WHAT ARE THE LIMITS OF EUROPEAN EXPANSION ?

THE SECESSION CLAUSE AND WHY IT MATTERS

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April 2004

I am grateful to Joana Almada Cardoso and Nuno Garoupa for useful suggestions and also to John Huffstot for his interesting questions and for revision of much of my English. The usual disclaimer applies.

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ABSTRACT

What are the limits of European expansion?

The secession clause and why it matters.

During the last days of the year 2003 twenty-five European countries failed to come to terms with all demands enclosed within the project of a Constitution for Europe. Everyone went home. Now nothing is agreed upon before all is agreed upon, and hopes are high that the Irish Presidency will manage to bring about a satisfactory covenant sometime in the Spring. In the meantime, a secession clause has crept into the agenda for Europe… quietly. Article 59 of the upcoming Constitution allows any Member State, and thus all Member States, to leave the Treaty at will and in the process, entitles them to a bilateral agreement that clarifies the terms of such a procedure.

The Treaties of Amsterdam and Nice had addressed the issue of suspension of a Member State's voting rights but halted at the threshold of secession. Their unwillingness to go further had made it very clear to Member States that agreement and compromise was the only answer allowed when European issues were at stake. After the Constitution a Member State may distance itself not only from single issues under discussion but from European affairs altogether. It may later repent and appeal to article 57 to re-join the Union. Frontiers are thus rendered temporary. All European frontiers, old and new are rendered temporary. The external border is no longer fated to expand only, it may retreat, and the old and forgotten internal borders may be resurrected.

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Section I

The Text of the Clause.

1. Amendment Proposals by Members of the Convention

The question that comes to mind is why *only* in 2003? Why is there no secession clause prior to this date in the European treaties? And its answer is as interesting as it is elusive, as we will now discuss.

When the proposed text of the articles to be incorporated into the project of a Constitution for Europe was handed out to the over two hundred members (full and alternate) of the so-called *Convention for the future of Europe*[i], recipients were encouraged to submit critical comment under the form of amendment proposals. Later, the text they agreed to would serve as the Inter Governmental Conference (IGC) working base in order to achieve the Treaty Establishing a Constitution for Europe. This circle of debate, broadcast in real time through the press, purposefully invited to attend all meetings, was further made available on the Internet around the clock.

The object of this paper is to examine the circumstance under which, for the first time within a project that is over fifty years old, a clause regarding the issue of withdrawal made its appearance: **Article 46** (that during the course of the Convention was renumbered and became **Article I-59**) of the initial draft of the project of a Constitution for Europe stated:

PRAESIDIUM DRAFT **Article 59: Voluntary Withdrawal from the Union**
1. Any Member State may decide to withdraw from the European Union in accordance to its own constitutional requirements. 2. A Member State which decides to withdraw shall notify the Council of its intention. Once that notification has been given, the Union shall negotiate and conclude an agreement with that state, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. The agreement shall be concluded on behalf of the Union by the **Council, acting by a qualified majority**, after obtaining the **assent** of the **European Parliament**. The withdrawing State shall not participate in the Council's discussions or decisions concerning it.

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> 3. This Constitution shall cease to apply to the State in Question as from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2.

Amendment proposals submitted by the Members of the Convention were made public, and despite the failure of the first attempt to bring the Constitution into force, may still be retrieved[ii]: We have singled out ten of these contributions and examined their contents in order to describe first hand reactions to the formal appearance of a clause of this type in the context of the Constitution.

What exactly were members of the Convention asked to amend? It is obvious from their comments that they were delivered a written text on which their opinion should be given. The content of the text was certainly distinct from pre-existing EU Law[iii], in whose context no provision on withdrawal was included. Convention matter regarded the future, *post-Treaty of Nice* Europe. It was very clear that Members of the Convention were invited to submit critical comment on the draft proposal of a new international treaty, whose preliminary version included, when submitted for amendment (albeit under the form of a draft)[iv], a provision on withdrawal.

Reaction to the secession clause was of three types. Some members did not object and willed the text of draft article 59 to be approved unaltered (1.1), others suggested that the text of the draft article should be altered (1.2) and, not surprisingly, a large number held that the text of the article on secession should be deleted altogether (1.3 & 1.4) (see Table 1).

1.1 A secession clause is welcome

The mere *appearance* in the draft Treaty of a secession clause indicates that evidently some number of members to the Convention – enough to carry weight with the *Praesidium*[v] - were in favour of both concept and wording of proposed article 59.

This explicitly runs contrary the direction taken through the Amsterdam-Nice axis that sought to discourage even the event of suspension of a Member State's rights taking place. The Treaty of Nice expressly softened the suspension procedure

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introduced under articles 7 TEU and 309 TEC in 1997, in order to provide a new definition -potentially defaulting Member State- in addition to the established one of defaulting Member State (see Table II), thus construing an option to reinstate respect at State level for fundamental rights within a Member State before any definite antagonistic measures are taken by the Council.

Many thought that ultimately the Constitution might have provided for an expulsion mechanism, complementary to articles 7 TEU and 309 TEC. The latter establish sanctions for breach within national territory of status required to enter the Union: (freedom, democracy, respect for human rights, fundamental freedoms and the rule of law). Through the possibility to expel a member, muscle[vi] would have been conferred to current article 10 TEC that calls for loyal countenance from Member States *vis-à-vis* the Union (see Table III), and might have discouraged further exasperation of an à *la carte* Europe born of multiple and selective opt-outs.

The very wording of article 59, *voluntary* withdrawal, suggests that readers look for a compulsive provision elsewhere in the text, but under the current structure of the draft it would be pointless. Article 59 of the Constitution, being in fact the only provision regarding exit, shifts initiative on this matter exclusively in favour of the secessionist State, and leaves the Union defenceless against moody behaviour of one of its components. Given that we are now twenty-five in number this is, to say the least, surprising.

1.2 The Text of draft article 59 should be altered

The second position expressed by members of the Convention -agreement as to the presence of a clause on withdrawal subject to alteration of the text proposed- is consistent with general principles of international law governing treaties: article 54 of the 1969 Vienna Convention on the Law of Treaties[vii] encourages specific provisions on exit to be established in each covenant coupled with a subsidiary rule based on consent of all parties involved.

Consensus on the clause was declared possible as long as withdrawal did not take place at will, and preferably intention to withdraw should be notified to the European Council, prior to a subsequent negotiation by the Council of Ministers of a bilateral

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agreement with the Member State on behalf of the Union and under qualified majority. (see Table IV).

Possibility of withdrawal should be provided for in case of refusal to ratify a future revision of the treaty, partial withdrawal would not be admissible, and a mechanism of expulsion should also be provided for in the Constitution. Non-participation in the Council's decisions or discussion concerning the withdrawing (ex) Member State was generally sustained and some severe suggestions as to rules governing the procedure of re-joining the Union were presented (see table V).

1.3 The Text of draft article 59 should be deleted altogether with reference to the 1969 Vienna Convention

Explanations for the third position were not homogenous. The most frequent explanation given was the following: The Vienna Convention of the 23rd of May 1969 on the Law of (International) Treaties provides for this situation. It does so in a different manner and the Vienna solution is preferable, not so much for substantive reasons, but mainly because it provides a common answer applicable to all withdrawals from any international treaty.

Amendment proposals that followed this line of thinking failed, however to specify which article of the Vienna Convention they had in mind. Whether the intended reference was to Article **54 VC** (see Table VI) *(Termination or withdrawal from a treaty under its provisions or by consent of all the parties,)* in any event compatible with the Constitution Draft, or whether it was Article **56 VC (**see Table VII**)** they had in mind (*withdrawal from a Treaty containing no provision regarding termination, denunciation or withdrawal*), more appropriate for possible application to European law *prior* to the Constitution draft.

As we have mentioned, the wording of Article 54 VC seemingly encourages international treaties to specifically provide for rules on withdrawal, and, accordingly, the solution it offers is drawn up in subsidiary terms. If we actually applied this provision to the Constitution draft we would be led to literally apply proposed Article 59 of the Constitution, and no substantive amendment would take place.

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On the other hand, Article 56 VC explicitly confines its applicability to international treaties (old or new) that contain no provisions for withdrawal, thus rendering itself suitable for application exclusively to EU Law prior to the Constitution draft, and therefore not to specific provisions in the draft.

It therefore follows that in any case, both provisions of The Vienna Convention are unsuitable as a legal base for amendment of a Constitution draft that includes explicit provisions on withdrawal (see table below).

Treaty with No provision on withdrawal corresponds to: EU law *prior* to the Constitution draft TEC and TEU, Treaty of NICE version	**Treaty with Provision on withdrawal corresponds to:** EU law *after* Constitution draft
Only Article 56 of the 1969 Vienna Convention is applicable	Only Article 54 of the 1969 Vienna Convention is applicable
1. Not suitable as amendment justification for article in Constitution draft. 2. Doubts on whether European Court of Justice would have allowed straightforward subsidiary application of classical international law in absence of European Union law provisions.	1. No relevant alteration of article in Constitution draft. 2. Makes explicit reference to validity of terms of the particular treaty (in this case constitution draft)

Suggestions in favour of altogether removing the secession clause from the Constitution draft (with or without reference to the Vienna Convention) were evidently intended to encourage continuity of a peculiar yet popular interpretation of EU Law heritage -a Union not compatible with a secession clause. A further intention was this position should influence the nature, as well as the text, of the new Constitution.

Curiously enough, some members[viii] that describe the Union (old and new) as non-compatible with a secession clause, proceed to specify that on the grounds of furthering the will of sovereign States "no one questions their right to withdraw from the (*old or new*) Union".

Confusion as to the exact nature of the Union is patent. Either the Union is of a nature such that it is incompatible with a secession clause (and therefore the application of classical international law is here limited to Article 56 nº 1 VC, which regulates the status of a Treaty not subject to withdrawal), or the Union is an entity born of the will

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of sovereign States who consequently may withdraw at will in conformity to what is determined by section *b)* of Article 56 nº1VC.

More detail would have been welcome on this point, as opposed to the contradictory statements issued or the mere reminders that unspecified provisions of the 1969 Vienna Convention constituted sufficient basis for termination of membership.

1.4 The Text of draft article 59 should simply be deleted

A number of members (see Table I, column 2) simply stated that the nature of the Union was incompatible with an exit clause –a circumstance that rendered the appearance of such a provision inconsistent with this European project. The position here defended considered EU Law treaties to be *by nature* not subject to withdrawal. No explicit reference was made to principles governing international law even though the existence of similar treaties is acknowledged by the first phrase of Article 56 VC. Cancellation of the entire provision was recommended.

The theoretical grounds for such a choice are intimately linked to the concept of irreversible (LUCAS PIRES 1997) transfers of sovereignty[ix] from all Member States in favour of Communities and Union that ultimately represent a new legal order of international law, distinct from other international organisations. The exercise of competence at Union level is not justified on the basis of a mere process of delegation, competence given up, according to this position, has been reallocated on a permanent basis.

This is a credible explanation for the mind-set concept of the European outer perimeter as fated only to expand. Limits to this *inevitable* process might be geographically more comfortably justified than philosophically, and in fact for the time being, expansion to the East is not problematic in terms of public opinion. Other applicants such as Morocco, Turkey and Russia that are physical gateways to culturally different worlds will require further appeasement of the less accommodating current members. Moreover, the need to keep the European institutional framework governable reduces the concept of a Europe beyond present

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cultural boundaries to wishful thinking (the case of Morocco and eventually Turkey), in the light of the Institutions' present *status quo.*

Because of the secession clause, **New Frontiers for Europe are now, unexpectedly, the old and forgotten (territorial) borders between Member States of EU-Europe as well as what lies beyond the external perimeter of this complex organization**..

EU literature on the termination of membership recalls that the unlimited duration of the Treaties (except for that of the ECSC, established for a period of fifty years, and that is no longer in force) is a strong argument in favour of the one-way border (Jacqué 2001). Conversely authors that have addressed this issue (many have chosen to ignore it) acknowledge that there is no justifiable impediment to a negotiated withdrawal should there be consensus of all parties. This is not due to principles of international law, this is due to the inevitability of this outcome should this come to pass (however exceptional and improbable it may be). If this were the case, then the established outer perimeter of Europe might evidently retract.

But this is not what the Constitution envisages.

Unanimity in the Council is now confined to cases where a State *asks* to join in opposition to situations in which a member State *decides* to leave. A *voluntarist* idea behind membership is enhanced and increasingly generates consensus on related descriptions of sovereignty as *lent* rather than lost (JONES 2001 and VITORINO 2004)[x].

The very original assumption of otherwise authoritative doctrine (Jones 2001, p38) that already prior to the Constitution "the TEU (of 1993) *explicitly confirmed* the right of any Member State to withdraw from the Union" is tribute to an idiosyncratic interpretation of this *voluntarist* principle of membership, and clearly in detriment of any textual foundation in the three existing versions (Maastricht, Amsterdam or Nice) of the Treaty of the Union.

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Section II

European Legislator anticipates European Court.

Rejecting all opinion in favour of deleting the exit clause and conferring visible support to those who preferred the deliberate and explicit normalization of this specific procedure by way of the Constitution, the *Praesidium* upheld the proposed article 59 and fitted it into a document said to have been approved by consensus[xi].

Treaty that Establishes a Constitution for Europe **Article 59: Voluntary Withdrawal from the Union**
1.Any Member State may decide to withdraw from the European Union in accordance to its own constitutional requirements. 2.A Member State which decides to withdraw shall notify the European Council of its intention. Once that notification has been given, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. The agreement shall be concluded on behalf of the Union by the Council of Ministers, acting by a qualified majority, after obtaining consent of the European Parliament. The representative of the withdrawing State shall not participate in the Council of Minister's or European Council's discussions or decisions concerning it. 3.This Constitution shall cease to apply to the State in Question as from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, decides to extend this period. 4. If a State which has withdrawn from the Union, asks to re-join, its request shall be subject to the procedure referred to in Article 57.

2.1 Whose consensus on a secession clause?

On the consensus issue the *Praesidium* was probably right, I recall no governmental objection to the Constitution as a whole on the grounds that it included a clause on withdrawal.

It is likely that all governments involved considered the implications of such a clause adequately. Conversely, I am sure that many Europeans are not aware that such a

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clause is at their doorstep, but that is not the fault of the *Praesidium*, it is the fault of the Europeans.

2.2 No space for the European Court of Justice

I cannot help but wonder, at this point, what the outcome would have been had the Court of Justice been able to intervene before the legislator.

The Public is familiar with the role of the European Court in the construction of Europe. It is to the Court (coupled with a permissive attitude on the part of the 'core' Member States) that we owe the definition of the principles of prevalence of EU law over any national disposition, and the direct protection of European substantive rights in favour of or against national citizens before national Courts. It is also to this Court that we owe an enriched protection of fundamental rights within the European legal order[xii].

It might be said that up to the moment when the exit clause was actually drafted a large part of Europeans confided that member States would not withdraw from the Union. Legal silence (in the Treaties and from the ECJ) on the very existence of adequate formal procedures to follow, inhibited the Members *behaviourally*[xiii] and bound them to the judge-made and established the concept of new legal order of international law,[xiv] in benefit of which (said the Court) sovereign rights had been willingly and permanently limited.

Regarding the relationship between European law and public international law, we do not share the opinion that the ECJ would have been in favour of straightforward subsidiary application of classical international law in absence of provisions on withdrawal specific to EU Law. Although '*formalist international lawyers may argue that a Treaty will remain a Treaty*' (POIARES MADURO, 1998, p.8), the European Court of Justice, that has certainly relied on certain principles governing international law when defining EU law, has just as readily discarded others that it holds to be incompatible with the legal nature or the institutional structure of Europe. Among the principles discarded, some are established in the Vienna Convention. (see Table VIII).

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The historical explanation is that, on sovereignty, the Court had repeatedly been put one step ahead of the legislator, it was allowed to pre-set the pace of the intensity of integration because national judges and national citizens had turned first to the Court for answers. Judges and citizens sought answers on how to behave consistently with the gaps in current EU legislation. They relied on a Court, with a '*certain idea of Europe*' to construe it in a manner convenient to European goals, if necessary, over and above (presumably) expendable national interests.

During the process associated with the Convention and *post –NICE* enlarged Europe, with detectably different intent, Governments and citizens sought primarily that new legislation would be construed in a manner as convenient as possible, to maximise national goals[xv] held compatible with a more general European interest. To obtain these results you do not turn to the judges in Luxembourg, you rely openly on nationally appointed expert members.

The Laeken Declaration has purposefully *hinted* that in order to adjust the Union to new challenges, the solution may be not only to entrust the Union with further encumbrances (i.e. more powers, more competence) but also to reassign tasks - currently dealt with at Union level- to the Member States.

Overbearing needs of new institutional design arising from enlargement are the formal justification for change. The uncontested political statement (referred to above) along with the comparison of the secession clause in the new Constitutional rules for Europe are a serious symptoms that the traditional trend of permanent, irreversible and ever-growing allocation of national competence in favour of a supranational body only, might have been shed.

Prudence suggests caution.

For the time being, results of this *volte-face* are that once-allocated national sovereignty is now <u>*described*</u> as recoverable. Formally, this is the ultimate significance of codifying secession.

Section III

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Conclusions

3. Checks and balances between the Union and the Member States.

Who does the power game favour? Which European component disposes of more remedies against external antagonistic behaviour?

3.1 When the Member States are not loyal to the Citizens of the UNION

We are heirs to an institutional system of Europe that demands that Members observe democratic principles within their national territory (current Article 6/1 TEU) prior to entry (where unanimity is necessary). If this behaviour is not maintained during the course of European partnership, citizens linked to that territory are protected, given that Member's rights may be suspended while its obligations towards the Union remain unaltered, but expulsion of a persistently defaulting Member State is currently not provided for.

Moreover, directly through decisions of national judges or ultimately by the ECJ, citizens of the Union may be awarded monetary damages from Member States if rights stemming from the treaties or EU heritage are not adequately protected and enforced by the latter within national territory.

3.2 When the Member States are not loyal to the UNION

If a Member State is not loyal to the Union (current Article 10 TEC) there is no suspension of its' rights but it may be brought before the ECJ under infringement charges, by the Commission (226 TEC) or by one of its peers (227 TEC) and be subject to monetary sanctions (228 TEC).

However, in cases where a Member State repeatedly resorts to 'opt-out' solutions in the event of conflict over multiple issues, or where (after the Constitution) causing political havoc, it repeatedly threatens or enacts secession (only qualified majority is necessary), not only is no sanction prescribed, but a '*prodigal son*' approach will be made available under future article 57. Silence of the Constitution on defensive

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measures regarding this type of behaviour opens up fertile grounds to the ECJ who might thus return to smoothing out the power issue.

3.3 *When the UNION is not loyal to the Member States*

Although *legislative greed* on the part of the institutions -beach of the principle of subsidiarity (current Article 5 TEC)- is amenable to judicial review before the ECJ, a decade of *de facto* impunity reigns over alleged breaches of this 1993 rule.
Institutional breaching of the Treaty (230 TEC) and unlawful inertia (232) are struck down by the ECJ and non-contractual liability of institutions and respective servants (288 TEC) is provided for.

3.4 Imminent rearrangement of competence partition between the Union and its Member States?

That an imminent rearrangement of competence partition between the Union and its Member States may take place is no novelty. In the past this would have meant that the Union was to be further encumbered with tasks. **Many believe that in the near future some of the Union's current tasks are to be reclaimed by the Member States**.

Is *sovereignty recoverable* an explicit challenge to the established principle that the lowest form of EU law takes precedence over the highest form of national law?

The Constitution codifies rules. Among them are the rule of primacy already established in EU jurisprudence, and an exit clause, to date unfamiliar to the EU system. Massive enlargement has made the legislator wary. Economic theory holds that when *club models* (here the Union) grow beyond their optimum (CORNES and SANDLER 1989), we may expect to watch some members depart. Codification of an enlarged Europe adopted an 'all cards on the table' approach. Those who do not agree to submission of national rules, to exclusive jurisdiction of the ECJ or to frequent implementation of decisions they do not agree with–as is the case under qualified majority voting- are free to leave.

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No one will be forcefully excluded from the European project, but it is clear that consensus between the majority and an isolated contestant will not be sought for with the intensity known to negotiation under *pre-constitutional* rules.

European bliss has met with its reverse gear. Frontiers are thus rendered temporary, All European frontiers, old and new are rendered temporary. The external border is no longer fated to expand only, it may retreat, and the old and forgotten internal borders may be resurrected.

Bibliography

BEAUMONT and WEATHERILL, 1999, *EU Law. The essential guide to the legal workings of the European Union*, Penguin

CORNES and SANDLER, 1989, *The theory of externalities, public goods and club goods*, Cambridge University Press.

DAUVERGNE, 2004, *L'Europe en Otage? Histoire secrète de la Convention*, Saint Simon, France

DELORS, 2004, (Preface of) *L'Europe en Otage? Histoire secrète de la Convention*, Saint Simon, France

CONFORTI, 1987, *Diritto Internazionale*, Scientifica, Napoli

JACQUÉ, 2001, *Droit Institutionnel de L'Union Europeénne*, Cours, Dalloz, France.

JONES, 2001, *The Politics and Economics of the European Union, an introductory text*, Edward Elgar, London.

LUCAS PIRES, 1997, *Introdução ao Direito Constitucional Europeu*, Almedina, Coimbra

LANGRISH, 1998, *The Treaty of Amsterdam, Selected Highlights*, 23 EL Review, 3.

MOTA de CAMPOS, (coord)1999, *Organizações Internacionais*, Gulbenkian

POIARES MADURO, 1998, *We. the court. The European Court of Justice and the European Economic Constitution*, Hart

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VITORINO, 2004, *A Constituição Europeia, que Novas Perspectivas para a UE?*, www.cijdelors.pt/newsletters/constituicao/vitorino.pdf.

ZARKA, 2002, *L'éssentiel des institutions de l'Union Européenne*, Gualino, France, 5eme edition.

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[i] The Convention lasted from 28 February 2002 until 10 July 2003, the *Praesidium* of this Convention distributed an initial draft Constitution text to members appointed to the Convention in order to obtain amendments, producing thus a second draft Constitution project. Subsequently an Intergovernmental Conference (IGC) started on 4 October 2003, using the second text as working base, and produced in turn a draft Treaty establishing a Constitution for Europe. No consensus was reached on a final version by participants in the European Summit of 12 and 13 December 2003. For details see http://european.convention.eu.int.

[ii] http://european.convention.eu.int/amendemTrait.asp?lang=EN.

[iii] "Pour la (…) Convention (…)les traités existants ne constituaient pour elle qu'un point de départ et son mandat lui ouvrai l'ensemble du champ de la construction européenne." DELORS, 2004 (preface of) *L'Europe en Otage?* P.13.

[iv] GISCARD d'ESTAING, quoted by DAUVERGNE In *L'Europe en Otage*? P.165 "C'est la Convention, pas le Praesidium, qui rédige (le traité). Mais c'est le Praesidium qui fournit la base du travail, sans quoi ce serait impossible."

[v] The *Praesidium* that chaired the Convention counted **12 Members**. **2 representatives from National Parliaments** (Gisela Stuart .UK / John Bruton IRL); **2 representatives from the EP** (Inigo Mendez de Vigo SP/ Klaus Hansch GER); **3 representatives from Governments holding the presidency of the Union** (Ana Palacio SP/ Hening Christophersen DK/ Giorgios Katiforis GR); **2 representatives from the Commission** (Michel Barnier FR/ Antonio Vitorino PT) and last but not least the **triumvirate** Valéry Giscard d'Estaing FR/ Giuliano Amato IT/ Jean-Luc Dehaene BE) and one guest Alojz Peterle SLO.

[vi] The issue of reversibility of EU membership has been raised concerning the trade-off between current article 5 TEC, which establishes the principle of subsidiarity and current article 10 TEC in the case of unwillingness on the part of a Member State, to comply with EU democratic standards, where European rules are found to be less intense than those enshrined in national law. See S.LANGRISH, 1998, *The Treaty of Amsterdam, Selected Highlights*, 23 EL Review, 3.

[vii] Text of the Vienna Convention is available http:/www.un.org/law/ilc/texts/treaties.htm.

[viii] Mr Ernâni Lopes, Mr. Manuel Lobo Antunes, Mr. Santer, Mr. Fayot.

[ix] Original words "apropriação progressiva e sem retorno pelas instituições comunitárias" Francisco Lucas Pires, 1997, *Introdução ao Direito Constitucional Europeu*, Almedina, p.64.

[x] JONES, 2001, *The Politics and Economics of the European Union*, (page 38) More recently, during a conference in Lisbon, *A Constituição Europeia: que novas perspectivas para a UE?* , 5th of April 2004, Mr. Antonio Vitorino, Commissioner for Justice and Home Affairs, stated "*É um nível de*

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maturidade da União ao qual já não convence (nem mete medo) a perda de soberania". Transcript of the speech is available www.cijdelors.pt/newsletters/constituicao/vitorino.pdf.

[xi] See an interesting definition of the concept as stated by GISCARD "Un consensus, cela se constate." And Jean Luc DEHAENE "Le jour ou vous définissez ce qu'est un consensus, vous n'en aurez plus jamais, c'est quelque chose d'indéfini, et qui n'est surtout pas mathématique" both quoted by DAUVERGNE in *L'Europe en Otage?* p. 231 and p.256. "

[xii] Illustrative of the ECJ's role: **Case 6/64** Costa vs. ENEL; **Case 11/70** Internationalehandelsgesellschaft; **Case 48/71** Commission vs. Italy; **Case107/77** Simmenthal; and Case **C-213/89** Factortame. (www.curia.eu.int).

[xiii] On this point (JONES 2001, p. 38) states that the principle of primacy is ultimately based on the willingness of Parliament to accept it, and further expresses the opinion that only as long as the issue of withdrawal is not on the political agenda of Member States, is lent sovereignty as good as lost.

[xiv] **Case 26/62** Van Gend en Loos and ECJ Opinion **1/91** (www.curia.eu.int).

[xv] It is not by chance that non - negotiable objections to the Constitution regarded **weighted** voting in the Council of Ministers. On this issue we have a recent statement from Commissioner VITORINO. Transcript retrievable at www.cijdelors.pt/newsletters/constituicao/vitorino.pdf .

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TABLE I

Proposed Article 59 to be **Deleted**	
With reference to 1969 Vienna Convention	**Without reference to 1969 Vienna Convention**
Ernâni Lopes, Manuel Lobo Antunes (Portuguese Goverment);	G.M. de Vries, T.J.ªM.de Bruijn (Dutch Government);
Farnleitener;	Joschka Fischer
Kimmo Kiljunen, Matti Vanhannen;;	Anne van Lancker
Teija Tiilikainen, Peltomaki, Korhonen	Brok, Santer, Stylandis, Szazer, Van den Linden, Alonso, Basile, Cisneros, Cushnahan, Demetriou, Dolores, Frendo, Giannakou, Korhonen, Kroupa, Maij-Weggen, Mladenov, Piks, Rack, Van Dijk, Zieleniec, Zile
Santer, Fayot	Jurgen Meyer (German Bundestag)

N.B Horizontal divisions correspond to separate amendment proposals that were submitted individually or collectively.

SOURCE:

http://european.convention.eu.int/amendem/Trait.asp?lang=EN

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TABLE II

SUSPENSION OF MEMBER STATE'S RIGHTS
AMSTERDAM-NICE COMPARISON

Possibility of suspension of Member State's rights in case of breach of Article 6(1) TEU	
Under initial version introduced by Treaty of **Amsterdam**	Under consolidated version as amended by Treaty of **Nice**
Art 7 TEU On a reasoned proposal (…) the Council (…) **may determine that there is a serious and persistent breach** by a Member State of principles mentioned in Article 6(1). Before making such a determination, the Council shall hear the Member State in question.	Art 7 TEU On a reasoned proposal (…) the Council (…) **may determine that there is a <u>clear risk</u> of serious breach** by a Member State of principles mentioned in Article 6(1). Before making such a determination, the Council shall hear the Member State in question.

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TABLE III

LOYALTY MEMBER STATE vis à vis UNION

Article 10 TEC
Member States shall take all appropriate measures whether general or particular, to ensure fulfilment of the obligations arising out of this treaty or resulting from action taken by the institutions of the Community. They **shall abstain from any measure which could jeopardise** the attainment of the objectives of this Treaty.

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TABLE IV

How should the Council of Ministers vote the secession bilateral agreement?		
Qualified Majority	**2/3 Majority**	**Unanimity**
Villepin	David Heathcoat-Amory, Bonde, Seppanen, Zahadril	Kimmo Kiljunen, Matti Vanhanen
(EPP Convention Group) Brock, Sjajer, Akam, Van den Linden, Lamassoure, Brejc, Demetriou,, Fiegel, Liepina, Santer, Kelam, Kroupa, Tajani, Almeida Garret, Altmaier, Kauppi, Lennmarker, Maij-Weggen, Rack, Vilen		Teija Tiilikainen, Peltomaki, Korhonen
Louis Michel, Karel de Gucht, Elio di Rupo, Anne van lancker, Pierre Chevalier, Marie Nagy, Patrick Dewael		Roche
Soren Lekberg, Goran Lenmarker		
Badinter		
Vastagh		
Kirkhope, Lord Stockton		

N.B Horizontal divisions correspond to separate amendment proposals that were submitted individually or collectively.

SOURCE:

http://european.convention.eu.int/amendem/Trait.asp?lang=EN

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TABLE V

AMENDMENDMENTS PROPOSED TO ALTER THE TEXT OF THE CLAUSE

Withdrawal possible if refusal of ratification in future revisions	Villepin, Louis Michel, Elio di Rupo, Anne van Lancker, Pierre Chevalier, Marie Nagy
Expulsion allowed/ No partial withdrawal allowed	EPP Convention Group (see Table IV)
No participation in negotiation of bilateral agreement	Heathcoat-Amory, Bonde, Seppanen, Zahadril all held that there should be participation in the discussion of the terms of the agreement but non-participation in the final vote.
Rejoining the Union, penalties	Mr Vastagh (proposed that this should only take place **5 years** after entry into force of withdrawal), and Mr Alain Lamassoure suggested that re-entry should be forbidden to a secessionist Member State up to **20 years** after entry into force of withdrawa.l

SOURCE:

http://european.convention.eu.int/amendem/Trait.asp?lang=EN

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TABLE VI

1969 Vienna Convention on the Law of Treaties **Article 54** **Termination or withdrawal from a treaty under its provisions or by consent of the parties**
The termination of a Treaty or the withdrawal of a party may take place (a) in conformity with the provisions of the treaty (b) at any time by consent of all the parties after consultation with the other contracting States.

TABLE VII

1969 Vienna Convention on the Law of Treaties **Article 56** **Denunciation or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal**
1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless a) it is established that parties intended to admit the possibility of denunciation or withdrawal or b): a right of denunciation or withdrawal may be implied by the nature of the treaty. 2. A party shall not give less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

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TABLE VIII

Relationship between EU Law and International Law, According to the Jurisprudence of the ECJ	
Principles of General International Law and/or specifically prescribed in the 1969 Vienna Convention considered **compatible** with EU Law	Principles of General International Law and/or specifically prescribed in the 1969 Vienna Convention yet considered **inadequate** for application to EU Law
1. Case 41/74 Van Duyn, Access to national territory by national citizen. 2. Principle of Territoriality 3. Principle of *effet utile* *4. Pacta sunt servanda*	5. Joint cases 90 and 91/63 Commission vs. Luxembourg and Belgium. Article 60 VC: Decision 13 November 1964: substantive breach of multilateral treaty by one party allows others to terminate or suspend application of treaty, 6. Case 52/75 principle of Reciprocity 7. Joint cases 63 and 64/79 Estoppel

SOURCE:

ZARKA, 2002, *L'éssentiel des institutions de l'Union Européenne*, 5 eme édition, p. 112-113.

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