The European Union after Laeken: a Convention, a Constitution, a Consensus?

Dr. Edward Best and Dr. Sophie Vanhoonacker
Professor and Associate Professor, EIPA

On 15 December 2001 the European Council adopted the Laeken Declaration, establishing a "Convention on the Future of Europe" which is to meet in advance of the next Intergovernmental Conference (IGC). This Convention – which will bring together European and national parliamentarians with representatives of national governments and of the European Commission, and include candidate countries as well as present Member States – is to debate a series of questions about the Union's constitutional framework and fundamental political system.

It is a bold step which has raised considerable expectations, as well as a few eyebrows: will such a huge and diverse body really be able to come up with specific and generally-acceptable answers? Yet it is remarkable in itself that such a comprehensive agenda should have been accepted by the Heads of State or Government of all 15 Member States. And there is little doubt that the Convention, an instrument that is not foreseen in the Treaty, represents an important innovation in how the Union goes about changing itself.

In the last ten years, the first decade of post-Cold War Europe, one IGC has led to another as the EU has tried simultaneously to manage the radical deepening of integration from a single market through a single currency and common security arrangements towards political union; to prepare its institutions and policies for an enlargement from 12 members to 15 and then 25 or more; and to deal with the uncomfortable fact that the support of its citizens cannot be taken for granted, as shown by the Danish "No" to Maastricht in 1992 and the Irish "No" to Nice in 2001.

In this process, each IGC has explicitly foreseen the next one. The Maastricht Treaty had to be concluded in haste amid the accelerated historical events of the time. It was thus not only a second best or a lesser evil which all could agree should be revisited. It was also part of the bargain to postpone some questions in order to reach a deal. The Treaty on European Union thus committed the parties to come back in 1996 to review some of the arrangements agreed**,** although the agenda quickly had to be broadened to include the demands of enlargement and the problems of legitimacy. The ensuing 1996-1997 IGC, however, failed to resolve the institutional issues which were considered indispensable prerequisites for enlargement. The 1997 Amsterdam Treaty was thus accompanied by a Protocol committing the Union to deal with these "left-overs" and to carry out a broader review of its institutional system before enlargement involving more than five countries took place. The result was another IGC, formally opened in February 2000, which produced the Nice Treaty in December that year. And yet again, the conclusions were accompanied by an agreement to come back and do better next time. Another IGC would be called in 2004 to address, at a minimum, four outstanding issues: the delimitation of competences between the Union and the Member States, the status of the Charter of Fundamental Rights, the role of national parliaments and simplification of the treaties. Yet the Declaration on the Future of the Union which was attached to the Treaty of Nice was at least as significant with regard to the process as to the content of the next steps, calling for a "broad and open debate" involving not only governments but national parliaments and civil society. The Laeken Declaration, one year later, would define the modalities of this debate.

This new interest in involving the public may partly have been a general reaction to the alarmingly low level of public support indicated by polls. According to *Eurobarometer*, on average across the whole Union, barely half of citizens could say positively that the European Union was a good thing. This was not only regrettable but could (and did!) have practical consequences when it came to ratification.

There seems also to have been a broad consensus that the purely diplomatic approach to agreeing changes had run out of steam. The process of hopping from treaty to treaty can certainly be seen as a reflection of the step-by-step approach to integration which has characterised European integration since the days of Monnet and Schuman. However, it also seemed to many involved to be producing "diminishing returns" (that is, it was progressively taking more and more time and effort to reach agreements) as well as a negative image for the public, while contributing to the quite undemocratic complexity of the Union's constitutional framework. Finally, there was the shining example of the Convention which successfully drafted a Charter of Fundamental Rights in parallel to the 2000 IGC. In contrast to the purely intergovernmental negotiations over institutional reform and the final bad-tempered wranglings behind closed doors in the early hours at Nice, the Convention had brought together representatives of national governments and national parliaments, as well as of the European Commission and the European Parliament,

and had worked on the basis of transparency, consultation and consensus.

At least for the next time, there can be no substitute for an IGC. Article 48 of the Treaty on European Union is quite clear that only the governments of the Member States have the power to change the treaties. However, could not the Convention model be a new and more effective way of preparing the decisions to be taken?

The Report presented by the Swedish Presidency in June 2001[1] therefore outlined not only the option of a group of government representatives (like the Reflection Group which met in advance of the 1996-1997 IGC) and that of a small group of wise persons, but also the idea of "a broad and open preparatory forum" for the next IGC. This last option was strongly supported by the upcoming Belgian Presidency, the other two Benelux countries[2] and a number of other Member States, as well as the European Parliament[3] and the Commission. Not all agreed. The United Kingdom was the strongest opponent of the idea, fearing that this would tie the hands of the IGC. Even after the decision was taken, the UK pressed for a long period of digestion between the end of the Convention and the beginning of the IGC in order to weaken any direct link between the two. Although in the end there was a clear decision of the European Council to go ahead with the Convention, it is clear that hopes and expectations differ widely, and the structure of the Convention may in fact not make it easy to come up with clear and consensual results.

Moreover, it is evident that the Convention will not be acting in isolation. In the last few years, a new political debate has emerged over the constitutional framework of Europe and the roles of the European institutions. This has been fed mainly by speeches given by national political leaders – chiefly from the big Member States – starting with German Foreign Minister Joschka Fischer in May 2000, followed by French President Jacques Chirac in June and UK Prime Minister Tony Blair in October. And just as the Convention was coming into being in the last days of February 2002, new proposals were jointly presented by the British and German Governments with a view to strengthening both transparency and the role of the Council in the legislative process. This predictably provoked open concerns in some quarters about the influence which national governments, and especially the big Member States, would exert over the Convention's proceedings.

The Convention

The composition of the Convention generally follows that of the body which drafted the Charter of Fundamental Rights: one representative of each government, two members of each national parliament, 16 members of the European Parliament, and two Commission representatives.[4] However, the candidate countries – including Turkey – will now participate, with the same representation as the current Member States "and will be able to take part in the proceedings without, however, being able to prevent any consensus which may emerge among the Member States". There will be 13 observers: three representatives of the Economic and Social Committee and three of the European social partners,[5] six from the Committee of the Regions; and the European Ombudsman. This means that there will be a total number of 105 full members, of whom two-thirds will be parliamentarians. At the time of writing it had not been agreed what role would be played by the Observers or by the alternate members.[6]

The Laeken Declaration also appointed the Chairman, former French President Valéry Giscard d'Estaing, and two Vice-Chairmen, former Italian Prime Minister Guiliano Amato and former Belgian Prime Minister Jean-Luc Dehaene. It was agreed that the Praesidium should have 12 members: the Chairman and Vice-Chairmen; two representatives of the European Parliament,[7] the two representatives of the European Commission, two representatives of the national parliaments,[8] and the governmental representatives of the three Member States which will hold the Presidency of the Council during the life of the Convention, i.e. Spain, Denmark and Greece.[9]

The Declaration is clear as to the leading role of the Praesidium and the Chairman, who "will pave the way for the opening of the Convention's proceedings by drawing conclusions from the public debate. The Praesidium will serve to lend impetus and will provide the Convention with an initial working basis." In order to involve citizens, "a Forum will be opened for organisations representing civil society". The Declaration gives the impression that this will also be very much in the hands of the Praesidium: "a structured network of organisations receiving information on the Convention's proceedings. Their contributions will serve as input into the debate. Such organisations may be heard or consulted on specific topics in accordance with arrangements to be established by the Praesidium." It was subsequently agreed that Vice-Chairman Dehaene would have special responsibility for the Convention's interaction with civil society.

At the time of writing, the Rules of Procedure had not been finalised, although it was already clear that working groups will be created to deal with particular issues. The Declaration leaves open the nature of the final document to be produced (for which Vice-Chairman Amato will have special responsibility). This "may comprise either different options, indicating the degree of support which they received, or recommendations if consensus is achieved." It does stress, however, that this should not tie the hands of the Member States. "Together with the outcome of national debates on the future of the Union, the final document will provide a starting point for discussions in the Intergovernmental Conference, which will take the ultimate decisions." The Convention should conclude by June 2003.

The Laeken Agenda

The four sections included under the heading of "Challenges and Reforms in a Renewed Union" modify, reorganise and add to the points in the Nice Declaration. A total of just over 50 questions are formulated. Despite

the emphasis in the first part on the Union's role in a globalised world, there are only fleeting references to enhancing the coherence of European foreign policy, reinforcing synergy between the High Representative and the Commissioner responsible for external relations, and possibly extending the external representation of the Union in international fora.

Most questions concern the internal workings of the Union, grouped in four sections:

- clarification of the principles for deciding who does what, and possible reorganisation of competences between EU and Member States (and regions);
- simplification of the Union's instruments;
- how to increase "democracy, transparency and efficiency" in the EU; and
- constitutionalisation of the Union in the process of simplification of the Treaties and incorporation of the Charter on Fundamental Rights.

It is in itself a very significant step that the Heads of State or Government should have agreed to a such a broad agenda which includes fundamental questions about the political organisation and nature of the Union. Yet only a few new points are introduced: for example, the idea that the President of the European Commission could be appointed by the European Parliament or even directly elected, as means to increase the authority of the Commission; the possible introduction of a European electoral constituency as a means to strengthen the credibility of the Parliament; and the need to review the rotating Presidency. Most of the questions posed have been high on the agenda since the 1990s or before, and nothing is really added in the Declaration which makes it any easier to solve the problems.

Among the many questions posed with regard to democracy, transparency and efficiency, for example, the role of national parliaments has been debated constantly since the late 1980s. A Declaration was attached to the Maastricht Treaty in which governments undertake to ensure that national parliaments have adequate time to scrutinise Commission proposals, as well as encouraging contacts between the national parliaments and the European Parliament. The Treaty of Amsterdam included a Protocol obliging the governments of the Member States to ensure that their parliaments received proposals for EU legislation at least six weeks before the Council was scheduled to act; and encouraging COSAC[10] to play an active role, particularly with a view to ensuring respect for subsidiarity. The possibility of a new institution is mentioned in the Laeken Declaration, but it is not easy to see what more could be done to give the national parliaments an institutionalised role at European level. The idea of a permanent chamber of national parliaments has been pushed by Tony Blair (and before him, most notably, by various French politicians), although his public proposals were not clear as to the specific role such a body should play, and the British Government has seemed more recently to back away from this idea.[11] Any idea of a chamber working on a day-to-day basis in parallel to the European Parliament, however, still faces the strong counter-arguments that this would only create further institutional complexity and further undermine the EP's credibility.

Likewise, the issue of the distribution of competences and the application of the principle of subsidiarity has been at the centre of the European debate since before the Maastricht Treaty (quite apart from being a basic question in any integration project). The Laeken Declaration sensibly breaks down the issue into two parts. It first asks whether it is possible to make "a clearer distinction between three types of competence: the exclusive competence of the Union, the competence of the Member States and the shared competence of the Union and the Member States". It then asks whether there needs to be an adjustment of who does what – for example, should the Union do more in the areas of defence or police cooperation, or should some things be more clearly left to the Member States or the regions? The Declaration stresses that a reorganisation "can lead both to restoring tasks to the Member States and to assigning new missions to the Union". Yet nothing new is said about how to deal with these challenges and dilemmas. How can one reconcile a fixing of competences with the maintenance of dynamism? What about the fact that competences are mostly shared, and that in practice the division of tasks has been according to function rather than by sector? Even where there may be exclusive legislative competence, in other words, almost all the responsibility for policy implementation remains in the hands of the Member States or sub-state authorities. Can one, in practice, really envisage a clear separation of who will "do" what?

Rather different problems arise with regard to the very un-simple question of "simplification". The Laeken Declaration sensibly divides the issue into two parts. A short section on "Simplification of the Union's instruments" thus raises the issues of reducing the number and clarifying the nature of the various legislative instruments, as well as clarifying the areas in which "non-enforceable" methods such as "open coordination" are appropriate. There is a wide consensus that something must be done to deal with the unnecessary complexity and confusing nomenclature in these respects, and many would argue that this could be done without major constitutional implications. Simplification of the treaties, on the other hand, is rightly put into a quite separate section entitled "Towards a Constitution for European citizens", along with the status of the Charter of Fundamental Rights. Again, there is a wide consensus as to the desirability of sorting out the present constitutional mess of having Treaties which change Treaties within other Treaties, but it is also clear that it is very hard to reorganise the Treaties without any change in the law.

As the Laeken Declaration says, "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" (emphasis added). This wording is interesting. After all, the Court

of Justice has already ruled that the treaties are a "constitutional charter" for the Union. Does the Declaration actually commit anyone to go further?

Expectations and Prospects

In the run-up to Nice, the European Parliament openly urged that "the IGC should amend the procedure for the revision of the Treaties with a view to the 'constitutionalisation' of the Treaties and the democratisation of the revision process by means of the introduction of a power of joint participation in decision-making for the institution which represents the States and that which represents Union citizens."[12] More recently the EP has proclaimed itself in favour of "the emergence – even at this stage through the Convention established by the Laeken European Council – of a *constituent power* exercised jointly by the national parliaments, the Commission, the European Parliament and the governments of the Member States, which would not only allow effective preparation of reform of the treaties but would also give European integration efforts greater legitimacy and would thus mark a new chapter in the role of parliaments in European integration by introducing a major institutional innovation."[13]

Those who want a full European Constitution will obviously judge the results and the impact of the Convention by the extent to which it contributes to such formal constitutionalisation, but those who hope for a modern European equivalent of Philadelphia – apparently including Mr Giscard D'Estaing – are likely to be disappointed. To be sure, there can be unexpected outcomes. When the members of the US Convention met in Philadelphia in May 1787, they had only been given a mandate to introduce amendments to the original Articles of Confederation, but they ultimately produced an entirely new document. The new Constitution was controversial and led to fierce debates, but was ultimately adopted and has survived to become an important symbol of unity. However, although the American states at the time were indeed less integrated than the EU today, for many reasons it will not be simple for the members of the Laeken Convention to come up with a similarly bold proposal, quite apart from convincing the Member States to put it into practice. The US Founding Fathers did nothing less than create a new system of national government. It is doubtful whether most members of the Convention will be willing to go that far, and also whether there is sufficient popular support to approve any such radical changes.

Yet it would be wrong to reduce evaluations of the Convention to such terms. There are two kinds of hopes and expectations for the Convention which are quite independent of any such ambitions, and are just as important in the long term. These are a) that it may prove a more effective as well as democratic way of preparing major decisions, both by building consensus between decision-makers and by involving in advance those actors who will have to ratify the decisions which are taken; and b) that it may afford an opportunity for the public to become more involved in the European process more generally (which will also require, of course, that individual governments and parliaments themselves take the necessary initiatives).

In this context it is worth asking what consensus-building actually means. In particular, does it necessarily mean to try to produce a single set of concrete proposals, or even the text of a Draft Constitution, albeit with minority opinions? Even if such a text can be produced, there is no guarantee as to how the subsequent IGC will act, and there may be costs. Indeed, there may be a certain trade-off between the degree of concreteness and unicity which is pursued in the proposals to come out of the Convention, on the one hand, and the degree of involvement in the Convention's proceedings on the part of the parliamentarians and the public who are to ratify the outcome of the next IGC, on the other.

The Nice Declaration on the Future of the Union seemed to open up an unprecedented pause in the integration process, an opportunity for the public to "catch up" with what has happened and for their representatives, at least, to have more of a chance to influence with some degree of calm what is to happen next. There would be a starting period of one year (2001) for national debates to be launched. There would then be a period of two years (2002 and 2003) for some form of structured debate at European level. And only then, in 2004 – and with the equal participation of the new Member States – there would be a formal agreement between the governments as to the constitutional future of this very new European Union.

Already the time horizons are under pressure, as Member States hope to manage the agenda so that their country can start or end the IGC, and other actors try to time things so as to guarantee that everything will be over before the next European elections in June 2004. This only accentuates concerns about the working methods of the Convention – mainly the fear that the Praesidium, under the double pressures of time and ambition (and perhaps also the personal style of the Chairman), may give less attention than is merited to the process of actually bringing in the European parliamentarians and the European public, in order to get on with drafting a "Constitution for European Citizens". These considerations, of course, apply all the more in the case of the candidate countries.

Whatever the final document looks like, and even if there is a significant gap between the end of the Convention and the beginning of the IGC, it will not be possible to ignore the outcome of a Convention chaired by a former President flanked by two former Prime Ministers, with the participation of all national governments and parliaments as well as the European Parliament and Commission. After all, it is the parliaments which will in most cases have the power to ratify, or not, the results of the IGC. Even if there will not be a single document, the Convention can make a tremendous contribution to the stability and legitimacy of European integration by promoting general agreement and public understanding as to the basic principles according to which we all want the European Union to operate and to evolve.

NOTES

[1] 'Report on the Debate on the Future of the European Union', Brussels, 8 June 2001.

[2] On 22 June 2001, the Benelux countries had put forward a memorandum on the future of Europe in which they argue that the IGC should be prepared by a forum chaired by a leading political figure and composed of representatives of national parliaments, the EP, the European Commission's, the governments of the Member States ('Benelux Memorandum on the Future of Europe', 22 June 2001).

[3] 'European Parliament Resolution on the Treaty of Nice and the Future of the European Union', 31 May 2001.

[4] There was only one Commission representative in the previous Convention. The two Commissioners now will be Michel Barnier, who has had personal responsibility for IGCs and institutional reform in the Prodi Commission, and Antonio Vitorino, who was the Commission's representative in the Convention which drafted the Charter of Fundamental Rights.

[5] The European social partners are the two main bodies representing employers´ organisations at European level (the Union of Industrial and Employers' Confederations of Europe - UNICE, and the European Centre of Enterprises with Public Participation - CEEP) and the European Trade Union Confederation - ETUC.

[6] The European Parliament proposed in the run-up to the Convention that the alternates should play a full role in the proceedings in all respects except voting, as in EP Committees, which would mean that plenary sessions would actively involve some 200 people.

[7] The two representatives of the European Parliament in the Praesidium are Iñigo Méndez de Vigo and Klaus Hänsch.

[8] The first meeting of the representatives of the national parliaments in Brussels on 22 February agreed, on the basis of an understanding reached between the two major political groups, that these would be Gisela Stuart, the UK Labour representative, and former Irish Prime Minister John Bruton.

[9] It is striking that the Spanish and Greek Governments have named Members of the European Parliament as their representatives.

[10] COSAC is the conference of specialised European affairs Committees of the EU national parliaments and the European Parliament, which has met every six months since 1989 to discuss particular aspects of the EU's evolution.

[11] The UK House of Lords, as well as the European Parliament, has recently pronounced itself against such proposals for a second chamber.

[12] EP Resolution on the constitutionalisation of the Treaties adopted in October 2000 (2000/2160(INI)).

[13] European Parliament, Committee on Constitutional Affairs, 'Report on relations between the European Parliament and the national parliaments in European integration', A5-0023/ 2002, 23 January 2002. p.8, emphasis added. ❑