of Article I-40(2) that a decision of this type

> would not only have profound implications for the role of NATO, but also appears to be wholly unrealistic in the fore-

117. *See id.* art. I-39(1), O.J. C 169/1, at 17 (2003).

118. A European decision is "a non-legislative act, binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them." Draft Treaty, *supra* note 12, art. I-32(1), O.J. C 169/1, at 16 (2003).

119. *See id.* art. I-40, O.J. C 169/1, at 18 (2003).

120. *See* ANTHONY ARNULL ET AL., EUROPEAN UNION LAW 49 (4th ed. 2000).

> seeable future. The Committee can see a case for such an aspirational provision against the possibility that NATO might become ineffective and that the Member States might accordingly need an alternative mechanism. We assert our view that we would not wish any developments in European Union defence to weaken the role of NATO. We also believe that it is wholly unlikely that "the progressive framing of a common defense policy . . . will lead to a common defense."[121]

The Draft Treaty would continue to make it clear that the CSDP "must not prejudice the specific character of the security and defense policy" of non-aligned Member States and Member States who see their collective defense as assured principally through NATO and must "be compatible with the common security and defense policy established within that framework."[122] In its White Paper, the British Government said it thought that effective links to NATO were essential: "[w]e will not agree to anything which is contradictory to, or would replace, the security guarantee established through NATO."[123]

Detailed rules on decision-making under the CFSP are set out in Article III-201. Article III-201(1) is essentially the same as Article 23(1) of the TEU. The first subparagraph provides that the Council of Ministers is to act unanimously and that abstentions will not prevent it from doing so.[124] The second subparagraph includes a mechanism for so-called constructive abstention. Under that mechanism, a Member State that qualifies an abstention is not obliged to apply the decision, but must accept that it commits the Union and refrain from any action likely to undermine it.[125] If the number of Council members qualifying their abstentions in this way exceeds a certain threshold, the decision cannot be adopted. The second subparagraph of Article III-201(1) alters the current threshold to "one third of the Member States representing at least one third of the population of the Union".[126]

Article III-201(2) sets out the cases in which, by derogation

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121. *Draft Articles on External Action*, *supra* note 105, at 12.

122. *See* Draft Treaty, *supra* note 12, art. I-40, O.J. C 169/1, at 18 (2003). *See also id.* art I-40(2), para. 2, O.J. C 169/1, at 18 (reproducing the second subparagraph of Article 17(1) of the Consolidated TEU).

123. *See* British White Paper, *supra* note 20, at ¶ 95.

124. *See* Draft Treaty, supra note 12, art. III-201, O.J. C 169/1, at 67 (2003).

125. *See id.* art. III-201(2), O.J. C 169/1, at 67 (2003).

126. The current threshold is set at Member States representing more than one-

from Article III-201(1), the Council of Ministers may act by qualified majority. Three of the cases mentioned correspond essentially to those in which the Council of Ministers is currently permitted to act by a qualified majority within the framework of the CFSP by Article 23(2) of the TEU. A new fourth case would allow the Council of Ministers to act by qualified majority "when adopting a decision on a Union action or position, on a proposal which the Minister [for Foreign Affairs] has put to it following a specific request to him or her from the European Council made on its own initiative or that of the Minister."[127]

This represents a potentially significant extension in the use of qualified majority voting in relation to the CFSP. However, in an important change from earlier drafts, QMV is now only envisaged where the Minister has made his or her proposal at the request of the European Council, which would act by consensus.[128] Moreover, as with Article 23(2) of the TEU, an "emergency brake" is available to any member of the Council which is opposed to the adoption of a decision by qualified majority vote. Thus, Article III-201(2) provides:

> If a member of the Council of Ministers declares that, for *vital* and stated reasons of national policy, it intends to oppose the adoption of a European decision to be adopted by qualified majority, a vote shall not be taken. The Union Minister for Foreign Affairs will, in close consultation with the Member State involved, search for a solution acceptable to it. If he or she does not succeed, the Council of Ministers may, acting by a qualified majority, request that the matter be referred to the European Council for decision by unanimity.[129]

It is arguable that the Draft Treaty would make the "emergency brake" slightly more difficult to apply in this context, for the word "vital" in the opening sentence (italicized above) has replaced the word "important" in Article 23(2) of the Treaty on European Union. That change may not have any practical significance.

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third of the votes as weighted under QMV. *See* Consolidated TEU, *supra* note 4, art. 23(1), O.J. C 325/5, at 18 (2002), 37 I.L.M. at 72 (ex Article J.13).

127. *See* Draft Treaty, *supra* note 12, art. III-201(2)(b), O.J. C 169/1, at 67 (2003).

128. The Draft Treaty does not specify how the European Council is to act in this instance, so the default rule in Article I-20(4) would apply. *See* Draft Treaty, *supra* note 12, art. I-20(4), O.J. C 169/1, at 12 (2003).

129. *Id.* art. III-201(2), O.J. C 169/1, at 67 (2003) (emphasis added).

Article III-201(4) preserves the current exclusion[130] of qualified majority voting in the case of "decisions having military or defense implications."[131] Such decisions are also excluded from the European Council's power, reiterated in Article III-201(3), to decide unanimously that the Council of Ministers should act by qualified majority in cases other than those referred to in Article III-201(2). Partial compensation for those exclusions may be found in provisions on new forms of enhanced cooperation in the context of the CSDP.[132] Enhanced cooperation, in relation to matters having military or defense implications, is currently ruled out by the second sentence of Article 27b of the TEU. There was, however, a feeling in the Convention that enhanced cooperation might be useful in security and defense matters because of differences between the Member States regarding their capabilities and willingness to commit them.[133] Enhanced cooperation under the CFSP in matters that do not have military or defense implications, currently the subject of provisions introduced at Nice,[134] is dealt with in Articles III-325 and III-326.

In the Working Group on defense, there was broad support for a new provision spelling out the principle of solidarity between Member States. The provision was not envisaged as "a clause on collective defence entailing an obligation to provide military assistance," but as applying to threats from non-State entities.[135] The provision contemplated appears in the Draft Treaty as Article I-42, which is headed "Solidarity clause." It provides:

> 1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the victim of terrorist attack or natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:

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130. *See* Consolidated TEU, *supra* note 4, art. 23(2), O.J. C 325/5, at 18 (2002), 37 I.L.M. at 72 (ex Article J.13).

131. *See* Draft Treaty, *supra* note 12, art. III-201(4)(2003).

132. *See id.* arts. I-40(6)-(7), III-211, III-213, III-214, O.J. C 169/1, at 18, 69 (2003).

133. *See* The European Convention, Final Report of Working Group VIII on Defense, CONV 461/02, at 19, *available at* http://register.consilium.eu.int/pdf/en/02/cv00/00461en2.pdf (Dec. 16, 2002) [hereinafter Final Report of Working Group VIII].

134. *See* Consolidated TEU, *supra* note 4, art. 27, O.J. C 325/5, at 19 (2002), 37 I.L.M. at 73 (ex Article J.17).

135. *See* Final Report of Working Group VIII, *supra* note 133, at 20.

(a) - prevent the terrorist threat in the territory of the Member States;
- protect democratic institutions and the civilian population from any terrorist attack;
- assist a Member State in its territory at the request of its political authorities in the event of a terrorist attack;

(b) - assist a Member State in its territory at the request of its political authorities in the event of a disaster.

2. The detailed arrangements for implementing this provision are at Article III-231.[136]

Article III-231(1) gives the Council of Ministers the task, acting on a joint proposal by the Commission and the Union Minister for Foreign Affairs, of adopting a European decision laying down the arrangements for implementing the solidarity clause. The European Parliament merely has to be "informed." The Council of Ministers would act by qualified majority under the default rule contained in Article I-22(3).[137] By virtue of Article III-231(2), "[s]hould a Member State fall victim to a terrorist attack or a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities."[138]

The House of Lords EU Committee said of an earlier version of the solidarity clause that it was "a fundamental and constitutional provision," which represented "an extension of existing provisions. While the aspirations of this Clause may be valuable for political reasons, the defense implications should not be overlooked."[139] The clause has been welcomed by the British Government, which said in its White Paper[140] that it "should give us a robust mechanism to ensure a swift, coordinated response to a Member State's request for help in dealing with the consequences of a disaster or terrorist attack."

Finally, it should be noted that the Council of Ministers, acting by a qualified majority, will be required to adopt a European decision defining the statute, seat and operational rules of the European Armaments, Research and Military Capabilities

136. *See* Draft Treaty, *supra* note 12, art. I-42, O.J. C 169/1, at 19(2003).

137. Technically, the solidarity clause would fall outside the scope of the CFSP, so Articles I-39(7) and III-201(1) would not apply.

138. The European Convention, Draft Constitution, Volume II — Draft Texts of Parts Two, Three and Four, CONV 725/03, at art. III-226(2) (ex Article X), *available at* http://european-convention.eu.int/docs/Treaty/cv00725.en03.pdf (May 27, 2003).

139. *Draft Articles on External Action*, *supra* note 105, at 14.

140. British White Paper, *supra* note 20, at ¶ 94.

Agency referred to in the second subparagraph of Article I-40(3).[141] The Agency is to be "open to all Member States wishing to be part of it."[142] The creation of the Agency is supported by the British Government, which said in its White Paper that it "should ensure that improved, more cost-effective, capabilities are made available to ESDP (European Security and Defence Policy) as a result of increased transparency and cooperation among Member States. This is essential to the EU being able to run crisis management operations in an appropriate, timely and effective way."[143]

D. *Composition of the Commission*

With effect from November 1, 2009, the Commission would comprise of its President, the Union Minister for Foreign Affairs, and thirteen European Commissioners along with ten non-voting Commissioners.[144] The introduction of non-voting Commissioners would be an innovation. The two categories of Commissioner are to be selected on the basis of a system of equal rotation between the Member States. Although there are currently two Commissioners from the larger Member States (France, Germany, Italy, Spain, and the U.K.), the relevant provisions of the Draft Treaty represent a partial retreat from the position agreed on at Nice, where it was accepted that the Commission would in due course comprise fewer Commissioners than Member States.[145] Under the Draft Treaty, each Member State would be guaranteed either a voting European Commissioner or a non-voting Commissioner.

These proposals have been strongly criticized by the Commission itself.[146] In its opinion on the Draft Treaty, it points out that it rarely proceeds to a vote.[147] It observes that, if non-voting Commissioners are to be assigned a portfolio, it is hard to see how they could discharge their responsibilities if they are ex-

141. Revised Text of Part One, *supra* note 9, at 40(3).

142. *Id.*

143. *Id.*

144. *Id.* art I-25(3).

145. Treaty of Nice, *supra* note 4, Protocol A, art. 4(2), O.J. C 80/1, at 52 (2001).

146. *See also* The European Parliament's Resolution of Sept. 24, 2003, *supra* note 96, at ¶ 30 (where regret is expressed that "the system envisaged makes it difficult to keep a good European Commissioner for a second term").

147. *See* Commission Opinion, *supra* note 63, at 17.

cluded from collective decision-making. If they are not to be assigned a portfolio, it is unclear what their role would be.[148] The Commission's preference is for a national from each Member State to be appointed, each Member having the same rights and obligations. This, it says, is the only way to ensure that all national sensitivities, cultures and identities are properly taken into account in its deliberations.[149] That suggestion is likely to appeal particularly to the smaller Member States, who tend to see the Commission as an ally and to oppose moves they perceive as liable to undermine it.

V. *THE ROLE AND FUNCTIONING OF NATIONAL INSTITUTIONS*

A. *National Parliaments*

Because it elevates the European Parliament to the position of co-legislator alongside the Council of Ministers, greater use of what the Draft Treaty calls the ordinary legislative procedure would contribute to increasing the democratic legitimacy of the Union and its institutions, an objective identified at both Nice and Laeken. In the same vein, the Draft Treaty seeks to involve the national parliaments more closely in the Union's activities.[150] A Protocol on the Role of National Parliaments in the European Union[151] strengthens the Amsterdam Protocol on the same subject, notably by requiring the Commission to send all legislative proposals and consultation documents directly to Member States' national parliaments. An accompanying Protocol on the Application of the Principles of Subsidiarity and Proportionality would introduce an "early warning system" or "yellow card"[152] mechanism where a national parliament has concerns as to whether a Commission proposal complies with the principle of

148. *Id.* at 5.

149. *Id.* at 6.

150. *See, e.g.*, Draft Treaty, *supra* note 12, arts. I-17, I-24(4), I-41(2), I-57, III-160, III-161, III-162, III-174(2), III-177(2), IV-7, O.J. C 169/1, at 11, 13, 18, 21, 57-58, 60, 61, 92 (2003) (provisions recognizing a role for national parliaments).

151. For further discussion on the background to the Protocol, see The European Convention, The Final Report of Working Group IV on the Role of National Parliaments, CONV 353/02, *available at* http://register.consilium.eu.int/pdf/en/02/cv00/00353en2.pdf (Oct. 22, 2002).

152. The metaphor refers to the cards shown by the referee to soccer players who infringe the rules during a match. A yellow card signifies a caution. Players shown a red card must leave the field of play for the duration of the match.

subsidiarity. It provides that a national parliament "may, within six weeks from the date of transmission of the Commission's legislative proposal, send to the Presidents of the European Parliament, the Council of Ministers and the Commission, a reasoned opinion stating why it considers that the proposal in question does not comply with the principle of subsidiarity."[153] If the number of such reasoned opinions exceeded a certain threshold, the Commission would be required to review its proposal.

That mechanism was introduced following a recommendation by Working Group I on the principle of subsidiarity.[154] The Working Group went on to suggest that a national parliament which issues a "yellow card" should have the right to issue a "red card" by referring the matter to the Court of Justice if its concerns over subsidiarity were not met. That is the background to paragraph 7 of the proposed new Protocol, the first subparagraph of which provides:

> The Court of Justice shall have jurisdiction to hear actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article III-270 of the Constitution [the action for annulment or judicial review] by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it.[155]

This subparagraph is clearly inadequate to give effect to the "red card" mechanism envisaged by Working Group I. In fact, it makes no change to the present position, since there is nothing to prevent a Member State from bringing an action for the annulment of a Community act at the request of its national parliament on the ground that the principle of subsidiarity has been violated.[156] That would remain the case under the corresponding provisions of the Draft Treaty.

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153. *See* Draft Treaty, *supra* note 12, art. IV-5, O.J. C 169/1, at 92 (2003). *See also* The European Convention, Conclusions of Working Group I on the Principle of Subsidiarity, CONV 286/02, at part II, *available at* http://register.consilium.eu.int/pdf/en/02/cv00/00286en2.pdf (Sept. 23, 2002).

154. *See id.*

155. *See* Protocol on the Application of the Principles of Subsidiarity and Proportionality, ¶ 7, *available at* http://europa.eu.int/eur-lex/en/treaties/dat/C2003169en.009501.htm.

156. This has been pointed out by the House of Lords EU Committee. *See* HL Report of the Select Committee on the European Union, *The Future of Europe: National Parliaments and Subsidiarity*, at ¶¶ 15-16 (HL Paper No. 70, 2003).

There is no point in including provisions in the Constitution that have no effect. The subparagraph should therefore be deleted or amended to give effect to the recommendation of Working Group I.[157] If national parliaments are permitted to bring annulment proceedings for infringement of the principle of subsidiarity, then consideration might also be given to allowing them to bring such proceedings — only this time for infringement of an essential procedural requirement, where the Protocol on the Role of National Parliaments is infringed in the process leading to the adoption of a Union act.

B. *The Amendment Procedure*

The procedure for amending the Constitution set out in Article IV-7 would involve convening a Convention unless the European Council decided by simple majority, and with the consent of the European Parliament, that the extent of the proposed amendments did not justify that step.[158] The amendment procedure does not distinguish between different Parts of the Draft Treaty. Therefore, it could not be used to support an argument that some Parts have higher status than others. Nevertheless, it would remain the case that any amendments would have to be agreed to by all the Member States and ratified by them in accordance with their respective constitutional requirements. As at present, the approval of the European Parliament and the Commission could not be required, although the European Parliament would acquire the right to trigger the amendment procedure by submitting proposals to the Council of Ministers. At the moment, that right is confined to national governments and the Commission.

The predicted difficulty of securing agreement on constitutional amendments to the proposed Constitution in a Union of twenty-five or more Member States led to the inclusion in the

157. In that event, Article III-270 on the action for annulment would also need to be amended.

158. The European Parliament has suggested that where a Convention is convened, it should have the right to elect its own Praesidium. *See also* the European Parliament's Resolution of Sept. 24, 2003, *supra* note 96, at ¶ 34. The Praesidium of the Convention on the Future of Europe, like that Convention's Chairman and two Vice-Chairmen, was chosen by the European Council. *See* the LAEKEN DECLARATION, *supra* note 5.

draft of provisions, some already mentioned, allowing the European Council, acting unanimously, to

1) decide that certain decisions that may only be taken by the Council of Ministers acting unanimously may henceforward be taken by Qualified Majority Voting;[159] and
2) extend the use of the ordinary legislative procedure.[160]

These provisions will enable national governments to avoid seeking the approval of their parliaments for changes that would otherwise require such approval. A compromise arrangement may be to require decisions extending the use of QMV or the ordinary legislative procedure to be submitted to the Member States for ratification under their own constitutional requirements.[161]

The Commission has expressed regret that even minor amendments to the Constitution would require the agreement of all the Member States in addition to national ratification.[162] It therefore proposes that modifications to Part III of the Constitution ("The Policies and Functioning of the Union") should be made by the European Council acting by a majority of 5/6 of its members and with the consent of the European Parliament and the Commission.[163] This suggestion is problematic.[164] If pursued at the IGC, it could lead to some provisions of Part III being moved to, or replicated in, other Parts of the Constitution if Member States wished to preserve a right to block changes. That could undermine the structure of the Constitution.

VI. *AN APPRAISAL*

Each of the four major Treaty revisions that have taken place since the Rome Treaties were signed in 1957 have signifi-

159. *See* Draft Treaty, *supra* note 12, at arts. I-24(4), I-39(8), III-201(3), O.J. C 169/1, at 13, 17, 67 (2003).

160. *See id.* art. I-24(4), O.J. C 169/1, at 13 (2003) (the so-called *'passerelle'* clause); *see also id.* arts. III-104(3), III-130(2), III-170(3), O.J. C 169/1, at 48, 53, 59 (2003).

161. *Cf. id.* art I-40(2), O.J. C 169/1, at 18 (discussing a common defense.)

162. The Commission's position on this point is shared by the European Parliament. *See* European Parliament's Resolution of Sept. 24, 2003, *supra* note 96, at ¶ 32.

163. *See* Commission of the European Communities, A Constitution for the Union, COM(2003) 548 Final, at ¶ 11 (Sept. 2003) [hereinafter A Constitution for the Union]. The Commission envisages that the decision of the European Council would be preceded by a Convention (in which the national parliaments would be represented) and that compliance with the conditions laid down for this type of amendment procedure would be supervised by the Court of Justice.

164. *See* Draft Text of Part IV, *supra* note 9, at 10.

cantly altered the balance between national governments and the supranational institutions that affected the Member States' freedom of action.[165] If endorsed by the Member States, the Draft Treaty establishing a Constitution for Europe would be no exception. However, it remains doubtful that Draft Treaty would shift the balance away from the Member States to the same extent as its predecessors, particularly the Single European Act and the TEU. The House of Lords EU Committee, in commenting in May 2003 on draft Articles on the institutions published by the Convention Praesidium, observed: "it is clear that the balance of power in the European Union is going to shift from the Commission in favour of the Member States if the proposals here are adopted."[166]

It is true that the Draft Treaty would extend the use of QMV, but only to a limited extent. Even where it is envisaged that QMV will apply, a qualified majority seems likely to prove more difficult to muster than at present. In a number of important areas, the Draft Treaty would continue to require the Council of Ministers to act unanimously.[167] This is especially true of the CFSP. Although the Draft Treaty makes a limited attempt to extend the use of QMV in this context, what is striking about the provisions on CFSP is how firmly it would remain the preserve of the Member States, with only a limited role for the European Parliament, the Commission, as distinct from the Minister for Foreign Affairs, and the Court of Justice.

There was considerable demand in the Convention for a more enthusiastic embrace of QMV.[168] Advocates of greater provision for QMV view it as promoting consensus and more rapid agreement rather than necessarily leading to more frequent voting. As Galloway explains, "qualified majority voting lends a dynamic to negotiating in the Council in which [M]ember [S]tates

165. This is reflected in the Court's Opinion on the European Economic Area, where it spoke of the Member States having limited their sovereign rights "in ever wider fields." *See* DECLARATION ON THE FUTURE OF THE UNION, *supra* note 1, at ¶ 3.

166. HL Report of the Select Committee on the European Union, *The Future of Europe: Constitutional Treaty — Draft articles on the institutions*, at ¶ 11 (HL Paper No. 105, 2003).

167. This disappointed the Commission, which has suggested ways of reducing still further the requirement of unanimity. *See* A Constitution for the Union, *supra* note 163, at ¶¶ 6-9.

168. *Cf.* European Parliament's Resolution of Sept. 24, 2003, *supra* note 96, at ¶ 29.

are forced to seek compromises, to consider what their key bottom-line objectives are and to focus their negotiating effort accordingly."[169] Opponents of greater recourse to QMV sometimes forget that no Member State opposes everything. Enlargement increases the likelihood that, where unanimity is required, measures supported by a majority of Member States will be blocked by perhaps a single dissident. In relation to the CFSP, however, greater use of QMV could well prove counter-productive. As some members of Working Group VII on external action pointed out, QMV would "heighten third country awareness of internal EU disagreement, thus rendering CFSP less effective."[170]

Some will also find disappointing the failure of the Draft Treaty to address principles of a constitutional nature which have been laid down by the Court of Justice in its case law. It is true that there is a provision (albeit unsatisfactory) on primacy, but there is no mention of the related concepts of direct effect or State liability in damages.[171] Moreover, no attempt has been made to reflect in Article III-274, which concerns the preliminary rulings procedure, the limits on the power of national courts to pronounce on the validity of Union acts laid down in the *Foto-Frost* case.[172] These omissions seem hard to defend in a document which describes itself as a Constitution and is intended to add clarity.

Others may be reassured by the prospective demise of the (in) famous reference to "an ever closer union among the peoples of Europe," which appears in the preambles to both the EC Treaty and the TEU, as well as in Article 1 of the latter. It is replaced in the preamble to the Draft Treaty by a less provocative reference to the peoples of Europe as "united ever more closely."[173] The Draft Treaty makes it clear that the powers en-

169. *See* GALLOWAY, *supra* note 69, at 62; *see also* HL Report of the Select Committee on the European Union, *The Future of the European Union: The Future of Europe — Convention Working Group Reports on Defense and External Action* (HL Paper No. 80, 2003).

170. *See* The European Convention, Final Report of Working Group VII on External Action, CONV 459/02, at ¶ 45, *available at* http://register.consilium.eu.int/pdf/en/02/cv00/00459en2.pdf (Dec. 16, 2002).

171. *See, e.g.*, Francovich and Others, Joined Cases C-6/90 & C-9/90, [1991] ECR I-5357.

172. *See* Foto-Frost, Case 314/85 [1987] ECR 4199.

173. The Preamble to the Charter of Fundamental Rights, which appears at the beginning of Part II of the Draft Treaty, retains its existing reference to "an ever closer

joyed by the Union are conferred on it by the Member States, who therefore remain its collective masters.[174] It states explicitly that: "Powers not conferred upon the Union in the Constitution remain with the Member States."[175] This was seen by Working Group V as an aspect of the principle of conferral and as necessary to establish a presumption in favor of national competence.[176] The expanded provision on the Union's obligation to respect the national identities of the Member States[177] further underlines the role and importance of the Member States in the proposed constitutional dispensation.[178]

CONCLUSION

The Draft Treaty has attracted a variety of epithets, some bearing a more distant relationship with the truth than others. A middle-market British newspaper famously described it as a "blueprint for tyranny."[179] At the other end of the spectrum, the British Government representative on the Convention, the Rt. Hon. Peter Hain MP, said the draft was no more than a "tidying up exercise."[180] Valéry Giscard d'Estaing himself stated, in his so-called Rome Declaration made as the full draft Treaty was handed over to the President of the European Council,[181] that the Draft Treaty struck "the necessary balance between peoples,

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union" among the peoples of Europe. That seems to be an oversight given that there is no corresponding reference in the Preamble to the Draft Treaty itself.

174. The term "*Herren der Verträge*" ["masters of the Treaties"] was used by the Bundesverfassungsgericht in its Maastricht decision, Brunner v. European Union Treaty [1994] 1 C.M.L.R. 57.

175. *See* Draft Treaty, *supra* note 12, art. I-9(2), O.J. C 169/1, at 10 (2003).

176. *See* The European Convention, Final Report of Working Group V, CONV 375/1/02 REV 1, at ¶ 10, *available at* http://register.consilium.eu.int/pdf/en/02/cv00/00375-r1en2.pdf (Nov. 4, 2002) [hereinafter Working Group V Report].

177. *See* Draft Treaty, *supra* note 12, at art. I-5(1), O.J. C 169/1, at 9 (2003). *Cf.* Consolidated TEU, *supra* note 4, art. 6(3), O.J. C 325/5, at 12 (2002), 37 I.L.M. at 69 (ex Article F).

178. *See* Working Group V Report, *supra* note 176, at ¶ 10-12.

179. *See A Blueprint for Tyranny*, DAILY MAIL, May 8, 2003, *available at* http://www.no-euro.com/mediacentre/dossiers/display.asp?IDNO=1236. *See also* Report from the Presidency, *supra* note 13, at ann. III. That annex contains a minority report produced by a group of dissident members of the Convention who, although not seeking to block consensus, were unable to endorse the Draft Treaty.

180. *See, e.g.*, Patrick Wintour, *Hain Plays Down Any Poll on EU Future: Restructuring Mainly a Matter of Tidying Up, Says Chief Negotiator*, THE GUARDIAN, May 14, 2003, at 13.

181. *See* Rome Declaration, July 18, 2003, *available at* http://european-convention.eu.int/docs/Treaty/Rome_EN.pdf.

between States new and old, between institutions and between dream and reality."[182] He went on to make a plea for the text to be left unchanged at the IGC: "Reopening it, even in part, would cause it to unravel."[183]

It is natural for the authors of such a long and complex document to be anxious at the prospect of entrusting its fate to others, but it was never the intention that the outcome of the Convention's work should simply be rubber-stamped by the Member States. Although the view that the draft should not be altered initially attracted powerful support,[184] it is by no means universally held. In its White Paper, the British Government stated:

> Like most other Member States, the UK does not support every proposal put forward in the Convention. Important issues still need to be determined, as European leaders made clear at Thessaloniki. Some of these are areas of unfinished business, where the Convention has not worked through the detail of its proposals. Some are ideas with which we disagree. And some are issues which require further technical, including important legal, work.[185]

In a press release issued in June 2003,[186] the Commission criticized the draft for an alleged lack of ambition and said it would do what it could to secure improvements at the IGC. Its opinion of September 17, 2003[187] was more measured, urging the IGC not to upset the overall balance of the draft but nonetheless indi-

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182. *Id.*

183. *Id.*

184. *See, e.g.*, Chancellor Gerhard Schroeder of Germany & President Jacques Chirac of France, Remarks at the Conclusion of the Franco-German Summit in Dresden, Sept. 4, 2003, *available at* http://www.elysee.fr/magazine/deplacement_etranger/sommaire.php?doc=/Documents/discours/2003/CP030904.html.

185. See British White Paper, *supra* note 20, at ¶ 43. At their meeting in Berlin on September 20, 2003, Prime Minister Tony Blair, President Chirac, and Chancellor Schroeder seemed to agree that some issues might need to be reopened, but that anyone wishing to do so would be responsible for finding a new consensus. For further analysis see the transcript of the press conference following the meeting on the 10 Downing Street web site, *available at* http://www.number-10.gov.uk/output/Page4508.asp.

186. *See* Commission Press Release, IP/03/836, *available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=GT&doc=IP/03/836—0—AGED&lg=EN&display= (June 13, 2003).

187. *See* Commission Opinion, *supra* note 63. A similarly nuanced line was taken by the European Parliament in its resolution of September 24, 2003. *See* European Parliament's Resolution of Sept. 24, 2003, *supra* note 96.

cating several areas where the Commission considered it incomplete or inadequate.

The adoption of a Constitution will represent a milestone in the history of the EU. Once agreed, it is likely to be hard to change. The text, which emerges from the IGC must not only be conceptually coherent, it must also be one which national governments can sell to perhaps skeptical national parliaments and electorates. That is unlikely to be possible if serious national concerns are left unaddressed.