

**THE EUROPEAN CONSTITUTION
IN THE MAKING**

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**CENTRE FOR EUROPEAN POLICY STUDIES
BRUSSELS**

*Dedicated to the memory
of my father, Veikko Kiljunen*

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Foreword

“Congratulations, you have just given birth to a new superstate! You got the Constitution you wanted, and now the EU looks like a single state. All we need now is a single people.” An embittered, passionate outburst at the solemn concluding session of the Convention from the staunch Danish eurosceptic Jens-Peter Bonde. This discordant note in the proceedings was followed by an unbroken silence in the packed hall. A lone pair of hands came together in applause: those of Finnish MEP, alternate member Esko Seppänen’s.

Was that the result? Have we been in a process to produce a constitution for a federal state? To top it off, the draft Constitution was approved at an undemocratic Convention? Wise enough, some of the Convention members refused to sign the covering letter to the Convention’s proposal. “Convention fizzles out in Brussels”, ran the headlines in the press. Is this really how badly we did? Sixteen months of work and nothing to show for it but general confusion? Did the European Convention really fail?

Things did not look much better at the intergovernmental conference before Christmas when the Convention’s draft Constitution was taken up. Chaired by Italian Prime Minister Silvio Berlusconi, the summit was unable to agree on the Constitution. Was the Convention’s proposal that poor?

The Convention had a bad press in many countries from day one: the large member states were railroading the small ones, Chairman Valéry Giscard d’Estaing was acting autocratically, the Praesidium and Secretariat were running things as they pleased, the Convention had exceeded its mandate, its preparations were confusing and secretive, etc., etc.

No wonder, then, that there is a quite negative attitude in many member states to the EU Constitution. Did the Convention project the right image? Is the EU conspiring to hoodwink the member states with its Constitution? What is the Union becoming: a federal state or a superpower? Was it a mistake to entrust reform of the EU to something like the Convention in the first place? Will a referendum need to be held on the Constitution?

Citizens need information. Both decision-makers and the media are responsible for giving them that information. We, the Convention members, carry a particular responsibility in illuminating the process and the end result that will lead to a new EU Constitution. This, then, is the reason for writing this book.

A lot will be written about the Convention and the EU Constitution. Convention members from various member states will assess their work and

its results. There were many of us, and each has a tale to tell. There were different national, political and institutional backgrounds. That is why it is useful for me as a Convention member from Finland to contribute to this European debate.

This book is a document about the drafting of the EU Constitution, but it is also more than that. It is a background work and textbook on the history of integration and the institutional development of the Union. There are definitions on 'EU-speak', a species of jargon guaranteed to overwhelm even the most dedicated EU enthusiast. There are also explanatory figures along the way.

The book is mostly based on observations and notes made by myself over the 16-month duration of the Convention. The main source is the *Draft Treaty establishing a Constitution for Europe* produced by the Convention. All other sources are listed in the bibliography.

This book was first written in Finnish, *EU:n perustuslaki – Suomalaisena konventissa*, and was published by the Ministry of Foreign Affairs in February 2004. The English version in hand is somewhat modified in comparison to the Finnish one, in particular, by leaving out details related to Finland. Nevertheless, the background of the author coming from a small, 'peripheral' European country is still well-expressed in the book.

The beginning of the first draft of this manuscript was lost to thieves who stole my computer. Presumably they have found the material useful. Now, at last, the book in its entirety is available to everyone. Any errors are my responsibility.

Kimmo Kiljunen
Vantaa, 30 March 2004

A day will come when these two great groupings that face each other, the United States of America and the United States of Europe, will join hands across the sea.

Victor Hugo, 1849

If Europe were once united in the sharing of its common inheritance, there would be no limit to the happiness, to the prosperity and the glory which its three or four hundred million people would enjoy. [...] We must build a kind of United States of Europe.

Winston Churchill, 1946

1. What is the European Union?

Valéry Giscard d'Estaing is sitting opposite me in the Speaker's lounge of the Finnish Parliament. The Chairman of the European Convention is finally visiting Finland, the last country in a tour of the member states. We are having dinner and have progressed as far as dessert. Giscard asks nonchalantly: "What about the name of the new union? What would you think about the United States of Europe? There may be other options too, of course, such as United Europe or the European Community? We are creating something new, and that should be apparent in the name, too."

We were nonplussed. We, the Finnish members of the Convention, were not prepared to go that far. Why change the existing, established and unique name of the European Union? Why, in particular, create a misleading image with a name such as the United States of Europe, which would inevitably invite comparison with the United States of America? This, of course, was exactly the point.

Not that Giscard imagined Europe to be now where North America was two centuries ago. Or even that he wanted the European Union to become a federal state like the United States of America. But he did imagine that the European Convention in Brussels chaired by him would be of historical importance equal to the Constitutional Convention in Philadelphia in 1787, which, chaired by George Washington, drafted the Constitution of the United States of America. The Convention chaired by Valéry Giscard d'Estaing had met to draft a Constitution for the European Union.

Giscard had done his homework, in particular with regard to his historical models, as we Convention members could not fail to observe. It began with the name.

One month after Giscard's visit to Finland, in late October 2002, the Praesidium submitted the first outline draft for a European Constitutional Treaty to the Convention. Known as the 'skeleton', it opened with the very issue of the name of the union being founded. Sure enough, the United States of Europe was there.

1.1 The Philadelphia Convention

"If I am George Washington, then you, Giuliano [Amato], are James Madison. But who is Alexander Hamilton? Well, António [Vitorino], of course." Giscard was in full spate, making a toast to his own, to us, the members of his Convention.

And the secretary? The appointed secretary of the Philadelphia Convention was one Maj. William Jackson of Georgia, a hapless man who was too lazy and incompetent to keep a record of the proceedings. Posterity would know nothing of the drafting of the Constitution of the USA had it not been for the efforts of James Madison. However, not one of us lunching with Giscard was ready to equate our Secretary General, the redoubtable British diplomat John Kerr, with William Jackson, even though he himself offered the comparison. The Philadelphia Convention was present in spirit as we members of the Brussels Convention met.

On 25 May 1787, a select group of American politicians met in Philadelphia. They had been summoned by Congress to draft a founding treaty for the emerging cooperation between the fledgling states. A decade earlier, in 1776, the American Revolutionary War had ended with the Declaration of Independence of the United States. It was a treaty drawn up by 13 independent states forming a confederation.

Each state was to nominate representatives to the Philadelphia Convention. Twelve states appointed a total of 74 representatives. The tiny state of Rhode Island refused to send a representative, fearing that the Convention would lead to a centralisation of power – a federal state, as we would say now.

On its first day in session, the Philadelphia Convention came to order. A President had to be elected. The President of the host state, Pennsylvania, was the obvious candidate: Benjamin Franklin, 81 years of age, a naturalist, statesman and author, and also the oldest member of the Convention. Franklin declined, however, and at his suggestion the Commander-in-Chief of the Revolutionary War, George Washington of Virginia, was elected President. Ground rules were laid down. Each delegation was to have one vote. A majority of votes had to be present to constitute a quorum, and the Convention met behind closed doors.

The two Conventions differ in their ground rules, due to the two centuries separating them. We were not organised as national delegations with one vote each. Instead, each member of the Convention had a vote. Nor did we sequester ourselves, quite the opposite. The Brussels Convention was as public as could be. The media were in the corridors, and there was a room above our conference hall where the proceedings could be observed on a screen. Our footsteps were dogged by students, researchers, correspondents, civil servants, lobbyists and activists. Our speeches, written submissions, background reports of the Secretariat and proposals of the Praesidium were immediately available in electronic form on the internet for anyone to read. We were in real-time contact with the surrounding world.

With the Philadelphia Convention, the surrounding world had to wait for results. Information leaks were feared, and there was a strong desire to hammer everything out before publicising anything. In our case, even unfinished business was accessible for public debate should anyone be interested.

Although different in their procedures, the two Conventions had remarkable similarities in their content, logic and political confrontations. In both Philadelphia and Brussels, three major problems of balance were encountered in the division of power: a) equality of member states, b) the relationship between a member state and the Union and c) the balance between Union institutions. These three delicate balances had to be adjusted simultaneously.

Firstly, rules were laid down for the division of power. In this regard, the size of the actors involved determines their interests and status. Accordingly, in both Conventions a rift appeared between large and small states.

Secondly, rules were laid down for managing matters in common. It had to be decided what those matters were, and what the competences would be. Here, a rift appeared between centralised and decentralised governance.

Thirdly, rules were laid down for common institutions. The issue of balance between the institutions had to be resolved. A rift appeared between inter-governmental and Community institutions.

1.1.1 Federalists and anti-federalists

In both Philadelphia and Brussels, the very first argument the Convention ran into concerned its mandate: whether the aim should be to produce a single unified draft Constitution, or indeed, whether the Convention was even authorised to produce any such thing. In Philadelphia, there was fierce debate over whether the Convention should concentrate on revising the Articles of

Confederation, as per the instructions of Congress, or whether it should take the bold step of attempting to create a new national Constitution.

“Are we to be a nation?” asked the drafters of the Constitution of the USA ambitiously. Most of them responded: “Yes”. These people came to be known as Federalists. They wanted to turn the United States into a single state, a federal state. This would require common institutions whose power would derive from the people, not the member states. A union of peoples, not of states.

Many delegates were averse to the idea of centralised government and would have settled for a confederation. There were many types of anti-Federalists. Small states such as Rhode Island and New Hampshire feared that in a federal state they would have no influence at all in internal matters. Some large states such as New York considered that they would wield greater external power as independent members of a confederation than by being subordinated to the common institutions of a federal state. The New York delegation, with the exception of Alexander Hamilton, stormed out of the Convention and left Philadelphia, berating the way in which the Convention was conducted.

How about equal power in common institutions? Equality of citizens or of member states? One of the large states, Virginia, opened the debate with a proposal drafted by James Madison. Its aim was a new Constitution and a strong central government. Its competence would derive from population. The legislative body, Congress, would be elected by direct popular vote. This was a policy statement by the large states. A counter-proposal was not long in coming. Drafted in the name of New Jersey, it was supported by many small states such as Maryland and New Hampshire, and by the anti-Federalists. This approach opposed a strong central government and suggested that members of Congress should be nominated by the parliaments of the member states and that in decision-making each state should have one vote.

The dispute seemed impossible to resolve, and the Philadelphia Convention was in danger of collapsing. A compromise had to be found, a way of creating a federation so that the large states would not trample over the small ones, yet so that the basic principle of democracy – one man, one vote – would be upheld.

A compromise was found, presented by Connecticut. Congress would consist of two chambers, one representing citizens and the other the member states. The House of Representatives enshrines the equality of citizens and the Senate that of states. Both chambers must approve legislation in order for it to become law. The small states were so adamant about safeguarding their position that they had an article added to the Constitution stating that

changes in the composition of the Senate could only be enacted by unanimous decision of all the states. This is the only clause in the entire Constitution of the USA requiring a unanimous decision.

What emerged in Philadelphia was a Constitution for a federal state, the first of its kind in the world. The mandate of the Convention was to improve the Articles of Federation, yet instead it created a Constitution. The Federalists triumphed over the anti-Federalists. So where was the difference?

The preamble to the Constitution of the USA envisions “a more perfect Union”. How is a federation better in this respect than the confederation that preceded it?

1.1.2 Confederation or federation?

In a confederation, member states retain both internal and external sovereignty. The member states are independent sovereign states. This means that internally a state has the exclusive right to wield public authority, including coercion, within its territory. External sovereignty involves the inviolability of territory, independence and equality among nations of the world in the international context. A confederation is a union of sovereign states. It is not a state in itself.

In a federal state, the member states forfeit their sovereignty to the federation, which is based on the sovereignty of the people, not of the member states. This is no longer a union of states. The very first words of the Constitution of the USA demonstrate this: “We, the people of the United states...” The union consists of several states and one people. The result is a federation, a sovereign state.

The legal basis of a confederation is a treaty between states, a treaty under international law. It does not supersede the constitutions of the member states, and changing it requires the approval of each member, a unanimous decision. Being a member of the confederation or seceding from it rests with the sole discretion of the member states.

In a federation, by comparison, the legal basis is a Constitution. It is the highest regulation in the legislative hierarchy of the federation and the foundation of its sovereignty. Changing the Constitution is usually subject to a majority stricter than normal, but does not require a unanimous decision. In the United States, passing a Constitutional amendment requires three-fourths of the states’ votes. States do not have the right to secede from the federation.

In forming a confederation, the states commit themselves to close cooperation, setting up common institutions for specific purposes. The confederation has no sovereignty or identity of its own. Its functioning is

dependent on cooperation between the governments of its member states. A confederation has no independent executive power, nor does it pass legislation or wield judicial authority. Its authority derives from that of the member states, which are also responsible for executing decisions. The confederation has no right of taxation and no citizens of its own. Its decisions are not binding upon member states that disagree with those decisions. The confederation's position in the international system is as strong as the level of cooperation the member states can agree upon.

A federation is something quite different, as Table 1 shows. Internally, power is shared between the federation and the states, and there is a system in place for resolving disputes of authority. The Constitution of the USA aimed at a literal application of Montesquieu's separation of powers. The legislative, executive and judicial branches of government were kept apart. The aim was to prevent any one branch from gaining too much power and to have one branch control another. Externally, the federation is a single entity. It forms a nation with which its citizens can identify. Internationally, the federation is just as strong as its resources enable it to be as a sovereign actor.

Table 1. Differences between a confederation and a federation

	Confederation	Federation
Definition	Union between states	State in the form of a federation
Sovereignty	Member states	Federal state
Legitimacy	Union of states	Union of peoples
Legal basis	Treaty	Constitution
Competence	Member states	Federal state
Continuity	Secession possible	Permanent
Decision-making	Intergovernmental	Federal
Decision basis	Unanimity	Majority
Supreme legislation	Member states	Federal
Identification	Member state	Federation as nation
Citizenship	National	Federal

The Philadelphia Convention held its final session on 17 September 1787. Were the majority of Convention delegates prepared to sign the compromise proposal drafted by the Federalists, founding a federal state in North America? The question was still open. President George Washington called for yet another reading of the entire text. Then Benjamin Franklin spoke in what was to be his final act as a statesman:

Mr President – I confess that there are several parts of this constitution which I do not approve, but I am not sure I shall never approve them: For having lived long, I have experienced many instances of being obliged by better information, or fuller consideration, to change opinions even on important subjects, which I once thought right, but found to be otherwise. It is therefore that the older I grow, the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others. [...] In these sentiments, Sir, I agree to this Constitution with all its faults. (quoted in Bernstein, 1987, p. 184)

Benjamin Franklin's speech resolved the issue. Of the delegates present, 39 were willing to sign the Constitution. Three delegates protested and refused to sign. But the majority concurred.

The Constitution then had to be ratified by the individual states. According to the Articles of Confederation, each state had to approve any changes to the Articles of Confederation in order for such changes to take effect. But it was now a federal Constitution that was being forged, and it was deemed undesirable that reluctant states should pose an obstacle. For this purpose, the Constitution included an article whereby it would come into force when nine states had ratified it. On the other hand, it was understood that if even only one of the four large states – Virginia, New York, Pennsylvania or Massachusetts – refused to ratify, the process would grind to a halt.

A fervent campaign began, as each state was to hold an election for delegates to approve the new Constitution. The Federalists were hard pushed to justify the need for a new federation. The members of the Philadelphia Convention were no doubt the best proponents of the novel proposal. The Federalists were wealthier, professional and represented the cities and the intelligentsia. The anti-Federalists, by comparison, represented farmers and frontiersmen. They had less financial and information resources for campaigning, and they were spread out along the fringes of the states.

The anti-Federalists had many reasons to protest against the new Constitution. There was talk of a lack of democracy, considering that the Convention delegates had been appointed instead of being elected by popular vote. This was all the more suspect since the Convention had exceeded its authority by drafting a Constitution instead of revising the Articles of Confederation. It was unfair to put the states in a 'take it or leave it' position without allowing for any adjustment of the draft Constitution.

Besides, the Constitution never once referred to God. Instead, it was felt, the proposed President would become second to God, almost a monarch. The southern states feared that federal institutions would bolster the already strong economic position of the northern states. The North, by contrast,

considered it an unthinkable moral compromise to allow slavery in the South. In large states, the anti-Federalists considered that the small states had been pandered to too much, whereas small states feared being dictated to by the large states.

No doubt there was a multitude of reasons for opposing the new Constitution. However, state after state ratified, ultimately even New York, which remained hesitant to the last. Both Virginia and New York made their ratification conditional on the drafting of a Proposal of Rights comparable to the Constitution.

And what happened in the case of Rhode Island, the state that had never even sent a delegate to Philadelphia? Once all the other states in the confederation had accepted the federation, and its first President had been elected – George Washington, who had been the President of the Convention – Rhode Island was up against a wall. Congress had threatened to revoke Rhode Island's trade privileges, and it would have had to resign from the confederation that had now become a federation. There was nothing for it but to comply, and in 1790 the United States of America finally became a reality, all 13 member states of the confederacy having become its states.

1.2 The EU into a federal state?

The great auditorium of the Helsinki Workers' Hall is full. The media are in attendance. Commissioner Erkki Liikanen is speaking at an international seminar organised by the Social Democratic Party on the topic of Europe's Future. It is January 2002. One month earlier, the EU summit had decided to set up a Convention to draft proposals for revising the founding treaties of the EU. Public debate on where European integration was going had been sparked in Finland as elsewhere.

Commissioner Liikanen opened his speech by saying that living amidst history is insufferable because it is so difficult to see revolutions in progress. After the fact it is easy enough, since with enough perspective large things can be readily distinguished from small ones. So where are we going? Is the European Union turning into a federal state, or is a confederation good enough? Are you a Federalist or an anti-Federalist? This was the big question being asked both on Oulu Market Square and in the lecture halls at Oxford University.

Liikanen calls upon a parable from the Finnish Civil War cited by President Mauno Koivisto: A solitary man in a forest suddenly finds the business end of a rifle against his back and hears a voice asking: "Are you Red or White?" To which the man responded, "it would be much easier to answer if I knew which side the person asking is on".

Are you for a federation or a confederation? Commissioner Liikanen dexterously side-steps the issue. Not because he does not want to answer the question, but because it cannot be answered.

The ghost of the Philadelphia Convention plagues European debate. The development of the European Union is seen as paralleling that of the United States of America. As if European integration were just like what happened in North America, only 200 years later. We use the same concepts with no conception of history. In late 18th-century America, the Federalists and anti-Federalists were at loggerheads. Is this what we are seeing in Europe today? In North America, the choice had to be made between a confederation and a federation. Europe is now supposed to be at the same crossroads, but this is hardly the case.

At the Philadelphia Convention, the large and small states were in opposition. The same was true of the Brussels Convention. Is integration about cooperation between states or cooperation between peoples? Though centuries have passed, the question is the same. Are we to revise the founding treaties or draft a new Constitution? Should fundamental rights be entered in the Constitution? How should the Convention be set up, by popular vote or by appointment? What about ratification of the Constitution? Will the Constitution come into effect even if one member state (or more) refuses to ratify it? The same questions came up in both Philadelphia and Brussels. There are too many parallels, making it difficult to see clearly the historical difference between the two processes.

And there certainly are differences. When a federation was forged in North America, it was done by 13 British colonies that had just won their independence through war. They all overthrew their colonial overlord at the same time. Not one of them had a political or national history of its own. They were communities of immigrants, with a relatively weak economy and a combined population of only about four million. The birth of a nation was nowhere near at hand. The external threat remained present. A federation was a means of pooling resources and seeking safety in numbers.

What about Europe today? It could scarcely be more different. Each member state of the European Union has its own political and national history. They are genuinely independent nations seeking support in each other. The Union's 25 member states have a combined population of 450 million, and the Union is in very real terms a world power. The peoples of Europe differ in language and culture, and their unity springs from this diversity. Unlike North America, Europe is not pursuing integration in politically virgin soil against a specific external threat.

Speaking at the Library of Congress in Washington, D.C. in February 2003, Valéry Giscard d'Estaing discussed the differences between the Philadelphia

Convention and the Brussels Convention. To the essential question, “Are we to be a nation?”, the Founding Fathers answered “yes”. Giscard’s answer to the same question was “no.” That is politically and historically the appropriate answer. The Union being built in Europe is for a different purpose, of a different kind and of a different time – and more complex. “We are a Europe of many nations,” said Giscard d’Estaing.

1.2.1 The spectre of federalism

So why was the European Union created? What is fuelling European integration? Why are states willing to abandon existing political structures and seek new ones? What is the European Union?

Article 1 of the ‘skeleton’ Constitution drafted by the Praesidium of the Convention in October 2002 read:

A Union of European states which, while retaining their national identities, closely coordinate their policies at the European level, and administer certain common competences on a federal basis.

So the word “federal” is lurking in there after all. The dreaded “f-word”, as former British Prime Minister Margaret Thatcher said, refusing even to speak it out loud.

What is it about ‘federalism’ that is so frightening? The word itself derives from the Latin *foedus*, meaning a pact or treaty, but also camaraderie and friendship. The ambiguity of the original Latin persists in the word ‘federalism’, which is understood in different ways in different historical and political contexts. It involves the relationship between central government and member states.

For the British, federalism means centralisation of power. This approach reflects the Anglo-Saxon tradition, whose roots are to be found in the Constitutional debate in the United States, the Federalists wanting a strong central government and the anti-Federalists wanting decentralisation.

The European approach is very different. According to a dictionary, *federalism* is “a state system, a form of federal state or union whose component parts are as independent as possible”. Its opposite is *unitarism*, “a system of government where centralised government is emphasised”.

In Germany, Italy and Spain, ‘federalism’ means decentralisation of power. Federations aim above all to ensure as high a level of autonomy for their states as possible. Federalism translates into the aim of shifting power down to lower levels as much as possible and shifting it up to higher levels only when absolutely necessary.

No wonder, then, that trouble began brewing when the word ‘federalism’ was invoked in the Convention to describe the European Union. Different political traditions collided. I submitted in a plenary session that the term be removed altogether from Article 1. It is fatally ambiguous and linked to existing definitions of government. The European Union is a governance system that is something quite new. Let us therefore find new concepts.

British MEP Andrew Duff, Chairman of the Liberal Group in the Convention, was prepared to leave the word ‘federalism’ in the definition of the Union, since it simply reflected the existing situation, supranational common exercise of power. Teija Tiilikainen, representative of the Finnish Government, also did not mind the word, since it was used to refer to the decision-making process and not the Union itself. Romanian MP Adrian Severin asked how the ‘federal basis’ wording could be replaced so as to reflect the special nature of the Union’s decision-making. I proposed the terms ‘supranational’ or ‘Community method’.

The Union exercises *supranational* power within the framework of competences granted to it; this has a direct impact on the legislation of member states and is binding upon them regardless of what their national position on any given matter is. The *Community method*, by contrast, is a legislative process unique to the EU where the Commission has the exclusive right of initiative, and decisions must be taken by qualified majority in the Council of Ministers and by majority in the Parliament. The Community method enshrines the supranational exercise of power by the Union.

The ‘f-word’ was ultimately dropped from the Convention’s proposal. The critical sentence in Article 1 of the draft Constitution states:

The Union shall exercise in the Community way the competences they (the member states) confer on it.

1.3 The roots of integration

The idea of a European Federation was first floated by Winston Churchill in his famous speech in Zurich in 1946. He considered that the future and peace of Europe could only be ensured through a United States of Europe formed around the core of France and Germany, supported overseas by the United States of America and Britain. After the Second World War, solutions were sought to bridle the jingoism fuelled by nation states that had led Europe and the whole world into insane wars.

Universal peace could only be achieved by curbing the sovereignty of states and by developing supranational decision-making. *Perpetual Peace* by philosopher Immanuel Kant (1795) inspired thoughts of a federation of nations as a vehicle for ensuring permanent peace. The United Nations was

founded in 1945 and given supranational powers. Its Security Council can take decisions that are binding on member states if international peace and security are threatened.

In Europe, major political leaders met in The Hague in 1948 to discuss a system of supranational cooperation. The end result was the Council of Europe, which outlined European standards for democracy and human rights and created a monitoring system for them. Despite its Parliamentary Assembly, the European Council is an intergovernmental organ that makes recommendations to its member states; it does not make binding supranational decisions.

The founding treaty of the Council of Europe – like those of the European Union later – was written in a way that enabled all European countries to join. In what might be interpreted as a show of intellectual dependence, the European Union hijacked the symbols of the Council of Europe in 1986: the flag, consisting of twelve gold stars on a dark blue field, and the European hymn, the choral movement from the Ninth Symphony of Ludwig van Beethoven, the ‘Ode to Joy’. Our Convention enshrined these acquisitions in the Constitution.

The key to peace in Europe lay in the relationship between France and Germany. Since time immemorial the two nations had disputed the tiny region of Saar, known for its steel industry based on extensive coal reserves. The dispute was defused with the declaration by French Foreign Minister Robert Schuman of an insight originally had by a compatriot of his, Jean Monnet:

The French government proposes placing the whole of French and German production of coal and steel under a common high authority, in an organisation open to the participation other European countries [...] The first stage of the European Federation [...] World peace cannot be safeguarded without creative efforts commensurate with the dangers threatening it.

Schuman made this pronouncement at a press conference on 9 May 1950. Coincidentally, it was the anniversary of the end of the Second World War. Subsequently, May 9th has become established in all EU member states as Europe Day, and was also inscribed in the Constitution produced by our Convention. Furthermore, the Catholic Church is in the process of beatifying Robert Schuman, which means he will eventually become a saint. Such can be the fate of a visionary politician.

Konrad Adenauer, Chancellor of West Germany, expressed his satisfaction with Schuman’s proposal: “When the production of the Saar region is shared, one reason for the tension between France and Germany will have been eliminated.” This was a statement of fundamental importance. When two

former enemies took joint possession of the very fundamentals of warfare – coal and steel – ‘perpetual peace’ began to seem like more than just a pipe dream.

In 1951, the European Coal and Steel Community was founded. In addition to France and the Federal Republic of Germany, it was joined by the Netherlands, Belgium, Luxembourg and Italy. It was a truly supranational organisation. A common market for coal and steel was created, controlled by a *high authority* that subsequently evolved into the European Commission. The other institutions of the Coal and Steel Community were the Council, which represented the governments of the member states, the Parliamentary Assembly and the Court. All these are institutions that have been inherited by the European Union.

The functioning of the Coal and Steel Community was largely based on the independence of the supranational high authority. Its head office was placed in the tiny state of Luxembourg, where both French and German are official languages. Luxembourg was tipped to become the capital of united Europe, but it was much too small and cramped for such a role. When the EEC, the predecessor of the EU, was founded, its main institutions were placed in Brussels “for the time being”. They are still there.

Appetite grows in the eating. In 1952, the French government proposed a European Defence Community to complement the supranational Coal and Steel Community. These two Communities would have constituted an ambitious political entity in Europe. The proposal was rejected by the French National Assembly.

Smaller steps and practical measures had to be employed. Jean Monnet, the first President of the European Coal and Steel Community, began to promote a new integration venture. As a result, the founding treaties of the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) were signed in Rome in 1957. The former established the common market and the customs union, the latter was intended to control and develop the peaceful use of nuclear power. In the mind of Jean Monnet, Euratom was more important than the EEC in expediting European integration. However, nuclear energy did not in the end prove to be the motor that pulled Europe together; rather, the Economic Community did.

The Treaty of Rome incorporated the lofty aim “to lay the foundations of an ever closer union among the peoples of Europe”. Not only was the ultimate goal ambitious, the institutions founded were also designed for something larger than just coal and steel production or a customs union.

The Treaty of Rome was joined by the same six countries that constituted the Coal and Steel Community. Britain was a serious candidate for membership.

It was partly with the British in mind that the founding treaty of the EEC was made broader and its organisation less supranational than was the case with the Coal and Steel Community. Instead of a high authority, a Commission was founded, sharing its power with a Council of Ministers representing the member states.

A Parliamentary Assembly was also founded, consisting of representatives appointed by the parliaments of member states. This only had a consultative function. It was not until 1979, when the European Parliament was first elected by popular vote that its role began to increase in importance. In 1967, the secretariats and Councils of Ministers of the EEC, the Coal and Steel Community and Euratom were merged. The European Community replaced the term European Economic Community.

These were bold political steps. The customs union, the free trade area and their descendant, the common market, and above all the decision-making system governing it constituted a project far ahead of its time. The institutions of the European Community were given supranational powers that were exceptional, considering that at the time Europe still comprised fully independent nation states. The Commission did not turn out to be a European cabinet like the most purebred Federalists envisioned. Nevertheless the combined supranational powers of the Commission and the Council of Ministers were astounding in the context of the period.

1.4 The birth of the Union

From the very first, the structures of the European Community incorporated a creative tension between supranational and intergovernmental power. The Commission represented the Community as a whole; it had the exclusive right of initiative and executive power. National interests were not to be considered in the Commission's work. It was to represent European unity and supranational integration.

The Council of Ministers, by contrast, was an intergovernmental body. It was the ultimate decision-making authority, and it too, when taking decisions by qualified majority, represented supranational power. However, unanimity, i.e. traditional intergovernmental decision-making, and vested national interests were the norm. This was emphasised in the 'Luxembourg compromise' of 1966. There France was granted a concession in that, where vital national interests are at stake, a member state can always require a unanimous decision.

For France, integration was about creating a 'Europe of fatherlands': strong, sovereign nations that develop a cooperation structure and are willing to commit to supranational decision-making, but ultimately the governments

retain the final say-so. France came to see European integration as a substitute for its former imperial status, and that is why it has been adamant in safeguarding where the power ultimately lies.

A good example was the proposal made by President Charles de Gaulle of France, in 1960 to organise a summit meeting of 'the Six'. De Gaulle referred to this meeting as the 'High Political Council' and envisioned a Secretariat for it, to be located in Paris. Summit meetings were in fact held, but it was not until the initiative of President Valéry Giscard d'Estaing in 1974 that regular meetings at least twice a year came about.

These summit meetings came to be called the European Council. This was not an institution of the European Community or of the Union, even though the summit has always drawn the major policy lines and initiated the greatest steps in integration. The European Council has become a sort of collective Presidency. It is a stronghold of intergovernmental cooperation at the very core of the EU; its decisions are always and exclusively taken by consensus. Its decisions are not in fact Community decisions. Rather, they can be described as agreements between the member states that the Council of Ministers has to take into account in its work.

Compared with France, the rest of 'the Six' approach integration from a different angle. For them, the challenge has been to forge not so much a 'Europe of fatherlands' as a 'Europe of regions'. As the role of sovereign states weakens, both supranational European institutions and the local and regional level will increase in power. This goes back to the decentralising Federalist tradition.

When the European Community admitted new member states in 1973, France gained allies supporting the intergovernmental process, though for different reasons. Britain, Denmark and Ireland have each in turn expressed reservations about integration. They have considered that the surest way to arrest unwanted developments is through the intergovernmental process, where each country ultimately has the power of veto. For these member states, in talking of the 'Europe of fatherlands', the emphasis is on 'fatherland'.

The membership of the European Community has grown by stages. In the 1980s, Spain, Portugal and Greece joined – three relatively poor southern European countries that had only recently gained freedom from military government. In 1995, the non-aligned countries Finland, Sweden and Austria followed suit. Now, in 2004, the most extensive enlargement to date is upon us. No fewer than ten former Socialist countries of Eastern Europe are coming on board, with Romania and Bulgaria to join a few years later. The island states of Malta and Cyprus will also be joining, and Turkey is a

candidate for membership. The European Community is becoming a continent-wide union.

The Community's functional development is at least as important as its geographical scope. This is known as the deepening of integration, and it is apparent even in the changes of name. The European Community became the European Union in 1992 with a radical reform of the founding treaties in Maastricht. Before this, in 1986, a Single European Act had been approved to convert the Customs Union and Free Trade Area into a common internal market, guaranteeing the free movement of goods, services, capital and labour. The internal market was subjected to supranational control and to decision-making by qualified majority in enacting Community law binding upon the member states.

1.4.1 Beyond the common market

From the very first, the integration process was tied in with the economy. Common trade policy and the internal market project were boosted with the European Monetary System set up in 1979. In Maastricht, economic union and monetary union were enacted, and the move to a common currency was decided upon. The common currency became a reality with the introduction of the euro in twelve member states at the beginning of 2002. By the 1990s, however, integration was no longer seen as an exclusively economic process. Cooperation was envisioned in foreign policy, and internal and external security too.

After the Treaty of Maastricht was signed in 1992, the decision-making mechanism of the Union came to be described as 'three pillars'. The first pillar is the European Community, which covers economic integration. The decision-making process here follows the Community method, and it is supranational by nature. The Commission has the exclusive right of initiative in legislation, a process that is mainly conducted in the Council of Ministers by qualified majority decisions. The European Parliament can debate proposals before they are enacted. The second pillar covers the Common Foreign and Security Policy (CFSP), and the third pillar cooperation in internal and judicial matters. These involve intergovernmental cooperation, where competence rests with the member states, and decisions are taken unanimously in the Council of Ministers.

The Treaty of Maastricht created the concept of Union citizenship. This is automatically granted to each citizen of every member state to complement, not replace, their existing citizenship. The Treaty also included a declaration on the status of national parliaments in the Union's decision-making process. Highly ambitiously, the Treaty of Maastricht marks a new stage in "the process of creating an ever closer union among the peoples of Europe, in

which decisions are taken as closely as possible to the citizen”. A new stage it undoubtedly was, pompous rhetoric notwithstanding.

The solemn phrasing is intentionally ambiguous. “An ever closer union among the peoples of Europe” can, in terms of international law, mean either a confederation or a federation – or something completely different. The issue is unresolved. And what about “decisions are taken as closely as possible to the citizen”? Is this an expression of centralisation or decentralisation? The hard-core Federalists may interpret it to mean a direct connection between Union institutions and the local and regional level and, ultimately, citizens – bypassing the power of the member states. For their opponents, it means dissolution of the Union’s centralised power and its restoration to the member states.

The European Union is many things to many people. The Eurobarometer, an opinion poll conducted by the European Commission, shows how differently the various member states assess the content and importance of integration. For the Germans and the Danes, the EU is a peace project. For the Spanish and the Irish, it is a means of promoting economic welfare. For the French, it is a bastion of cultural diversity and plurality of languages. For the Finns, it safeguards freedom of movement and the common currency, the euro.

Citizens appraise the Union by the tangible things it does, which is a good thing. But the Union must also be appraised as a decision-making system, and here conventional concepts of political science are no longer helpful. The Union is very much a thing unto itself.

1.5 The European Union *sui generis*

In the early 1970s, a pitched battle was fought in Finland against joining the EEC free trade treaty. Of the Nordic countries, Denmark, Norway and Iceland were seriously considering joining the European Community. In Finland and Sweden, even signing a free trade agreement blew up a storm. “No to the EEC” was the slogan of everyone who considered himself to be progressive. The opposition was forcefully against centralised supranational power and against yielding to market forces.

Literature was circulated. The radical Belgian economist Ernest Mandel (1970) wrote the book *The EEC and the Competition: Europe vs. America*. The newest book of Norwegian Professor Johan Galtung (1972) was provocatively titled *The European Community – A Superpower in the Making*. And the Finns were not far behind. Jyrki Vesikansa (1973), a correspondent active in Brussels, boldly entitled his book *EEC – From Customs Union to the United States of Europe?* The European Community

had only just been born, and already it was being cast as a superpower. Finns would do well to steer clear of such matters.

Article 1 of Finland's Constitution Act from 1919 states: "Finland is a sovereign republic". The exact same wording was incorporated in Article 1 of Finland's new Constitution Act in 2000. Of course, the Constitution of an independent state declares that state to be sovereign.

In 1995, Finland joined the European Union and was thus willing to compromise its independence and sovereignty. The political leaders of the nation were convinced of the need to transfer part of the state's competence to a new union vested with supranational power. A consultative referendum was held to ensure that citizens were in agreement with this restriction of national sovereignty.

So what happened? What did Finland join? A superpower? When Parliament decided that Finland would apply to join the European Union, the overall understanding was that to be a union of independent states. This is still the official formula, even though a government report in autumn 2001 also stated that the EU was "fundamentally a close-knit community formed by independent member states and European peoples; it has supranational competence in certain matters." Parliament approved this wording as preparations were being made for revising the founding treaties of the Union and for convening the European Convention.

When the Convention completed its work, the establishment of the Union was enshrined in Article 1 of the draft Constitution:

Reflecting the will of the citizens and states of Europe to build a common future, this Constitution establishes the European Union, on which the member states confer competences to attain objectives they have in common.

In strict legal terms, there are grounds in international law for defining the EU as a union of independent member states. The competence of the Union is ultimately dependent on the will of the sovereign member states. But the Convention consciously amended Article 1 of the existing Treaty Establishing the European Union, which opens:

By this Treaty, the High Contracting Parties establish among themselves a European Union. (European Union, Consolidated Treaties, 2003)

In the Convention's proposal, the founding of the European Union derives not only from the will of the member states but also that of the peoples and citizens of Europe. Justification for the Union's power is thus sought beyond merely the competence of the member states. This approaches the origin of state competence, the sovereignty of people. Thus, the European Union is

something more than a union or association of states, all the more so considering that the competence conferred upon the EU restricts the power of the national governments.

But is the European Union a state? No, because it has no absolute sovereignty. Its sovereignty derives from that of its member states. Although the Union wields supranational power that is binding upon the member states, its base is crucial: “the member states confer competences...” If a day should come when the institutions of the EU can independently decide on their competences, the Union would then be transformed into an actor in its own right, a state.

1.5.1 Difficulties in definition

So what is the European Union, then? Surprisingly, it is easier to explain what it is not. The EU is not an international organisation of states, but neither is it a state. It is not a confederation, but neither is it a federation. According to Jacques Delors, the distinguished French former President of the Commission, it is “*un objet politique non-identifié*” (an unidentified political object). The European Union is the embodiment of a political process that has no model or precedent. We have great difficulties in defining it because we are bound up with conventional concepts of statehood. The Union requires new terms for supranational structures and duties.

Joschka Fischer, the German Foreign Minister, made an apology in his famous speech “From Confederacy to Federation – Thoughts on the finality of European integration” at Humboldt University in Berlin in 2000. The apology concerned the use of the term ‘federation’, which irritates the British in particular. The European Union is not and was not evolving under this concept, and yet he was forced to use it, since “to date, I have been unable to come up with another word”. As a member of the convention, Fischer had the opportunity to specify his thoughts and to find new words.

Fischer ended up talking about a federation, but he emphasised that the EU is not a federal state in the traditional sense. Nation states and their sovereignty are fundamental facts in Europe today. It would be madness to construct a community through suppression of the historical, linguistic and cultural plurality apparent in the spectrum of European nation states. Any cooperation cannot involve reining in the will of independent states; rather, it should be about opening up new ways of expressing that will. As Fischer (2000) said:

Only if European integration takes the nation states along with it into such a federation will such a project be workable. In other words: the existing concept of a federal European state replacing the old nation states and their democracies as the new sovereign

power shows itself to be an artificial construct which ignores the established realities in Europe. The completion of European integration can only be successfully conceived if it is done on the basis of a division of sovereignty between Europe and the nation state.

1.5.2 Shared sovereignty

Shared sovereignty is a new concept in politics. It is, however, already reality in the relationship between the Union and its member states. The latter have transferred part of their legislative, executive and judicial sovereignty to the supranational level. But the member states have only transferred part of their competence, and they retain the sovereign right to determine which part. Therefore, the European Union is not an independent sovereign actor, a state. It is *sui generis*, a thing unto itself.

No doubt it is unsatisfactory to describe the Union simply as *sui generis*. This is particularly unsatisfactory if we try to force reality to conform to old concepts. If we are willing to explore new definitions, then identifying the European Union as something unique offers a historical challenge. Our Convention was willing to take up that challenge.

It is surprising to note that this *sui generis* nature of the European integration, lying somewhere between statehood and an international organisation, was in fact its original purpose and, at each intervening stage, its achievement. Indeed, Robert Schuman defined the nature of the European Coal and Steel Community back in 1953 thus:

The *supranational* is situated equidistant from, on one hand, international individualism and, on the other hand, a federation of states subordinating themselves to a superstate. (quoted in Jääskinen, 2001, p. 143)

Schuman described the two poles as international individualism, which accepts limitations on national sovereignty only on a contractual, occasional and revocable basis, and federalism that surrenders sovereignty to a regional actor, a superstate that subsumes the independence of its member states. Schuman placed the unique new supranational actor, the European Coal and Steel Community, halfway between the two.

Responding to the same challenge, Valéry Giscard d'Estaing (2003, p. 8) defined the nature of the European Union thus:

Europe's answer to the question 'Federation or confederation?' is the acknowledgement that the Union is a unique construct which borrows from both models. The Convention will not change that answer: rather, it will formalise it in Constitutional provisions.

1.6 A supranational union

What should we conceptually call this unique actor, an entity never seen before? It already has a name: the European Union. But how to define it as an international actor? There are several alternatives, and every pundit worth his salt has had a go at finding the *mot juste*.

At the Convention, French Foreign Minister Dominique de Villepin relied on cool logic, stating that since the EU is more than a confederation and less than a federation, why should it not be both: a *federation of nation states*? French President Jacques Chirac aimed at much the same thing with his term *United Europe of states*. German Foreign Minister Joschka Fischer would settle for the more simple *European Federation*. British MEP Andrew Duff preferred semantic exactitude: *a federal union of states and peoples*. Finnish MEP Paavo Väyrynen offered a *decentralised federal state*.

But why tie the definition to any existing terminology of a sovereign state? The European Union expresses something supranational, if not indeed post-national, in its sharing of sovereignty. There is a clear risk in the use of the term ‘federation’. It undeniably divides competence between the central government and the member states, but it does not share sovereignty. In a federation, sovereignty rests with the federal state, not the member states.

Why not look to the original vision of Robert Schuman, the founder of European integration? He created new things and was willing to seek a definition free of established concepts. He called his creation “*le supranational*”. Since this supranational entity, being the European Union, is a union of sovereign member states, the term *federation* should be avoided. Why not consequently settle on the term *union*?

The European Union is thus a *supranational union* in terms of international law. This definition would also please more eurosceptic politicians such as Tony Blair, the British Prime Minister. In his famous speech in Warsaw, Blair (2000) outlined his vision of Europe:

Europe is a Europe of free, independent sovereign nations who choose to pool that sovereignty in pursuit of their own interests and the common good, achieving more together than we can achieve alone. Europe will remain a unique combination of the intergovernmental and the supranational. Such a Europe can be a superpower, but not a superstate.

The concept of supranational union defines the essential difference between the European Union and other international actors, be they states, federations, confederations or international organisations. Table 2 illustrates the tripartite division, using simple definitions.

Table 2. A supranational union defined

	Confederation	Supranational union	Federation
Definition	Union between states	Supranational union	State in the form of a federation
Sovereignty	Member states	Shared	Federal state
Legitimacy	Union of states	Union of states and peoples	Union of peoples
Legal basis	Treaty	Treaty on Constitution	Constitution
Competence	Member states	Conferred by member states	Federal state
Continuity	Secession possible in practice	Secession possible in principle	Permanent
Decision-making	Intergovernmental	Combination of supranational and intergovernmental	Federal
Decision basis	Unanimity	Qualified majority	Majority
Supreme legislation	Member states	Dual-tiered	Federal
Identification	Member state	Multi-level	Federation as nation
Citizenship	National	Both national and supranational	Federal

By definition, then, the supranational union resides somewhere between a confederation and a federation. It has supranational sovereign competences, albeit such competences are conferred upon it by the sovereign member states. The Union can only act within the bounds of the competences conferred upon it, and any competences not conferred upon it remain with the member states. Any competences delegated can be revoked. A member state is also entitled to revoke its commitment and secede from the Union. Supranational decision-making does not require unanimity; qualified majority is used, yet decisions so taken are binding upon the member states and directly affect their legal system.

A supranational union has independent legislative, executive and judicial power, and it is sovereign in using that power. The EU is the only entity in the world that has a Parliament which is elected through a supranational popular vote and which has legislative power. The Commission has the exclusive right of initiative in legislation, and it has independent executive

power. The legislative entities of the member states have conferred part of their competences on Union institutions, and the member states have committed to implement Union legislation. The EU can also grant Union citizenship to citizens of its member states.

To top it all off, the legal system created by the European Community is the only supranational legal system in existence. Its norms have a direct legal impact on the member states. Supranationality translates into the primacy of European justice, which in turn means that, in the case of conflict, national legislation must yield.

Does not all this make the Union *de facto* a federal state? No, for there are crucial quantitative and qualitative differences. The entire budget of the EU is about €100 billion, equivalent to 1.2% of the combined GDP of the member states. By comparison, the federal budget of the US is about €3,000 billion, equivalent to about 25% of the GDP of the country. In budgetary terms, the EU is not seriously a federal state.

The central administration of the EU – the Commission, the Council and the Parliament – employs some 30,000 people, similar to the amount employed by the administration of a medium-sized European city such as Helsinki. The EU civil service is pathetically small compared with the civil service of any major country. Accordingly, EU decisions are rarely implemented through Union institutions. The administrations of the member states are responsible for the implementation of EU directives and regulations in 90% of all cases.

That the EU is not a state is, however, due not to the relative size of its budget or administration, but to the nature of its competence. The Union only exercises sovereign power insofar as its member states have delegated such power to it. Its competences are based on a Constitution that is actually an international treaty in its legal nature. The Union's decision-making is a unique combination of the supranational and the intergovernmental. Ultimately, the Union's wielding of power defers to the 'Luxembourg compromise', whereby no member state can be forced to act against its own vital national interests.

European legislation takes precedence over the national legislation, but only in the areas where the EU has been given the competence to enact legislation. Even Union citizenship is designed to complement citizenship of a member state, not to replace it, as would be the case in a federal state. However, the most crucial reason for the Union not being a state is that it lacks a people; it is not a nation in itself. The Union consists of several peoples. There is no European *demos*, and the finest Convention on earth could not conjure forth any such thing.

1.7 Towards a post-nation-state era

No one people, no one language, no one culture or history, and yet here we are ready to implement a common supranational decision-making system. How did this come about? Why would any independent state be willing to compromise its sovereignty?

No one was forced into the European Union, but nor has any state joined it by accident or carelessly. It has been a deliberate process undertaken by responsible politicians, often supported by referenda.

In today's world, sovereignty is not what it used to be. National sovereignty is creaking at the seams. The world has changed, and is shrinking. We now talk about globalisation, meaning broader and closer contact between peoples all over the world. Many major social problems concerning Finns or indeed any Europeans today are matters that cannot be solved through national decision-making and reliance on the absolute sovereignty of the nation state. There are numerous examples we might name: the ecology, the financial system, world trade, organised crime, drug-trafficking and terrorism.

The world without frontiers created by globalisation has eroded the sovereignty that used to define a nation state. However, this does not mean that national sovereignty will disappear. There are undeniable grounds for not holding on to absolute nation state sovereignty. The challenge lies in how public authority can rise beyond the nation state and take charge of problems that are supranational by nature.

The challenge lies in the sharing of sovereignty, which is what supranational governance is all about. We are faced with a paradox: states are both losing sovereignty and expanding it at the same time. By giving up power, they gain more power. By giving up absolute power, states gain relative power.

The interest that states have in exerting influence forces them to transfer part of their power to supranational institutions and to that extent abandon the narrow pursuit of their interests as sovereign actors. Sacrificing part of an absolute, narrow sovereignty confers access to influence on extensive issues that affect the future of humanity as a whole. Thus, we are hereby creating a decision-making system that represents the new post-nation state world order. The supranational union is one of its first institutions.

The concept of a sovereign state was born in Europe. In Westphalia in 1648, rulers exhausted by prolonged religious conflicts signed a treaty ending the Thirty Years' War. Wishing to detach themselves from the Pope's authority, they decided to respect each other's exclusive right to wield power in their respective territories. Each undertook not to support people of his own faith in the territory of others. The ruler, as the sovereign representative of his nation, was granted sovereign power over his community. States undertook

to respect each other's independence and not to interfere in the internal matters of others. This was the ground rule by which the nation state world order has operated to this day.

Europe, the birthplace of the nation state, is again at the cutting edge. Now it is seeking forms for the supranational authority of the post-nation state era. Supranational decision-making is being first implemented on a regional basis, with Europe leading the way in this regard. The European Union is the most ambitious and bold step. It expresses the most extensive format of shared sovereignty.

There is no model for a supranational union. It is not a state. Nevertheless, its fundamental treaties or Constitution rely not only on the will of the member states, but also on the will of their citizens. For the first time, the sovereignty of a people supersedes that of a state. It extends to the supranational union, which in part supplants national power. The relationship between citizens and the state has thus been paralleled with a new and unique relationship, that between the individual and a community beyond the sovereign state.

1.7.1 Supranational democracy

But what will happen to democracy? So far, representative or direct democracy has only been implemented in sovereign states. The democratic process is, by definition, a feature of states. We know of no such thing as supranational democracy. How could we safeguard the legitimacy of power on the supranational level? Can democratic decision-making ever reach that level?

No, it cannot. For MEP Esko Seppänen (2002), the answer is unequivocal. His condemnation is absolute:

There is no such thing as supranational democracy. There is only national democracy. Since the EU – or Europe – is not a nation, it cannot be governed democratically. The EU is thus not democratic, and this supranational union should not be given power in the hopes that, once it has power, it will become democratic [...] Those who wish for democracy cannot support the future Constitution. It should be opposed because there is not and cannot be a supranational democracy in the EU.

An outside observer can draw justified conclusions on the state of democracy in the EU. A scholar can analyse the nature of the exercise of supranational power and voice doubts about whether democracy can reach that level or not. But Esko Seppänen is neither an outside observer nor an academic contemplator. He is a politician charged with the task of doing the possible. He was an alternate member of the European Convention, whose challenging

mission was to render the Union's decision-making process democratic. By denying the possibility of supranational democracy, Seppänen effectively denied his own influence. He rendered himself unnecessary.

It is true that there is no such concept as supranational democracy. But it is also true that there is a need for supranational decision-making. That is why the European Union was founded. The challenge is to ensure the legitimacy of its power. We therefore have to seek an answer to the question: How can democracy reach the supranational level? This is precisely the question to which the European Convention was founded to find an answer.

Valéry Giscard d'Estaing is right to draw parallels between the Brussels Convention and the Philadelphia Convention. Both had an historical opportunity. Both drafted a constitution. But their outcome cannot be the same. The times are different, and the historical mission is different. The Philadelphia Convention shaped the model for a federal state, which the rest of the world has followed.

The Brussels Convention would not go down in history if it simply copied the concept of the federal state. It will, however, be remembered if it fashions a model for supranational democracy. There are no precedents. Philadelphia is no help. At the Brussels Convention, we had to start from scratch.

The first germs and fledgling structures of the post-nation state world order are emerging. The EU, a supranational union, can point the way for the rest of the world. "In one's life one is, if one is lucky, permitted once or twice to touch the hem of history. Together we have that chance." Thus Giscard d'Estaing encouraged the members of his Convention to grasp the task at hand. Which we did.

Europe can, in its economic and political strength, be a superpower; a superpower, but not a superstate.

Tony Blair, 2000

The European Union can best succeed as a pragmatic alliance, not as a future superpower hard sold to the public as an object of affection.

Erkki Tuomioja, 1998

2. The Brussels Convention

February 28th, 2002 was the day. A week earlier, I had received a letter on parchment paper that began: “You have been appointed to participate in the Convention on the Future of the European Union, convened by the European Council in Laeken last December. I warmly congratulate you.” And the letter ended: “I am looking forward to meet you on February 28, and I commit myself together with you to undertake the ambitious task for Europe which we had been authorised to carry out. Yours sincerely, V. Giscard d’Estaing”.

I was one of 105. We all had received a similar letter. We had been summoned, and we responded. The European Council in Laeken had in fact agreed that the Convention would hold its opening session on 1 March 2002, but being one day early simply demonstrated how eager we were. The Convention was given one year to complete its work, but in the event it took over 16 months. History will, I trust, forgive us for not being exact with the dates.

So there we were, meeting for the opening session in the brand-new glass palace of the European Parliament in Brussels. We had been allocated the Parliament’s general assembly room on the third floor of the building named after Paul-Henri Spaak. Spaak was a former Belgian Foreign Minister who had masterminded the drafting of the founding treaties of the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) 50 years earlier. We were walking in his footsteps, or would be, once we managed to find the way to the right hall in the Parliament’s gigantic complex of buildings.

I found my assigned seat. I said hello to the people next to me, British Conservative Timothy Kirkhope and Estonian Conservative Tunne Kelam. Kirkhope was a former Minister and then an MEP; Kelam was the Deputy

Speaker of the *Riigikogu*, the Estonian Parliament. We three were to share a great many things.

The seating order was no accident; rather, it was a compromise arrived at after much wrangling. There were several alternatives: should we be seated as national delegations, by party, or by institutional background? The seating order would reflect the very nature of the Convention.

If I had been seated with the other Finnish members, we would have ended up primarily representing our national background, as at any meeting of an international organisation. If I had been seated with the other Social Democrats, we would have tended to represent our political groups, as in any parliament. If, again, I had been seated with other representatives of national parliaments of the member states, we would have represented an institutional interest, as at any meeting of interest groups. Each of us Convention members had these three hats to wear. The unsolvable problem was, accordingly, left unsolved: the members were seated alphabetically.

There was one man who knew how to make an *entrée*. The opening session of the Convention, as indeed all its plenary sessions, began not at but about the scheduled time. Nordic punctuality had to yield to southern European nonchalance. There had to be leeway in the time of commencement for the *entrée* to work. Whereas Valéry Giscard d'Estaing regularly left the session hall through the door behind the Praesidium dais, he always entered through the main door. There was an enormous crowd of photographers, journalists and officials. Giscard would greet members along the way down the hall towards the dais.

We heard uplifting speeches. The leaders of the three main Union institutions addressed the opening session: José Maria Aznar, Prime Minister of Spain, then holder of the Presidency, Pat Cox, Speaker of the European Parliament and Romano Prodi, President of the European Commission. Aznar charged the Convention with creating “more Europe” in accordance with the slogan of Spain’s Presidency. Cox stressed the Convention’s historical importance, this being the first time that a common future for Europe was being shaped across Cold War borders. Prodi described the Union as offering globalisation “a harmonious model of supranational democracy”.

The most electrifying speech, however, was that given by Giscard. He began by welcoming the “ladies and gentlemen” of the Convention in the eleven official languages of the Convention and in Polish (!). He told us to dream of Europe. The word enthusiasm comes from the Greek *en-thousia*, meaning ‘to be inspired by a god’. He implored us to be inspired by a goddess, Europa. He placed his mascot, a turquoise porcelain tortoise, on the Chairman’s table to symbolise our slow but determined progress.

Once, only once, did we interrupt his speech with applause, when he said:

The Laeken Declaration leaves the Convention free to choose between submitting options or making a single recommendation. [...] Our recommendation would carry considerable weight and authority if we could manage to achieve broad consensus on a single proposal which we could all present. If we were to reach consensus, we would thus open the way towards a Constitution for Europe. In order to avoid any disagreement over semantics, let us agree now to call it: a ‘constitutional treaty for Europe’. (Giscard d’Estaing, 2002, p. 11)

It was not only the Chairman who was ambitious. All we members realised that the influence we exerted depended on our mutual understanding. That is why our goal had to be a single uniform proposal, call it a Constitutional Treaty. The Convention defined its place in history at its very first session. But did it overstep its mandate?

2.1 Why have a Convention?

The European Union had reached the *cul-de-sac*. The past 15 years had seen a constant whirlwind of changes to the founding treaties. There was always another founding treaty being prepared, negotiated or ratified. The pace was breathtaking, and no fewer than four new founding treaties were produced: the Single European Act (1986), the Treaty of Maastricht (1992), the Treaty of Amsterdam (1997) and the Treaty of Nice (2000) – and the rate was constantly accelerating.

Each treaty foreshadowed the next. One intergovernmental conference followed another. Amsterdam continued where Maastricht left off. The leftovers of Amsterdam were digested in Nice. Laeken, in turn, focused on the future discussion launched in Nice and began to prepare for the following intergovernmental conference. No member state had ever amended its constitution so frequently.

And the result of this process? An incredibly layered, incoherent and incomprehensible morass of treaties. It is a real challenge even for an expert to make any sense of the Union’s legal system and forms of decision-making. Indeed, the European Union is a sort of blanket term for three supranational communities and for two pillars that exist outside the supranational community structure. These are governed by four founding treaties, which contain over 700 articles plus over 50 protocols and over 100 declarations. The EU treaties and regulations add up to a whopping 80,000 pages. Just try to master all that!

Not even the decision-makers were always on the ball in amending the founding treaties. The Heads of state have often concluded agreements in the critical small hours of the last night of an intergovernmental conference – agreements which have only been fully comprehended in the bleak light of morning, if even then. In far too many cases, the end result is a compromise that is unsatisfying both technically and substantially. After Nice, Prime Minister Paavo Lipponen drew a lot of flak in Parliament because he was unable to explain to the Grand Committee what exactly had been agreed in the amendments to the founding treaty. Lipponen was surely not alone, but he was one of the few Union leaders that were immediately put on the spot by his own Parliament.

The need to provide the Union with a more durable, more coherent and simpler founding treaty system is obvious. Preparation for amendments should focus on the long term and on common interests, instead of degenerating into horse-trading between narrow national interests. Nevertheless, it is clear that the intergovernmental conference (IGC) will continue to have the ultimate authority to decide on the Union's founding treaties, because the acceptance and entry into force of any amendments requires the approval of all the member states.

But how to prepare for an IGC? Amendments to the founding treaties do not have to be submitted to the European Parliament for approval. The Commission also has no part to play in this, because it does not have the right of initiative with regard to the founding treaties, as it does for other Union legislation. National parliaments are the ultimate bodies ratifying the founding treaties, to be sure, but they do not negotiate. The actual preparation is done through a diplomatic process of negotiation between governments, aided variously by independent groups of 'wise men' or intergovernmental working groups. The final wrangling, however, has always been left to the IGC, and in the knottiest problems to summit meetings.

This approach is no longer viable. Prime Minister Paavo Lipponen had learned this the hard way. In autumn 2000, he gave a major speech on the future of Europe at the College of Europe in Bruges:

We need to set in motion a constitutionalisation process, together with the candidate states [...] We have to change the way in which we revise the treaties [...] Last minute deals are struck so that everyone can bring something home [...] The preparatory phase should be as broad as possible. We need to take the fundamental decisions together, not only among governments [...] I suggest that any future European agenda should be prepared on a broad basis by a Convention that should include the governments and national

parliaments of the member states and the candidate states and the EU institutions. (Lipponen, 2001)

Prime Minister Lipponen was not alone in proposing the founding of a Convention on the Future of Europe. In the same year, French President Jacques Chirac had made a strong policy statement in Berlin:

This preparatory reflection should be conducted openly, by associating governments and citizens, through their representatives in the European Parliament and in the national parliaments. Naturally, the candidate countries should participate. Numerous methods are conceivable, from the committee of wise men to a model inspired by the Convention that draws up our Charter for Fundamental Rights. And stemming from these tasks which, doubtless, will take some time, governments and then the people will be asked to decide on a text which we would then be able to designate as the first European Constitution. (Chirac, 2000)

Chirac was impatient to deepen the integration of the Union and proposed “*un groupe pionnier*” led by France and Germany to take the lead in drafting a Constitution. He was supported by German Foreign Minister Joschka Fischer (2000) in a policy speech at about the same time; Fischer, too, spoke of an ‘*avant-garde*’ of member states wishing closer cooperation that would work on a Constitution for Europe.

But why divide the Union? After all, there was consensus broader than just that involving France and Germany. Why not follow the model used in the successful drafting of the Charter for Fundamental Rights, as President Jacques Chirac proposed?

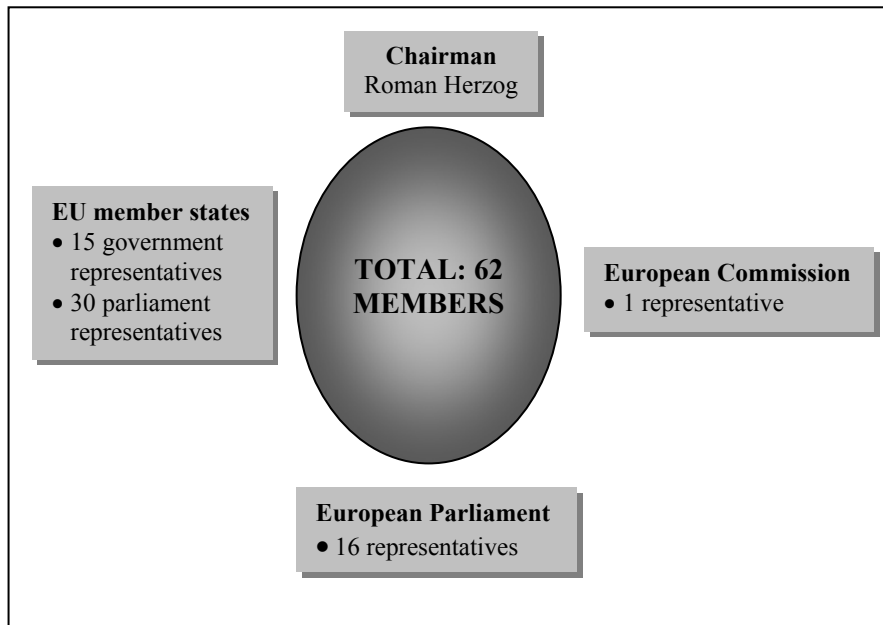
2.2 The first Convention

The meeting of the European Council in Tampere in autumn 1999 decided to gather the existing fundamental rights in the Union into a single Charter. This was meant to be not a legally binding document but a political manifesto. A Convention was appointed to prepare this document. For the first time in the history of the Union, Members of Parliament, in addition to government representatives, were involved in drafting the text of a Union Treaty – albeit not a legally binding one.

The Convention working on the Charter of Fundamental Rights consisted of 62 members: 15 representing the Heads of state of member states, one representing the President of the Commission, 16 representing the European Parliament and 30 representing national parliaments. It was not easy to decide on the composition of the Convention, to strike a balance between size and sufficient representation.

The most difficult question of all was the number of MPs. The fact that some member states have two-chamber parliaments led to the number of representatives per parliament being increased to two. At the same time, political representation was ensured since this enabled a place to be offered to both the opposition and the government party, although this was not the original reason for the arrangement. The European Parliament was adamant in insisting that it be granted as many representatives as the governments of the member states. The member states, in turn, opposed this, because the European Parliament should not be equated with governments. Thus, it was given one seat more.

Figure 1. Composition of the Convention on the EU Charter of Fundamental Rights



At its first session, the Convention elected Roman Herzog, former President of Germany, as its Chairman. Herzog was a high-profile politician and ensured the continuity of the work through his permanent chairmanship. The alternative would have been to have a rotating chairmanship following the EU Presidency. This would have emphasised the role of the governments, which was undesirable.

The chairman of each institutional group was appointed a Vice-Chairman of the Convention. The European Parliament delegation was led by Inigo Méndez de Vigo, a Conservative from Spain. The group of national MPs was

led by Finland's representative, Gunnar Jansson of Åland. The Government of the Presidency member state – initially Finland, later Portugal and France – was represented first by Finland's Chancellor of Justice Paavo Nikula. Finland was strongly represented, partly by chance. The Praesidium of the Convention played an important role in drafting the final text, that was approved in each institutional group.

The Convention on the Charter of Fundamental Rights consisted of a select group of expert politicians. Competence was deemed more important than political representation.

It completed its work in less than a year. The result, one single document, was approved at the European Council in Nice as it stood, to the very last comma. It was an obvious success. There were many reasons for this.

Extensive preparation, above all the participation of MPs and MEPs, proved to be a good thing. The Convention had a precise mandate: recording existing fundamental rights. Disputes were not solved by vote but by seeking a consensus. This was not an immense challenge, considering that the final text was not legally binding.

The Convention established a model. Its structure and procedures seemed attractive when the time came to tackle a far more complex and extensive task, drafting a Constitution for the EU. As a by-product, the Charter was to be incorporated into the Constitution, which of course would be legally binding. Consensus became a rare commodity.

2.3 The Laeken decision

The EU summit in Laeken in December 2001 was not a success. Prime Minister Lipponen certainly was not happy to return home, since he had no presents to bring.

The negotiations on the complicated package of EU agencies had had to be broken off by Belgian Prime Minister Guy Verhofstadt as inconclusive. An impasse had been reached because of the stubbornness of Italian Prime Minister Silvio Berlusconi. He was the only one who opposed the location of the EU Food Agency in Helsinki. A single dissenter was enough: a solution was not reached. Before the Laeken meeting, Sweden and Finland were the only EU member states that did not host a single EU institution – and this remained the case after Laeken, too. The Finns were not amused.

But the Union can also decide things without unanimity. This, too, was demonstrated by the Laeken summit. The member states agreed on the founding of a Convention on the Future of the European Union. This decision was unanimous. But who should chair the Convention? This was

not self-evident. Former French President Valéry Giscard d'Estaing had put himself forward at an early stage when the Convention had first been mooted. He was supported by the French and German governments. The British did not oppose him. Ultimately, only five member states supported him directly, but that was enough.

Other countries were appeased through the appointment of two Vice-Chairmen in addition to the Chairman. Belgium, the host country, stood up for itself and managed to get former long-standing Prime Minister Jean-Luc Dehaene appointed Vice-Chairman. He, like the other Vice-Chairman, former Italian Prime Minister Giuliano Amato, had been members of the group of five 'wise men' who had drafted the Laeken Declaration. Dehaene is a Christian Democrat and Amato a Social Democrat, so political representation was guaranteed too.

Solving one problem revealed another. Whom did the appointed Vice-Chairmen represent? Their respective governments? Or were they, like Giscard, to be *intuitu personae*, independent persons? Prime Minister Berlusconi refused point-blank to consider Amato, a Socialist, as a representative of his right-wing government. Giuliano Amato was no less abrupt. He, a committed Social Democrat, a Professor and a top expert on European law, would not take orders from Italy's populist right-wing Prime Minister. There was nothing for it. The Convention's Praesidium was cast as an independent triumvirate. Later, Silvio Berlusconi appointed Deputy Prime Minister Gianfranco Fini, leader of the Neo-Fascist party, to represent him in the Convention. Ah, the pluralism of Europe!

What sort of leadership was this for a Convention on the Future? Old men and no women? The average age of the triumvirate was 67 years, the oldest being Giscard d'Estaing (76). He did not consider his age an obstacle; after all, he was younger than the figurehead of the Philadelphia Convention, Benjamin Franklin (81). George Washington, the Chairman of the Philadelphia Convention, was only 55 at the time and went on to serve as the first President of the United States.

Age was indeed no obstacle, as Giscard was to demonstrate. He kept an iron grip on things throughout the Convention. He pushed through his grand vision – and how? By sacrificing details which he flipped onto the table as distractions and by listening closely to those who had appointed him in the first place. Valéry Giscard d'Estaing had been the youngest man ever elected President of France when he took office in 1974. For a long time he had been of the opinion that the European Union should have a President.

In addition to the three chairmen, the Laeken summit decided on the composition of the Convention as a whole. It was modelled on the Convention on the Charter of Fundamental Rights; here, too, one

representative of the head of each member state was included. This member was usually known as the Government Representative, although this was not literally the case. Out of an unwillingness to tie the governments' hands, these members were actually just representatives appointed by the Head of state or Head of Government.

The Commission wanted two representatives instead of one as in the earlier Convention, and this was granted. The number of parliamentarians to be included was again heavily debated. Two representatives of each national parliament were appointed, like the previous time. But what about MEPs? The European Parliament, adamant again, demanded as many representatives as the national parliaments, i.e. 30. This was unacceptable. The European Parliament had to make do with 16 representatives as before.

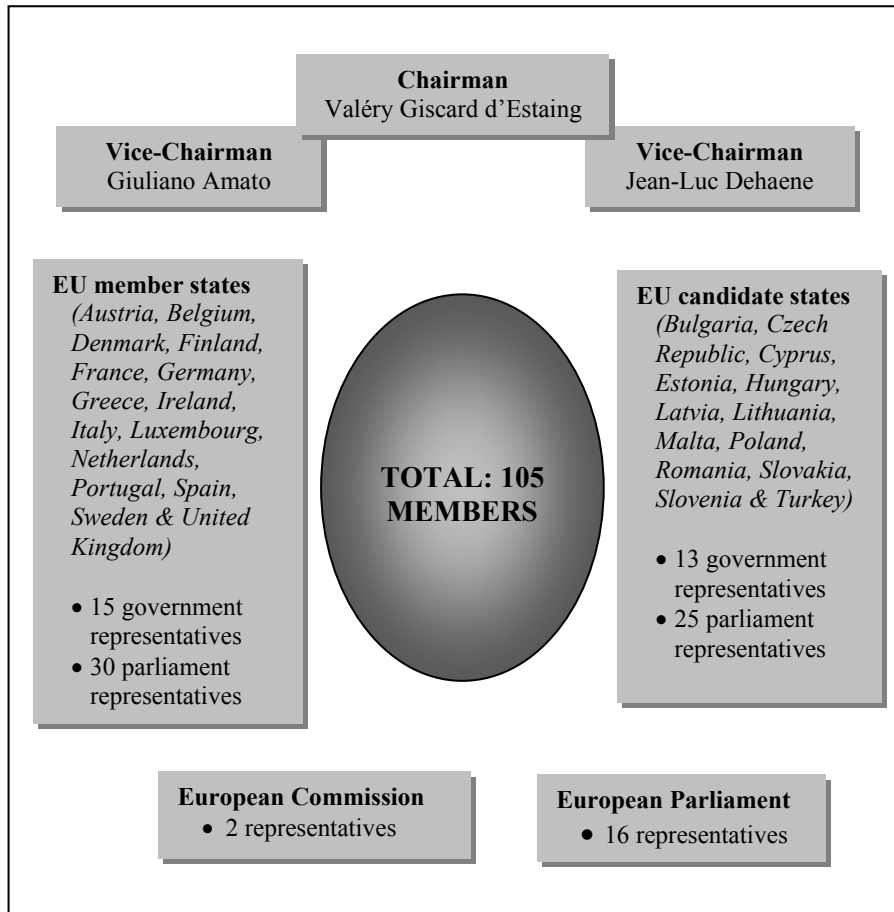
So the Convention would consist of 66 delegates. But this was not all. The Union was on the threshold of enlargement. It was unreasonable to expect the new Constitution to be drafted without the prospective member states being able to influence its content when they would have to apply it in any case. It was agreed that the ten eastern European candidate states and three Mediterranean candidate states, including Turkey, could participate with full credentials in the work of the Convention. They would have the same representation as member states: one government representative and two MPs. They would not, however, be considered completely equal, since it was noted in the Laeken Conclusions that the representatives of the candidate states could participate "without, however, being able to prevent any consensus which may emerge among the member states".

The appointed 39 representatives of the candidate countries did not at any point present an obstacle to consensus, and they participated fully in the work of the Convention. Only once, at the very end, had they to be shown their place, but in practice the Convention had 105 full members.

This was not all. Except for the chairmen, each member of the Convention had been appointed an alternate member. The idea was to use the substitutes only when the full members were absent. In practice, the alternate members participated in both plenary sessions and working groups much like full members, and in some cases even more actively and vociferously. So actually there were 207 of us.

And even this was not all. Three members of the Economic and Social Committee and three representatives of social partners were invited to observe the Convention. Also, six members of the Committee of Regions and the EU Ombudsman were also observers. They all had a right to speak in the Convention.

Figure 2. Composition of the Convention on the Future of the European Union



Apart from those who spoke, there were those who recorded what was spoken. The Secretariat was at the very core of the Convention. John Kerr, Britain's former permanent EU representative and Permanent Under-Secretary of state at the Foreign and Commonwealth Office, was appointed as its head. He can with justification be regarded as the fourteenth member of the Praesidium, and indeed one of its key players. The General Secretariat of the Council was the primary source of resources for the Convention Secretariat, but experts were also drafted from the Commission and the European Parliament. However, no national representatives from either governments or parliaments were required in the Secretariat. This created a bias, as not every member state had a person in the Secretariat.

The bias was all the more problematic considering the narrow Praesidium appointed for the Convention. It was never in fact intended to be large in order to be efficient, but it became so small that it was non-representative. It was decided in Laeken to appoint three Chairmen and both Commission representatives (Michel Barnier of France, Commissioner for Regional Policy, and Antonio Vitorino of Portugal, Commissioner for Justice and Home Affairs) to the Praesidium. Each holder of the EU Presidency during the Convention (Spain, Greece and Denmark) was offered a seat in the Praesidium. Italy also wanted in because of its upcoming EU Presidency in the autumn of 2003. This was declined, but both the European Parliament and the national parliaments were allowed to appoint two representatives each. Thus, the Praesidium consisted of twelve people in all.

The bias was obvious. Most of the Convention members were parliamentarians, yet there were only four parliamentary representatives in the Praesidium. The European Parliament appointed group leaders Inigo Méndez de Vigo of Spain and Klaus Hänsch of Germany, the former a Conservative and the latter a Social Democrat.

Guy Verhofstadt, Prime Minister of Belgium, let slip in Laeken that Britain had been allocated one of the two national parliament representative seats. The regional imbalance in the Praesidium was becoming intolerable. The large countries were staking out their territories, France and Spain with two representatives each. Southern Europe was strongly represented, while the small countries of northern and central Europe were all but shut out. Once the composition of the Secretariat was finalised, Finland and Luxembourg remained the only member states without a seat in either the Praesidium or the Secretariat. It was slim pickings indeed that Prime Minister Paavo Lipponen had to bring home from the Laeken summit.

2.4 The Convention comes to order

The Convention will draw up a final document which may comprise either different options, indicating the degree of support which they received, or recommendations if consensus is achieved. [...] the Intergovernmental Conference will take the ultimate decisions. (Laeken Declaration, 2001, p. 8)

This was how the mandate for the Convention was recorded in Laeken. It was interpreted differently in different countries. Was the Convention to be a think tank for working out options for the Union? Or a political organ aiming at definitive conclusions? Was it an academic seminar or a forum for preparing decisions?

Most member states got it right. When politicians are let loose, they act like politicians. They want to exert influence and guide decision-making; the

Convention did not become an academic seminar. Most of its full members (over 60) were or had been ministers; 20 of them were ministers currently in office. There were also a dozen former presidents and prime ministers and a former President of the Commission, Jacques Santer. Many member states such as France, Germany, Ireland and Greece replaced one of their Convention members with their foreign minister midway through the Convention. Spain, in an opposite move, appointed its Convention member Ana Palacio Foreign Minister.

The Convention was overwhelmingly male. Only 17 of the full members were women. Of the member states' government representatives, only Teija Tiilikainen (Finland), a leading Europe scholar at the University of Helsinki, and Deputy Prime Minister Lena Hjelm-Wallén (Sweden) were women.

The aim in choosing the two representatives of national parliaments was to give a voice to both the leading government party and the leading opposition party. In Finland, this meant that one seat went to the Social Democrats and the other to the opposition, Matti Vanhanen of the Centre Party.

We Finns kept in touch. We submitted joint proposals and tried to coordinate our speeches. Before plenary sessions, we met in Parliament to exchange information, and Finland's EU Ambassador Eikka Kosonen organised luncheons for us in Brussels. Nevertheless, once we got to Brussels we were no longer only Finns; we were members of a broader European community. The only way we could exert influence was to participate actively in shared structures, not by putting up a Finnish hedgehog defence. This truth was brought home very clearly in the first days of the Convention.

The Convention was politically organised. It met on the premises of the European Parliament and made use of its logistical infrastructure. Of all the Convention members, the MEPs had the most explicit and determined political agenda. The political group structure of the European Parliament was applied directly in the organisation of the Convention.

The two largest European parties, the Conservatives (EPP) and the Social Democrats (PES), were slightly over-represented at the Convention. This was due to the way in which the national parliament representatives had been appointed, with a member from both the government and the opposition. Of the full members of the Convention, there were 40 Conservatives and 36 Socialists.

The Red-Greens and Liberals also huddled in groups. Eurosceptics were active on both the right and left flanks. Gianfranco Fini, the representative of the Italian Government, founded the Alliance for the People of Europe, an umbrella for the extreme right. Danish MEP Jens-Peter Bonde led the Democracy Forum, which opposed European integration and the

constitutional process as a whole. The Social Democrat group of the European Parliament had given up one of its seats in favour of Bonde's ultra-critical small group, demonstrating that Europe can tolerate dissenters.

The Conservatives, the EPP, chose German MEP Elmar Brok as their group leader at the Convention. And the Social Democrats? The election meeting had been called by the MEP group leader Klaus Hänsch. He opened the meeting, only to throw aside his papers and march out. The board of the PES had overruled the MEP group and nominated Giuliano Amato for the post of chairman of the Convention group. He scarcely got a word in edgewise at our first dramatic group meeting, but this was soon put right. We came to rely on Professor Amato's detailed analyses and instructive lectures in the course of the Convention. The Social Democrats held a group meeting regularly, every morning during plenary sessions, and concluded each day with dinner together. Comrades became friends.

Coming to order included appointing the two representatives of national parliaments to the Praesidium. The Social Democrats nominated Gisela Stuart. A woman MP from Britain was difficult to challenge. The Conservatives, too, went for the British Isles, nominating former Irish Prime Minister John Bruton. The Liberal group nominated both Matti Vanhanen and Paul Helminger, Mayor of Luxembourg and MP. But it was the large political groups that decided the appointments, which were formally somewhat suspect considering that the candidate countries were not present in the decisive meeting of the representatives of national parliaments. It was not yet known whether the representatives from the candidate countries would be entitled to vote.

Not only the political groups but also the institutional groups met regularly. The Convention members who were MEPs could meet weekly, since they were in Brussels or Strasbourg all the time anyway. The two other groups, government representatives and national parliament representatives, met in connection with the plenary sessions. The MEPs inevitably constituted the closest and most active group, while that of the government representatives was the most disparate and unfocused.

We representatives of national parliaments were mainly interested in our influence in the Convention, which is why we focused on the working procedures. At the very first session we turned down the Praesidium's proposal for a working order for the Convention. We required that the Convention meet more often than once a month. Instead of Thursday and Friday, the session days should be Monday and Tuesday. Working group meetings should be held in addition to plenary sessions, and those meetings should be open to all Convention members. To ensure the transmission of information, national parliaments must have a representative in the

Convention Secretariat. The candidate states must be given a seat in the Praesidium and granted the possibility of speaking in their native language at sessions of the Convention.

As a result of our presenting this extensive list of demands, the Convention never actually approved a working order, only a procedural memorandum. Giscard announced that the work of the Convention was governed by its objective of drafting a Constitution and should thus not be cramped by a formal working order. He had to give some ground, however. The candidate states were given a seat in the Praesidium, and they appointed Alojz Peterle, the first Prime Minister of Slovenia. In plenary sessions, interpretation was arranged not only for the eleven official EU languages but for the languages of the candidate states as well. The Convention began to meet more often than once a month, and working groups were set up. Some plenary sessions were held on Mondays and Tuesdays, but most of the meetings were towards the end of the week.

National parliaments, however, were not given a seat in the Secretariat. This had been Finland's last chance to get someone into the Secretariat.

2.5 Consensus

The most difficult question in the matter of working procedures was how the Convention should decide on things. What did the 'consensus' required in the Laeken Declaration actually mean? Can the Convention take a vote? Formally, the working procedures stated that the Convention could take a vote if this was requested by one-fifth of its members or its Chairman, and that the Convention could also call consultative votes. However, the main objective was to achieve as broad a consensus as possible.

Broad consensus? Is there such a thing as narrow consensus? Usually consensus means unanimity, the absence of an opposing motion. Unanimity cannot be qualified with such words as 'broad' or 'narrow'. Except at the Convention, of course.

Chairman Giscard d'Estaing reminded us in his response on working procedures that the Convention was unique and therefore could not abide by the rules of other institutions. It was not a parliament complete with voting rules. The groups represented were not in balance in terms of democratic legitimacy. It would be impossible to consider the votes of Convention members to be equal. Some were from large member states, others from small ones.

Also, it would be impossible to achieve unanimity on all matters. Therefore, the approach chosen should be that of finding a consensus that provides enough flexibility for establishing a shared position. Giscard pointed out that

consensus here stood for ‘mainstream opinion’, with which some might disagree. On one thing, however, there was an agreement: if the Convention ever tried to define ‘consensus’, there would be no consensus as to what ‘consensus’ might be.

We would therefore have to be content with going with the mainstream, as interpreted by the Praesidium. The Convention never once took a vote, even a consultative one. The Praesidium, on the other hand, did take votes, especially towards the end, when decisions had to be reached one way or another.

The last night before the Convention came to an end, the candidate states received their first and only demonstration of what the Laeken Declaration wording of candidate states not “being able to prevent any consensus which may emerge among the member states” really meant. In the Praesidium, France was adamant in promoting the requirement of unanimity in trade policy when deciding on cultural and audiovisual services. Alojz Peterle of Slovenia objected. Giscard lost his temper and overruled Peterle by invoking the Laeken Declaration. Peterle lost his temper, too. Giscard was undaunted.

2.5.1 Whom did we represent?

So how unique was the Convention? Whom did it represent? It consisted of representatives appointed by governments, national parliaments, the European Parliament and the Commission. However, the members did not have the authority to speak for their respective member states, governments or background entities. We were members without a mandate. Legally, we did not represent the bodies that had appointed us, since our opinions or decisions were not binding on those bodies. Giscard d’Estaing reminded us of this in November 2002, when he first recognised a new member of the Convention: “Mr Joschka Fischer, not German Foreign Minister Fischer”.

In practice, though, things were rather different. There was no doubt that Convention members did actually represent their countries. Preparation for Convention meetings did not take place in a vacuum; there was careful consultation at home. The further the Convention progressed, the more clearly the national dimension began to emerge in the performances of the members. Initially, all contributions in the Convention were recorded as the submissions of individual members. But the situation changed when politically sensitive issues such as institutional matters came up. This happened first in the defence working group. Suddenly we began to find anonymous submissions ascribed to the Netherlands, or to Germany and France.

The Convention was in danger of becoming an intergovernmental conference. That would have been regrettable. The success of the Convention relied on its representing parliaments, not just governments. The MPs and MEPs in the Convention belonged not only to their countries but to their political reference groups, which maintained a strong presence in the Convention and created a sense of political discourse. The intention was to avoid the emergence of inherent power politics of the Union, i.e. the contradictions by vested national interests. In such struggle small countries are easily overrun by large ones.

The analysis of the importance of political groups in the Convention was too much for some people in Finland. Kirsi Piha, an MP with the National Coalition and deputy chairman of the Grand Committee, said in press statements when the Convention began: “Parliament has given Kiljunen his mandate and can just as well revoke it. We’re paying for his tickets and expenses. He may soon find himself without a return ticket.” She was publicly supported by Juha Korkeaoja, deputy chairman of the Parliamentary group of the Centre Party: “Kiljunen should immediately put on his Finland hat instead of the Socialist hat he is now so eager to don.”

Sauli Niinistö, Minister of Finance and chairman of the National Coalition, who had also been chairman of the European Democratic Union, put things in their proper perspective:

The Convention has prompted debate on whether European party politics conflict with national interests. Especially in a small country, there seems to be little mileage in such debate. If a politician imports the views of his national party or his parliament into the political debate of his European party, this can scarcely constitute a national disadvantage. (Niinistö, 2002)

The best constitution is short and obscure.

Napoleon Bonaparte, 1804

We need Europe in order to have an effect on the world, but we must also supervise Europe.

Jean-Pierre Raffarin, 2003

3. The EU Constitution

At one of the first plenary sessions of the Convention, I received a note from Matti Vanhanen:

“Kimmo, when VGE gave you the floor, Kerr whispered to him: ‘He is your friend’. This was relayed through the earphones by mistake. Matti.”

What prompted this sarcastic remark from the Secretary General to Chairman Giscard? What made me a particular “friend” of his? It is true that I had received a personal letter from him expressing puzzlement over our abrupt criticism of the Convention’s working methods as relayed by the press.

The Danish newspaper *Politiken* had published a conspicuous and deliberately mocking story entitled “Sun King Giscard”. It was quoted in other European newspapers, not least in Brussels. The underlying source of the article was a letter to the Chairman of the Convention which had been written at my initiative and signed by fourteen Convention members from Finland, Sweden, Austria, the Netherlands, Luxembourg and Denmark. The first five of these had no representative on the Praesidium. The letter expressed the desire that, when working groups were set up for the Convention, their chairs would not be exclusively selected from the Praesidium. This would guarantee a better geographical balance in the Convention’s work.

Politiken went to town on the subject and distilled it into a malicious criticism of Chairman Giscard d’Estaing. The flames were fanned by Danish Convention member Peter Skaarup, Deputy Chairman of the far-right People’s Party and a eurosceptic. He told *Politiken* that the Chairman’s intention of appointing the chairs of the working groups himself is “likely once again to reinforce the impression of Giscard as the ‘Sun King’”. The press was overjoyed at the slur; and, as the first co-signatory of the joint letter, I received my share of the mud.

Six working groups were subsequently founded. Their chairmanships were divided among members of the Praesidium. The justification for this was to

help the Praesidium to coordinate the Convention better. As a consolation prize, we were promised that the geographical balance would be addressed in future appointments. That promise, however, remained merely a promise.

3.1 Founding treaty or constitution?

The question ultimately arises as to whether this simplification and reorganisation might not lead in the long run to the adoption of a constitutional text in the Union. What might the basic features of such a constitution be? (Laeken Declaration, 2001, p. 7)

The Laeken Declaration dared to put the question of a constitution to the Convention. For the first time in the history of the Union, the word ‘constitution’ was mentioned in an official mandate for revision of the founding treaties. A bold step.

Not that the Convention swallowed the term ‘constitution’ without gagging. It is a term too closely bound up with statehood, and the EU is not a state. Those who want to turn the Union into a federal state would dearly like to see a Constitution, one submitted to a Europe-wide referendum. Conversely, those who oppose a federal state oppose a constitution. They view the new document as a founding treaty that is by nature an international treaty between the member states.

In terms of international law, the latter view is correct. If the entity drawing up a treaty is not a state, it cannot by definition create a constitution. However, the founding treaties of the Union are more than standard international treaties. They have a direct impact on matters covered by the constitutions of the member states, unlike the regulations of international organisations as a rule. This is due to the Union’s supranational *sui generis* nature.

The EU’s founding treaties are constitutional in nature. They define the Union’s basic values and competences, its decision-making system, the relationships between its institutions and the division of competences between the member states and the Union. These are all matters typically enacted in constitutions. Even in the Union’s legislative system, the founding treaties have a special hierarchical position, and the procedure for amending them is more difficult. Accordingly, they have come to be described, at the risk of misunderstanding, as constitutions.

Words fail us. We are bound to traditional concepts of statehood. But the Union is not a state. The situation is particularly difficult in the Germanic-Nordic cultural sphere, where the very terms employed – *perustuslaki*, *grundlag*, *Grundgesetz* or *valtiosääntö* – translate directly into English as ‘fundamental law’ or ‘state code’, thus directly referring to statehood. The

terminology derived from the Latin word *constitutio* is somewhat broader in application. Nevertheless, new concepts for describing supranational authority and post-nation state structures are needed.

3.1.1 What shall we call this treaty?

Throughout the debate on the future of the Union, unclear and ambiguous references have been made to a founding treaty, a fundamental code, a constitutional treaty, a constitutive charter or a ‘constitution’ in quotation marks. This was true of the Convention as well. We all had our own pet terms. The search for an acceptable one was long and difficult.

The Praesidium’s first proposal for an outline of a constitution, presented in October 2002, described the objective as a Constitutional Treaty. This avoided using ‘Constitution’ as a noun and focused instead on the noun ‘Treaty’. It did not solve the problem, however. The question was raised of whether the term ‘Constitutional Treaty’ did not refer to the member states signing it and whether such a ‘constitutional’ measure should therefore be approved by the member states according to the procedure for the enactment of constitutional legislation. The answer was, of course, “no” – this is a constitution for the EU, not for the member states.

The Convention ultimately decided to call the end result what it actually is, both *de jure* under international law and *de facto*: a Treaty on Constitution. Here, both key words ‘treaty’ and ‘constitution’ are on an equal footing, both being nouns. It is an excellent solution. This is an international treaty as far as the member states are concerned, but for the EU it is a constitution. It fits the special nature of the Union as something between a state and an international organisation. A federal state has a constitution, and international organisations conclude treaties between states. A supranational Union, therefore, has a *Treaty on Constitution*.

But some member states had a hard time stomaching the solution proffered by the Convention. The Finnish Government wanted to water down the ‘Constitutional Treaty’ term contained in the Convention’s first, skeleton proposal to the euphemistic ‘treaty of constitutional nature’. When the Convention finally arrived at ‘Treaty on Constitution’, the Finnish Government had come round to accepting ‘Constitutional Treaty’, again at variance with the current proposal.

Curiously enough, in official texts in Finland, Sweden and Britain, the term ‘Constitutional Treaty’ is used for the EU Constitution. This is confusing and ambiguous. Surely the fundamental terms should be used in a consistent way by all member states? A cat is a cat, not a lynx or, more ambiguously, a feline.

It is comforting to remember the Roman law principle of *falsa demonstratio non nocet* – erroneous description does not vitiate; in other words, a false name does not change the legal nature of the case. The nature of the EU Constitution is determined by its content, not its title. Legally speaking, it is an international treaty, and calling it a constitution will not turn it into the constitution of a state, because the Union it governs is not a state. The situation could be the reverse, too. There are historical examples of an intergovernmental treaty becoming a constitution: the German Empire was founded by agreement between various principalities in 1870-71, the United Arab Republic was founded by agreement between Egypt and Syria in 1958, and Tanzania was founded by agreement between Tanganyika and Zanzibar in 1964. There are also states that do not even have a written constitution, such as Great Britain, Israel and New Zealand.

The Montevideo Convention of 1933 defines the characteristics of a state under international law: “The state as a legal personality should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) sovereign government; and (d) capacity to enter into relations with the other states.” A Constitution does not of itself turn an entity into a state.

In the 19th century, there was some confusion about the statehood of the federal states of the US, Germany and Switzerland, because their constitutions declared their member states to be sovereign entities. This, however, was not a problem of international law. What is essential in terms of international law is the relationship between the community and the rest of the world. Which is the equal partner with which other states conclude diplomatic relations and direct foreign policy relations? The federal state or the member states? That is what counts.

3.1.2 Competence competence

The first article of the Convention’s proposal states: “This Constitution establishes the European Union, on which the member states confer competences to attain objectives they have in common.” This wording does not turn the Union into a state, nor can the Union thereby seek recognition of sovereignty from other states. Quite the contrary. The competence of the Union is restricted exclusively to competence conferred upon it by its member states. This is described as ‘*competence competence*’, in a term borrowed from the German constitutional debate. What this means is that the competence of deciding on the competence of the Union rests solely with the member states.

It is because of ‘competence competence’ that the Union is not a state. Should a day ever come when EU institutions are given the authority to amend the Constitution, on that day the shared sovereignty manifested in the

supranational Union would be dispelled, and the EU would become a sovereign state among states. The member states would no longer be the “Masters of the Founding Treaties”.

The Convention was an ambitious undertaking, but we knew where the beef was. According to the Convention’s proposal, the new EU Constitution would replace all the current founding treaties and all protocols and declarations appended thereto. However, the Constitution would only take effect if all the member states ratified it in accordance with their respective constitutional requirements.

3.2 The Constitution for Europe

Gisela Stuart was unhappy. The Convention Praesidium was twice shown the draft for an outline for the new Constitution, but the papers were removed immediately after the Praesidium meeting. Excessive paranoia about leaks, you see. The outline, dubbed the ‘skeleton’, did not become public until Giscard d’Estaing presented it at the plenary session on 28 October 2002.

Jean-Luc Dehaene was unhappy. The Vice-Chairman of the Convention is irked by the fact that the skeleton proposes changing the name of the European Union and founding a wholly new institution, the Congress of the Peoples of Europe. Giscard had not bothered to inform the other members of the Praesidium of his proposals, let alone seek their approval.

John Kerr was unhappy. The Secretary General of the Convention wondered what on earth space research was doing in the Union’s goals. What constitutional value was there in space research – except in the French mindset, of course? So the Secretary General quietly proposed to a member of the Convention to take a pot shot at space research.

Well, members of the Praesidium had their share of discontent at not being ‘in the loop’, a sentiment familiar to us Finnish members.

Giscard d’Estaing discussed the name issue when presenting the skeleton at the plenary session:

There are now two names, the European Community and the European Union. We could, of course, use the present name, or call the new institution the United states of Europe, or give a name showing how far we have come: United Europe.

We all knew that Giscard was particularly fond of *l’Europe Unie*, United Europe. The noun is more important than the adjective, and we would ultimately come to talk simply of Europe much like the United States is referred to as America. Peter Hain, a British member of the Convention, quipped that “the United States of Europe sounds like a superstate and

United Europe like a name of a football club”. We were unanimous. Wrangling about the name at the Convention was pointless.

We had to be content with the name European Union. Fair enough.

If the name of the Union was out of bounds, at least we could name its Constitution with some flamboyance. It was undoubtedly somewhat pompous of the Convention to name its product not the Constitution for EU but the Constitution for Europe. It is an ambitious if misleading moniker. It is not a constitution for a territorially defined state but a code for a supranational cooperative system, albeit the aim of the member states is to be “united ever more closely, to forge a common destiny”, as the Convention puts it in the preamble to the Constitution. Also, it is not all of Europe but only part of it that is involved, albeit the ultimate goal is to enable all European countries to join the Union. Or is it?

3.2.1 The boundaries of Europe

Article 1 paragraph 2 of the draft Constitutional Treaty is unambiguous:

The Union shall be open to all European states which respect its values and are committed to promoting them together.

How do we understand “Europe”? Do we define it geographically, culturally or politically? It depends on who is doing the defining.

Geography is only partly helpful. Europe is a peninsula of the world’s largest continent, Eurasia. It is bound by the Mediterranean Sea and the Arctic Ocean, extending from the Ural and Caucasus Mountains to the Atlantic. Are all the peoples and states inhabiting this region entitled to EU membership?

Culture, too, is only of some help. The European value set rests on a foundation of Judaeo-Christian beliefs, Hellenist philosophy, Roman justice and Enlightenment humanism. Are all peoples claiming this cultural heritage entitled to EU membership?

And what about political definitions? Ancient Greece or the Roman Empire are of little help to us today. A better definition of Europe would be one stemming from the Empire of Charlemagne in the 9th century or the Holy Roman Empire from the mid-10th to the early 19th century. This would undeniably define the core of the EU, but it would leave out a great deal too.

Over the centuries, philosophers and leading scholars from Montesquieu and Voltaire to Count Richard Coudenhove-Kalerg, leader of the pan-European movement, have proposed various plans for a union in Europe. All these plans rested on a uniformity of religion, excluding Turkey and Russia from Europe. The East was seen as an other side, as a threat. But where, exactly, does the East begin?

Valéry Giscard d'Estaing, Chairman of the Convention, and Romano Prodi, President of the Commission, have firm views on the subject. Giscard is categorical about Turkey not being part of Europe. Turks are not Europeans, and Turkey's acceptance as a member state of the EU would spell the end of the Union. Prodi is equally categorical: Eastern countries such as Moldova, Belarus, Ukraine, Russia or Israel can never become member states of the EU. His compatriot, Prime Minister Silvio Berlusconi, disagrees. He has on several occasions publicly advocated admission to the EU of Russia, led by his friend Vladimir Putin. Confusing, isn't it?

Turkey applied for EU membership as far back as in 1983, and has already been turned down once, in 1989. Then again, Morocco has also applied for membership. Russia has not, though Russian leaders have voiced speculations about the matter. Where, then, do the limits of the EU lie?

Giscard's comment about Turkey is disconcerting. In the Convention of which he was Chairman, there were three Turkish members participating in the drafting of a Constitution. Did this, then, spell the end of the EU? Turkey was accepted as a candidate state at the Helsinki Summit in 1999. However, membership negotiations have not yet begun due to the human rights situation and shortcomings in democracy in the country. The military has political power that it should not have, and there are frequent reports of torture. On the other hand, the fact that most Turks are Muslims and that Turkey, as a successor to the Ottoman Empire, historically represents 'the other side' is not and must not be an obstacle to EU membership.

Romano Prodi's comment about Eastern European countries is equally disconcerting. He would not wish to admit eastern Slavs to the Union. But can we really say that they would never share our common European values – a criterion for EU membership? Take Moldova, for example. In the 1920s and '30s, it was part of Romania, which is now acceding to the Union. Can we permanently exclude Moldova from the EU on a say-so from Prodi, an Italian? The official language of Moldova is Romanian, which is linguistically closer to Latin, the language of the Roman Empire, than Italian is.

The Convention approved a slogan for the Union: "United in diversity". We must be careful not to nurture an insidious Euro-nationalism that relies smugly on European virtues and excludes the rest of the world. A Europe united in diversity is open and pluralist, and cannot erect a wall shutting out 'the other side'. This is why Turkey's eventual membership of the Union will be of exceptional challenge and merit. Giuliano Amato's efforts at the Convention to include a chapter on "The Union and its neighbouring areas" in the Constitution was also a device to pave the way for a Europe of cooperation. Towards the East we need not a wall but gateways.

3.3 Values of the Union

The skeleton needed to acquire some flesh on its bones. The outline required precise wordings for its articles. And at the plenary session on 6 February 2003, it finally happened: the Praesidium presented the first 16 articles of the new Constitution. These firstly defined the Union, secondly presented its values and goals and the fundamental rights of its citizens, and thirdly provided for the Union's competence.

Convention members were given ten days to return their written responses. And return we did. The Secretariat was flooded with amendments – 1,040 of them! We demanded, and got, access to each other's proposals. The Secretariat prepared an excellent summary of all the amendments, a model that was subsequently followed throughout the spring. The major political groups, the Conservatives and the Social Democrats, also made summaries of their members' proposals. For the first time, political groups made their speeches at a plenary session.

The second article of the Constitution defines the values of the Union. In the existing founding treaties, these are confined to principles of freedom, democracy, human rights and the rule of law, and the four freedoms of the internal market: free movement of goods, services, capital and people. The Convention wished to expand the value base of the Union from conventional political rights and market freedoms towards a social Europe. And it succeeded.

The Praesidium appended new concepts to the list of values in the second article: respect for human dignity, social peace, tolerance, justice and solidarity. The economic union took a mighty leap towards becoming a social union. This, however, was not enough. We members wondered why equality and minority rights were not addressed. We were also not sure whether focus should be put on social peace, thus underlining the state's function in exercising coercion.

Article 2 was fine-tuned through the amendment proposals. Equality, pluralism and non-discrimination were added to the list of values. Social peace was discarded. The final form of Article 2 runs as follows:

The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These values are common to the member states in a society of pluralism, tolerance, justice, solidarity and non-discrimination.

These values we could subscribe to with equanimity. However, the most emotional and fervent debate involved values that were never included in Article 2.

3.3.1 Christian values

Pope John Paul II had visited the Italian Parliament. He had invited Giscard d'Estaing to visit him in the Vatican. He had communicated with Tony Blair and Jacques Chirac. The Papal message was unequivocal. The EU Constitution must refer explicitly to the Christian basis for its values and to God, *invocatio Dei*.

The Pope's appeal did not go unheeded. In the referendum on EU membership in Poland, the single most important issue was whether there would be a reference to God in the accession treaty and hence in the EU Constitution. Poland's Constitution makes reference to the Christian God, as indeed does that of Ireland.

Many of the Catholic members of the Convention were adamant. Conservative group leader Elmar Brok made a plea for Christian values, and his group submitted the following amendment proposal for Article 2:

The Union's values include the values of those who believe in God as the source of truth, justice, good and beauty as well as of those who do not share such a belief but respect these universal values arising from other sources. (Brok et al., 2003)

The Conservatives have a lot of clout. Freedom of religion was undoubtedly a fundamental right that should be entered in the EU Constitution. But explicit references to God and the Judaeo-Christian tradition? An impasse loomed. And proved a test of tolerance and pluralism – on both sides. We would have done well to remember the words of Voltaire, from the time of the Enlightenment: “I disagree with you, but to the last I will defend your right to express your opinion.”

The citizens of the EU member states are not exclusively Christian. Many religions and theories of life coexist peacefully. There are over 15 million Muslims, and the influence of Islam is increasing, not least in view of the potential membership of Turkey. It would be unrealistic for the EU Constitution to enshrine the Christian faith above all others.

A compromise had to be found, and was. The preamble to the Constitution now reads as follows:

[Europe's] inhabitants have gradually developed the values underlying humanism: equality of persons, freedom, respect for reason, drawing inspiration from the cultural, religious and humanist inheritance of Europe...

A separate article on the status of churches and non-confessional organisations with which the Union engages in open and regular dialogue was added to the Constitution. This gave religious communities and churches

a special status, but unfortunately this was not enough. Giscard d'Estaing was roundly trounced by Józef Glemp, the highest ecclesiastical authority in Poland, who said:

After Gagarin's trip into space, Khrushchev assured himself that there was no God, because Gagarin had not seen Him. Khrushchev did not see God in space, and Valéry Giscard d'Estaing does not see God in history, and therefore prohibits Him from being written into the European constitution. (Abrahamson, 2003)

Giscard was not the only blind person at the Convention. There were many of us. We were looking the other way and seeing the full range of human ideals. We were "convinced that, thus 'united in its diversity', Europe offers [its peoples] the best chance of pursuing, with due regard for the rights of each individual" as we solemnly declared in the preamble to the Constitution.

3.4 Objectives of the Union

If the two largest political groups in the Convention disagreed on the inclusion of Christian values in the Constitution, there was considerable argument about the definition of the Union's objectives, too, as entered in Article 3 of the Constitution.

Both the Social Democrats and the Conservatives concurred with the Praesidium's motion that peace should be the first objective to be named, followed by the well-being of peoples and a Europe of sustainable development. Fair enough, but how to achieve these goals? The Praesidium favoured balanced economic growth and a free internal market. Both of the large political groups preferred the term 'social market economy', which is what was eventually entered into the Constitution.

For the Conservatives, the social market economy will lead to "a high level of employment", as the current founding treaty has it. The Social Democrats required that the Union's objective should be 'full employment'. And we were given that, at least on paper in Article 3.

Other demanding objectives were listed: social justice and protection, equality between women and men, solidarity between generations and protection of children's rights. The Union was also to promote scientific and technological advance. The Praesidium proposal here focused on space research in particular. "Europe must have modern objectives that inspire its citizens," Giscard expounded. We were not inspired. Space research was dropped.

And what about global objectives? The Union is not separate from the rest of the world. The Praesidium opened with a somewhat pompous gambit: "In defending Europe's independence and interests, the Union shall seek to

advance its values in the wider world.” What kind of a superpower are we sculpting here, anyway? There are cautionary examples in European history of visionaries who have taken it upon themselves to advance their interests and values in the wider world.

The Convention rejected the Praesidium’s formulation of Article 3 Paragraph 4. The final formulation is less offensive: “In its relations with the wider world, the Union shall uphold and promote its values and interests.” What values and interests are we talking about here? Peace, security, global sustainable development, solidarity, elimination of poverty, and human rights, particularly the rights of children. These objectives are pursued under international law and the principles of the UN Charter.

This was great stuff. For the first time ever, the Union was about to enter the concepts of broad security and global solidarity into its founding treaties.

The Conservative EPP group wanted to add ‘free trade’ to the list of global objectives. This was well and good, but the world economy needs not only free trade but free and fair trade, which became the final formulation.

3.4.1 The languages of the Union

And one more objective: “The Union shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced.” Little more is said on the delicate language issue, even though there was some demand for a separate article on the languages of the Union. What the Constitution does say is: “Every person may write to the Institutions of the Union in one of the languages of the Constitution and must have an answer in the same language.”

So, which languages are “the Constitution’s languages”? These are listed in the final article of the entire Constitution, which declares that each of the 21 language versions of the Constitution is equally authentic. The official languages of the member states are the official languages of the EU. At the time of the Convention, there were 11 of them. After the 2004 enlargement, there will be 21, and in 2007 there will be 23 when Romania and Bulgaria join.

The official languages of the EU are one thing, but its actual working languages are something else. We discovered this at the Convention. Formally, it was possible to conduct business in all 11 official languages at the Convention. Even the candidate states were allowed to use their own languages in plenary sessions if they provided interpretation at their own cost. The proposals of the Praesidium were published in all languages, and we could submit our contributions in our mother tongues. That was the theory. The practice, however, was something completely different.

There were only two working languages in the Convention's working groups, French and English. In the party groups, too, only French and English were used as a rule. All documentation was initially prepared only in these two languages. Versions in other individual languages were slow in coming.

It was a huge mistake to speak at a plenary session in Finnish, or in any other one's own language if it was not English or French. This effectively ensured that a significant number of Convention members would be focusing on something else besides one's speech. Also, the reaction to the main points came in three waves: first from those who understood your own language; then from those who were listening to the simultaneous interpretation into French and English; and finally from those who were listening to a relayed interpretation via French or English. There was little certainty that what came out the other end through two interpreters was actually what one had said. I capitulated and always spoke in English at the Convention, and also submitted my written proposals in English.

What else could a poor man do? The French and British were enviably suave in their speeches. But the fact remains – language is power.

Danny Pieters, a Belgian alternate member of the Convention, investigated the language issue in depth and wrote a book. He suggested that the current practice of having all the official languages of the member states as official languages of the EU should be continued. The working languages, however, should be restricted to English, French and German – but no one should be allowed to use one's mother tongue. Everyone would thus be speaking in a foreign language. An intriguing idea.

3.5 A simpler system

“Nothing is more complicated than simplification.” This observation in the opening sentence of the report of the Simplification working group chaired by Giuliano Amato is true in reverse too, of course: Nothing is simpler than making things complicated.

The task of the Convention was to simplify and clarify the Union's decision-making system. As it stands now, it is opaque and nearly impossible to comprehend even for experts, let alone ordinary citizens. If and when real efforts are made to increase transparency and democracy in the Union, it is vital to make the decision-making tools and procedures understandable. As of now, they are nothing of the kind.

For ordinary citizens, EU directives are rather like imperial edicts, distant and alien yet mandatory. And what about the Union's pillar structure? Modern architecture or ancient temple? Complete hogwash to the man in the

street. Or take the term ‘subsidiarity’. MEP Pertti Paasio once quipped that Finns should not even attempt to pronounce the word before morning pee.

3.5.1 Directives into laws

Amato’s working group grasped the bull by the horns. It suggested that the number of forms of legislation and decision used by the Union should be cut from 15 to six and their names made more understandable. The term ‘directive’ should be scrapped. Why not call these bits of legislation what they are – acts and decrees? To distinguish them from national legislation, they would have the prefix ‘European’.

The new Constitution did clarify things quite a bit. The legislative acts are described as *European laws* (formerly known as regulations) and *European framework laws* (formerly known as directives). A European law is binding in its entirety and directly applicable in all member states. A European framework law is binding as to the result to be achieved, but leaves the national authorities entirely free to choose the ways and means of achieving that result.

The second group consists of non-legislative acts that are nevertheless binding on the member states. These are *European regulations* and *European decisions*. The third group consists of *recommendations* and *opinions* published by Union institutions; these are not binding on the member states.

Terms such as ‘European framework law’ or ‘European decision’ may seem strange at first, but they will become familiar enough in due course. The essential thing is that the name says what the thing is. This was something of an achievement.

3.5.2 The Convention’s working groups

Each of the Convention’s working groups was in fact charged with the task of rendering the Union’s decision-making process more transparent and clear. There were 11 groups in all. The first wave, founded in summer 2002, comprised six working groups addressing Subsidiarity, the European Charter of Fundamental Rights, the Legal Personality of the Union, National Parliaments, Complementary Competencies and Economic Governance. The second wave, in the autumn, had working groups on External Action, Defence, Simplification, as well as Freedom, Security and Justice.

The working groups were open to all members and alternate members. Usually, each working group had some 30 participants attending out of their interest in the subject. This meant that representation was somewhat dubious. The Finnish delegation aimed at having one member in each working group.

I chose the National Parliaments working group in the first wave. Finland has the most advanced parliamentary system monitoring EU decision-making among the member states. In the second wave I chose Defence.

The working groups brought tangible content to the Convention. They enabled members to discuss the nitty gritty of the business in detail, but they also took up a lot of time. The working groups were a test of our ability to present arguments, but also of our capacity for compromise. The reports of the working groups were reflected in the end result of the Convention. In the final moments, those subjects that had been discussed by the working groups were those that the Convention had the least difficulty in accepting. The fiercest arguments erupted over issues that had not been covered by any working group due to lack of time or the necessary will.

We also failed to achieve a third wave of working groups. The Social Democratic group, in particular, wanted a working group to be set up on Social Europe. The primus motor here was Belgian MEP Anne van Lancker. I had myself made a written submission concerning the establishment of a working group on Regional and Local Government. Several Convention members demanded a working group on the hottest potato of them all: Union Institutions.

A joint letter to Convention Chairman Giscard d'Estaing was drafted by the Nordic countries (Finland, Sweden and Denmark) and the Baltic countries (Estonia, Latvia and Lithuania) in February 2003. We proposed special working groups to deliberate the articles over which consensus had not yet been reached. We also expressed our wish that sufficient time be reserved for discussing amendment proposals submitted by Convention members and that these amendments be made available to all members.

The Praesidium responded. A Social Europe working group had already been set up, and in two months (December to January) it produced a report. A Regional and Local Government working group, on the other hand, never emerged. The Spanish members of the Praesidium, led by Ana Palacio, considered the topic too sensitive and quashed the proposal. Instead, several smaller discussion circles with invited membership were convened to discuss the Court of Justice, the Union budget and the Union own resources system.

The hottest potato, Union Institutions, never did get a working group of its own. General Secretary John Kerr had suggested that a working group should be set up for each institution. This idea never got off the ground. Only the Court of Justice was given a think tank. According to Giscard, the status of all the other institutions – the Parliament, Commission and Council – is of interest to all members and should thus be discussed in plenary session. We had to be content with this, although the results were not altogether satisfactory.

3.5.3 Legal personality for the Union

The idea of a working group on Simplification of the Decision-Making Process was originally a brainchild of Giuliano Amato. Before he had been chairing the working group on the Legal Personality of the Union, which had achieved much by way of clarifying the structures of the Union.

The working group on Legal Personality was a great success. It produced an unanimous proposal that the Convention had no trouble in accepting, the shortest Article in the entire Constitution. Article 6 says with unequivocal bluntness: “The Union shall have legal personality.” What does this mean?

The Union will have a new, uniform legal personality, making it a subject in international law. Typically states are subjects in international law; but acquiring legal personality does not turn the Union into a state. There are quite a many international organisations that are also independent entities with regard to the rights and obligations of international law and thus have a legal personality. They can be party to international treaties, be subjects in international legal proceedings and have external representation.

Legal personality will no doubt reinforce the status of the EU as an international actor. It will also considerably clarify and simplify the Union’s structure. Up to now, the European Community (EC), the Coal and Steel Community and Euratom have each had separate legal personalities. Now these will disappear, except for Euratom. That will remain because the Austrian Convention members in particular, being strongly opposed to nuclear energy, could not tolerate the idea of Euratom being merged into the structures of the EU.

Legal personality will unify the Union’s institutions. The curious pillar structure will disappear. Having Foreign and Security Policy as the second pillar and Home and Justice Affairs as the third pillar will be consigned to the scrap heap of history. Of course, different forms of decision-making will also in the future be used, depending on the context. Undoubtedly foreign and security policy will remain intergovernmental in nature, and no European laws or European framework laws will be passed in this area. European decisions will have to suffice.

3.6 Fundamental rights

Legal personality enables the Union to take a significant step forward. The EU can now accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms and thus bind itself to the international human rights monitoring system guided by the Council of Europe. This objective was entered in Article 7 of the Constitution.

Up to now, the situation has been preposterous. Although all member states have committed themselves to the European Convention on Human Rights and submitted themselves to the European Court of Human Rights, this has not applied to the EU. The Union has gradually increased its competence, thus rather surprisingly eroding the member states' responsibilities in safeguarding human rights. Now this will be put right. When the EU accedes to the Convention, its institutions will be subject to the same obligations with regard to human rights as the member states. The European Court of Human Rights will be able to deliberate EU decisions.

This will, in turn, bring a new dimension to Union citizenship.

3.6.1 Union citizenship

Article 8 of the Constitution states: "Every national of a member state shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship; it shall not replace it."

This is how it should be, since the Union is not a state and as such cannot have citizenship in its own right. The Praesidium did boldly put forward the idea of dual citizenship in its skeleton outline – the concept of people being free to choose between citizenship of a member state and citizenship of the Union – but this was firmly put down by the Convention. Citizenship will continue to be derived primarily from the member states.

3.6.2 Charter of Fundamental Rights into the Constitution

The European Convention on Human Rights covers traditional human rights and civil liberties. When the first Convention founded in Tampere in 1999 was charged with the task of drawing up a Charter of Fundamental Rights for the Union, the aim was to go beyond. Political and civil rights are not enough. The market freedoms already provided by the Union – the free movement of goods, services, capital and labour – needed to be complemented with economic, social and cultural rights. Fundamental rights are assessed as a whole. Ultimately, everyone has the right to a good life.

The first Convention succeeded admirably. A Charter of Fundamental Rights was drawn up, with 54 articles divided under six titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights and Justice.

Significant new issues were to be found under Solidarity: workers' rights such as the right of association, the right of collective bargaining and action, the prohibition of child labour, free placement services, fair and just working conditions, protection against unjustified dismissal and the right to social security and health care. In enshrining these, the Charter highlights the

European social and labour market model. It is something unique and worth defending in the global context, differing in many ways from the American or Anglo-Saxon labour market model.

The Charter also safeguards the rights of those outside the labour force. Under Equality there are separate articles concerning the rights of children, the elderly and the disabled. Equality between men and women is also acknowledged, as is the diversity of cultures. There is a ban on discrimination and a focus on environmental protection and consumer protection. As a whole, the Charter embodies qualitatively a new type of interpretation of human rights and as such heralds a new era for the Union.

The difficulty was that the Charter was approved at the Nice summit only as a declaration. It was not a legally binding document. This was a problem for the Convention.

The most ambitious members wished simply to incorporate the Charter wholesale into the Constitution. Others proposed a specific article referring to the Charter, which would remain a separate document. However, everyone – even the British, ultimately – were willing to make the Charter legally binding. This was something of an achievement.

The most ambitious members won. Despite Giscard's initial opposition, the 54 articles of the Charter were appended to the Constitution in their entirety, with only minor technical alterations, forming Part II of the Constitution. This scuttled the Praesidium's original plan for the structure of the Constitution, but it was for the best.

Baroness Patricia Scotland, an alternate member of the Convention representing the British Government, said on several occasions that the Charter must not expand the Union's competence, and it should not be possible for an individual citizen to bypass national legislation by invoking the Charter. She was worried that British workers would begin to demand European rights and appeal to the European Court of Justice. We Finns had completely the opposite concerns. Our Constitution grants our citizens broader rights than the Union Charter does. It was unthinkable for rights enshrined in the Finnish Constitution to be annulled on the Union level.

Again, a compromise had to be sought, and was found. Provisions on the interpretation of the Charter were appended to it. The fundamental rights defined in the EU Constitution primarily apply to EU institutions. They are only binding on the member states in the application of Union legislation. Thus, the Union does not gain added competence, either.

Neither the British nor we Finns thus have anything to worry about. The protection of fundamental rights derives primarily from national legislation, and the rights guaranteed by the EU Constitution only apply to the decisions

and actions of the Union itself. This was an achievement, but one that will in time prove insufficient. After all, human rights if anything are universal by nature. Defining fundamental rights is the first step towards creating a common supranational value basis.

3.7 Competence of the Union

There is always a shortage of news when the summer holidays begin. Thank heaven for the EU, which once again provided fodder for the idling Finnish media in summer 2003. *Svenska Dagbladet* in neighbouring Sweden ran the headline: “EU to ban smoked food”, which electrified Finland. Just think, those nobs down in Brussels are going to stop us grilling sausages! Only the week before we had learned that tar was to be added to the EU list of banned substances. And what about that thing the previous summer: the EU would only allow swimming in hygienically monitored places where the water temperature is over 21 degrees? Or the banning of curved cucumbers – the mother of all EU myths?

Reijo Kemppinen, Spokesperson of the European Commission, has his work cut out for him putting right the urban myths and wild speculations that only a hot summer can spawn: “Go right ahead and grill your sausages and steaks, the Commission says it’s fine.” But even this story hides a grain of truth. No doubt various working groups and preparatory bodies in the Union discuss all matter of things that then give rise to such canards. They spread like wildfire in an environment where people regard the Union with suspicion and healthy scepticism. Brussels is far enough away for the mysticism to take hold.

Has decision-making in the Union become too estranged from the everyday lives of people? What things should the EU decide about, anyway? Is the Union grabbing more and more power? Since the decision-making processes of the EU are unfamiliar, non-transparent and not adequately democratic, suspicion is nurtured. It is wholly justified to ask who decides what and why. This is why one of the Convention’s main tasks was to clarify the division of competences between the Union and the member states. The Constitution was to specify which decisions the Union is competent to make and which matters will remain with the member states.

Finland proceeds from the assumption that the Union’s competence is extraordinary. It requires a specific decision by the member states to transfer competence to the supranational level. No decision, no competence. It is a sound principle, but is it sufficient? No, says real life. The Union has been expanding its competence in unexpected ways through increasingly detailed legislation. This has not necessarily happened against the will of the member states, but it has on too many occasions been an uncontrolled process.

The Convention wanted to re-establish that control. Peter Hain, a representative of the British Government, was nervous. He was irritated by Article 9 in the Praesidium's February proposal concerning the transfer of competence. According to the proposal, "the Union shall act within the limits of the competences conferred upon it by the Constitution". Hain said that this was not so, explaining that it is not the Constitution which confers competences but the member states through the Constitution. His argument was convincing enough to carry weight, especially as he tacitly approved of the term 'Constitution'. In its final form, Article 9 paragraph 2 reads as follows:

Under the principle of conferral, 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. Competences not conferred upon the Union in the Constitution remain with the member states.

The second sentence is more important than the first. For the first time, a founding treaty of the Union states explicitly that general competence resides with the member states. That is the fount of sovereignty. The EU Constitution cannot define the competence of the member states, but it should define the competence of the Union. But how?

3.7.1 The tripartite division of competencies

The German members of the Convention proposed that a detailed list of EU competencies be drawn up. This *Kompetenzkatalog* reflected Germany's own concept of the division of powers within a federal state. The problem had become increasingly acute as the competence of the Union extended not only to the competence of the Federal German Government but to that of its states, the *Länder*. A detailed list of which competence belonged to which level would solve the problem, but it would also cripple the natural development of the Union. For this latter reason, many of us in the Convention opposed the drafting of such a detailed list. But the question remained: How could the Union's competence be defined?

The solution reached was to retain the present tripartite division: exclusive competence, shared competence and support measures. Of course, there is also fourth category, the exclusive competence of the member states, but this need not be defined in the EU Constitution.

In exercising *exclusive competence*, only the Union may legislate, the member states being able to do so themselves only if so empowered by the Union or for the implementation of acts adopted by the Union. With *shared competence*, both the Union and the member states have the authority to legislate. But the member states shall exercise their competence insofar as

the Union has not exercised its competence. The Union may also undertake *support actions* to support, coordinate or supplement the actions of the member states, without thereby superseding their competence in these areas. These are defined in the Constitution.

Union competence is not somehow detached from the member states. On the contrary, the question is about joint decision-making by the member states. Each European law is ultimately approved by the Council of Ministers, where each member state is represented by a minister. Union competence is akin to borrowing power from the member states, and such a loan can be recalled by joint decision if necessary.

What has often been seen as a problem is not so much that the Union wields too much power in the wrong fields but that the Union issues provisions that are too detailed. Directives, or framework laws, should be just that – a framework. It should be up to the member states to decide on the details. On too many occasions, however, directives have turned out to contain detailed provisions. In the future, European framework laws will have to conform to their name.

3.7.2 Areas of Union competence

And where can the Union exercise its competence? This, too, is outlined in the Constitution, although on a general level. Generalities are nothing new in the history of integration. When the European Economic Community was founded by the Treaty of Rome in 1958, many Community competences were listed: transport policy, social policy, an investment bank, general industrial policy, regional policy, trade policy and foreign policy. Who would have known that the customs union and the agricultural market would become the most important EEC competencies in its first decades?

What about today? There are surprisingly few areas in which the Union has exclusive competence. The only areas where member states have no competence of their own are the competition regulation of the internal market, trade policy and duties, and monetary policy in those member states that have adopted the euro. None of this will be changed by the new Constitution.

No doubt the most important thing for the EU is shared competence, which accounts for 80% of the Union's decision-making. The main areas covered by shared competence are the internal market, agriculture and fisheries, transport, regional policy, environmental and consumer matters and, as new additions, energy policy and some internal and justice matters. The Union also has competence in research and technological development and in development cooperation.

Industry, health care, education, culture and rescue services are areas in which member states retain primary competence, with only support and coordination being provided by the Union. The Constitution singles out Union actions in economic, employment and social policy and in the Common Foreign and Security Policy as special categories of competence. Specifically, the competence of the Union cannot replace the competence of the member states in any of these areas, and EU legislation cannot thus be enacted to harmonise the legislation of the member states.

The division is schematic and serves only as an aid in outlining the areas to which the member states are willing to extend shared competence. The Union's competence has expanded by stages. In addition to amendments to the founding treaties, the process has been promoted by deliberations of the European Court of Justice and by the use of 'open coordination'.

Furthermore, the founding treaties have a *flexibility clause* for expanding the competence if needed. Article 17 in the new Constitution reads:

If action by the Union should prove necessary to attain one of the objectives set by the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously, shall take the appropriate measures.

Certain MEPs, led by British Liberal Andrew Duff, wanted to amend the flexibility clause so as to require a qualified majority instead of unanimity. This would have been tantamount to a *coup d'état*. It would have enabled the Union to expand its competence without the agreement of all its member states. The Union would no longer have been borrowing its power; it would have been stealing it. It would have become an independent sovereign entity.

3.8 Subsidiarity

"Render to Caesar the things that are Caesar's, and to God the things that are God's." And the people, obligingly, do so.

But what should one render to the EU? Does the Union not exist to manage matters that are better dealt with jointly than by each member state separately? Indeed it does.

However, the Union has exclusive competence in very few matters – trade policy, the competition regulations of the internal market and the euro. There are far more matters where supranational cooperation would be appropriate. These will come under shared competence, where both the Union and the member states can enact legislation. However, the member states "shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence." This is the basic principle

of shared competence entered in the Constitution. The member states can only enact legislation if there is no Union legislation.

In shared competence, the Union takes precedence over the member states. However, Union action is not a goal in itself. It is significant only if joint decisions provide added value. The Union should only act if it is in the common interest. This is well understood. Thus, shared competence is complemented with the principle of subsidiarity, which highlights the responsibility. The term is borrowed from the Catholic Church.

In ecclesiastical terms, the concept of subsidiarity emerged in the Papal bull *Quadragesimo Anno* 1931 issued 70 years ago by Pope Pius XI. In the modern social doctrine of the Catholic Church, it transfers responsibility in the care of body and soul to the level of the hierarchy closest to the matter at hand. The individual has primary responsibility for his or her life. If the individual fails, the family helps. If even that is not enough, society is responsible, and in spiritual matters the Church. Subsidiarity relieved the Pope from intervening in matters he could have no knowledge of and no influence in.

Will subsidiarity prevent the EU from intervening in matters that are none of its concern and that it cannot influence? Problems must be solved where they emerge. Decisions should be made as close to citizens as possible. This was the approach when the principle of subsidiarity was introduced into the Maastricht Treaty. The Convention took the same challenge and specifically declared that “the use of Union competences is governed by the principles of subsidiarity and proportionality”.

What exactly are these principles? They are defined in Article 9 of the Constitution:

Under the *principle of subsidiarity*, the Union shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the member states, either at central level or at regional and local level, but can be better achieved at Union level. Under the *principle of proportionality*, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution.

This is a sound foundation for the Union’s actions. Even the most sceptical critics could accept this. Subsidiarity ensures that the Union does not take upon itself duties that can be better managed on the national, regional or local level. Proportionality ensures that the Union avoids overkill.

3.8.1 Monitoring subsidiarity

The principles are sound. How about the practice? How can we ensure that subsidiarity and proportionality are actually embodied in the Union's decision-making process? The Convention took up this question in an innovative way. Several ideas were floated regarding the monitoring of subsidiarity. Would this be political or judicial by nature?

Subsidiarity is primarily a political concept. National decision-making has been surrendered to the supranational level. National parliaments have given up their absolute sovereignty in legislation. That is why the national level is both competent and justified to indicate which segments of power it has been willing to surrender; thus, national parliaments should play a key role in the political monitoring of subsidiarity.

Would the Union need a third chamber consisting of representatives of national parliaments, charged with monitoring EU legislation from the point of view of subsidiarity and proportionality? This was a proposal propounded particularly by the French Convention members, led by Senator Hubert Haenel. However, this would have resulted in an unnecessarily heavy and complicated system. Furthermore, how representative would such a third chamber be, since representatives of national parliaments could not speak on behalf of their own parliaments as a whole.

Some other solution had to be found, and the Subsidiarity working group chaired by Méndez de Vigo found it. What we need is a sort of *early-warning system*. National parliaments should be given the opportunity to assess legislative initiatives from the Commission and thus to ensure that the initiatives really do fall under the Union's competence, and not the national or regional level. Accordingly, a separate protocol on the application of the principles of subsidiarity and proportionality was appended to the Constitution.

The basic principle is that decisions are made as close to citizens as possible. The Commission must ensure, in drafting legislative initiatives, that subsidiarity and proportionality are observed. The initiatives must also be justified on this basis. The Commission must be able to show that the matter at hand is best managed on the Union level and that a Union decision on it will actually bring added value in comparison with national decision-making.

The Commission will be required to submit all its proposals to the national parliaments at the same time as it submits them to governments and the Union's legislative bodies. National parliaments will then have six weeks in which to react. The Commission will be required to reconsider the proposal if at least one-third of the national parliaments consider that the principle of subsidiarity or proportionality has not been observed. In judicial and internal

affairs, which are nationally more sensitive areas, the required number is only one-fourth of national parliaments.

The aim is not to petrify the Union's legislative process by killing initiatives. It is more of a preventative scheme. The Commission, while retaining legislative monopoly, will need to think more carefully about whether a particular issue really falls within Union competence. Hopefully, this will help dispel some of the suspicions harboured by citizens.

The British members, led by Gisela Stuart, wanted an even stricter approach. Up until the very last sessions of the Convention she circulated a petition for her submission that called for the addition of a red card to the yellow card. A no vote from one-third of the national parliaments would force the Commission to reconsider an initiative: the yellow card. A no vote from two-thirds of the national parliaments would force the Commission to retract the initiative: the red card, a veto. This was deemed unacceptable. If national parliaments were to gain a direct veto in EU legislation, they would effectively be transformed into yet another EU institution.

Giscard rejected Stuart's submission on the grounds of reality. If it were truly the case that two-thirds of the national parliaments were against a particular piece of legislation, the Commission should have sense enough to draw the necessary conclusion.

Gisela Stuart did manage to have one of her submissions approved. The British had a problem with how to express the position of a parliament when said parliament has two chambers, as in their own case. The Lords had to have their say. Stuart had a sensible proposal: unicameral parliaments would be given two votes, and in bicameral parliaments each chamber would have one vote each. This was brilliant! The Finnish Parliament is worth two Houses of Lords any day!

The Convention was highly successful in providing for political monitoring of the principles of subsidiarity and proportionality in the Union. Judicial monitoring, on the other hand, is somewhat lacking. Would it even be possible to create for the Union a mechanism comparable to a federal constitutional court for judicial assessment of the distribution of power between central government and its members? The EU is not, after all, a federal state.

The Convention proposed that, after legislation is enacted, a member state should be entitled to file a suit with the European Court of Justice concerning observance of the principle of subsidiarity. This was good. The problem is that such a suit can also be brought by request of a national parliament. This effectively means that a parliament would be suing its own government. A representative of that government would have been involved in approving

that legislation in the Council of Ministers. There is a clear risk here of political deliberation turning judicial.

3.8.2 The regional and local levels

If subsidiarity is taken literally, it does not only involve the distribution of power between the national and the Union level. If decisions are to be made as close to citizens as possible, then the regional and local levels are highly important, too. In several member states, regions have independent legislative powers, or else they have advanced municipal autonomy, with local taxation authority. There are also autonomous regions, for example Åland in Finland.

Naturally, subsidiarity refers to the right of the regional and local levels to handle their own affairs. Do they also have the right to ensure that the Union does not interfere? They should have, and the Convention said as much. Regional and local actors can bring suit through the Committee of Regions if they feel that Union legislation is in violation of the principle of subsidiarity.

National parliaments are free to provide for consultation with regional parliaments that have legislative powers. In monitoring the principle of subsidiarity, for example, the Finnish Parliament will have to give new thought to consultation with the Provincial Assembly of Åland.

The new EU Constitution opens up new dimensions. The legitimacy of the Union's decision-making is strengthened, and it is provided with democratic checks and balances. We are one step closer to creating a Europe of citizens. Who is to say, then, that the Convention failed?

There are only two kinds of countries in Europe today: those that are small and know it, and those that are small and do not.

Paul-Henri Spaak, 1957

The world has changed – it is dangerous, disorganised and dehumanised. We do not resign ourselves to a feeble Europe that is a spectator in the world.

Dominique de Villepin, 2003

4. Common Foreign and Security Policy

I raised my blue card, asking to speak. The Convention was in plenary session in early September 2002. The Praesidium had introduced blue cards in order to liven up debate in the plenary sessions. By raising a blue card, a member could take the floor for a brief comment. Such a comment was now called for.

Giscard d'Estaing had just outlined the second wave of working groups. I protested. Why were External Action and Defence separated into two working groups? Defence policy had always been an integral part of the Common Foreign and Security Policy. Why single out defence now? Swedish Deputy Prime Minister Lena Hjelm-Wallén and Irish Labour Party leader Proinsias de Rossa seconded my proposal for a joint working group on Defence and External Action. The small non-aligned member states were worried.

This concern was all the more motivated considering that in the skeleton outline presented by the Praesidium, defence had a title to itself, separate from other external action. Was this a subtle way of crafting an independent defence dimension for the Union? Of turning the Union into a military alliance, perhaps?

Giscard stood firm. The Defence working group was necessary for certain specific issues such as defence industry cooperation and crisis management principles. To chair the working group, he appointed French Commissioner Michel Barnier, a key person in the Praesidium as regards the views of the French Government and particularly those of President Chirac.

Barnier buttonholed me as the first meeting of the Defence working group was starting. He said he hoped for successful cooperation. There were two issues that were paramount: a solidarity clause against the threat of terrorism,

and respect for the desire of certain member states to enter into closer defence cooperation. If agreement were not reached, these things might evolve outside the Union structures. Surely Finland would not want that? We got the message. The Defence working group had a hidden agenda beyond what Giscard had intimated.

The first overhead the working group was shown compared defence expenditure on both sides of the Atlantic. The US spends €400 billion per year on defence, compared with €170 billion for all EU member states together. The figures for military R&D are €53 billion in the US and €10 billion in the EU. The imbalance was obvious. Something had to be done if the EU's Common Foreign and Security Policy was to have any credibility.

The lines had been drawn, and the defence debate in the Convention was thus launched.

4.1 CFSP

It was yet another small victory, but a victory all the same. We managed to get our basic position slipped into the Constitution. Article 40 begins thus: "The common security and defence policy shall be an integral part of the common foreign and security policy."

I'm sorry? What the hell does that mean? The common security policy is part of the common security policy? And you call that a victory?

These things are usually referred to by acronyms in the day-to-day wrangling in the meeting rooms and hallways of Brussels. Would it help in understanding Article 40 if it read: "The ESDP is an integral part of the CFSP."

Just imagine the confusion of having to memorize those acronyms in French (PESD, PESC), Finnish (ETPP, YUTP) and Swedish (ESFP, GUSP) too! Gasp! Talk about surreal! But this is the reality. There was nothing for it but to learn to talk the talk and walk the walk; otherwise there was no chance of having any influence at all.

So what exactly was the victory in this particular case? In plain English, Article 40 means that EU defence policy is part of a broader external policy. It is not to be a separate sector within which, in the worst scenario, certain member states could fly the Union banner on military excursions elsewhere in the world.

All terms have their history. Therefore there is a certain reluctance to abandon existing terms, even if they have become somewhat detached from reality. The Common Foreign and Security Policy is a fairly recent phenomenon in the history of integration. Not that its ambitions did not exist

from the start; rather, foreign policy and defence are the most sensitive areas in weighing the sovereignty and identity of the member states.

In 1954, the French National Assembly toppled agreement on a European Defence Community with the combined votes of its Communists and nationalist Gaullists. The founding treaty for the Community had already been signed by the governments of the Six. Defence was to have provided the anchor for European integration, with the added objective of preventing West Germany from building up its own army. The Germans were to be incorporated with other Europeans – particularly the French – into a common European army. But there it was, European defence cooperation had been scuppered, and by the French Parliament, no less. West Germany was drafted into NATO.

The Economic Community was founded by the Treaty of Rome in 1957. Economic integration has proved a strong motor for overall integration. Political dialogue, particularly that involving foreign policy, was shunned in the EEC. The ‘Europe of fatherlands’ allowed each fatherland to pursue its own course. However, economic cooperation and the common trade policy forced the member states into increasingly close political cooperation, too.

In 1969, it was agreed that the EEC Foreign Ministers would have regular meetings twice a year, with the proviso that these meetings would in no way be binding on the member states. Thus, the meetings had to take place outside the structures of the EEC, through intergovernmental arrangements. France took the strictest view: the unofficial meetings of the Foreign Ministers must not even be held in the EEC capital city, Brussels, let alone on actual EEC premises. The system had to be kept completely separate, and was. In an extreme example, one Monday in July 1973 the Foreign Ministers met to discuss foreign policy in Copenhagen and then flew to Brussels for a meeting of the Council of Ministers in the afternoon.

4.1.1 Foreign policy included in integration

Foreign policy was first mentioned as part of the work of the European Community in the Single European Act of 1986. This enabled a Secretariat to be set up in Brussels to help the current Presidency country to coordinate policy.

A great leap forward was taken in Maastricht in 1992. There, common foreign and security policy was made into a separate intergovernmental pillar in the EU structure. Decisions regarding this policy were to be taken unanimously by the External Relations Council. The concept of a *Common Foreign and Security Policy* (CFSP) was born. Article J.4 of the Maastricht Treaty reads:

The common foreign and security policy shall include all questions related to the security of the Union, including the eventual framing of a common defence policy, which might in time lead to a common defence.

These were the key concepts: ‘foreign and security policy’ as a blanket term, ‘defence policy’ as one part of it, and ultimately ‘common defence’, referring to territorial defence and a Euro-army. All this was high rhetoric in 1992, with little functionality to back it up.

But that was how NATO got started. The Treaty of Washington (1949) contained nothing more than a declaration of mutual assistance. It was not until the permanent command structures of NATO were laid down after the Korean War that the potential for a common defence was realised.

Before the Treaty of Washington, the countries of western Europe had drafted the Brussels Treaty (1948) concerning a common defence. This was the Charter of the Western European Union (WEU). Its security guarantee provision, Article 5, was more peremptory than that of NATO’s:

If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all military and other aid and assistance in their power.

By comparison, Article 5 of the NATO Charter simply says:

If an armed attack occurs, each of [the Parties], in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force.

Declarations are one thing, practical measures are another. The WEU never developed into a collective defence organisation. It remained a military policy forum for EU member states that were also members of NATO. In the world of the Cold War, the US and western Europe sought support in one another, and thus the transatlantic military alliance trumped the European one.

4.2 ESDP

The front lines of the Cold War dissolved at the end of the 1990s. Europe was finally able to stand on its own feet. The Treaty of Maastricht sought to resurrect the WEU, giving it the task of creating a European defence identity. A common defence policy within the EU was still a distant dream in those

days. The WEU, however, took up the challenge. It created the concept of a *European Security and Defence Policy* (ESDP).

At the WEU meeting held at Petersberg Castle near Bonn in 1992, the content of the ESDP was defined as “humanitarian and rescue tasks, peacekeeping tasks, and tasks of combat forces in crisis management, including peacemaking”. These came to be known as the *Petersberg tasks*. They did not involve mutual defence commitments, which were already provided for by Article 5 in the Charters of both NATO and the WEU. Rather, this new arrangement involved peacekeeping functions in neighbouring areas and further afield, too. The wars following the dissolution of Yugoslavia had taught Europe a thing or two.

Finland and Sweden had joined the EU in 1995. Both wanted to play an active role in the development of the Union, including its emerging defence policy. These two non-aligned countries were prepared to assume their share of responsibility, but they were not willing to see the Union turned into a military alliance that would draw new front lines. Finland and Sweden put forward a joint proposal whereby the CFSP would include the possibility of military action, but limited to crisis management capabilities as per the Petersberg tasks. On the basis of this proposal, the Petersberg tasks were incorporated into the Treaty of Amsterdam unaltered (Article 17.2.) in 1997. A unique military dimension, crisis management, had been created for the Union – on paper, at least. But how would it work in real life?

For all the commendable initiative of small countries, the defence policy of the Union will not budge an inch without the approval of the two EU member states that are nuclear powers and permanent members of the Security Council of the United Nations: the UK and France. And these two remained in disagreement on defence for a long time. They represented opposite ends of the spectrum: two disenfranchised ex-superpowers trying to hang on to the remnants of their hegemony wherever they can, the British seeking military clout in the transatlantic dimension, the French in an anti-transatlantic stance. Hence the dilemma.

Just before Christmas 1998, President Jacques Chirac and Prime Minister Tony Blair shook hands on the quayside of the tiny French town of St. Malo. France and Britain had finally reached an understanding. In a compromise solution, the British agreed that the EU should have its own military capability so as to enable ‘autonomous action’, while the French agreed that the collective defence of Europe would be managed through NATO and that EU crisis management would only be undertaken “where NATO as a whole is not engaged”.

Things began to happen. The WEU was no longer required as a separate European defence entity. It was merged into the EU, except for the collective

defence provision of Article 5. The ESDP was incorporated into Union policies. The institutions of the WEU, mainly the Institute for Security Studies in Paris and the Satellite Centre in Torrèjon, Spain, were also merged into the EU.

The detailed specifications of the crisis management force were decided on at the Helsinki summit in 1999. A common *Helsinki Headline Goal* was established, according to which the EU was to have, by the year 2003, a force 50,000 to 60,000 strong supported by an air force of 400 aircraft and a navy of 100 vessels. This force was to be set up so that it could be deployed in 60 days. A rapid response force was also to be founded, a smaller body capable of evacuation or support actions. New decision-making bodies were also created: the Political and Security Committee (COPS), the European Union Military Committee (EUMC) subordinate to it, and the European Union Military Staff (EUMS). With these military units, the EU is beginning to address the entire scope of the Petersberg tasks. The change has been astonishingly rapid.

4.2.1 Civilian crisis management

Crisis management is a concept that includes more than just military action. A non-military civilian component is needed too. Prevention of conflicts is the most efficient crisis management of all. Reconstruction following war, natural disaster or major accident also calls for non-military action.

Finland and Sweden have taken the initiative in the development of civilian crisis management in the EU. An action plan was approved in Helsinki in 1999. A Committee for Civilian Aspects of Crisis Management has been set up, focusing on police, rescue services and legal administration. There is also a quantitative goal: the member states pledged to have 5,000 policemen in international duties by 2003.

4.2.2 Crisis management operations

Tangible crisis management measures have already been undertaken. The first such EU operation was a civilian one, the dispatch of a unit of 500 police officers to Bosnia-Herzegovina in early 2003 to advise and guide the local police force. The first military operation was launched in Macedonia, where the EU took over the NATO operation in March 2003. All EU member states except for Denmark participated in this.

And there was more to come. In May 2003, UN Secretary General Kofi Annan asked the EU to send peacekeeping troops to the Democratic Republic of Congo. The request was accepted, and the operation was undertaken under French leadership. This was the first military operation

planned and executed by the EU outside Europe. NATO was not even consulted, which drew some flak from Washington later.

This was the situation at the point where the Convention was to enter the CFSP and the ESDP in the Constitution – and to look forward as well.

4.3 Comprehensive security

The Treaty of Amsterdam (1997) not only added crisis management duties to the Union's defence policy; it contained another innovation as well. The position of High Representative of the CFSP was founded. This official was also made Secretary-General of the Council of Ministers and the Secretary-General of the WEU, which was being wound down. On the map of Union institutions, the post was sited in the camp of the Council, not the Commission. The intergovernmental dimension thus gained importance. The man appointed to the post was Javier Solana, former Secretary-General of NATO, former Spanish Foreign Minister and former peace activist who in his youth had opposed Spain joining NATO and the presence of American military bases on Spanish soil.

Javier Solana was invited to address the Defence working group of the Convention. His message was clear: the EU is an economic giant but a political dwarf, and will not have political credibility unless its defence dimension is substantially strengthened. We heard from other important people, too. External Relations Commissioner Chris Patten of the UK emphasised the comprehensive nature of the Union's security policy. The EU's political credibility in the world does not depend on military capability alone. We must consider external relations as a whole, with trade policy, development cooperation, human rights policy and environmental policy all playing a part. We received an object lesson in how multifaceted the Union's foreign policy could be: Solana said one thing, Patten said another.

Commissioner Patten was right. The EU is the largest single economic entity in the world. Its share of world trade – not including the substantial EU internal market – is equal to that of the US – about one-fifth. In services and direct investments, the Union outranks the US. In development cooperation, EU member states are second to none, funding over half of all development cooperation in the world. The EU member states contribute 37% of the UN budget and a stunning 65% of all humanitarian aid in the world. These are not the actions of a political dwarf.

Results have been achieved, too. The EU has successfully exerted its influence in foreign policy. The personal contribution of Javier Solana was important in seeking a peaceful solution in Macedonia and Serbia-Montenegro. EU efforts have substantially increased stability in the Balkans.

Without the EU there would be no ‘road map’ peace plan in the Middle East. Without the EU there would have been no Doha round in the WTO, no Kyoto Treaty, no International Criminal Court. These were all EU achievements.

All this has to do with *comprehensive security*, which is defined by three factors:

1. an indivisible security, which cannot be sought at a neighbour’s expense but by everyone working together;
2. an overall security, which covers not just military issues but all external factors that affect the community’s well-being; and
3. a security involving not only states but citizens, focusing on the security of peoples rather than the integrity of states.

Comprehensive security is a new concept which is related to globalisation. Today, an effective security policy requires more than just defending the borders of a country against invaders with military force. The true security risks in Europe today are not about invasions threatening the territorial integrity of nations. They are about problems that cannot be solved within the confines of national sovereignty alone.

We have seen new types of threats: increasing environmental problems, the dangers of nuclear disasters, the risks involved in decommissioning nuclear weapons, the spread of weapons of mass destruction, organised crime, illicit arms dealing, people smuggling, drug trafficking, genocide, violence spreading from dissolving states, floods of refugees, minority conflicts and the vulnerability of infrastructures and information networks. These problems have no regard for national borders; they are universal. They cannot be combated by traditional military alliances and their security guarantees, and there is no point in declaring oneself neutral with regard to them.

Military alliances are always somewhat problematic as providers of security in that they are themselves part of the problem, i.e. military confrontation. Sustainable security can ultimately only be created through structures that are shared by everyone. Military alliances are aimed against an external threat, but that threat may become self-fulfilling, nurturing a vicious circle where suspicion, lack of trust and enemy images feed on one another. If we see a neighbour as a threat instead of a partner, all our actions serve to increase the distance instead of reducing it.

Sustainable security can only be based on close cooperation. It is this cohesion security that will generate the added value of security in European integration, and this is true worldwide, too. Confrontation will increase if, for

instance, the world of Islam is seen primarily as a threat and not as a potential partner. The two sides will draw apart, and the potential for common security will diminish.

4.3.1 The position of the Social Democrats

I was appointed chairman of the Foreign and Security Policy working group of the Social Democrats within the Convention. The very first thing I wanted to record as an objective was the concept of comprehensive security, for which European integration naturally provides a basis. The added value in security given to its member states by the EU is built on the cohesive security created through integration.

Externally, too, the credibility and potential global actions of the Union derive not so much from military might as from the will to cooperate closely. National self-interests are sacrificed in favour of multilateral treaties, international organisations and international law.

The emphasis is on conflict prevention. In the case of crises that have already erupted into violence or are threatening to do so, joint military efforts may also be needed. In such cases, all action must be based on the principles of the UN Charter.

We, the Convention's Social Democrats, were ambitious. We explored the possibility of the EU's having a seat on the UN Security Council. The EU should also have a joint vote in the World Bank and in the International Monetary Fund. It would be a decisive vote, since the combined voting power of the EU member states would be 32% in the World Bank and 28% in the IMF, considerable larger than that of the US, which currently dominates both organisations.

External representation of the Union should be clarified. At the moment, the same agenda is being pursued by the rotating Presidency of the Council, the High Representative for the CFSP, the President of the Commission and the External Relations Commissioners. Henry Kissinger's famous problem was more than just a quip: What number should one dial to learn the foreign policy position of the EU? We supported the concept of *'two hats'*, i.e. of combining the posts of High Representative and Commission Vice-President/Commissioner for External Relations. Solana's and Patten's hats should be combined and given to one person. Then Kissinger would at least face one less phone number.

Qualified majority, rather than unanimity, should be the norm in decision-making in the CFSP, simply for reasons of functionality and efficiency. Only strategic decisions and military decisions would have to be unanimous. We were also aiming to strengthen the initiative of the Commission in foreign

and security policy. But here we came up against a wall. Swedish Deputy Prime Minister Lena Hjelm-Wallén firmly demanded, backed up by the British Social Democrats, that we should clearly state that the CFSP would continue to be intergovernmental in nature. This was, indeed, recorded as the position of the Convention's Social Democrats.

4.3.2 The Convention's proposals on foreign policy

So what was the Convention's decision? The provisions on the Union's external action were collated under one heading – Part III Title V of the Constitution. The main objective is to preserve peace through a multilateral system and international law, according to the principles of the UN Charter. The aim is global governance and respect for equality, democracy and human rights. All countries are encouraged to integrate into the world economy. Global solidarity, the elimination of poverty and sustainable development are named as aims. These were sound principles. We were pleased to enter them in the Constitution as the basis for the Union's external action.

The legal personality of the Union and the removal of the pillar structure serve to clarify the coherence of external relations. Nevertheless, a dualism remains. On the one hand, we have Community external action, including trade policy and development cooperation, for instance. The Commission plays a strong role in these areas, and European laws apply to them. On the other hand, we have intergovernmental external action, including the Common Foreign and Security Policy and defence policy. Here, the Council makes the decisions and relies on European decisions instead of legislation.

4.3.3 Foreign Minister of the Union

The most significant reform in external relations was the founding of the post of Foreign Minister for the Union. The Convention provided the future Foreign Minister with two hats: that of High Representative for the CFSP and that of External Relations Commissioner. The same person will sit on both the Council and the Commission. This is squaring the circle: eroding the dualism in the EU's external relations – Community vs. intergovernmental – by having one person do both jobs.

The idea is schizophrenic. Not only will the Foreign Minister have a huge work load, but he will also face a highly challenging double mandate. He will be both Vice-President of the Commission and chairman of the External Relations Council. Which will prevail? It seems certain that his mandate will derive primarily from the Council, and that the intergovernmental aspect has triumphed.

The Foreign Minister will have the right of initiative in the Common Foreign and Security Policy, and the Commission will lose its separate right of initiative. There are plans to set up a Foreign Service to aid the Foreign Minister, subordinating the present 130 foreign missions of the EU to the Foreign Minister. This would be tantamount to creating a Foreign Ministry for the Union. The Germans were particularly keen on this point in the Convention, and their last-minute pitch was successful. The word in the Convention was that Joschka Fischer, had been tagged by the Germans as the EU's first Foreign Minister.

Would the Germans thus gain indirect influence on the UN Security Council, too? The perpetual question of Germany's permanent membership of the Security Council remains unsolved. Neither Britain nor France wishes to abandon its permanent seat, even for the good of the EU. The Convention stirred things up further in Article 206 of Title III of the Constitution:

When the Union has defined a position on a subject which is on the United Nations Security Council agenda, those member states which sit on the Security Council shall request that the Union Minister for Foreign Affairs be asked to present the Union's position.

An unprejudiced proposal. Is this the first step towards the EU having a single representative on the UN Security Council?

4.4 The Defence working group

The Defence working group of the Convention was given an avalanche of questions by the Secretariat, the first and most important of which was "What defence functions should the Union have in addition to the Petersberg tasks?" The mandate of the Defence working group subsumed the problem of how to organise a common defence. This was building up to an ambitious major step.

How to respond? Was not the provision in the current Treaties enough – "The eventual framing of a common defence policy, which might in time lead to a common defence"? This represents an excellent compromise, covering the wishes and needs of all the Union's member states. It enables both allied and non-aligned countries to participate in Union defence policy. Its implementation, particularly the creation of an operative crisis management system, is only just beginning. It also offers options, up to and including common defence, if everyone agrees.

Is this not enough as the EU's defence policy? All that is needed is to implement it; no one is excluded, and all options are open, as long as

political consensus is reached. I said as much in my written contribution to the Defence working group.

It was not convincing enough. There was a stronger will at play. Germany and France played a joint card. Their proposal, signed by Foreign Ministers Joschka Fischer and Dominique de Villepin, stated that they were in favour of a potential common defence. That would reflect the solidarity of values and interests that unites us, which would increase as European integration progresses, and which would have to be apparent in all fields.

This was not the first time Germany and France had joined ranks. When the Treaty of Amsterdam was being drafted, Germany was strongly in favour of including common defence in the provisions. In Nice, by comparison, France took up the same topic. On both occasions, the proposal was overturned because of vehement opposition from the UK.

Now, Germany and France were proposing that the Constitution include a new ‘solidarity clause’ against all possible risks, particularly terrorism, enabling conversion of the EU into a ‘European security and defence union’. One could not put it much more clearly than that.

Germany and France also required more flexibility in the decision-making progress so that a smaller group of countries could, if necessary, go further than consensus would allow. The aim was to increase the military capability of the EU substantially. The Defence working group was being spoon-fed a solution.

How to react? A curious unholy alliance emerged. It was vital for the UK, represented in the Defence working group by Gisela Stuart, that a structure competing with NATO should not be created by the Union. We, the small non-aligned countries, did not want to see a Union defence policy that would exclude us. Thus, we joined Britain in opposing Germany’s and France’s proposal on a common defence.

The nature of the Convention’s work changed. We were no longer independent European political actors detached from our national backgrounds. We represented our countries, if not actually our governments. No longer were individual members speaking; we were discussing Germany’s proposal on this or Britain’s opinion on that. Thus, in Finland too we set up a background team, consisting of key officials in Parliament and specialists from the Ministry of Defence and Ministry for Foreign Affairs.

4.4.1 Small achievements

Michel Barnier, chairman of the Defence working group, had outlined the basis for discussion. It was curious that the proposal rested on the differences

in defence between the member states. Eleven of them are NATO members, ten of them WEU members, and between them six member states (Germany, France, Britain, Italy, Spain, Sweden) account for 90% of the defence industry; there are great differences in defence budgets and troop performance.

There are still more differences. Some countries have professional armies, others have conscription. Two member states have nuclear weapons, and the same two are permanent members of the UN Security Council. I managed to have these additions entered in the working group's final proposal, but this was cold comfort. I still had not received an answer explaining why the differences should be highlighted, considering that a common defence policy has been successfully pursued up to now despite all the differences. But the ultimate goal lay far ahead. This highlighting of differences was paving the way for the emergence of a 'hard core'.

This was not all we achieved. The concept of comprehensive security was entered as the basis of the Defence working group's report. Crisis management includes civilian as well as military operations. EU crisis management can only be pursued according to the principles of the UN Charter. And we also managed to include the sentence: "The aim is not to transform the European Union into a military alliance."

We achieved some other small victories too. Michel Barnier's idea of having a Defence Minister for the Union was shot down. We also did not approve the idea of a joint European military academy advocated particularly by Italian MP Valdo Spini. In the promotion of defence industry cooperation, we avoided the notion of an 'internal market for armaments'. These, however, were only trimmings. The real substance was elsewhere, and we had to give in on certain matters.

4.4.2 Great objectives

The Petersberg tasks had to be updated. A consensus was found and ultimately entered in Article 40 of the Constitution:

The common security and defence policy shall provide the Union with an operational capacity drawing on assets civil and military. The Union may use them on missions outside the Union for peacekeeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the member states.

Which duties might these be? The new concept of *crisis management* was outlined in Title III Article 210:

The tasks shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peacemaking and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism.

Experiences of international crisis management in the 1990s had taught everyone a few lessons, so it was necessary to update the tasks. This posed no problems in the Convention. A few other things were accepted on the nod, too.

There was a desire to increase defence industry cooperation between member states. At present, the major defence industry countries have their own organisations (OCCAR and LOI), which have been closed to others. It would be only natural to make defence material cooperation open and accessible to all member states, and thus the proposal for a new defence material agency found approval. Its name expanded a bit en route, and its duties likewise; the final text of Title III Article 212 specifies a “European Armaments, Research and Military Capabilities Agency”.

What about the solidarity clause on combating new threats such as terrorism, the clause so fervently propounded by Michel Barnier? Even that found wide acceptance. Some of us wanted to augment the list of new threats to include more than just terrorism. This augmentation was not approved until the Convention’s final proposal. The solidarity clause was entered as Article 42 in the Constitution; it states that member states are prepared to help one another if “a member state is the victim of terrorist attack or natural or man-made disaster”.

This is all very innocent. But each of the three new proposals that were widely accepted included a broader vision. The increase in crisis management duties expands the Union’s operative reach. The European Armaments, Research and Military Capabilities Agency is designed to increase and harmonise the Union’s military capability, and the solidarity clause is a first step towards collective security guarantees.

We Convention members were not blind. How could we be? We were looking at long-range goals, too. Germany and France were propounding concrete proposals aimed at cooperation between member states capable of more demanding military tasks and at placing a joint defence obligation on member states. These proposals also enjoyed widespread support.

4.5 Towards a common defence

The Defence working group finished its work in December 2002, but it was not until April 2003 that we finally received the Praesidium's proposal for the Constitution's articles on foreign and security policy. There was at the time a greater demand for building an autonomous defence identity for the Union. The reason was evident. The US and the UK had just invaded Iraq – illegally, from the point of view of international law. Europe was deeply divided. There was even a short plenary-session debate on Iraq at the Convention.

“Having reflected at length on the current situation and the lessons of the Iraq crisis,” the Praesidium began its proposal. What had we learned? “A main element is the introduction of different forms of flexibility to allow groups of countries which wish to undertake closer military cooperation to do so in the Union framework.” That was the Praesidium's response to America's challenge.

4.5.1 Enhanced cooperation

How should we achieve closer cooperation? What forms of flexibility are available? This had been discussed extensively and heatedly in earlier revisions of the founding treaties. There are two basic approaches. On the one hand, we could increase the scope of qualified-majority decision-making and incorporate into it certain checks and balances. This is what has partly been done within the CFSP. On the other hand, a smaller group of member states could be allowed to proceed as a vanguard within the Union structure, without dragging everyone along and without progressing on the terms of the slowest. A case in point is the introduction of the common currency, the euro, in only certain member states.

Unanimity will continue to be the primary principle in the Common Foreign and Security Policy. “You need only read these provisions on the CFSP to feel disappointment and sadness in the current situation”, sighed Giscard d'Estaing in a plenary session. Indeed, the scope of qualified-majority decision-making in foreign and security policy had not been increased by the Convention, even though there is the risk of the process grinding to a halt with the addition of new member states after enlargement.

The use of the qualified majority could well be increased in CFSP without jeopardising the vital interests of member states. There are checks and balances. There is an *emergency brake*, according to which a member state can oppose a vote if its vital national interests are threatened, in which case the matter must be submitted to the European Council for unanimous decision. There is a *constructive abstention*, meaning that a member state can

abstain from voting and that any decision thus taken is not binding on that member state, although it is binding on the Union. Furthermore, a unanimous decision is always required in any matter related to defence. The Convention faithfully recorded these existing forms of decision-making in the CFSP.

If the principle of unanimity is strictly adhered to, the pressure towards closer cooperation between a smaller group of member states will increase. There are also separate provisions for this in the founding treaties. As an approach, it is always a last resort, to be employed in a situation where the Union is unable to proceed otherwise.

The new Constitution requires that at least one-third of all the member states participate in such enhanced cooperation, that it must in principle be open to all member states and that is a joint decision. When enhanced cooperation was first provided for, in the Treaty of Amsterdam in 1997, the requirement was for half of all the member states to participate. In the existing treaties, it requires the participation of eight member states, and covers all of the Union's competences except defence policy.

4.5.2 Enhanced cooperation in defence policy

Germany and France were in a tight spot. How to advance towards a common defence if decisions cannot be voted on? Unanimity must be achieved. And even the enhanced cooperation option could not be employed, since defence is specifically excluded from that mechanism. What could be done?

The only solution was to create separate flexibility rules for defence policy. That is exactly what the Convention did, much to the chagrin of myself and certain others.

The general principle is laid down in Article 15: "the progressive framing of a common defence policy, which might lead to a common defence". On the other hand, Article 40 states: "This will lead to a common defence, when the European Council, acting unanimously, so decides." "Might lead" or "will lead", whatever. In any case, the end result is dependent on consensus between the member states. It is also noted that "the policy of the Union in accordance with this Article shall not prejudice the specific character of the security and defence policy of certain member states". This is a nod towards the obligations of NATO membership, but also a gesture of respect towards military non-alliance.

Or is it? Is all this in fact taking a direction diametrically opposed to both NATO obligations and purebred neutrality?

It is understood that a common defence involving all the member states cannot just be conjured up out of thin air. Therefore it must be made possible for a ‘hard core’ of member states to proceed on their own. Three modes of closer cooperation in defence policy were grafted onto the Constitution:

1. The possibility of authorising a group of member states to execute a crisis management operation in the name of the Union,
2. The possibility of the member states with the best military capability executing more demanding crisis management operations and structured cooperation, and
3. The possibility for mutual security guarantees between member states desiring them, within the Union.

The first possibility is self-evident, and could be invoked even today. Not all member states need to participate in an EU crisis management operation. Once the decision is taken jointly, the actual task can be assigned to a smaller group of member states.

The second possibility is anything but self-evident. It was proposed that a separate protocol be drawn up by those member states willing to undertake structured cooperation in more demanding crisis management operations. Later, only the member states already involved would be able to decide on new participants and participation criteria. The system would thus be closed, yet would enable military operations abroad in the name of the Union.

The third possibility is the possibility of mutual security guarantees and defence obligations between those member states willing to participate. These countries would be listed in a declaration to which any other member state could accede. Despite its openness, this proposal was no easier to accept than closed structured cooperation.

4.5.3 Closed structured cooperation

Michel Barnier was enthusiastic. The concept of structured cooperation was introduced in the Defence working group as the “defence eurozone”. Just as the euro was launched by a small group of member states, defence policy could be implemented in the same way. Just as there were quantitative convergence criteria for qualifying for the euro, there must be criteria for structured military cooperation too.

Such quantitative convergence objectives were actually listed by the Defence working group: the proportion of GDP devoted to the defence budget, the proportion of the defence budget devoted to expenditure on equipment or to military research as well as the force preparedness, including force deployment capabilities and their interoperability. Only member states

‘mature’ enough in terms of capabilities could participate in the more demanding structured cooperation.

But would this not be a question of political ‘maturity’? Did the founding member states wish to ensure that the new member states would not be able to prevent the build-up of a common defence?

As a result, the common defence policy would no longer be common. A small self-sufficient group would take command under self-imposed criteria. Finland’s position was uncompromising. We were willing to take quite a lot on the chin, but not an exclusive military club taking charge of the Union’s defence policy. We began to demand application of the general principles of enhanced cooperation to defence policy, too. Thus, the decision would have to be taken together, the arrangement would be open to anyone to join, and it would have to involve at least one-third of the member states. We dug in our heels and were supported by the Swedes and the British.

The majority of the Convention drew the line at the list of quantitative convergence criteria. The proponents of an exclusive military club had to settle for less. A broader, though in constitutional terms stranger, formulation was finally proposed: “member states shall undertake progressively to improve their military capabilities.” Whatever that may mean remains for the future European Armaments, Research and Military Capabilities Agency to identify and promote, as Article 40.3 puts it.

So there it was. Structured cooperation in the execution of demanding crisis management operations within the EU framework will be taken forward regardless of whether the relevant protocol is approved or not.

4.5.4 The Military Capabilities Agency

In June 2003, Valéry Giscard d’Estaing presented Parts I and II of the draft Constitution to the European Council in Thessaloniki. The summit immediately focused on one item in the draft: the preparations for founding a European Armaments, Research and Military Capabilities Agency in 2004 were set in motion.

The term ‘military capabilities’ was added to the agency’s name in the final moments of the Convention’s work. This was a significant change. The development of military resources was added to cooperation in defence industry, technology and research. The tasks of the agency as defined in Article 40.3 of Part I of the Constitution are ambitious: to identify operational requirements, to promote measures to satisfy those requirements, to strengthen the industrial and technological base of the defence sector and to participate in defining a European capabilities and armaments policy.

But that was not all. Working overtime in July 2003, the Convention continued to expand the remit of the Agency. Part III Article 212 states that the Agency's function is to:

- (a) contribute to identifying the member states' military capability objectives and evaluating observance of the capability commitments given by the member states;
- (b) promote harmonisation of operational needs and adoption of effective, compatible procurement methods;
- (c) propose multilateral projects to fulfil the objectives in terms of military capabilities...
- (d) support defence technology research...
- (e) to strengthen the industrial and technological base of the defence sector and to improve the effectiveness of military expenditure.

This was quite a mouthful! It no longer involves simply cooperation in defence industry and material procurement, nor the sole definition of European arrangements policy. It involves the military capabilities directly in command of the sovereign member states. It involves efforts to harmonise operational needs and military capabilities, as well as to promote multilateral projects to fulfil these objectives. How these commitments are carried will also be open to common scrutiny.

The arrangement is an open one. All member states can participate in the work of the Agency, and all evidently will. There have been no reservations, from either allied or non-aligned member states. One should note, however, that once the Agency is founded the concept of 'military non-alignment' will become blurred. Similarly, NATO membership will also lose some of its meaning and categorical obligations for those member states who belong to the alliance.

4.5.5 Open defence cooperation

The establishment of the Military Capabilities Agency and, thus, the creation of an autonomous European military capability is a major step. It is a step towards a common defence for the EU. It does not necessarily even require a proposed structured cooperation protocol, whether such a protocol would be closed or open for the member states.

On the very last night before the concluding session of the Convention, the Praesidium had met for some final fine-tuning. Michel Barnier rang me early in the morning. The Praesidium had discovered a solution to defence policy in the manner outlined by Finland. He had the solution on paper and wanted to fax it to me. I was equally eager to see it.

Excellent! The Praesidium was willing to compromise on the closed defence cooperation principle. They were willing to extend the general principles of enhanced cooperation to defence policy, too. Both the Social Democrat group and the Conservative group, at the instigation of myself and Finnish MEP Piiia-Noora Kauppi, respectively, had already taken a stand in favour of this approach. Now, at the very last moment, the Praesidium had finally accepted the inevitable.

Barnier notified me of two changes to the text of the Constitution. The defence policy exception was removed from enhanced cooperation in Article 43, and an addition was made to structured cooperation in Article III-213 on the application of the general provisions of enhanced cooperation.

So we got what we wanted. I only wondered whether it was, after all, a Pyrrhic victory. It would remove the last obstacles thwarting Germany's and France's ambitions to build up a common defence for the EU.

4.6 Security guarantees

Creating a common military capability is one thing. Whether this capability will be used for mutual assistance and whether a multilateral defence obligation should be created is another kettle of fish altogether. The question of collective security guarantees was mooted. Thus, the draft Constitution came to include a third form of enhanced cooperation in defence policy: the option of mutual security guarantees among willing member states within the Union. This was just as impossible to swallow as the concept of structured military cooperation.

In the Treaty of Amsterdam, the WEU was incorporated into the structures of the EU in all respects other than the security guarantees provided for in Article 5 of the WEU Charter. Now finally, it was time to unite the WEU altogether in the EU. Nevertheless, a mutual defence obligation among all member states would be unrealistic for the time being and thus one should provide a mechanism for willing member states to advance. Those participating would be listed in a declaration to which the excluded member states could accede later if they wished. The security guarantee clause in Article 40.7. of the draft Constitution is based on that in the WEU's Treaty of Brussels and is thus more peremptory than the NATO version:

If one of the member states participating in such cooperation is the victim of armed aggression on its territory, the other participating states shall give it aid and assistance by all the means in their power, military or other.

This mutual assistance obligation "shall not affect the rights and obligations resulting, for the member states concerned, from the North Atlantic Treaty",

as Part III, Article 214 of the Constitution states. “Shall not affect”, yes; on the other hand it does not rely on NATO capability, either. Of course not – the whole point is that the Union is trying to achieve a security guarantee system of its own, with its own resources.

And there was the rub. Britain did not want to see a defence system paralleling or overlapping NATO. Finland, on the other hand, fretted over the crumbling of the common approach in defence policy; as a non-aligned country, Finland cannot enter into multilateral defence obligations. Besides, did the EU even have the potential to give security guarantees in the first place?

Austrian MP Caspar Einem tried to save the day. He entered a written submission in the Convention proposing that, instead of being obliged to aid one another in the event of attack, each member state would commit to provide such help as their respective Constitutions and resources allowed. Practical and voluntary solidarity. This would enable even militarily non-aligned Austria and Finland to stay aboard.

Caspar Einem was remarkably clear-headed. What he was suggesting was, as matter of fact, self-evident. Surely all EU member states would show solidarity and provide military assistance voluntarily if any member states was faced with a serious security threat? But what about the defence obligation? That also was a step that the Convention actually did take – surprisingly enough!

4.6.1 The solidarity clause

So far, the Union’s crisis management capability has been developed for operations outside the Union. It was never intended to be used for protecting the Union’s own territory, population or institutions. With the new Constitution, this will change. A solidarity clause was entered, by consensus, in Part I of the Constitution, applying to the Union’s territory and the use of common military capability to protect member states in the event of an attack. This ‘attack’ was restricted to refer to terrorism, whatever that may be taken to mean in this era of asymmetrical warfare.

The solidarity clause, linked to terrorist threats, terrorist attacks, natural disasters and major accidents, is just as obligatory as a general security guarantee system would be. This is evident in Part III Article 231 of the Constitution: “Should a member state fall victim to a terrorist attack [...], the other member states shall assist it at the request of its political authorities.” All means, including military ones, will then be at the disposal of the EU.

We were not far from providing for collective security guarantees. The political message concerning the Union as a solidarity community is obvious.

What about the military message? In formal terms, the joint military action provided for by the solidarity clause is limited to terrorist attacks and natural or man-made disasters. This begs the question: Will the defence mechanism provided for by the solidarity clause remain unused should a different sort of security risk threaten a member state? The answer is: No.

The Convention was neither unfeeling with regard to other types of security threats. Accordingly, the solidarity clause was provided with a final remark in Article 231.4:

The European Council shall regularly assess the threats facing the Union in order to enable the Union to take effective action.

The conclusion is crystal-clear. The EU is evolving into an extensive and comprehensive security community. Step by step, we are progressing towards common defence.

4.6.2 Stairway to defence cooperation

As Table 3 shows, the defence track has two rails at the Treaty level. One defines the nature of the tasks involved and the other specifies the military capability required for it. Both are needed if the track is to work.

Table 3. Steps towards a common defence for the EU

Nature of military action	Military capability
Petersberg tasks <i>Treaty on the EU, Article 17.1</i>	Helsinki Headline Goal <i>Common goal</i>
Added Petersberg tasks <i>Constitution, Article III.201.1</i>	Group of member states executing operation <i>Constitution, Article I.40.5</i>
Solidarity clause <i>Constitution, Article I.42</i>	European Armaments, Research and Military Capabilities Agency <i>Constitution, Article I.40.3</i>
Security guarantee clause <i>Constitution, Article I.40.7</i>	Protocol on structured cooperation in military capabilities <i>Constitution, Article I.40.6</i>

The EU Constitution thus contains a stairway to defence cooperation. One step foreshadows the next, and the steps must be ascended in order. Regardless of the shape the final step ultimately takes, the preceding step will show in which direction we are heading.

The Petersberg tasks, as augmented, defined the tasks of jointly executed crisis management. The solidarity clause takes the first tentative step towards

a collective territorial defence obligation, albeit tied to a terrorist attack. The security guarantee clause enshrines a comprehensive commitment to mutual assistance.

What about the capability supporting all this? The common crisis management force goal is already being put into practice. If there is a need for more, a smaller group of member states can execute a jointly agreed operation. The Agency to be founded will create uniform criteria for the capability to be used jointly. Ultimately, a protocol on structured cooperation will seek capability for increasingly demanding actions. One step at a time.

The Constitution contains a system for military cooperation and assistance. This will necessarily blur the concept of ‘military non-alignment’ in those member states that still adhere to it. It is time to face the facts. The EU Constitution inevitably creates an interface for abandoning non-alignment.

4.7 Security policy options

Alain Lamassoure, former French Minister for Europe and now a French MEP, gave a hard-hitting speech at a plenary session of the Convention. He said that the neutral countries are not taking on their share of the overall responsibility and are dragging their heels in development of the Union’s common defence policy. The remark was uncalled for, and I accordingly responded.

Dragging our heels? EU crisis management is based on a joint proposal submitted by Finland and Sweden. The goal for the force to be assembled bears the name of Finland’s capital, the Helsinki Headline Goal. Finland has always been a major force in peacekeeping. Even now, Finland has supplied the largest number of troops relative to population – 820 men from a nation of 5.1 million – to the largest crisis management operation in Europe, KFOR in Kosovo. Lamassoure’s native France comes second, with 7,300 men from a nation of 58.6 million. The other member states lag far behind. Finland has never been, and will not now be, a freeloader in EU defence policy. Finland also joined Sweden in making submissions for the development of civilian crisis management.

Besides, the term ‘neutral countries’ is out of date. It is true that in the Cold War years following the Second World War Finland’s security policy was based on other countries recognising our neutrality. The last country to recognise it was the one we most wanted to do so. In 1989, while on a visit to Finland, the last President of the Soviet Union, Mikhail Gorbachev, finally recognised Finland’s neutrality – too late for it to have any real meaning.

Neutrality was Finland’s way of defining its space in the bipolar Cold War world. We wanted to avoid taking sides in superpower conflicts at all costs.

Today, the situation is very different. Our official stance is that in the present circumstances Finland is militarily non-aligned. ‘Present circumstances’, however, have a tendency to change. The most significant change for Finland’s security policy was when we joined the European Union in 1995. That spelled the death of our neutrality policy – and there is more to be seen later.

4.7.1 The neutrality of Finland and Sweden

A comparison with our neighbour, Sweden, is in order. Sweden has always pursued a policy of neutrality that is ‘pure’ from the point of view of international law. Sweden is “militarily non-aligned in peacetime in order to remain neutral in any war in its neighbourhood”. This is how the Swedish Parliament has formulated it. Neutrality has always been an end in itself for Sweden, and non-alignment a tool of its neutrality policy.

Finland is somewhat different. A neutrality policy was a tool for us. To echo the Swedish doctrine, Finland strove for neutrality in peacetime in order to stay out of any war. Wartime neutrality would scarcely have been credible, and indeed would have been impossible for as long as the Treaty of Friendship, Cooperation and Mutual Assistance with the Soviet Union was in force.

After the Cold War, Finland’s traditional neutrality policy had to be reviewed. For one thing, there was no longer polarisation with regard to which one might declare oneself neutral.

Secondly, security risks in Europe today are something quite different from military conquests threatening the territorial integrity of a country. New security problems, beginning with environmental risks and extending to international crime and terrorism, mean that there is no point in declaring oneself neutral. Instead of avoidance, we need participation and solidarity.

However, the factor most pressingly leading to a reassessment of security policy in Finland was EU membership. Finland could no longer be neutral in the traditional sense, since we were participating in the Union’s Common Foreign and Security Policy. We redefined our policy as military non-alignment. Altogether, it was easier for Finland to abandon the concept of neutrality than for Sweden, because for Finland it had been a tool, not an end in itself.

The CFSP eroded Finland’s neutrality policy. And what about the ESDP? Will it erode the doctrine of military non-alignment?

Understandably, the defence policy formulations in the articles proposed by the Convention were scrutinised with a magnifying glass, particularly in the

militarily non-aligned member states – Finland, Sweden, Ireland and Austria. These were dangerous waters. Fundamental values were being impinged upon. What would participation in the common defence of the EU mean? How would it relate to NATO membership? And most importantly: Why develop the Union's defence dimension at all? Why does the EU need a common defence?

Of the 15 present member states, 11 are members of NATO. Of the future 25 member states, 19 are members of NATO. Why do we need a separate system of security guarantees and related military capability within the EU? Any member state can join NATO if it wishes. Why create a parallel system?

4.7.2 Old Europe and new Europe

To quote a Finnish saying, “you learn quickly in Siberia”. Well, you learn quickly in Brussels too! The mood there is not anchored in Anglo-Saxon culture and paradigms. There is awareness of the state of flux in conventional security policy approaches and systems in Europe today.

Surprisingly enough, US Secretary of Defence Donald Rumsfeld got it exactly right when he spoke of “old Europe” and “new Europe”. Eight leaders in Europe – led by Britain, Spain, Poland, the Czech Republic and Hungary – were ready, without consulting Brussels, to sign an open letter to George W. Bush expressing their sympathy for his plans to go to war in Iraq. Old Europe – led by Germany and France – was not willing to approve this enterprise without a UN mandate. The Common Foreign and Security Policy lay in ruins.

However, this is about much more than merely the division of loyalty to the US in the Iraq war. The transatlantic and the European, the new and old Europe, embody differing interests and ultimately represent different views of society. The Old World and the New World are in economic competition; the euro stands against the dollar. But more than that, the US and Europe represent different market economy models. In the Convention, we loftily declared that our aim was a “social market economy”, an alternative to Anglo-American neo-liberalism.

The division extends to the concept of global responsibility, too. Europe relies on multilateral rules, international law and joint organisations. The US relies on its own rules, which it believes are justified, and on swift and efficient action. For Europe, commitment to joint institutions and sharing of national sovereignty means an expansion of sovereignty and a means of influence. In the US, this is seen as a restriction on sovereignty.

No wonder, then, that Europe and the US fail to hit it off concerning the Kyoto Treaty, intended to limit the carbon dioxide emissions into the

atmosphere. In the UN, Europeans are propounding an anti-torture convention, a declaration of the rights of children and a ban on the death penalty. Americans want no part in any of this. The US does not want to ratify a treaty banning biological weapons and has not ratified the nuclear test ban treaty either. Quite the contrary, the US has launched a development programme on small nuclear weapons. Europe takes international disarmament seriously. But the most serious conflict of all is that involving the International Criminal Court, where those committing the most heinous human rights violations can be put on trial under international law. Unless they are Americans, of course.

The division is also apparent in security policy. The US national defence budget is as large as the 14 next largest in the world combined. 'Have power, will travel.' Europe speaks of defence and defence alliances, while America speaks of pre-emptive strikes and a coalition of the willing. Europe trusts in diplomacy and civilian measures to prevent conflicts, while with the US, a show of military force tends to lead to its use.

The transatlantic new Europe looks to the US for leadership in international relations. In Europe, it puts its trust in NATO and its military security guarantees.

But what of old Europe? It is persuaded that the US wants to operate not so much in Europe as in the world as a whole. Old Europe asks, is the US still needed for the defence of Europe? Old Europe asks, are Europeans really incapable of keeping the peace without an American presence? Old Europe also asks, are Europeans utterly incompetent at managing crisis management and crisis prevention even in Europe itself?

Old Europe has no illusions about building up a European military power that could act as a counterpart or rival to the US. A new arms race, this time not with an enemy but with an ally?! Voters would soon put a stop to any such spiralling of defence expenditure. But be that as it may, old Europe is looking for leeway and self-reliance in its security policy.

4.7.3 Credibility of the EU military capacity

Old Europe is very powerful in Brussels. This is why a common defence for the EU is being developed. This is why a military staff and command structure separate from NATO is being established for the EU. This is why the member states are advancing European strategic intelligence within the Galileo satellite programme. This is why European resources have been pooled in the acquisition of the Airbus A400M wide-body transport plane and heavy NH 90 troop transport helicopters. This is why the EU is being

provided with a rapid response force and crisis management structure separate from NATO. The Americans are not amused.

Europe is seeking military self-reliance, as we discovered in the Convention. The new Constitution was to enable autonomous defence policy within the EU, creating a structure that parallels and overlaps NATO. On purpose. After all, the Common Foreign and Security Policy differs from the American brand of security.

What a castle in the air! The Union does not have the military capability that would be required for credible security guarantees and independent defence. Only NATO has that capability. When the WEU was incorporated into the EU in 1997, it was agreed that NATO resources could be used in EU-led crisis management operations. The WEU had had earlier a similar prerogative. This arrangement was given the curious title of Berlin+.

Obviously the EU will seem toothless without NATO resources. And no number of the kind of joint units or peacekeeping forces that some member states have set up will change that fact. As examples, just look at the Nordic NORDCAPS or the central European EUROCORPS and EUROFOR. These scarcely add up to a Euro army.

But what does one call upon when one calls upon NATO resources? The alliance has a permanent headquarters with command and communications systems. It has a defence planning system. It has a joint air surveillance system based on the use of AWACS planes. But that is all. Not even NATO has unlimited military resources in and of itself. It has no troops of its own. Its resources are national resources that can be made subordinate to the alliance as required. Hence, if the EU wishes to draw on these resources, this has to be agreed separately with each country.

Can the EU not equally rely on the national resources of its member states? This is already the case, and it is technically no great task to expand this practice and thus create a credible basis for security guarantees. At a minimum, this would require three things:

1. An independent military staff, command and planning system. The EU is working on this.
2. Harmonisation of the military capabilities and operative demands of the member states. This task has already been entrusted to the new Agency.
3. Heavy air transport capacity and strategic intelligence. These do not yet exist in the member states, but are being developed as European projects.

Today, the EU still relies on NATO for military resources, but tomorrow this will no longer be the case. Will a duplicate system emerge? Yes, as far as command and planning systems are concerned. No, as far as military

capabilities are concerned. Member states will simply be placing the same national resources at the disposal of a different body. There is an overlap already in existence anyway. The US itself has its own planning and headquarters system, the US European Command, for its forces in Europe, separate from NATO. Furthermore, each country in NATO has its own national defence capability.

Dissociating the defence dimension of the EU from NATO is not technically difficult and will undoubtedly result in a credible defence. The problem is political. Old and new Europe are at loggerheads. In this process, what will happen to the militarily non-aligned countries?

4.7.4 Four schools of thought

There are now four essentially different approaches to security policy in Finland. These reflect European discourse, as can be seen in the matrix below. The key parameters are the EU common defence and military non-alignment.

Table 4. Security policy options

		EU common defence	
		<i>Yes</i>	<i>No</i>
Military alignment		France, Germany, Belgium, “OLD EUROPE”	Britain, Denmark, “NEW EUROPE”
	<i>Yes</i>		
	<i>No</i>	Austria, Finland, Sweden	Ireland

First, we have those who adhere closely to traditional military non-alignment. They have learned from history. In Finland, our darkest hours as a nation coincided with occasions when we were dragged into other countries' wars, in the worst cases as a frontline. Thus, we must avoid all commitments that could lead to our small country once again becoming a doormat for a large one.

Secondly, there are those who emphasise the collective security guarantees that could be obtained through NATO membership. For them, maintaining the strategic alliance between Europe and the US is important. The American presence in Europe is bringing stability. Besides, the US is seen as the only power that can provide meaningful aid in case of a crisis.

To both schools, common defence within the EU is anathema. In an unholy alliance, transatlantic enthusiasts and confirmed non-alignment stalwarts are against the defence dimension of the EU. The former fear the emergence of a competitor to NATO, while the former shun all forms of military commitment.

Thirdly, there are those who want to keep military non-alignment but not prevent the evolution of the Union's defence policy. The conditions are that common rules are observed and that the Union as a whole is strengthened as a result. This is the current position of the Finnish Government.

Fourthly, there are those who also support the building up of EU defence policy but stress that a member country by its own means should not create divisions and thus weaken the Union; rather, one should make its evident contribution to the common defence. This approach would dismantle military non-alignment but would not be the same as joining NATO. After all, EU security guarantees cannot rely on NATO resources; after all, that would mean that a country outside the EU – the US – would gain a veto regarding membership of the EU.

The militarily non-aligned countries have a choice to make. Austria was the first to suggest a system of European security guarantees that would not require NATO membership. This was the position towards which the Convention finally drifted. The new Constitution blurs the military non-alignment of the member states. Nevertheless, the EU is not a military alliance but a comprehensive security community.

The solidarity clause in the Constitution incorporates joint territorial defence obligations against a terrorist attack. The complementary security guarantee clause, which in the Convention's proposal was a declaration to which member states could accede, was eventually accepted for inclusion in the Constitution itself. It echoes Article 5 of the Brussels Treaty, yet does not prejudice the specific character of the security and defence policy of certain member states. Some are members of NATO, some not. However, all share the responsibility of helping a member state under attack by all available means. The European Council regularly monitors all threats facing the Union. The Union is also about to gain military capability upon which to draw. These defence mechanisms, defined in the new Constitution, dismantle the traditional purist military non-alignment.

Being in the EU security community is not the same as NATO membership. Even if Finland were in the 'hard core' of the common defence, this would not be tantamount to signing Article 5 of the NATO Charter, which ultimately relies on the US military. Rather, the evolution of the EU defence dimension itself is a means of distancing Europe from the US. The Old World wants to stand on its own feet.

The Union must not wither into merely a European free trade zone, a 'great market place'.

Jacques Delors, 1990

If the institutional reforms are small, Europe too will remain small. Great reforms will make a great Europe.

Romano Prodi, 2000

5. Institutional Reform

Danish naysayer Jens-Peter Bonde, a sworn eurosceptic, has just concluded his press conference. The Convention press centre is waiting for the arrival of Valéry Giscard d'Estaing. There is a brief pause, and I take the opportunity to address the international press.

I have just given John Kerr, Secretary General of the Convention, a proposal on the reform of EU institutions. It was signed by 68 Convention members, 29 of whom were full members. MEP Andrew Duff and myself collected the signatures, which represented over one-third of the Convention members. These did not include the government representatives of the small countries, who were in principle in favour of our proposal but were working on one of their own at the same time. No wonder, then, that John Kerr remarked that my proposal was "strong stuff".

Six weeks earlier, on 15 January 2003, the 40th anniversary of the Elysée Treaty between France and Germany had been celebrated in Paris. The entire German Federal Government, Federal Council and Federal Parliament had gone to Paris. There a declaration concerning relations between the two countries had been solemnly approved. Appended to this declaration was a joint statement on EU institutional reform, which Chancellor Gerhard Schröder and President Jacques Chirac had agreed upon the previous evening.

The joint Franco-German proposal was immediately passed to the Convention. From that moment the Convention's debate on EU institutions was in full swing. The nub of the matter had been reached.

The two large countries were proposing that the EU should have a President. A Foreign Minister was also proposed, as was abandoning the rotating Presidency and a reduction in the Commission's size. What an incredible French coup, to celebrate the Elysée Treaty!

My German colleagues, Klaus Hänsch and Jürgen Meyer above all, told us to read the agreement more closely. And indeed there was more there than met the eye: The European Parliament was to appoint the President of the Commission with attention to the outcome of the Euro-Parliamentary election; qualified-majority decision-making was to be expanded to foreign and security policy; the European Parliament was to be given full legislative powers; and in the Council, legislation was to be separated from all other political functions. This was good. This would strengthen the position of the European Parliament and make the Union's legislative process more transparent and democratic.

But still – an EU President chairing the European Council, appointed for a term of five years?! That was too much for the majority of Convention members.

Not two weeks after publication of the Franco-German proposal, the UK and Spain launched a counter-offensive. Prime Ministers Tony Blair and José María Aznar submitted a rival bid. They, too, proposed a full-time post of President for the European Council, although their title was Chairman and the term was four years. The rotating six-month Presidency was to be scrapped. Teams of four member states would manage the Council meetings in various fields for two years at a time. A Foreign Minister would be needed, but appointment of the President of the Commission would remain with the member states. That appointment should not be politicised and allotted to the Parliament.

The large countries had spoken. It was time for the small ones to get their act together. But this was easier said than done. Government representatives from small countries did hold meetings at the Convention, but they became bogged down in details and wrangling. They could not see the wood for the trees. No joint position regarding the institutions and the power division emerged. Not even the smallest common denominator was found.

We, the parliamentarians, constituted the majority of the Convention. Accordingly, we closed ranks and submitted a joint proposal (see initiative in Box 1). We focused on the few key issues that we could agree on. The crucial point was: “The Presidency of the European Council should rotate among the member states.” This was an open challenge to the proposals of the four large countries.

Box I. Initiative no. CONV 590/03 presented to the Convention on 28 Feb 2003

Premises and Principles of EU Institutional Reform

Contribution by: Members of the Convention:

Kimmo Kiljunen, Andrew Duff, Vytenis Andriukaitis, Paraskevas Avgerinos, Eduarda Azevedo, Péter Balázs, Irene Belohorská, Alberto Costa, Kemal Dervis, Marietta Giannakou, Algirdas Gričius, Karel de Gucht, Puiu Hasotti, David Heathcoat-Amory, Paul Helminger, Ben Fayot, Jelko Kacin, Sandra Kalniete, Tunne Kelam, Jan Kohout, Ivan Korcok, Peeter Kreitzberg, Alain Lamassoure, Göran Lennmarker, Liena Liepina, René Van der Linden, Hanja Maij-Weggen, Luis Marinho, Rihards Pīks, Hildegard Puwak, Proinsias de Rossa, Dimitri Rupel, Peter Serracino-Inglott, József Szájer, Frans Timmermans, Matti Vanhanen, Edmund Wittbrodt, Jan Zahradil and Josef Zieleniec

Contribution by: Observers to the Convention:

Terese Almeida Garrett, Alexander Arabadjiev, Michel Brejc, Lone Dybkjaer, Wim Van Eekelen, Péter Eckstein-Kovacs, Constantin Ene, Marta Fogler, Genowefa Grabowska, Esko Helle, Franc Horvat, Liia Hänni, Arturs Krisjanis Karins, Piia-Noora Kauppi, Riitta Korhonen, Guntars Krasts, Neli Kutskova, Kenneth Kvist, Neil MacCormick, Guilherme d'Oliveira Martins,, Luis Quieró, Lenka Anna Rovna, Nicolas Schmit, Earl of Stockton, István Szent-Iványi, Helle Thorning-Schmidt, Ülo Tärno, Roberts Zile, alternate Members of the Convention, as well as Hasse Svensson

The signatories to this contribution believe it to establish a minimum catalogue of reform for the institutions of the Union.

Premises for reform

- The Laeken Declaration calls for democratic, transparent and efficient institutions.
- Institutional changes must respect, not disrupt, the institutional balance of the Union. Equally, they must respect the balance and equality between member states.
- Every single institutional change approved by the Convention must pass the litmus test of the above requirements. The creation of new institutions is not warranted under them.
- Inclusion of the Charter for Fundamental Rights in the new Constitutional Treaty¹ and the principle of a single legal personality for the Union, both accepted by the Convention with a very broad consensus, are essential foundations for reform.
- Competences not accorded to the European Union in the Constitutional Treaty remain the competence of member states.

- The Convention method should be formalised for Treaty changes of a constitutional nature.²

European Council

- Presidency of the European Council rotates between the member states.
- The European Council concentrates strictly on its Treaty tasks of giving the Union necessary impetus for its development and defining general political guidelines for said development.

Council

- Is open and transparent in all respects when legislating.
- Legislative function separated from the coordinative function within the Council work.
- Simple double majority (majority of EU population and majority of member states) the rule when Council exercises qualified majority.³

European Parliament

- Uses co-decision procedure in all legislative matters decided by qualified majority in the Council.⁴
- European Parliament has its seat in one location.⁵

Commission

- Has the exclusive right of initiative in all matters that do not remain intergovernmental.
- Takes its decision as a college.
- Equal representation of member states is guaranteed in the composition of the Commission.⁶
- Members have equal rights in the decision-making of the college.

National parliaments⁷

- National parliaments are enabled to formulate their position on all proposals for EU legislative measures and actions.
- A mechanism for control of the principle of subsidiarity is set up to allow national parliaments to adopt and convey their views on the compliance of a legislative proposal with the principle.

¹ Mr Heathcoat-Amory, Ms Kalniete, Mr Queiró, the Earl of Stockton and Mr Zahradil do not agree to this point of the contribution.

² Mr Queiró does not agree to this point of the contribution.

³ Ms Giannakou, Ms Kuskova, Mr Kvist, Mr Lennmarker and Mr Serracino-Inglott do not agree to this point of the contribution.

⁴ Mr Vanhanen does not agree to this point of the contribution.

⁵ Mr Fayot, Mr Lamassoure, Mr Rupel and Mr Serracino-Inglott do not agree to this point of the contribution.

⁶ Mr van der Linden does not agree to this point of the contribution.

⁷ Ms Giannakou does not agree to this point of the contribution.

5.1 Compromise of the large countries

Valéry Giscard d'Estaing is putting things into perspective. He has been reading population statistics. We are listening to a lecture with which he is opening a Convention plenary session (20 January 2003):

In the future European Union of 25 member states, we have three groups of countries. The six biggest member states, each with more than 40 million inhabitants, will account for 74% of the union population. Eight middle-size member states, with between 8 and 16 million inhabitants, will together represent 19% of the Union population. The eleven small member states, with 5 million or less inhabitants, will account for only 7% of the population.

The Chairman of the Convention was sincerely concerned about democracy and the equality of all EU citizens, particularly now that the debate on the Union's decision-making and institutions was under way. All the talk is about the equality of member states in the Union, but what about the equality of citizens?

It was obvious to everyone what Giscard was getting at. In speaking of the equality of citizens, he meant that some member states are more equal than others, *primus inter pares*. The weight of those member states with larger populations must be somehow apparent in the process. It certainly was in the work of the Convention, as in Giscard's case for majority democracy. He said that even if the majority of Convention members opposed the idea of an EU President, the few who supported the idea represented the majority of the Union's population.

So there it was, the actual problem. We had come up against double legitimacy in the Union's decision-making. How could equality of citizens and equality of member states be combined?

The large and small countries drifted into opposing camps. A strange situation. Now, all kinds of groupings frequently emerge in EU politics. Parties from the same geographical region often find support in one another. Those representing the same political alignment may likewise flock together, as may those favouring deeper integration, or eurosceptics, or the founding member states of the EU, or the new member states. But a division between small and large countries?!

The division was a real one. This was particularly apparent in the Convention when the Union's institutions and the use of power were being discussed. In agreeing on the common position for the division of power, the physical size is a factor in determining joint interests. Small countries have interests in common, and so do large ones. The end result in the Convention was a compromise, not so much between the small and large countries as among

the large countries. In the course of history, the large member states had never had a unified agenda for the European integration, and they did not have one at the Convention either.

Valéry Giscard d'Estaing was determined to become the Father of the EU Constitution. How could he achieve this? Only by listening closely to the three most influential member states, those that he had to thank for being placed at the head of the Convention. A compromise had to be found that would satisfy at least Germany, France and the UK. This was a necessary condition, though not a sufficient one.

The three largest member states have different views about European integration. This can be analysed in matrix form, as in Table 5. The Germans have learned their lesson from history: better a European Germany than a German Europe. Germany has advanced integration, counting on the Community method, with the Commission and Parliament playing an important role. France, too, as one of the founding member states, has been in favour of maximum integration, but with control by governments, best enshrined in the intergovernmental nature of the Council. The UK, on the other hand, has been hesitant about integration and has opted out of many common actions. In order to safeguard its position, it, too, has emphasised the intergovernmental approach.

Germany and France agree on what should be done. France and Britain agree on how it should be done. It was a no-brainer for Giscard to see where a compromise might be found. More Europe, but according to the will of the member states. Promote integration, but through an intergovernmental approach. That, in a nutshell, is the outcome of the Convention.

Table 5. Developing the European Union

		<i>Integration</i>	
		<i>Maximum</i>	<i>Minimum</i>
<i>Mode</i>	<i>Inter-governmental</i>	France	UK, Sweden, Denmark
	<i>Community</i>	Germany, Benelux, Greece, Portugal, Finland	Ireland (?)

The new Constitution proposes that the summit of Heads of State and Heads of Government, i.e. the European Council, should become an independent EU institution. It would be provided with a permanent chairman, the EU President. The Union would also be assigned a Foreign Minister, who would chair the External Relations Council. All these reforms reinforce the intergovernmental side of the decision-making. The small member states – or most of them – objected. They feared quite rightly that in an intergovernmental process large countries will loom large and small countries will be, well, small.

However, the outcome of the Convention has something for everyone. Those small member states that had voiced reservations about deeper integration, such as Denmark and Sweden, are satisfied with the increased intergovernmental focus. Most small member states, including Finland, trust in the further progress of integration despite the growing influence of the large member states. But there is no member state – except Ireland – that is hesitant about integration but would rely on the Community method. From the latter point of view, the draft Constitution is by no means the best possible, and accordingly, acceptance of the new Constitution may prove to be the most difficult to achieve in Ireland.

5.2 EU institutions

The European Union is not a traditional intergovernmental organisation. The special nature of its institutions goes back as far as the Coal and Steel Community of the 1950s. The idea was for the institutions of the Community to be independent of the member state governments. That was the only way in which the Community could achieve more than traditional international organisations could.

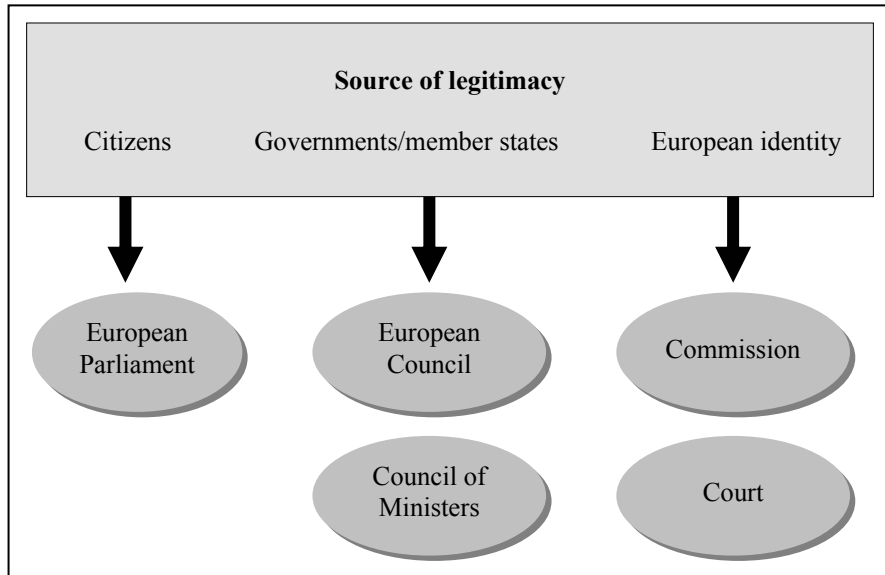
The Commission was founded. It was not a secretariat but a body wholly self-reliant of national governments. It was given competence of its own and a monopoly on legislative initiative. The Community's authority to take decisions that were binding on the member states was something new and exceptional. A General Assembly representing national parliaments and a Community Court were founded. These supranational institutions formed an entity whose permanence guaranteed continued integration regardless of changes of government and shifts in national mood.

However, the small countries of the Coal and Steel Community – the Benelux countries – feared that they would be overruled by the large countries and demanded that an intergovernmental body should be set up in addition to the supranational Commission. The Council of Ministers was subsequently founded, mainly to formally approve the decisions of the Commission, or so it was thought. Since the Council used to decide on

unanimity this was thought to be a good way for the small countries to get their voice heard.

The institutional structure created for the Coal and Steel Community in the 1950s still forms the core of the Union today: the Commission, the Council, the Parliament and the Court (see Figure 3). Naturally, the nature of these institutions has changed with time. The only major addition is the summit for Heads of State, i.e. the European Council, that has been regularly organised since 1974. However, the European Council is not an EU institution, and its decisions are not Community decisions; they are concords between the heads of state of the member states. Of course, these decisions have been of considerable importance in the development of the Union.

Figure 3. Institutions of the EU



If the small member states originally imagined that the Council of Ministers and its unanimous decision-making would safeguard their position, they were proved sadly wrong in real life. The Council has gradually strengthened its role. It is the only institution that represents the governments of the member states directly, and not always to the advantage of the small ones. The large member states are truly large and influential in the Council, because of their size alone.

The unanimity requirement has become a bottleneck. The entire Union can be held hostage by a single member state. Usually it is a large member state that has the courage to hold up the process rather than a small one. Thus, it

has been in the interests of small member states to promote majority decision-making, to make things move along better.

The Commission is a better manifestation of European togetherness than the Council. Being a supranational body, it is in principle unaffected by vested national interests; instead, it acts for the whole. This is true even though every member state has a seat on the Commission. However, a Commissioner may not represent his home country other than by acknowledging that it is the state he knows best.

The Union has thus formed a dual structure, a sort of bicameral government. The Commission is much like a government by officials that must take the common interest into account. The Council of Ministers, by contrast, is a political cabinet that represents national views. A Minister on the Council has the authority to present views that are binding on his member state.

The Council of Ministers is first and foremost the Union's main legislative body. In this, it is unique in the world. It wields both executive power and legislative power. In deciding unanimously, it functions like any intergovernmental body. In deciding by qualified majority, it wields supranational power. Formally, the legislation of the Council is legitimised by the national parliaments. Each Minister on the Council is, under the respective national constitution, politically accountable to his/her parliament. Although this is the case formally, the practice differs greatly from one member state to another.

The result is a yawning democracy gap. The Council of Ministers takes all its decisions behind closed doors. European laws are passed by the executive branch, hidden from publicity and far too often in practice by civil servants. No wonder there is a crisis of legitimacy in the Union. The problem has two components: Firstly, are the Union's actions considered appropriate (what is decided)? Secondly, are the proper parties deciding (how is it decided)? The Convention had to find an answer to both problems.

What has been decided? The new Constitution defines the Union's competence, which should not extend to areas where it is more natural to take decisions on a national or local level. Hence the principle of subsidiarity. The Union is expected to use authority efficiently within the area of its competences. This has to do not with the number of directives and regulations enacted, but how far the Union responds to the expectations and needs vested in it. Thus, majority decisions are needed. Too often the small member states imagine that the unanimity requirement safeguards their interests. The opposite is in fact true. Majority decisions prevent large member states from applying the brake in matters where the interests of the entire Union are at stake.

How is it decided? Too often the discussion on the democracy gap in the Union is restricted to the question of the status of the European Parliament. Of course, it is strange that the only Union institution whose legitimacy derives directly from citizens is the weakest in terms of power. So far, it is not in fact a Parliament in the strict sense of the word. The European Parliament does not have full-fledged legislative power, nor full budget power, nor full control over the executive branch. On the other hand, the Parliament has steadily increased in importance ever since it was first elected by direct popular vote in 1979.

Improving the transparency of the legislative work of the Council is at least as important as enhancing the status of the European Parliament. The role of national parliaments in supervising the ministers who take decisions in the Council is crucial.

The Convention was expected to produce proposals. Several bold submissions for increasing the efficiency and democracy of the Union's decision-making emerged, too. There were also proposals that were rather less democratic and almost painfully inefficient.

5.3 Giscard's tactics

It was a brilliant tactical manoeuvre. I said as much to Giscard d'Estaing during a recess in the plenary session. He merely chuckled. He had leaked a radical proposition on EU institutions that had been torn to shreds in the media, at the Convention and in the capitals of the small member states. The Chairman of the Convention seemed to pay no heed at all to what his Convention had been talking about.

Two days after Giscard's leak, on 23 April 2003, we finally received the Praesidium's proposal on the articles concerning EU institutions. These were nowhere near as horrible as Giscard's leak had led us to expect, quite the opposite. The Praesidium's proposal seemed to be a clear acknowledgement of the views aired in the Convention.

Valéry Giscard d'Estaing had succeeded in handling a difficult situation with aplomb. Imperceptibly he had conducted us back to square one: the Franco-German proposal of January. That was what we had been fighting against all along. Now it began to look like a tolerable compromise.

Giscard presented the Praesidium's proposal. He felt that the Convention should create a Constitution that can work for the next 50 years. Unlike his own proposal, in which the European Council was made the Union's highest-ranking body, the Praesidium's proposal placed the European Parliament highest in the list of institutions. Not surprisingly, he was applauded by the MEPs.

Unlike Giscard's proposal, where the President of the Commission would be appointed by the European Council, the Praesidium's proposal would allow the European Parliament to make the appointment. Giscard proposed a President and a Vice-President for the European Council; the Praesidium only proposed a President, who would in fact be called the Chairman. Giscard proposed a Bureau consisting of the Presidents and the chairmen of the main Councils; the Praesidium proposed a European Council Board consisting of three members of the European Council.

Giscard's proposal blatantly favoured the large member states: a qualified majority in the Council would consist of a majority of member states representing 2/3 of the Union's total population; no more than 700 MEP seats would be apportioned according to population; the Commission would be reduced to 13 members. The Praesidium catered to the wishes of the small member states: a qualified majority in the Council would consist of a majority of member states representing 3/5 of the Union's total population; the 700 MEP seats would be apportioned in decreasing proportion, the smaller countries gaining proportionally more MEPs; the Commission would have 15 members, with delegated Commissioners added.

So all was well. The Praesidium proposal was on the right track, favouring the small member states while opposing Giscard's unreasonable points. Yeah, right – or how?!

The proposals agreed in that they said the European Council should become an independent institution clearly separate from the Council of Ministers. There was also a requirement for a permanent Chairman or President. This EU President would represent the Union in external relations, while 'internal affairs' would be the responsibility of the Commission President. This was much like the division of duties between the President and the Prime Minister in France. It was not specifically ruled out that in the future the same person might hold both posts.

And what about the last, 'possible Article X', of the Praesidium's proposal? It had been included with obvious reluctance, as it addressed the Congress of the Peoples of Europe. That was Giscard's baby. Political life in Europe needs a forum where MEPs and national MPs can meet and interact. "Otherwise this valuable work will end with the disbanding of the Convention," Giscard said regretfully. Such a forum is needed to give the EU a more democratic face.

The Congress of the Peoples of Europe would meet once a year. It would have 700 members: one-third MEPs, two-thirds MPs. The Congress would hear reports from the President of the Commission and the President of the European Council on the state of the Union. Giscard's dream was for the Congress to actually elect the EU President and Vice-President.

This was rubbish. The Convention was not meant to create new institutions, and this was laying it on with a trowel. Megalomania. In my response in the plenary session, I could not help resorting to hyperbole: Did this mean that the EU was being turned into a superpower by imitating other superpowers? By all means, let's borrow a President from the US, a Congress of People from China and a Politburo from the Soviet Union!

The Congress of the Peoples of Europe never saw the light of day, and neither did the European Council Board, the Politburo. They were discarded from the Convention's final draft. Had they been seriously proposed to begin with? Giscard d'Estaing had pet topics of his own, such as changing the name of the EU, the Congress of Peoples and space research. The Convention summarily dismissed these proposals. But were we ever even expected to accept them? Perhaps they were merely red herrings that we were fully expected to toss out so as to ensure smooth passage for the shared agenda of the three largest member states. It was certainly beginning to look as if this was the case.

5.4 The Convention's proposal on the institutions

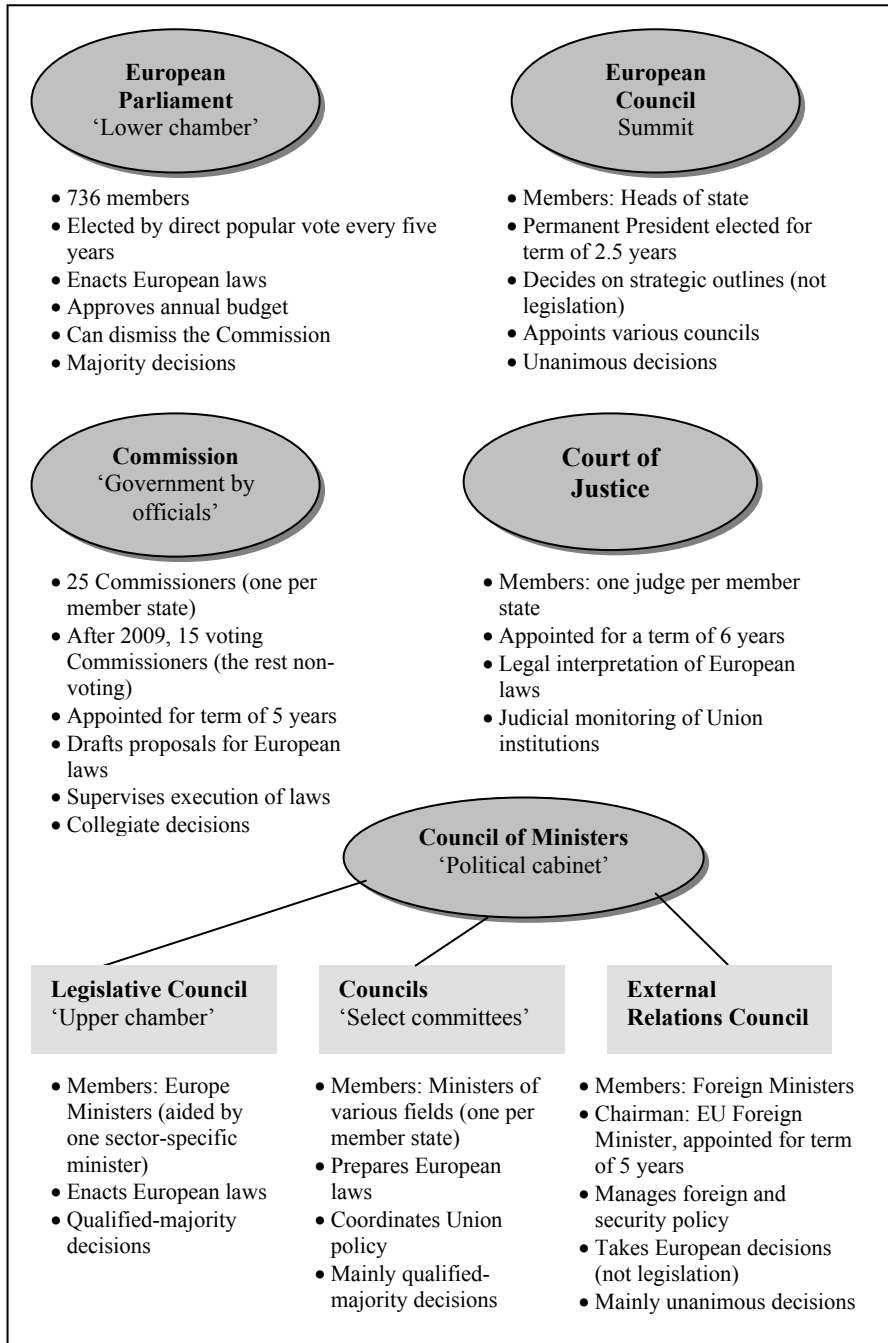
5.4.1 European Council

The one thing that the Convention really was forced to swallow was the redefinition of the position of the European Council. The large member states agreed fully on this, if on nothing else. They wanted to scrap the six-month rotating Presidency. They wanted continuity in the leadership of the EU. They wanted to give the Union a political face.

The representatives of governments and parliaments in small member states were worried. They feared that the true aim of the large member states was to reclaim power from Union institutions, particularly since the EU was facing its largest ever enlargement, involving mainly small countries as new member states. If the EU summit were turned into an independent institution, the political leaders of the member states would hijack the integration process. And when member states argue, the large ones appear large indeed. The common European approach threatened to wither in the face of fiercely guarded national interests.

A permanent President is icing on the cake. S/he would be elected from among former Heads of State and Prime Ministers. Every ousted major politician has the experience, the authority and the ambition to raise the post of EU President to unimaginable heights. A cuckoo in the common nest. We were witnessing the birth of a new institution that would gradually increase its power at the expense of others.

Figure 4. The Convention's proposal for the EU institutions



As early as 1960, French President Charles de Gaulle had proposed a summit meeting of the Heads of State of member states, a 'High Political Council', with a secretariat to be housed in Paris. The proposed organisation would have been a new institution separate from the other institutions of the European Economic Community. The proposal came to nothing, although some summits were in fact organised. From 1974, a practice of holding regular summits at least twice a year was adopted. Valéry Giscard d'Estaing, who was President of France at the time, and West German Chancellor Helmut Schmidt, both former Ministers of Finance who had experience of conferring in the Council of Ministers of the European Community, wanted to create a similar vehicle for Heads of State.

So the European Council was created. It was intended to become not a Community institution, but rather an unofficial policy think tank, something like a collective President of the Union without any formal power. In reality, the European Council has become the political guiding light of the Union, and all the significant steps of integration have stemmed from its proposals. At summits, the leaders of the large countries are naturally the most important players.

So, is having an EU President and giving the summit a strong official position contrary, by definition, to common European interests? Not necessarily.

Firstly, a lot depends on the persons involved. The Union has had, in addition to strong national leaders, strong leaders of its own that have shaped their own position and promoted their institution. Jacques Delors made the Commission strong, for instance, and Javier Solana has raised the profile of the Council.

Secondly, the EU summits go back to where the power really lies, i.e. with the political leaders of the member states. No doubt national interests come through, but this takes place in a forum that seeks advantages in balancing the shared European will. Integration cannot be forwarded by sidelining the member states. Quite the reverse: they must be relied on. A framework must be created for all member states to promote their objectives together. This is precisely why the European Council, a forum of political leaders, has provided the Union and its development with valuable impulses and legitimacy.

Once the membership of the Union approaches 30, the original concept of the summit as an intimate unofficial club will inevitably become outdated. The European Council will have to be institutionalised, and its meetings will have to be formally prepared. The rotating Presidency has hitherto guaranteed each member state visibility in managing the EU, but in an

enlarged Union the rotation interval would be so long as to be meaningless, 13 years.

The Prime Minister of the Presidency country used to tour the capitals of the member states before each European Council meeting. This would become impossible in the future, with almost 30 capitals to visit and a government to run at home at the same time. This is why we need a permanent President of the European Council, as long as the post does not take on a life of its own and begin to rival that of the President of the Commission.

It was for these reasons that the Convention finally accepted the idea of the European Council becoming an independent Union institution. It will be appointed a President for a term of two and a half years, renewable once. The President cannot hold national office at the same time, but it was not ruled out that he could hold another Union office. This loophole makes it possible for the Presidencies of the Commission and the European Council to be held by one person. This 'super-leader' concept delighted the German Convention members in particular.

The European Council was not given any actual legislative duties; rather, its task is to define general policy outlines for the future of the Union. It has considerable power, though. It makes the essential choices. It decides on closer cooperation and monitors threats and challenges facing the Union. It decides on the composition of Councils of Ministers. It is also intended to have an important Constitutional role through what are known as 'enabling clauses'.

The European Council would be authorised to amend the Constitution in several areas, such as moving from extraordinary legislative procedure to simple legislative procedure, and moving from unanimous decision-making to qualified-majority decision-making. It would also be allowed to decide on the allocation of seats in the European Parliament and on the eventual rules on the rotation of Commission members and chairmanships of the Council of Ministers. Anything that remained unagreed at the Convention was shoved onto the European Council agenda.

This is problematic, to say the least. The European Council is being given far too much power in this way. Its decisions are not judicially monitored by the European Courts like those of other institutions. Furthermore, the European Council would be allowed to change the new Constitution in certain areas without the approval of an IGC. What would happen to parliamentary legitimacy? National preparations for and parliamentary scrutiny of the European Council differ from other Union matters.

5.4.2 Commission

Is the Commission not intended to represent common European interests? Why should every member state have a Commissioner? That would lead to an impossible situation in the future. The Commission would just go on growing. A large Commission would be an internally unequal, hierarchical Commission. A small Commission is equal and efficient.

One argument after another was voiced for reduction of the Commission from its current composition of 20 members, particularly in favour of abandoning the principle of each member state having a Commissioner. Let's look at the future, shall we? If six or perhaps seven former states of the former Yugoslavia are accepted into the EU, should every one of them be given a Commissioner of its own? Obviously the Yugoslavs made a smart move in splintering their country into bits before applying for Union membership! Czechoslovakia did the same thing. What about the Soviet Union? In how many parts will it apply for membership?

Oof! Finland and the other small countries were running out of ways to defend our seats on the Commission. But defend them we did, to the bitter end. We were prepared to give up all sorts of things, but not our own Commissioner. Since the Commission has a monopoly on initiative in Union legislation, there must never arise a situation where the interests of every member state are not heard in wielding that power of initiative. Besides, having a Commissioner is the ultimate way of being visible at the top of the EU. And is this not a Union for everyone?

The large member states wanted a small Commission. The small member states wanted a large Commission. The issue was wrangled over at the Nice summit in 2000, and the resulting compromise was entered in the present founding treaty, although it has not yet been put into practice. The large member states accepted the idea of every member state having one and only one Commissioner. This was a significant concession since, as can be seen from Table 6, the large member states had had two Commissioners each ever since the days of the Coal and Steel Community, while the small member states had one. As the large member states were willing to drop one Commissioner each, pressures to reduce the size of the Commission as a whole grew. It was agreed in Nice that when the membership of the Union reached 27, the number of Commissioners would be reduced and an equitable rotation between the member states introduced.

This model was served up for the Convention, but we did not swallow it. The representatives of the small member states insisted that the practice whereby every member state has a Commissioner should continue no matter how many member states there are. Considering that they had just capitulated to

the large member states in the matter of the European Council, they were all the more insistent on this point. What was the solution?

Table 6. Composition of the Commission

Coal and Steel Community 1952-57	<p>9 Members 2 Commissioners: Germany, France, Italy 1 Commissioner: Netherlands, Belgium, Luxembourg</p>
EEC 1958-72	<p>9 Members 2 Commissioners: Germany, France, Italy 1 Commissioner: Netherlands, Belgium, Luxembourg</p>
EEC/EC 1973-86	<p>13 Members 2 Commissioners: Germany, France, Italy, UK 1 Commissioner: Netherlands, Belgium, Luxembourg, Ireland, Denmark, Greece (1981-)</p>
EC/EU 1986-94	<p>17 Members 2 Commissioners: Germany, France, Italy, UK, Spain 1 Commissioner: Netherlands, Belgium, Luxembourg, Ireland, Denmark, Greece, Portugal</p>
EU 1995-2004	<p>20 Members 2 Commissioners: Germany, France, Italy, UK, Spain 1 Commissioner: Netherlands, Belgium, Luxembourg, Ireland, Denmark, Greece, Portugal, Finland, Sweden, Austria</p>
EU 2005-	<p>25 Members 1 Commissioner: each member state</p>

The Praesidium in its wisdom came up with a compromise: every member state would have a Commissioner, but only 15 of them would have a vote. These would be known as European Commissioners, and they would be appointed from different member states in equitable rotation. This remained the Convention's proposal.

It was the most pathetic of all possible solutions. If the Convention can be said to have failed at anything, it was in the composition of the Commission. What purpose would be served by Commissioners who have no vote and no operative responsibility? They would be eunuchs, as External Relations Commissioner Chris Patten remarked. More than that, they would be a Fifth Column in the Commission. The only task left to the non-voting Commissioners would be to safeguard their national interests. That would demolish the common European approach and spirit that should inform the Commission's work.

A better solution simply must be found. Until 2009, the principle agreed on in Nice will be followed. Each member state will have a fully authorised equal Commissioner. But then what? Each member state should continue to have a Commissioner on an equal basis. If that proved to be impossible, even reducing the size of the Commission and ensuring absolute equality between member states in rotation would be better than the Convention's proposal.

The Convention proposed that the President of the Commission appoint the members of the Commission from a list of candidates provided by each member state, except for the Foreign Minister. A strange practice was proposed. Each member state was to draw up a list of three people, one of whom had to be a man and another, a woman, and the President of the Commission was to choose from these. The point of this was to ensure equality between men and women in the Commission. But is this the way to do it? What if Finland should submit the names of Paavo Lipponen, Joe Everyman and Mary Nobody? Some choice.

The Commission as a whole is accountable to the European Parliament. The Parliament cannot remove individual Commissioners, although this was also contemplated by the Convention. Instead, the entire Commission must resign if two-thirds of the MEPs support a vote of no confidence against it.

The basic functions of the Commission remained unchanged. Its exclusive right of initiative in legislation will be strengthened, the only exception being the parallel right of initiative of member states in criminal justice and police cooperation. The Commission will also gain more power in drafting the Union budget, submitting the initiatives for both the annual budget and the multi-annual financial framework.

5.4.3 European Parliament

Who shall have the final say in appointing the President of the Commission: the European Council or the European Parliament? Or should there be an electoral college consisting of MPs and MEPs, as the Swedish Convention members proposed? The election process for the President of the Commission will illustrate whether the Commission is primarily accountable to the governments of the member states or to the European Parliament elected by its citizens. The question is a fundamental one.

The Convention read the signs of the times correctly. Since the intergovernmental aspect was increasing in other institutional issues, that could not happen here. Thus, the MEP members of the Convention got what they wanted.

The President of the Commission is appointed by the European Parliament on submission from the European Council. If the Parliament does not like the candidate proposed, a new one must be found within one month. The important point is that the European Council must take into account the results of the European Parliament election. For the first time, the Presidency of the Commission will become a political appointment. It is a major step. The President of the Commission will no longer be appointed on the basis of competence and nationality alone, but also on the basis of consultation with European parties represented in the European Parliament.

All in all, the Convention aimed to reinforce the status of the European Parliament. If there is concern for the low voter turnout in Euro elections, then surely there should be support for allowing citizens to vote for true parliamentary candidates. Today, the European Parliament is not a parliament in the true sense, since it does not have full legislative power, budget power or control over the executive branch. In other words, it does not manage the functions that a parliament should perform in a representative democracy.

The Convention wanted to give the European Parliament the status of a 'lower chamber' chosen by citizens. Firstly, the Union's 'government by officials', the Commission, will be made collectively accountable to the European Parliament.

Secondly, the budgetary power of the European Parliament will be increased. The current strange division of the EU budget into compulsory and non-compulsory expenditure (with the Parliament having discretion only over the latter) was abolished, and in the future the Parliament will have the final decision over the annual budget, i.e. EU expenditure. The Council of Ministers will have the final decision in deciding on the multi-annual financial framework, which determines the size of EU revenues.

Thirdly, the European Parliament will be turned into a true legislative body, the second such body in the Union. The Council of Ministers, consisting of representatives of national governments, is the real legislative body in the EU today. It is, in theory, supervised by the national parliaments. When the Council of Ministers enacts legislation by unanimous decision, then national parliaments theoretically have the right to veto EU legislation. But what about qualified-majority decision-making? Where is the parliamentary legitimacy then? The Convention's view was unequivocal. Whenever the Council of Ministers enacts legislation by qualified majority, it must aim to generate a joint decision with the European Parliament. The 'upper chamber' will thus be joined by a 'lower chamber', considerably increasing the legitimacy of European legislation.

The Convention did not tamper with the allocation of seats in the European Parliament. The number of seats had been gradually increased with progressing integration and the accession of new member states. The Coal and Steel Community had a Parliamentary Assembly with 78 members appointed from among national MPs. This model was continued in the European Economic Community founded in 1958, albeit the Parliamentary Assembly was expanded to 142 members, as Table 7 shows.

Table 7. Distribution of seats in the European Parliament

Country	Population (millions)	No. of seats				
		1952	1958	1979	1994	2004
Germany	82.3	18	36	81	99	99
France	61.1	18	36	81	87	78
UK	59.8		36 (1973)	81	87	78
Italy	57.8	18	36	81	87	78
Spain	40.5			60 (1986)	64	54
Poland	38.6					54
Romania	22.4					(33)(2007?)
Netherlands	16.1	10	14	25	31	27
Belgium	10.3	10	14	24	25	24
Greece	10.9			24 (1981)	25	24
Portugal	10			24 (1986)	25	24

Czech Republic	10.3					24
Hungary	10					24
Sweden	8.9				22 (1995)	19
Austria	8.1				21 (1995)	18
Bulgaria	8.2					(17)(2007?)
Denmark	5.3		10 (1973)	16	16	14
Finland	5.2				16 (1995)	14
Slovakia	5.4					14
Ireland	3.8		10 (1973)	15	15	13
Lithuania	3.5					13
Latvia	2.4					9
Slovenia	2					7
Luxembourg	0.4	4	6	6	6	6
Estonia	1.4					6
Cyprus	0.8					6
Malta	0.4					5
Total seats		78	142 (198)	410 (518)	567 (626)	732 (782)

The European Parliament was elected by direct popular vote for the first time in 1979. It was established as a basic principle that MEPs were not to be members of their national parliaments at the same time. In this regard, however, the practice varies from one member state to another. The allocation of seats had to be revised yet again for the European Parliament elections in 1994, as a result of German reunification. It was no longer feasible for the large member states to each have the same number of seats.

The most recent change was enacted in Nice, where ground rules for the coming enlargement had to be agreed on. It was agreed that the number of seats would be increased from the present 626 to 732, thus creating space for MEPs from the new member states without unduly inconveniencing the existing ones. However, there were reductions all round. The number of Finland's MEPs dropped from 16 to 14. If and when Bulgaria and Romania join the Union, the number of seats in the Parliament will be temporarily

increased to 782. The Convention went no further into the matter, concluding merely with the observation that the European Council would be charged with reallocating the seats in 2009 in a way that reduced their number back to the maximum proposed by the Convention, 736.

The Convention did not have the courage to address one of the most preposterous relics in the entire Union: the meeting place of the European Parliament. Plenary sessions are held in Strasbourg, France; ‘mini-sessions’, committee meetings and group meetings are held in Brussels; and the Secretariat is housed in Luxembourg. Everyone moves from one place to another in a perpetual carousel. The arrangement is not of this world.

Together with a great number of co-signatories, I proposed to the Convention that the European Parliament should meet in a single location, which it would be free to choose for itself. It was easy enough to get Convention members to sign this proposal, particularly the itinerant MEPs themselves. Except the French, of course. It is a matter of honour for the French to have the European Parliament on its soil, whatever the cost. And indeed the cost is substantial, and will continue to be so, since our proposal was dismissed.

5.4.4 Council of Ministers

Every week, a miracle happens on the way to Brussels. In the capitals of EU member states, ministers sit in black cars on their way to the airport. They are going to a meeting of the Council of Ministers in Brussels. During the flight, a strange metamorphosis takes place. In Brussels, the person sitting in the black car is a different one from the person who left home earlier that day. Back home, a minister represents the executive branch of government; but in Brussels, he suddenly becomes a legislator. This happens even if he does not have a mandate from the citizens of his country to enact legislation. In the worst case, it is a civil servant occupying a minister’s chair in the closed meetings of the Council of Ministers. European legislation is enacted behind closed doors by the executive branch. This is democracy in Europe today.

This was a problem that needed to be addressed, and the Convention did so. Legislation had to be separated from political coordination and executive tasks in the work of the Council of Ministers. Meetings had to be open when legislation was being enacted. Citizens had to be able to see on what grounds and on what strength legislation affecting them is being enacted and by whom. The legislation should also be made into a coherent and indivisible body.

The Convention made a bold proposal. There should be a separate Legislative Council, whose work would be open and public. It would be the

body enacting legislation in the Council of Ministers, and it would take its decisions jointly with the European Parliament. The present various Councils would be involved in the legislative process like select committees in a Parliament.

The Legislative Council would have one minister from each member state, the Europe Minister. He or she could be aided at meetings by the relevant minister for the issue being discussed. Citizens would be better able to see and know who represents whom in Brussels when laws are enacted. Having a Europe Minister would put a face on the decision-making in Brussels, which can otherwise seem very distant.

Undoubtedly the Europe Minister would be something of a ‘super-minister’, next in rank after the Prime Minister and the Finance Minister. Foreign Ministers would have a tough rival. Even the role of the various other ministers would be reduced to preparation of legislation in the Council of Ministers; they would no longer be deciding things.

No wonder that the governments of member states were almost unanimously opposed to the idea of a Legislative Council. In the Convention, their representatives dismissed the concept, but we, parliamentarians overruled them and managed to get it into the final proposal. We realised that the Legislative Council would unfortunately never survive as far as the final Constitution. After all, the intergovernmental conference had to demonstrate its clout somewhere. But the main thing is that in the future the legislative actions of the Council of Ministers will be open and separate from the Council’s other actions.

The Convention only proposed two Councils. On the one hand, there was the Legislative and General Affairs Council, which would not only legislate but also manage coordination of the Council of Ministers’ work and prepare for meetings of the European Council. On the other hand, there was the External Relations Council, which would prepare the Union’s foreign and security policy. The European Council would decide on all other councils separately.

Once the Convention decided that the six-month rotating Presidency of the Council of Ministers would be abandoned, it had to be decided how the chairmanships of the various other councils would be allocated in the future. The EU Foreign Minister will be chairman of the External Relations Council, which is a really bad solution, because it invests too much power in one person. The Foreign Minister will prepare, decide on and execute matters related to foreign affairs. Moreover, he will be Vice-President of the Commission. Quite a post.

In other councils, chairmanships will be allocated in equitable rotation between member states at least for one year period. This proposal will result

in group chairmanships. Three member states will assume chairmanship of the councils for 18 months each and divide the different councils amongst themselves. Here, too, the European Council has the final say in how the rotation rules are drawn up.

5.4.5 Court of Justice

The ‘Court of Justice of the European Communities’ became the ‘European Court of Justice’ in the Convention’s proposal. The change of name has little effect on its jurisdiction. Its task will continue to be to ensure that the Constitution and any legislation based on it is interpreted and applied according to the law. The Court is the only body with the authority to issue binding interpretations of European legislation. However, its jurisdiction covers only European laws and their national implementation, not national legislation.

At present, the Court of Justice of the European Communities is not de facto the court of the EU. This is understandable, since its jurisdiction does not extend to intergovernmental cooperation, Pillar II (foreign and security policy) or Pillar III (home and justice affairs). This will remain the case in the future. According to the Convention’s proposal, no European laws are to be enacted within the Common Foreign and Security Policy, and the Court will therefore have no jurisdiction in that area. There is also a proviso in home and justice affairs whereby the Court has no jurisdiction in the internal law and order and security of member states.

The Court is situated in Luxembourg. One judge from each member state is appointed to the Court for a term of six years, which is renewable. This will remain the case, enlargement notwithstanding. Every member state will continue to have a judge in the Court.

The Court handles suits brought against member states and Union institutions that have not observed their membership obligations. Law-abiding citizens in Finland have often voiced doubts about whether Union legislation is implemented as conscientiously elsewhere in Europe as in Finland. The Convention took up this point. The imposition of sanctions on member states was made more efficient in the new Constitution. If a member state delays its implementation of European legislation, it can be quickly penalised with a fine.

5.4.6 Other institutions

The Constitution defines the Union’s institutional framework as comprising five bodies: the European Parliament, the European Council, the Council of Ministers, the European Commission and the Court of Justice – specifically

in this order. These institutions date back to the days of the Coal and Steel Community in the 1950s, except for the European Council, which did not become established until 1974.

The Constitution lists certain other Union institutions, most importantly the European Central Bank, which was founded in 1998. It has the exclusive right to issue euro notes. It is also responsible for monetary policy in those member states that have adopted the euro. The independence of the Central Bank is explicitly guaranteed in the Constitution. Its function is to maintain price stability. This is its only specified duty, although we Social Democrat Convention members tried to propose general goals related to economic growth and employment. We had to settle for the formulation in Article 29:

Without prejudice to the objective of price stability, it shall support general economic policies in the Union with a view to contributing to the achievement of the Union's objectives.

The Constitution also has a separate Article on the Court of Auditors. The name of this institution is misleading, founded as it is on the French administrative model where the body of government auditors is construed as a court. There is one auditor from each member state; their duty is to supervise the finances of the Union's institutions.

The Union has two permanent advisory bodies. The Economic and Social Committee dates from the 1950s; its members represent the business community and the social partners. The Committee of Regions, founded by the Treaty of Maastricht in 1992, consists mainly of representatives of regions and major cities. Both committees have 222 members; the Convention was prepared to increase membership to 350 to ensure sufficient representation after enlargement.

5.5 Qualified majority

According to Article 1 of the Constitution, the European Union was founded to reflect the will of the citizens and states of Europe. How can this dual will be equitably manifested in the decision-making process? A way must be found to ensure that all decisions are backed both by a majority of member states and a majority of citizens. Precise rules are required to implement the equality of both countries and people, and at the same time too. It is a question of division of power, and as such a delicate one.

The Philadelphia Convention almost came to a halt with the dispute over equitable power-sharing in common institutions. The large states considered that power should be apportioned by population, whereas the small states wanted each state to have an equal vote. The large states wanted a legislative body elected by a general popular vote, whereas the small states called for

Congress to be elected by the parliaments of the states, with each state having one vote in decision-making in Congress. The dispute was resolved with a remarkable compromise proposed by William Samuel Johnson, chairman of the Connecticut delegation. A bicameral system was devised. The Senate has an equal number of members from each state, while the House of Representatives has seats allocated by population. Any decisions must be passed by a majority in both chambers. The Congress of the United States is a simplified double majority model.

The Brussels Convention came up against the same problem of equitable power-sharing in the common institutions. Indeed, it threatened to topple the entire Constitution project – not at the Convention itself, but at the intergovernmental conference following it. Italy held the EU Presidency at the time, and Prime Minister Silvio Berlusconi was not able to pull off what William Samuel Johnson of Connecticut had managed.

5.5.1 Equality of member states and citizens

How can we ensure the equality of both member states and citizens? Valéry Giscard d’Estaing, wishing to emulate the US Constitution, proposed a proportional allocation of seats in the European Parliament, with each member state returning a number of MEPs proportional to its population. This would represent equality of citizens: one man, one vote.

In the EU, however, the concept is untenable. The differences in population size between the large and the small member states are too large. The comparison with the 18th century US and the EU today is illuminating as indicated in Table 8.

Table 8. Relative size of member states in the US and the EU

Share of total population	US (1787)	EU (2003)
Below 5%	4	10
5-10%	6	–
10-15%	2	1
Above 15%	1	4
Total number of states	13	15

When the US constitution was drafted, the founding states were middle-sized in comparison to each other. By contrast in the EU of 15 member states, one finds mostly the extremes: very large and very small states. This imbalance in population size reflects how seats should be allocated in the parliament. One man, one vote would create an unbearable situation. Either the number

of MEPs would become unmanageably large, or small member states would end up with only one or two MEPs, which would undermine representation. Furthermore, if the European Parliament were to be elected by popular vote, then the Council of Ministers should operate on the 'one country, one vote' principle, too. It never has and never will.

The Union is following a mid-way solution. Both the seat allocation of the European Parliament and the voting of the Council of Ministers take into account both the number and the populations of member states. Whether these weightings are right and just is a difficult question. It has been the subject of continuous power politics and insider trading whenever the founding treaties have been revised. The results have varied. Most recently, the 'night of long knives' at the Nice summit produced a less than successful result.

The European Parliament observes a principle of *decreasing proportion* in allocating MEPs to each member state. The large member states have numerically more seats than the small ones, but fewer in proportion to their population. The largest member state, Germany, now has 99 MEPs, Finland has 16 and Luxembourg, the smallest member state, has six. This means that the vote of a Luxembourg citizen or the vote of a Finnish citizen outweighs the vote of a German citizen by a factor of 12 or 2.5, respectively. The European Parliament is thus more of a congress representing the people of the member states rather than a parliament in the traditional democratic sense. A similar situation prevails in the Union's legislative body, the Council of Ministers.

Each member state has one member on the Council of Ministers, one minister, depending on the issue at hand. Decisions taken unanimously embody the 'one country, one vote' principle. However, the aim is to go over to majority decisions in an increasing number of issues. Today, some 80% of Community matters are decided by qualified majority. Once it becomes apparent that a matter may go to the vote, every effort is made to reach consensus without having to vote. Accordingly, only about one in ten legislative decisions taken by the Council are actually voted on.

If unanimity is required, i.e. if every member state has the right of veto, passive consensus is attained. A majority decision, by contrast, requires an active consensus. A member state threatened by a minority position would need to seek a compromise actively rather than just categorically reject the proposal.

5.5.2 Voting weights

A majority decision in legislative matters in the Council of Ministers is reached not by simple majority but by *qualified majority*: a majority of both member states and citizens. In a vote, each member state has a number of votes proportional to its population, albeit favouring the small member states. With enlargement, the votes have been adjusted as shown in Table 9. The number of votes required for a qualified majority is defined in the founding treaties. The system is complicated, to say the least.

Table 9. Voting weights in the Council of Ministers

Country	Population (millions)	Voting weights					
		1958	1973	1981	1986	1995	2005
Germany	82.3	4	10	10	10	10	29
France	61.1	4	10	10	10	10	29
Britain	59.8		10	10	10	10	29
Italy	57.8	4	10	10	10	10	29
Spain	40.5				8	8	27
Poland	38.6						27
Romania	22.4						14 (2007?)
Netherlands	16.1	2	5	5	5	5	13
Belgium	10.3	2	5	5	5	5	12
Greece	10.9			5	5	5	12
Portugal	10				5	5	12
Czech Republic	10.3						12
Hungary	10						12
Austria	8.1					4	10
Sweden	8.9					4	10
Bulgaria	8.2						10(2007 ?)
Ireland	3.8		3	3	3	3	7
Denmark	5.3		3	3	3	3	7
Finland	5.2					3	7

Lithuania	3.5						7
Slovakia	5.4						7
Luxembourg	0.4	1	2	2	2	2	4
Cyprus	0.8						4
Latvia	2.4						4
Slovenia	2						4
Estonia	1.4						4
Malta	0.4						3
Total votes		17	58	63	76	87	345
Qualified majority		12	41	45	54	62	258
Minimum number of states constituting a majority		3	3	5	7	8	14

The present voting weightings were introduced in 1995 when Finland, Sweden and Austria joined the EU. When the Council of Ministers acts on the basis of a proposal submitted by the Commission, 62 votes are needed for a qualified majority. Hence, more importantly, 26 votes are needed to prevent a motion from being carried. The weights have been carefully calculated so that a qualified majority requires eight member states, i.e. a majority. The member states forming such a majority have a minimum of 71% of the Union's population. Thus, a minority of member states, or a group of member states representing a minority of the Union's population, cannot overrule the majority in either respect.

The calculation is a fine one. The present voting system and its balance of power is based on what was created almost half a century ago for a Community of six very differently-sized countries. Tiny Luxembourg was given one vote. Belgium and the Netherlands received two votes each. The three largest countries were given four votes each. The principles then established are still in use:

1. While large member states have more votes than small ones, the small ones have more votes in proportion to population than the large ones.
2. The large member states wished to eliminate their differences and to have the same number of votes each.
3. The purpose of the qualified majority requirement is to ensure that the large member states cannot act together to railroad the small ones and that the small member states cannot together prevent legislation from passing. The large need the small, and vice versa.

4. The Council of Ministers can only force the Commission to amend the content of a proposal by a unanimous decision.

5.5.3 *The night of long knives in Nice*

As the EU has acquired more member states, allocating votes has become an intricate balancing act. An impasse was finally reached in Nice. The addition of twelve new member states could not be managed with vote tinkering. Completely new numbers had to be found.

More important than the number of new member states is their size. The original Six contained three large countries; of the future 27 member states, only six are large or even medium-sized. All the countries now acceding to the EU are small except Poland. No wonder that in Nice the large member states wanted to ensure their continued influence despite the considerable increase in the number of small member states. A pre-emptive qualified minority was sought.

The result was clumsy. France was adamant about maintaining equal voting weight with Germany. That was the way it had been since the beginning, and that was the way it was going to be evermore, regardless of the fact that the population of Germany had increased to 80 million with reunification, while France, the UK and Italy each had a population of 60 million. That the four largest member states retained an equal number of votes led to the latter three having to sacrifice nine seats in the European Parliament while Germany retained its existing seats (see Table 7). It was an artificial solution, a typical last-minute quid pro quo.

One skewed decision led to another. With France entrenched in the matter of voting weights, Spain saw no reason to compromise. Spain, too, saw itself as a large member state, or at least large enough. It wanted votes and got them, in a desperate wrangle that took place on the final night of the Nice summit so that consensus could be achieved. Spain was given no fewer than 27 votes – two fewer than Germany, whose population is double that of Spain. Following on Spain's coat-tails, Poland (40 million) scooped a wholly disproportionate number of votes. Table 9 shows the voting weights agreed in Nice, due to come into force in 2005.

So much for proportionality and fairness. Concessions to one member state brought the scavengers out of the woodwork, particularly the 'founding' member states. Everyone had to be appeased, and this took place at the expense of the new member states. For reasons of political hygiene, the Netherlands and Belgium could not both have the same number of votes. A difference of one vote was established, although the difference in population between the two countries is 6 million. So as to not make this seem

completely weird, the difference between the Netherlands and Romania had to be set at one vote, too – the difference between their populations was also 6 million. The end result was ludicrous. Romania and Belgium ended up with a difference of only two votes, even though the former has over twice the population of the latter.

If the Netherlands and Belgium were stuffing their pockets, Luxembourg could not be left out either. The tiniest member state received four votes, the same amount as Latvia (six times larger) or Slovenia (five times larger). A ‘night of long knives’ indeed!

And what about Germany? The largest member state was not amused. Its overwhelming population should count for something. One further concession was made in Nice to appease Germany: a qualified-majority decision must be supported by at least 62% of the Union’s population. As a result, the three largest member states can block a decision if Germany is with them. Since a majority of member states must also be behind a decision, the solution written up in Nice actually increased the influence of the large member states in blocking motions, not in carrying them. This was, incredibly, tantamount to a *triple majority*: a legislative decision by the Council requires a qualified majority of votes, a majority of member states and 62% of the population.

Is this simple, or what? The system agreed on in Nice has not yet been put to practice, but it will do nothing to clarify the already complicated process.

5.5.4 Simple double majority

All this would be unnecessary if the EU could only agree on what the Commission and the European Parliament proposed in Nice, a *simple double majority*. For a motion to be carried, it would have to be supported by a majority of member states representing a majority of the Union’s population. That is all. Simple and straightforward. It would be a logical application of the democratic majority principle, taking into account the equality of both member states and citizens, and at the same time too. Besides, no difficult negotiations about votes and weighting would be required when new member states acceded to the Union. The system would work automatically.

This was too simple to be acceptable. At the Nice summit, twelve member states were willing to approve the simple double majority. France, backed by Spain, objected. France has since revised its position. The opposition is now headed by Spain, backed by Poland.

The Convention did not dare to propose a simple double majority. Instead, it merely proposed a double majority: a majority of member states,

representing 60% of the Union's population. Even this would only come into force in 2009, and until then the system agreed on in Nice would be used.

The Convention's proposal is barely acceptable, though certainly better than the horrible triple majority that emerged in Nice. If a qualified majority is to consist of anything other than 50% of member states and 50% of the population, then the percentages should at least be equal – 60% of member states and 60% of the population, if nothing better can be achieved. This parity is the only way to create a system that is clear and fair for all member states and all citizens. Anything else would undermine the Constitution's goal of creating a more efficient, simpler and more democratic decision-making system for the Union.

5.6 The role of national parliaments

As observed earlier in this chapter, strange things happen on the planes to Brussels: Ministers are transformed into legislators. But in the case of Finnish ministers, their fellow passengers do not get to witness this astounding metamorphosis. Before the Finnish Ministers get into a black car to go to the airport, they go to Parliament, where the Grand Committee gives them a mandate to act as legislators in the Council of Ministers.

This is not the case in most of the other member states. Finnish Ministers' opposite numbers abroad are more self-sufficient. National parliaments rarely disturb the legislative work of the Council of Ministers with their comments; indeed, they are lucky to be informed after the fact of decisions made in Brussels! In most member states, national parliaments are confined to general debate over the broad outlines of EU development. They do not address the fine points of European legislation, even though they will later be required to implement it.

EU membership weakens the position of national parliaments. A transfer of power takes place: on the one hand, legislative power passes to the supranational institutions of the Union; on the other hand, governments and civil servants acquire power that previously belonged to parliaments.

5.6.1 Processing of EU matters in Finland

When Finland joined the EU in 1995, it was determined to learn from the experiences of others. The Finnish Parliament was on the ball. It wanted to compensate for its looming loss of power in the name of democracy. A separate provision, Section 96, was entered in the Finnish Constitution: "Participation of the Parliament in the national preparation of European Union matters".

Under the Finnish Constitution, the Government is responsible for the national preparation of matters to be decided in the EU. That Parliament participates in this preparation erodes the separation of the legislative and executive branches of government, which is otherwise maintained very strictly. In EU matters, ministers become legislators, but Parliament also sidles up to the executive branch in seeking a joint Finnish position.

Parliament has the right and the obligation to voice an opinion on all the legislation and agreements decided on in the EU – things that, were Finland not a member of the EU, would fall within the competence of Parliament. When the Commission submits a proposal to the Council of Ministers, the Finnish Government is obliged to submit the proposal to the Finnish Parliament immediately. The Grand Committee then formulates the position on behalf of the Parliament, having received opinions from the relevant select committees.

The relevant minister is heard by the Grand Committee before the meeting of the Council of Ministers, informing Parliament of the Government's view. Parliament may either concur or disagree. Ministers are politically bound by the opinion of Parliament, so when they subsequently attend meetings of the Council of Ministers, they will be airing the position of Finland, not just that of the Finnish Government. The process is outlined in Figure 5.

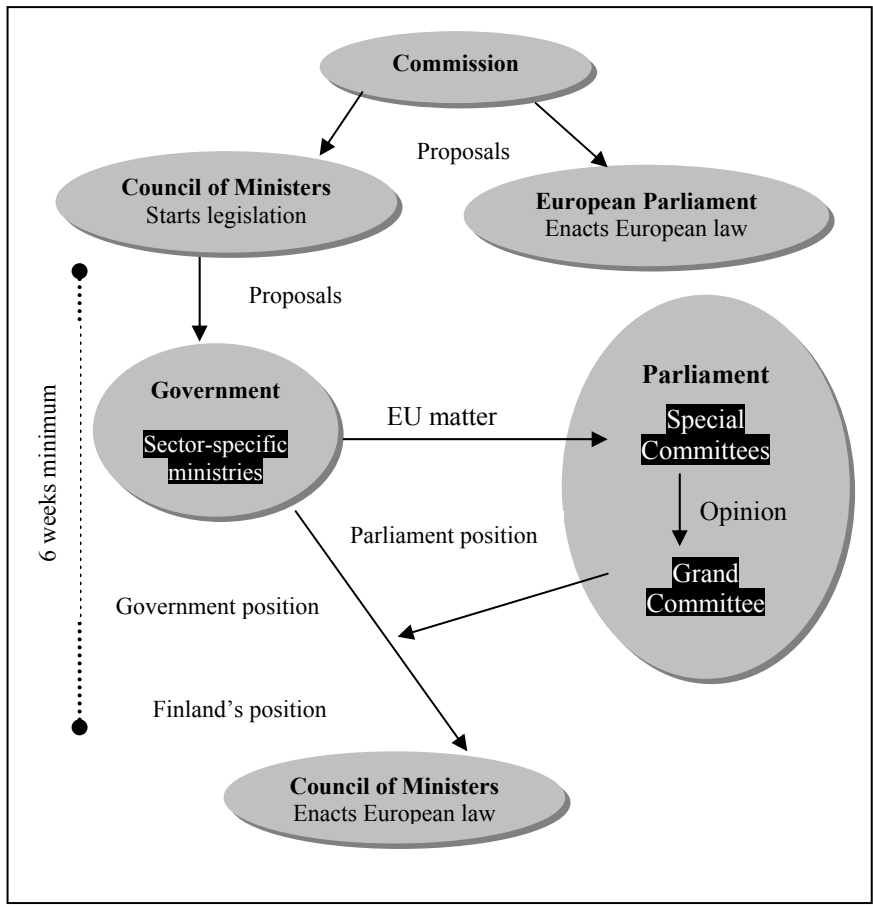
Here, the task of the Convention was to enhance the status of the national parliaments in the Union's legislation in order to narrow the perceived democracy gap and increase the legitimacy of EU decisions. This was not a new issue; it had been explored throughout the 1990s.

It all began with the Treaty of Maastricht (1992), to which, for the first time, two declarations concerning national parliaments were appended. These were recommendations exhorting parliaments to take a more active part in the Union's work. Governments were told to inform their parliaments about the Commission's proposals. Closer cooperation between national parliaments and the European Parliament was also desired. The first meeting of COSAC, the Conference of Community and European Affairs Committees, where the European Parliament also had representatives, had been held in 1989. The COSAC has since developed into an unofficial information exchange channel for national parliaments, meeting twice a year. Its decisions are not binding.

It was not until the Treaty of Amsterdam (1997) that binding provisions concerning national parliaments were enacted. A protocol was drawn up to provide national parliaments with an opportunity to state their position on EU matters before the Union's institutions take a final decision. A list was made of Commission proposals and statements that always had to be delivered to national parliaments. It was also agreed that the Council of

Ministers would have to wait for at least six weeks after receiving a proposal from the Commission before processing it. This was to give national parliaments time to exert influence; however, there is great variation in how the various parliaments have actually made use of this potential.

Figure 5. Parliamentary processing of EU legislation in Finland



5.6.2 Parliamentary practice

In Finland one has influence. Of all the member states, Finland has the most advanced system of parliamentary supervision. Finland can set an example for others in this respect.

As deputy chairman of the Grand Committee, I was familiar with this topic, and accordingly I sought membership of the Convention working group discussing the status of national parliaments. At the very least, we wanted to ensure that the influence of the Finnish Parliament would not be reduced. But we also wanted more: we wanted others to benefit from our experiences. We wrote memos and invited Gisela Stuart, chair of the working group, to visit Finland. We showed her step by step how the Finnish Parliament acts in EU matters.

The message was received and understood. The Convention's proposal regarding the role of national parliaments is based on the Finnish model. Equally rewarding was the interest that the future member states have shown in Finland. From the Baltic states to Hungary and Slovenia, the Finnish Constitution has been copied in the national preparation of EU matters.

And why not? Our version was a copy, too. We got it from the Danish *Folketing*, improving it slightly on the way in two respects. Firstly, it would have been unreasonable to burden a single committee with a multitude of different EU matters; it was much more sensible to distribute them among all the select committees and MPs according to their subject matter. Secondly, parliamentary influence is too late if a parliament's instructions to the government are only given just before the meeting of the Council of Ministers. Over 70% of European legislation is in practice agreed upon in the preparation done by the officials of the Council of Ministers. Therefore, Commission proposals must be submitted to the national parliament at the same time as the government begins its own preparatory work.

In Finland, parliamentary scrutiny of EU matters observes five principles:

1. *Comprehensive.* Parliament debates and when necessary issues a statement on all matters decided in the EU.
2. *Regular.* The Grand Committee meets twice a week and always before a meeting of the Council of Ministers or the European Council.
3. *Early stage.* The Government immediately submits Commission proposals to Parliament upon receiving them. If changes are made to its content during the preparatory work by officials, the Government must inform Parliament of this.
4. *Broad-based.* The entire Parliament is committed to debating EU matters. The Grand Committee formulates Parliament's position on the basis of the opinions of the Select Committees.
5. *Transparency.* The work of Parliament is public, including the processing of EU matters. The documents are freely available. Only in exceptional cases can a matter be declared confidential, and even then the reasons for doing so are public.

This is an ambitious but functional framework of representative democracy. The strong role of national parliaments in EU legislation furthers the acceptability of Union matters. It also contributes to the right kind of ownership. After all, it is estimated that half of all our legislation derives from the Union in one way or another. EU matters are therefore not distant international issues but typical, traditional internal affairs. Over 40% of the Union budget goes into agriculture, and 25% into regional and structural policy. Surely no one considered agriculture or regional policy to be uninteresting distant international matters before joining the EU? The parliamentary influence in the process should be strong, for democracy's sake.

What about the concern that a strong parliament will undermine the government? Not to worry: the actual effect is quite the opposite. When national consensus is sought on EU matters in parliament, the opposition is involved, too. Finland's position is one endorsed by everyone. The Government has the full support of Parliament when it acts in Union institutions. Moreover, Finnish ministers do their homework better than their colleagues, having defended their views in Parliament before meetings of the Council of Ministers.

Furthermore, ministers are allowed flexibility to seek a compromise: the position of Parliament is politically but not legally binding. Only Austria and Denmark have a procedure whereby – with unnecessary rigidity – their governments are legally bound to the positions of their parliaments when acting in the Council of Ministers.

5.6.3 National parliaments in the EU Constitution

What can and should the EU Constitution say about national parliaments? Not much. It falls within the sovereign competence of each member state to determine the relationship between parliament and government. The EU has no say in this whatsoever. The EU Constitution can at best enable strong parliamentary influence. It cannot regulate the role of national parliaments. Ultimately, the latter have the authority to decide on the Union's competence and Constitution, not the other way around.

Not that the EU Constitution has much to say about national parliaments. They only get a mention in Article 45:

Citizens are directly represented at Union level in the European Parliament. member states are represented in the European Council and in the Council of Ministers by their governments, themselves accountable to national parliaments, elected by their citizens.

That is all. The division of duties is clear. National parliaments have only an indirect role in the Union's legislation process. They do not constitute an EU institution. The European Parliament represents citizens directly. The member states are represented by their governments, which in turn are accountable to their respective national parliaments. But how to implement this accountability? This is, ultimately, defined in the Constitution of each member state and is beyond the scope of the EU Constitution.

The Convention proposal contains three major opportunities for national parliaments to have an influence in EU matters. These are entered not in the Constitution itself but in two of its Protocols. They are: a) monitoring of the principle of subsidiarity, b) participation in the national preparation of EU matters and c) cooperation with the European Parliament.

a) The Protocol on the Application of the Principles of Subsidiarity and Proportionality creates a brake for national parliaments to prevent European legislation from encroaching on areas where it does not belong. For the first time, a founding treaty will include a clear definition of the role of national parliaments in the enacting of Union legislation. Parliaments will be given six weeks in which to react to a Commission proposal and to assess whether the matter really falls within EU competence or whether it is a national or regional matter. This is a significant step that will make EU legislation more justified.

b) The Protocol on the Role of National Parliaments in the European Union is intended "to encourage greater involvement of national parliaments in the activities of the European Union and to enhance their ability to express their views on legislative proposals". How can this be aided through Union actions? Mainly by making information better available. The Commission will be required to submit all proposals and background documents directly to national parliaments, not just to governments. A six-week moratorium from submission of a proposal to its processing by the Council of Ministers will be observed. This will give the parliaments time to react. The documents of the Council of Ministers also have to be delivered directly to the parliaments. The rest, i.e. how each parliament actually monitors and supervises EU matters, is to be decided at the national level.

c) How to improve the cooperation between MPs and MEPs? Valéry Giscard d'Estaing proposed a Congress of the Peoples of Europe as a forum where European parliamentarians, MPs and MEPs, could meet regularly. The proposal was buried under universal objections in the Convention. There are other, more practical ways of improving cooperation between the European Parliament and national parliaments. I wrote a memo to the Convention on this matter in order to further justify the objections against the Congress of

People. Cooperation can be improved both on the European level and on the national level.

How the European Parliament and national parliaments actually manage their cooperation is up to them. It should not be provided for in the Constitution. COSAC is a feasible unofficial forum. It should not only be a forum for European Affairs Committees of national parliaments, but also for special committees, particularly on foreign and security policy. These objectives were entered in the Protocol on the Role of National Parliaments in the European Union. What was not mentioned was the notion of a 'Europe Week' when all national parliaments would debate the Commission's annual programme at the same time, which was the Convention working group's suggestion.

How each member state manages the cooperation between national MEPs and MPs is an internal matter. In several countries, MEPs can participate in meetings of European Affairs Committees in their national parliaments. In Belgium and Greece, MEPs even have the same rights as MPs, up to and including a vote. In the Netherlands, MEPs can address plenary sessions of parliament. In many other member states the record in this respect is poor. There is scope for improvement here. For example, parliamentary committees could call on MEPs as experts. Regular meetings of MEPs and MPs should be held both by committees and by party groups. The information service and premises of the national parliaments should also be made available to the MEPs.

If I had to invest in the stock market of ideas, I would suggest that any investor buy stock in the Convention.

Ana Palacio, 2002

Any moves towards a European constitution need to be solidly anchored in its citizens [...] Transparency is not only about 'access to documents', efficiency is not only about qualified majority, and democracy is not only reflected within the borders of the nation state.

Paavo Lipponen, 2000

6. The End of the Convention

“Come along, Teija!” I urged my colleague to join the sprawling queue before the Praesidium podium. Teija, however, was fiddling nervously with her mobile phone, trying to contact Finland. Eventually she got through; it was not until she had an OK from Prime Minister Matti Vanhanen that she joined the queue. Thus we signed the covering letter appended to the draft Constitution. The work of the Convention was done. A hectic one-and-half-a-year period had come to its conclusion. It was 10 July 2003.

The text of the covering letter had been delivered to the members’ desks in all 11 Union languages:

We European Convention members, having contributed to the preparation of this draft Constitution, now forward it to the Presidency of the European Council, hoping that it will constitute the foundation for the future treaty establishing a Constitution for Europe.

We, the signatories of this text, wanted to express our appreciation for the work that had been done. The draft Constitution we had produced would surely be of help to the intergovernmental conference (IGC). We did not agree on every detail, but it was a compromise, after all.

It was completely clear that the IGC would be perfectly within its rights to amend our draft in any way it saw fit. Whether we signed the covering letter or not was completely irrelevant to the manoeuvring position of any government.

Exactly six months earlier, I had been at Porvoo City Hall with Matti Vanhanen, holding a public briefing on the drafting of the EU Constitution as two representatives of the Finnish Parliament at the Convention. We remarked how uninterested the press was in the subject. With the amendment of the Finnish Constitution five years earlier, there had been no end of coverage in the media. In the case of the EU’s constitutional process, we were lucky to get any mention at all. Besides, the newspapers covered EU matters under foreign, not domestic, affairs.

Matti and I understood the risks. A parliamentary election was looming and perhaps it was not a good idea to hold such a briefing so close. Voters might imagine we were busy in Brussels and did not care about the things at home that were important to them. And they would be right, too, in the sense that throughout the duration of the Convention we were principally occupied in Brussels, even during the run-up to the Finnish elections.

By February and March, we were feeling the pressure. Competing candidates were free to run a full election campaign, while Matti and I spent most of our time travelling to and from Convention sessions. Luckily we managed to re-

win our seats in the Finnish Parliament. Matti Vanhanen went on to gain a seat in the new Government, becoming first Minister of Defence and then, in the summer, Prime Minister. His membership of the Convention was inherited by Jari Vilén of the National Coalition, which now found itself in opposition as a result of the election.

6.1 Last-minute changes

Twenty-six plenary sessions. Over 6,000 amendment proposals. Over 1,850 speeches in plenary session. These are the statistics. A fine effort from all of us Convention members; we worked hard up to, and especially during, the very last night.

So, did the large member states pull out the rug once again, horse-trading amongst themselves to get last-minute additions made to the draft Constitution? Even the European Parliament got part of what it wanted. What about small member states? Did we get the bum's rush? This was the general feeling among the Finnish representatives. I myself was not so sure.

There was a grain of truth in the accusation, certainly. Germany insisted on inclusion in the immigration articles of the right for member states to decide for themselves about workers from third countries. It also wanted to subordinate the EU External Relations Unit to the Foreign Secretary and to keep the Euratom Treaty unaltered. France demanded that a legal basis should be created for services of general economic interest and that an exception be included under the common commercial policy whereby unanimous action is required in trade of cultural and audiovisual services. The European Parliament wanted the Union to have defined symbols and a clause requiring approval by the Parliament if a Convention was not convened, should the Constitution be revised. The Praesidium made these adjustments to the draft during the final night.

But the Praesidium entered one further change. Giscard d'Estaing looked me straight in the eye as he spoke of openness in defence cooperation, something that we Finns had tirelessly championed to the bitter end. The Praesidium was willing to concede that the general principles of enhanced cooperation should be extended to defence, too. This amendment could only be incorporated in Part III of the draft Constitution, since the first two parts had been finalised a month earlier.

This discrepancy between different parts of the Constitution remained hanging in the air, to be ironed out at the IGC. An old judicial maxim is useful here: if the clauses cannot be interpreted, one must interpret the intention of the legislator. The intention of the Convention as regards defence

was made quite clear at the last session. There was no reason for us to be completely dissatisfied.

The Convention actually ended twice. It had originally been charged with completing its work before the European Council summit in Thessaloniki on June 20. It did, but only in part. In Thessaloniki, Valéry Giscard d'Estaing submitted only the first two parts of the Draft – albeit the most important ones – to the summit. He also requested further time for preparing Part III, which contained more detailed provisions. A month was granted, but only for technical amendments, not revision of content.

6.1.1 Small member states broke ranks

As May moved into June, we were in the home stretch. If the Convention did not prove successful, a whole year of work would have been wasted. The political groups were particularly active. The Social Democrats, Conservatives and Liberals all produced memoranda aiming at last-minute compromises. Lobbyists buttonholed both MEPs and MPs.

The various government representatives were in disarray. The large member states went their own way. The representatives of small member states desperately tried to agree on a consensus but failed. They did manage to write a joint letter to Valéry Giscard d'Estaing, but this only contained points that were self-evident anyway: the Community method had to be strengthened, balance between the institutions had to be maintained, the equality of the member states had to be respected, no new institutions should be created, and the institutions should act as openly as possible.

The only real issues addressed were that the equality of the member states should be preserved in the composition of the Commission and that the Presidency of the Council should rotate. That was all. The small member states could not even agree on whether they should defend the practice of each member state having a Commissioner of its own.

The small member states thus broke ranks. Only Finland, Austria and Portugal, and a number of candidate states, eventually remained together. That was not much of a position in which to make an impact. Perhaps there was not a great deal of desire to do so either, because it was understood that the whole matter would be reopened at the IGC. There the member states have equal representation and there every government must agree before a final solution is reached. There was no such a veto available at the Convention, and there was therefore no point in aiming for compromises. Standing firm at the Convention equals leverage at the IGC, or so the Finnish, Austrian and Portuguese Governments believed. Unfortunately, this assessment proved inaccurate, to say the least.

We, the representatives of national parliaments, wanted to achieve something. For us, the Convention was the only channel through which we could convey the points we wanted incorporated in the Constitution. We did not have the option of sitting around waiting for the IGC. Several of us proposed a joint meeting of MPs and MEPs to work out a joint position. Such a meeting was held, and such a position was worked out – and it did influence the outcome of the Convention.

We met in the office of Elmar Brok, the Conservative group leader, late at night: a select group of parliamentarians from each political group. We drafted a joint proposal to be submitted to Giscard d’Estaing at the group meeting of national parliament representatives the following day. Undoubtedly he was pleased to see that we expected the Convention to produce a single draft Constitution. Offering alternatives for disputed points would only demonstrate political impotence. The MEPs concurred. This was not only the home stretch; we were almost crossing the finish line.

6.1.2 The Praesidium’s compromise

The Praesidium’s final offer came on June 12th, the eve of the final day of the Convention. It made concessions to the views of the political groups and parliamentarians. A solution was sought with which no one was really happy, but with which everyone could live. A compromise always comes across as damage control; but how else can one hold things together?

In order to achieve some sort of consensus about the European Council as a new institution, it was entered in the Constitution that the European Council “does not exercise legislative functions”.

In order to achieve some sort of consensus about the permanent President of the European Council, his/her powers were restricted by providing that s/he “shall ensure the European Council’s proper preparation and continuity in cooperation with the President of the Commission”.

In order to achieve some sort of consensus about the composition of the Commission, it was entered that all Commissioners – whether voting or non-voting – shall be “chosen according to the same criteria”. Besides, “these arrangements shall take effect in 2009”, up to which point every member state is to have one voting Commissioner.

In order to achieve some sort of consensus about the Presidency of the Council of Ministers, it was entered that the Presidency “shall be held by member state representatives on the basis of equal rotation”.

In order to achieve some sort of consensus about the definition of a qualified majority, it was entered that the new double majority “shall take effect on 1

November 2009". Until then, the system agreed in Nice would remain in force.

Small achievements, but achievements all the same. Something for everyone. And so the package was completed. Giscard d'Estaing and a number of Convention members in their final speeches expressed a fervent wish that the IGC would not change the draft at all. It was a carefully crafted compromise, and if one corner of it was picked apart, the whole thing might unravel.

6.1.3 Symbols of the Union

Not that Giscard was wholly consistent, though. One month later, as the Convention's extra time drew to a close, he was willing to recommend one amendment to the IGC. Drawing a round of applause, Giscard announced to a plenary session that the Praesidium had added the symbols of the Union to the draft as Part IV Article 1

The flag of the Union shall be a circle of twelve golden stars on a blue background.

The anthem of the Union shall be based on the 'Ode to Joy' from the Ninth Symphony by Ludwig van Beethoven.

The motto of the Union shall be: United in diversity.

The currency of the Union shall be the euro.

9 May shall be celebrated throughout the Union as Europe day.

Giscard's recommendation to the IGC was to move this article to where it should rightly be, Part I of the Constitution. The Convention could not move it, because the extra time allowed after the Convention's conclusion on June 13 was only intended for technical amendments to Part III. The Convention, however, took a broad view of this and made changes to the content as well, though only in Parts III and IV.

6.2 The challenge of democracy

The symbols of the Union are important. Not because they resemble the trappings of an independent state and thus portray the EU as a state. After all, Rotary Clubs have mottos, football clubs have songs, women have Women's Day, casinos have their own money (chips), and provinces have flags – but no one would ever imagine that these are sovereign states.

The symbols of the Union are important because in a democracy, the approval and commitment of the citizens are required if public authority is to be exercised. Common symbols create a sense of community and identity among the citizens of the Union's member states. This is the only way in which supranational democracy can work and be credible.

One of Giscard d'Estaing's weaker efforts was his attempt to define democracy by choosing as the motto for the preamble of the draft a quote from the ancient Greek statesman Thucydides: "Our Constitution [...] is called a democracy because power is in the hands not of a minority but of the greatest number." Is this a comprehensive definition of European democracy?

Quoting Thucydides was just playing silly buggers. Thucydides was a leader of the nobility and an opponent of Athenian democracy; he was attacking another statesman, Pericles, by quoting one of the latter's famous speeches back at him. And here we are, prefacing the EU Constitution with a motto that is a quote of a quote. Which is fine, but why not credit it to the original author? Unless, of course, this is a demonstration of real tolerance in practice: having an opponent of democracy praise democracy by quoting his enemy!

6.2.1 The citizens' initiative

German Convention member Jürgen Meyer was considerably more successful in embedding democracy into the structures of the Union. In the final weeks of the Convention, he patiently collected signatures for his proposal on a citizens' initiative. I, too, signed it. Obviously he got enough signatures, since his proposal was approved by the Praesidium. Or was this because it was the Germans who were behind it? In any case, a fourth paragraph was added to Article 46:

No less than one million citizens coming from a significant number of member states may invite the Commission to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution.

This was a surprising expansion towards direct democracy. How such an initiative could be realised technically remains to be seen. Collecting a million names would be a wholly different project in Finland compared with Germany. But then again, this provision concerns organisation of the will of European citizens into an initiative.

6.2.2 The democratic life of the Union

The Constitution acquired a completely new title, "The democratic life of the Union", whose content emphasises the equality of citizens. A number of representatives of small member states attempted to include the equality of member states as a second principle but failed.

Democracy in the Union is both representative and participatory. The European Parliament and the governments of the member states accountable to their respective national parliaments are, naturally, the main elements of representative democracy in the Union's structures. The aim is for decision-making to be as transparent as possible and as close to citizens as possible. The Constitution also underlines the importance of political parties on the European level. This is all right and proper.

Participatory democracy means the Union institutions must engage in dialogue with interest groups and the civil society. The 'citizens' initiative' is a new feature. The Constitution separately recognises the need for dialogue with the social partners, on the one hand, and with churches and non-confessional organisations, on the other. It represents quite a concession to single out churches and religious bodies in this fashion.

The EU Ombudsman, Jakob Söderman, an observer at the Convention, did his utmost to ensure that the Constitution provided for this post of Ombudsman. The Ombudsman was duly entered in the Constitution, appropriately enough under the title 'The democratic life of the Union'. The European Ombudsman is a wholly independent functionary. He receives complaints about anomalies in the Union's administration and investigates them. As the first-ever holder of the post, Jakob Söderman has been a pioneer and he was rewarded for his efforts with a mandate in the Constitution.

What about the status of churches? And the Christian faith in particular? For many Convention members and governments, it was not enough simply to mention dialogue with religious organisations. There were those who demanded that the word 'Christian' be entered into the Constitution. There were also people, myself included, who were opposed to this, in the interests of plurality and tolerance. Finnish Foreign Minister Erkki Tuomioja came up with a Solomon-like solution: the Christian faith can be named in the preamble as one of the sources of European civilisation, but this preamble should then be removed from the body of the Constitution and be converted into an introductory text. This was a good idea, since it got rid of Thucydides, too.

6.3 Common commercial policy

The French were on the march. I found myself reading a proposed amendment whose first signatory was French Foreign Minister Dominique de Villepin. The provisions on the common commercial policy, it said, had to be amended. It would be unacceptable for national competence to be restricted in trade in cultural and audiovisual services by having the Council of Ministers take anything but unanimous decisions in this field. An

exception would therefore have to be entered, because commercial policy decisions in general were defined as qualified-majority decisions. The otherwise soft-spoken French alternate member Pascale Andreani was adamant on this point when she addressed the plenary session.

Fair enough. I was quite willing to sign the French proposal, but on one condition. The unanimity requirement should apply not only to cultural and audiovisual services but also to educational, social and health care services. This, after all, is the case in the existing treaties. If it is so important for the French to safeguard their cultural and linguistic autonomy, why should it not be acknowledged that it is equally important for us Nordic people to safeguard our public welfare services against international competition? Not everything can be measured in money. De Villepin's proposal fulfilled this condition, so I signed it.

To my surprise, the other Finnish Convention members were not amused, quite the reverse. Both Teija Tiilikainen and Jari Vilén levelled a broadside at any exceptions to the common commercial policy, since these would endanger the Union's capacity to enter into international treaties in the service sector. Here, in the very last moments of the Convention, the Finnish delegation was clearly and definitely split. This was to happen again in the debate on the legal basis for services of general economic interest.

It was an ideological divide. After all, we were not just representing our country at the Convention. We also each had individual political and ideological views. The division into Left and Right became apparent when the Convention began to address the status of public services.

6.3.1 Legal basis for services of general economic interest

The Social Democrats were strongly in favour of providing a legal basis for services of general economic interest. What was the aim here? Surely not to have Union legislation interfere with how member states provide public services on the national level? No, of course not.

Firstly, the services involved were public monopolies such as energy, railway, telecommunications and postal services, but also welfare services. Secondly, the point was to define these as services that strengthen the social and regional cohesion of society. Thirdly, if member states offer services of general economic interest, they are obliged to ensure financing for them. And fourthly, the Union cannot interfere with how member states provide public services. These were the aims of acquiring the legal basis.

A breakthrough was achieved. On extra time, the Convention added Article 6 to Part III of the Constitution, creating a legal basis for services of general economic interest. This was an amendment of content, not a technical

amendment, so the Convention in fact overstepped its mandate. But in a good cause!

What about the exceptions to the common commercial policy? Are public welfare services now endangered in international trade negotiations?

6.3.2 The EU and the trade in services

In the World Trade Organisation, trade in services is a point on the agenda concerning trade liberalisation; and the services are, in principle, taken to include public welfare services, too.

The Commission undertakes trade policy negotiations in the WTO on behalf of the EU member states. Several member states, Finland included, have been careful to ensure that welfare services are not opened up to international competition. The Commission, too, has been careful not to enter into negotiations concerning educational, social or health care services. The services under negotiation involve communications, telecommunications, transport, financing and various types of consulting.

The case is clear. Public services are not threatened by EU commercial policy measures at the moment. How about in the future, though?

It was agreed in Nice in 2000 that services would be included in the common commercial policy. This will enable the EU to negotiate the whole of the WTO agenda. As an exception to normal trade in goods, where the Council of Ministers acts on a qualified majority, it was entered in the Treaty that decisions on trade in services must be taken unanimously.

The Council of Ministers thus gives the Commission a mandate to negotiate multilateral trade agreements within the WTO. The Council then approves the result of the Commission's negotiations. The Council must take a unanimous decision in any matter involving trade in services: every member state must be in favour for such a decision to be carried.

It was further agreed in Nice that trade in certain services does not come under the Union's exclusive competence. Cultural and audiovisual services were placed under shared competence at the demand of France, and public educational, social and health care services likewise at the demand of the Nordic countries. In these fields, ratification by national parliaments is required in addition to a decision by EU institutions in concluding trade agreements. Opening up public welfare services to international competition is thus safeguarded by several locks in the EU, and ultimately requires a decision on the national level.

6.3.3 Exceptions to the common commercial policy

The Convention's task was to make the Union's decision-making simpler and more efficient. Therefore, the basic approach was to unify the common commercial policy and avoid exceptions. The Convention therefore proposed that trade in services should come under the Union's exclusive competence as a whole. The controversy raised in Nice then came up again, and was resolved at a Praesidium meeting on the last night before the Convention's final session.

The main rule in the common commercial policy is decision by qualified majority. As an exception to this, the Council of Ministers acts unanimously for trade in services involving the movement of persons and for the commercial aspects of intellectual property.

More exceptions were looked for. The proposal, whose first signatory was Dominique de Villepin, was on the Praesidium table. What should be done? Add more exceptions? The French were unyielding. In France, the draft Constitution would have to be submitted to a referendum, and it was certain that if the EU Constitution were in any way perceived to threaten French culture or the French language, the arts, sciences and cultural sector in France would raise such a stink that the referendum would inevitably reject the whole Constitution.

The Praesidium capitulated. A further derogation to the common commercial policy was added to Article III-217.4.:

The Council shall also act unanimously for the negotiation and conclusion of agreements in the field of trade in cultural and audiovisual services, where these risk prejudicing the Union's cultural and linguistic diversity.

There was no one in the Praesidium to defend the second point in de Villepin's original proposal, on educational, social and health care services. The Nordic voice was not heard. There was no Finn or Swede in the Praesidium, and even its Danish member, Henning Christophersen, was from the Right.

The case is a curious one. Public services come under national competence under the Union's internal market provisions; they are beyond the scope of harmonisation and require a unanimous decision. It is simply not possible to override all this through international trade policy agreements. One should ensure that the member states retain the capacity to decide how and on what terms they provide welfare services.

6.4 The *passerelle* clause

For all my French lessons, I was puzzled. A curious French word appeared in corridor discussions in the final weeks of the Convention: *passerelle*. Everyone spoke very knowledgeably about it. I hardly dared ask what it meant, for fear of seeming ignorant. The dictionary told me that it meant a ‘gangplank’ or an ‘overpass’. Yet another example of Euro-jargon at work.

An overpass to what? An overpass from an old Constitution to a new one without all the bother of procedure. An overpass to the European Council’s being authorised to find solutions to issues left open at the Convention.

Passerelle was the word of the week because there were things that we simply could not decide at the Convention but that we felt should be resolved quickly and painlessly in the future. On the other hand, there was a desire to increase the flexibility of the Constitution. In the short term, *passerelle* represents our failure, but in the longer term it demonstrates our vision.

The ‘*passerelle* clause’, or ‘enabling clause’ gives the European Council the opportunity to amend the new Constitution without national ratification. This was new and unheard-of. Hitherto, the only mechanism for amending the founding treaties had been the IGC, after which the member states have been required to ratify the amendment according to their respective constitutions.

Jean-Luc Dehaene, the Belgian Vice-President of the Convention, considered that the greatest weakness of the draft Constitution was that amendments to it would continue to require national ratification and unanimity. An easier way of revising the Constitution, particularly its highly technical Part III, should be established. In cases where the distribution of competences between the Union and the member states is not affected, it should be sufficient to proceed with ‘European ratification’, i.e. approval of only the European Parliament and the Council.

This was an ambitious, if not outright revolutionary, proposal. On the day that the power to amend the Constitution is given to EU institutions, the very constitutional nature of the Union will change, as the Union will then acquire state-like powers. The Convention did not want to take this path. It wanted to restrict the ‘*passerelle* clause’ to a few strictly defined issues: those issues that remained unsolved at the Convention, involving the institutions, on the one hand, and more efficient legislation, on the other.

According to the Convention’s proposal, the European Council has the authority to amend the Constitution in the following matters:

1. Allocation of seats in the European Parliament after 2009.
2. Provisions on the rotation of the Presidency of the Council of Ministers.
3. Organisation of the rotation of members of the Commission.

4. Moving from special legislative procedure to ordinary legislative procedure.
5. Moving from unanimous action to acting by qualified majority.

The European Council will thus gain significantly in power. As far as the points regarding the Parliament, Council and Commission are concerned, these are one-off issues that the Convention should have resolved. Enhancing the legislative mechanism is a continuous process which at the moment is unduly tied to the progress of the slowest member state. Those who want to stall are in favour of unanimity. Those who want to move on are in favour of a qualified majority.

‘Ordinary legislative procedure’ is a joint decision in which the European Parliament and the Council of Ministers are co-equals as legislators. This is the rule, certain exceptions being provided under *‘special legislative procedure’*. In such cases, one of the legislative bodies does the deciding, and the other one merely participates in the process. These special cases are specified in the relevant article of the Constitution. In future, any movement in such cases to ordinary legislative procedure is for the European Council to decide.

6.4.1 Extending qualified-majority decision-making

In the current founding treaties, there are over 80 points on which the Council of Ministers acts unanimously. No doubt there are matters that should be kept subject to unanimous decision, as long as there is no desire to turn the EU into a sovereign state – which the Union is not and should not be. Ultimately, sovereignty rests with the member states.

Transferring competence from the member states to the Union must always be done by unanimous decision. Defence, military action and vital national interests – public welfare services in the Nordic countries, cultural and audiovisual services in France – must be decided on by unanimous decision. The acceptance of new member states must likewise be by unanimous decision.

These, however, are the only matters in which unanimity is really needed. If competence has been conferred on the Union, it is only natural to allow it to take decisions too. The Convention extended qualified-majority decision-making to some 30 points.

There is still scope for the undermining of many vital issues, though. The Union’s decision-making should be enhanced in capital gains and corporate taxation, in labour protection and environmental policy if we wish to end the unhealthy competition between member states that breeds social and ecological irresponsibility. Likewise, the Common Foreign and Security

Policy is highly inefficient, as it rests largely on unanimous decision-making and will continue to do so. The intergovernmental aspect of the present Pillar II will remain strong even though the pillar structure itself will be demolished.

6.4.2 Justice and home affairs

What about Pillar III? It is coming down, too. The Convention envisioned bold reforms in judicial and internal matters. Normal Union legislation is already in place regarding visa, asylum and immigration policy. Criminal justice and police cooperation, on the other hand, are sensitive areas from the point of view of national sovereignty. The Convention proposed that the normal Union legislative procedure and qualified-majority decision-making be extended to these areas, too, with some exceptions.

The major new steps are the development of a common border control and immigration policy, and the enabling of European legislation concerning serious crime with cross-border dimensions. Police cooperation will be enhanced, particularly within Europol. A European Public Prosecutor will be founded. These reforms involve the most significant transfer of competences from the member states to the Union in the entire draft Constitution.

However, important elements of the intergovernmental approach will continue to be upheld. It is the European Council, not the Commission, that is charged with defining general legislative policy in matters related to freedom, justice and internal security. Similarly, the Commission does not have the exclusive right of initiative in criminal justice and police cooperation. Legislation can also be launched with an initiative supported by one-fourth of the member states. The early-warning system of national parliaments is more than usually sensitive in such issues too: if one-fourth (the normal requirement being one-third) of the national parliaments find a legislative proposal to be non-compliant with the principle of subsidiarity, the Commission must reconsider its proposal.

Home and justice affairs form a special category in Union policy, just like security and defence policy. In these areas, there is a case to be made for an intergovernmental approach and unanimous decision-making. But legislation should be streamlined in other areas where competences have been conferred upon the Union. It cannot be healthy in the long run to allow a single country to stall initiatives. A flexible move to qualified-majority decision-making is needed. Hence the ‘passerelle clause’.

6.5 Future of the Convention

The Convention praised the Convention. A job well done. So well, in fact, that the Convention provided for the future convening of a Convention to amend the Constitution – its own reincarnation, in effect. Under Article IV 7.2. of the draft Constitution:

If the European Council adopts a decision in favour of examining the proposed amendments [of the Treaty establishing the Constitution], the President of the European Council shall convene a Convention composed of representatives of the national Parliaments of the member states, of the Heads of state or Government of the member states, of the European Parliament and of the Commission.

The European Parliament praised the European Parliament. A job well done. So well, in fact, that the European Parliament provided for involvement of the European Parliament in amending the Constitution, in all cases. If minor amendments are involved, the European Council can decide to refer them directly to the IGC without convening a Convention. But not without consulting the European Parliament. The MEPs made sure of that on the last night of the Convention. An addition was made to Article IV 7.2.:

The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene the Convention should this not be justified by the extent of the proposed amendments.

This condition is not entirely unproblematic. Making approval by the European Parliament a condition for amending the EU Constitution is legally tantamount to changing the Union's constitutional nature. An EU institution would gain power over constitutional amendments. Is the EU beginning to turn into a sovereign, self-reliant state? The member states would no longer be 'Masters of the Founding Treaties'. This the Convention naturally found unacceptable.

As a matter of fact, the European Parliament was not given the competence on the EU Constitution. It is up to the member states to decide this, according to their respective Constitutions. Instead, the European Parliament will be involved in the process of estimating whether a Convention needs to be convened to amend the Constitution, or in other words to estimate whether MEPs are needed for the drafting of such amendments. This is not nearly as unreasonable a demand.

The government representatives varied in their praise. Those who did not wish to continue the wrangling at the IGC were fulsome. Those who wanted

to continue the work at the IGC (or who in the worst cases had not even yet begun to fight) were not. For them, the Convention was merely an overture.

And what about us, the representatives of national parliaments? Did we express any praise? You bet we did. The Convention was an experience. It was a broad-based forum where national, political and institutional interests were represented in shaping the articles of the Constitution. More importantly, the Convention members became a family. We now know each other personally. Valéry Giscard d'Estaing had dreams of becoming the Father of the European Constitution. Which he did, and we became members of the family. We will continue to rely on each other in the future.

6.5.1 What did we learn?

What about the future, then, about new Conventions that will be convened to amend the Constitution? What can they learn from our Convention?

1. The Convention worked best in its working groups. All the issues that were discussed in working groups progressed rapidly and showed the best results. In issues where the plenary session had to respond directly to the Praesidium's proposals, the result was debatable and in many cases unresolved.
2. The Praesidium and Secretariat of the Convention must without question have a representative from each of the member states. The Union consists of nation states, and all their specific characteristics must be represented in the process of amending the Constitution. Otherwise, alienation and unnecessary tensions will result.
3. The Convention must elect its own Praesidium, up to and including the Chairmen. It is always difficult to sit down when someone else has laid the table.
4. The Convention should be able to vote. The Praesidium took a vote on the most tangled issues. Why could the plenary session not have done the same? The impression created now was one of an artificial and partly dishonest consensus.

Many of us proposed that the Convention members could continue meeting even after the IGC had started. There were no illusions that a ghost of the Convention could overshadow governments; rather, the idea involved an exchange of information between politicians already familiar with one another and the subject matter. Of course, national parliaments supervise governments during the IGC, and this takes place at home, not in Brussels or Rome.

There were no illusions that such meetings would be attended by the government representatives at the Convention. But why could MPs and MEPs not sit down together to talk? Italian Senator Lamberto Dini, representing the Presidency, promised to call such a meeting, and did. Just as Valéry Giscard d'Estaing promised that the Convention Praesidium would aim to meet on a monthly basis during the IGC. Dini even proposed that Giscard be called to the IGC as an expert, to prevent undue unravelling of the draft. This prompted rumblings in certain capital cities.

6.6 Approving the Constitution

The Convention was coming to an end. A debate has emerged whether one should organise a referendum to approve the new EU Constitution.

There is a curious unholy alliance at work here. Eurosceptics are demanding a referendum in hopes that the Constitution will remain unratified by at least one member state. That would destroy the whole project. Federalists would like to see a Europe-wide referendum, following which the new Constitution would be genuinely based on sovereignty of the people, bypassing the will of the member states. This would create a Federal Constitution.

Article 1 of the draft Constitution begins: "Reflecting the will of the citizens and states of Europe..." The will of the states is expressed by governments. But how should the will of their citizens be expressed? That is why we need a referendum. Or do we?

The Finnish Constitution says: "The powers of the state in Finland are vested in the people, who are represented by the Parliament." In Finnish representative democracy, Parliament is the supreme governing body, representing the will of the people. The ratification of Parliament is required for approval of the EU Constitution. If a referendum were to be held, the people would bypass Parliament. The constitutional nature of the EU Constitution in Finland would thus change. It would become stronger than the Finnish Constitution itself, based directly on the sovereignty of the people. Finland would begin to be demoted from an independent state to a province in the European federal state. Is this what all the proponents of a referendum really want?

Those member states whose Constitution requires a referendum regarding any amendments to the founding treaties do not have this problem. Each member state observes its own Constitution.

6.6.1 Why have a referendum?

There are many things in favour of having a referendum. Direct democracy is needed to complement the representational system. A referendum would spark political debate and force parties to take a stand. It could also help strengthen acceptance of the EU. It would encourage citizens' interest and need for information. A referendum is an excellent way of educating citizens. But it also means taking a decision.

What would be decided in a referendum on the EU Constitution? The issue would be very different, depending on who is voting and in which country. In Austria, the principal issue during the Convention was the position of Euratom. Austria is highly anti-nuclear and was adamant about excluding nuclear energy from the Constitution. In Ireland, national competence in taxation is the number one issue. In Denmark, public debate focuses on consumer protection and sustainable development, whereas Sweden talks about the euro, Spain about the weighting of votes in the Council of Ministers. France is up in arms to defend its culture and language, and Poland is enraged about the Constitution not mentioning the Christian God. And Finland? All we talk about are EU defence and security guarantees.

So what would a citizen be deciding on in casting a vote for or against the EU Constitution? No doubt his principal concern would be to evaluate whether the Union is needed at all and, specifically, whether his or her country should be a member. And (s)he would be right: this is exactly what a referendum on the EU Constitution would be addressing.

So do we need a referendum? We might if the Union would substantially change as a result of the new Constitution. As a Convention member, I would like nothing more than to eulogise the historical importance of the Constitution in relation to its subject, the European Union. However, the Union will not in fact be changed fundamentally by the Constitution, and no substantial new competences will be transferred to it by the member states. A referendum on the Constitution might, if anything, exaggerate the significance of the Convention's achievement.

Truly, a referendum on the EU Constitution would address the question of whether a small member state like Finland should continue to be a member of the Union. The situation is different in France, where the referendum would genuinely be about the EU Constitution. There a vote of 'no' would overturn the entire process. So what would happen if a small country like Finland rejected the Constitution?

6.6.2 Enacting the Constitution

The Treaty establishing a Constitution for Europe will abolish all the existing founding treaties when enacted. In Article 1, “this Constitution establishes the European Union”. Re-establishes, right? At least it replaces all existing treaties with a new one.

The Treaty establishing a Constitution for Europe is, as the name says, an international treaty in its legal nature. Treaties can only be abolished according to their own provisions, or by agreement between all the parties concerned. The founding treaties of the EU contain no provisions as to their abolition, and they can thus only be replaced by a new treaty by agreement between all the member states. Otherwise they will remain in force.

So there is nothing to worry about. If Finland or any member state were to reject the Constitution, it would simply vanish. The whole project would come to a halt, and the Convention’s work would have been wasted. Life would go on as usual under the existing founding treaties.

Is this really what would happen? Not at all.

The Philadelphia Convention had the same problem. The Founding Fathers had no intention of trusting their Federal plans to the vacillations of small individual states. The Articles of Confederation of 1777 required a unanimous decision by all states to enact any amendment. What happened in Philadelphia in 1787 was a coup. Instead of requiring unanimity, it was enacted that the new Constitution would come into force when two-thirds of the states had ratified it. The states that had ratified it would then found a federal state, leaving the non-ratifying states outside.

The Union is not a federal state and is not becoming one. Its Constitution will remain an intergovernmental treaty. A unanimous decision by the member states is therefore needed to amend the founding treaties. But the Convention did allow for contingencies. Its very last act was to append to the draft Constitution a declaration whose content also appears in Article IV 7.4.:

If, two years after the signature of the Treaty establishing the Constitution, four-fifths of the member states have ratified it and one or more member states have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council.

This is abundantly clear. Finland or any member state might reject the Constitution but cannot prevent France and Germany from ratifying it. German Foreign Minister Joschka Fischer reminded us of this at the Convention. He quoted his famous predecessor Hans-Dietrich Genscher: “In the EU, no one can force anyone to advance, but neither can anyone prevent the others from advancing.” Well said!

It was not by accident that Article 1 of the draft Constitution was entitled “Establishment of the Union”. Nor was it by accident that the key sentence in that article contains the phrase “establishes the European Union”. It is, after all, something new that is being forged. Old things will pass away, naysayers or no.

If one or more member states encounter difficulties in proceeding with ratification, the matter has to be referred to the European Council. What would be the result? Certainly not a reversion to the old founding treaties, if the opposing member state is a small one. It would be forced to draw conclusions: it would be looking at some sort of associate membership, observer status or, ultimately, withdrawal from the Union.

Opposition by a large member state would undoubtedly wreck the entire constitutional process. Therefore, voters in large and small member states will be answering different questions in the referenda: the former will be deciding the fate of the Constitution, the latter will be deciding on their own fate within the Union.

6.6.3 *Withdrawal from the Union*

An article enabling withdrawal from the Union was entered in the draft Constitution. This was the first provision of its kind in the founding treaties. Article 59 states unequivocally:

Any member state may decide to withdraw from the European Union in accordance with its own constitutional requirements.

Although the existing founding treaties do not include such a provision, they are international treaties by nature, and withdrawal from an international treaty is always possible. For instance, Greenland, an autonomous territory under Denmark, withdrew from the Union after a referendum in 1985.

The possibility of withdrawal highlights the fundamental nature of the Union as a voluntary community of member states. It reinforces the primacy of the sovereignty of the member states relative to the competence of the EU. It resembles and partly replaces the Luxembourg compromise of 1966, whereby a member state can demand a unanimous decision in matters of vital national interest. The possibility to withdraw gives member states a tool for exerting pressure on each other and on the EU institutions. At home, too, the withdrawal clause will no doubt be frequently referred to by eurosceptics.

Can the possibility of withdrawal also be used as a tool for exerting pressure on an insubordinate member state? This is possible, though undesirable. If a member state has difficulties in ratifying the new Constitution, it is irrelevant whether the withdrawal clause is invoked as a threat. It is a fact that it exists.

A ‘no’ vote in a referendum would put a member state in a position where it would have to reconsider its membership of the Union.

6.7 June 13th

Finnish Foreign Minister Erkki Tuomioja was not a happy man on the day the Convention finished its work: “No Finn can approve of the procedures and content of the Convention.” I remembered how Secretary-General John Kerr had buttonholed me about midway through the Convention, asking why it was that in Finland, of all the member states, the press was the most vehemently critical of the Convention, even the Finnish Government being less vociferous. I said that we were still smarting from being overlooked at the beginning: there were no Finns in high places at the Convention. Kerr was willing to help in this matter, but the Convention was too far advanced for any corrective action to be taken.

An issue of *Le Monde* published that summer offered some consolation. Its main article proclaimed: “France to become second-class state in the EU.” The results of the Convention were criticised on the grounds that France was seen as one of the major losers and that minor concessions such as voting weights and the full-time EU Presidency were not much help. Apparently the draft Constitution really is a true compromise: everyone lost something for the good of the whole.

Leaving Finland after his brief visit in autumn 2002, Valéry Giscard d’Estaing said by way of farewell: “We cannot fail.” And we did not. The end result of the Convention has far more positive aspects to it than negative ones, and thus the majority of its content will remain in the EU Constitution. Giscard got the feather in his cap that he desired. He will become not only the Father of the draft Constitution but also the Father of the Constitution.

Each Convention member had his own agenda, his own national background and his own political group. Everyone assessed the outcome on the basis of their own precepts. Box 2 shows my assessment of the Convention’s achievements, which I believe is shared to a large extent by most Convention members.

*Box 2. The outcome of the Convention****General achievements***

- A single founding treaty: Treaty establishing a Constitution for Europe
- New Union values: equality, plurality, solidarity, non-discrimination
- New Union objectives: full employment, social justice, gender equality, environmental protection, protection of the rights of children
- Global Union objectives: peace, sustainable development, solidarity of nations, elimination of poverty, human rights, free and fair trade, the principles of the UN Charter
- Charter of Fundamental Rights appended to the Constitution: fundamental rights of citizens and workers safeguarded
- EU can accede to international human rights treaties
- Definition of the Union's competence: competence not conferred upon the Union in the Constitution remains with the member states
- Monitoring of subsidiarity: national parliaments assess whether a legislative proposal falls within Union competence
- Clearer legislation titles: European laws and European framework laws
- Citizens' initiative: legislative initiative signed by one million people
- Legal basis for services of general economic interest
- Right to withdraw from the Union

Institutional reforms

- EU to have a legal personality: dismantling of the pillar structure and creation of a uniform institutional system
- European Parliament to become a real parliament: a fully empowered legislator together with the Council, budgetary power
- Election of the President of the Commission by the European Parliament: reflects the result of European Parliament elections
- Legislative Council: rendering legislation transparent in the Council of Ministers and separating it from the executive branch
- Presidency of the Council of Ministers: equitable rotation between member states
- National parliaments to have a chance to form position on all EU legislation
- Court of Justice: enhanced judicial monitoring of the implementation of European laws in member states
- Foreign Minister of the Union: uniform external representation
- Convention method to continue in future amendment of the Constitution

Critical points

- European Council to become an independent institution
- European Council to have a permanent President
- Foreign Minister to chair the External Relations Council: concentration of preparation, decision and executive power
- Qualified majority through double majority without parity (50% of member states representing 60% of the combined population): simple double majority required
- Expansion of qualified-majority decision-making unfinished: needed in taxation (environmental, energy and capital gains taxes), labour protection, anti-discrimination actions, CFSP (not defence)
- European Parliament: should be located in one place

Things to fix

- Composition of the Commission: each member state must have a Commissioner with full voting rights
- Common commercial policy: unanimity required regarding public welfare services
- Defence policy: an arrangement open to all member states is needed

The Convention did what it was asked to do in Laeken. The aim of the new Constitution is to make the EU decision-making system simpler, more efficient and more democratic. The Convention's proposal represents a step forward in all these respects. The objective was to maintain a balance between a) Union institutions, b) national and Union decision-making and c) the member states. In this respect too, the Convention did not completely fail.

The outcome contains critical points that not all agree on. There are also things to be fixed: the composition of the Commission, public welfare services in the common commercial policy and defence. The IGC must undertake corrective surgery on these points, but not so radically as to kill the patient.

On 13 June 2003, the 'Ode to Joy' from Beethoven's Ninth Symphony rang out in the plenary session hall. We stood up. We honoured the end of our work in the solemn ceremony concluding the Convention. On the previous day, everyone had voiced his or her reservations with regard to the outcome of the Convention. Now was the time for celebration and thanks.

I was given the chance to speak at the concluding session. Speaking in Finnish, I said as follows:

Mr Chairman, I have given all my speeches here at the Convention in a foreign language. This is the first time I am speaking in my mother tongue, and I appreciate the possibility to do so. We Finns have certain reservations with regard to the outcome, as I outlined yesterday in the plenary. However, I believe it is important that we respect and value the fruits of our labour over the past year. We have achieved much. Today is June 13, the birthday of our draft Constitution. I am pleased to note that this day happens to be my birthday too.

Completing a draft Constitution for the EU is a wonderful achievement, but its importance to the Union must not be overestimated. The enlargement of the Union that will take place on May 1st, 2004 will have a far greater impact and will present a substantially greater historical challenge. Here, Europe will be breaching the frontier of the Cold War. Vytenis Andriukaitis, Deputy Speaker of the Lithuanian Parliament, the Seimas, spoke of his own birthday. He is of my age; he was born in Yakutia in Siberia in a Stalinist labour camp to which his parents had been exiled. Now we were here, building a common Europe at the Convention.

Valéry Giscard d'Estaing raised his glass of sparkling wine in a toast: "I have learned much from you, and that at an age at which a man does not usually learn very much any more." He placed his mascot, the turquoise china tortoise, on the Chairman's table in the plenary session hall. "Our mascot proceeds slowly but surely and gets there in the end. Much as we have done. He has been leading us," said Giscard, producing a few leaves of lettuce which he placed in front of the tortoise.

The Convention was over.

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