

The EU Constitution: in Search
of Europe's International Identity

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Walter van Gerven Lectures (4)

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The EU Constitution: in Search of Europe's International Identity

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It is a great honour to be invited to give the fourth Walter van Gerven lecture at Leuven. Not only did a number of his illuminating opinions as Advocate General at the Court of Justice inspire me in the early years of my career to write some of the first articles I ever published (on the Grogan case, and on the proportionality principle in particular), but his entire academic oeuvre has had enormous influence on European lawyers everywhere. While he is best known internationally for his contributions in the field of European private law and European administrative law, he has also made major contributions – both as professor and as Advocate General – in the field of European Union constitutional law. I am therefore delighted to dedicate this lecture, which focuses on the new European Constitution (a subject which Professor Van Gerven is to treat in his forthcoming book on The European Union: A Polity of States and Peoples), to one of the individuals who has been most distinguished and influential in shaping the fundamentals of the European Union legal order.

The Need for an EU Constitution?

Was there a need for an EU constitution? What purpose would an EU constitution serve? These questions were raised many times during the process of drafting and debating the text which ultimately became the treaty establishing a European constitution. For a number of prominent scholars, the move towards adopting a constitution for the EU was an unnecessary and ill-considered one. Joseph Weiler praised the uniqueness of the special path which Europe's institutional and legal arrangements had so far taken, and cautioned against the adoption of a formal constitution.¹ Stephen Weatherill warned against conflating the search for transparency and clarity in the EU with the case for a Constitution, and expressed alarm at the prospect of a constitution which sought to determine questions of political and legal authority in a final way.² Andrew Moravcsik argued that there was no need for a constitution since existing arrangements worked well enough.³ Further, the consensus amongst lawyers for many years, supported by the language occasionally used by the European Court of Justice,⁴ was that the EU in substance already had a constitution,⁵ whether or not a formal documentary constitution could or should be agreed. For many, the argument in favour of adopting an EU constitution was premised on an unrealistic assumption of existing social and cultural solidarity and cohesion,⁶ and would seek to impose an undesirably thick set of legal and political commitments in place of a more fluid system which had worked reasonably well within its own particular framework until that time. A constitution for the EU was at best premature, at worst entirely misguided.

Political Consensus and Public Apathy

Against this background, the fact that a document establishing an EU constitution was signed by twenty-five Member States in June 2004, should come as a surprise. It is all the more remarkable in view of the fact that the term constitution had – deliberately – almost never been used in political discourse in the EU since the signing of the EEC treaty in 1957. The handful of federalists who occasionally called for a constitution for Europe were notable for their exceptionalism.⁷ And yet, from the time that the political debate was publicly launched by Joschka Fischer in 2000 in his Humboldt University speech, a clear consensus at the level of the European political elite developed rapidly around the question of the desirability of an EU constitutional settlement, and culminated in the adoption of a text only four years later.⁸ From the perspective of most or all of Europe's powerful political leaders therefore, whatever their various reasons, the answer to the question whether there was a need for an EU constitution was clearly yes.

This unequivocal manifestation of high-level political agreement on the need for a constitution was not however accompanied by significant popular support. At best there seemed, during the course of drafting the constitutional text, to be a wide degree of public apathy, with debate remaining limited to specialized interests and actors, in spite of the initial hopes that the new Convention method would stimulate wider participation and a broader debate.⁹ Despite the optimistic showings of the EU's own Eurobarometer opinion polls,¹⁰ the success of Euro-sceptical parties in the 2004 European Parliament elections and the mobilization of EU-critical groups around the prospect of national referenda on the new constitution, suggest a different picture. The fact of these contrasting perspectives on the desirability of an EU constitution seems to present a puzzle. How was it that agreement was so rapidly reached on a matter in relation to which there had been decades of political resistance, passive or otherwise, about which the most prominent academic commentators were sceptical, and for which – to put it mildly – there was no popular demand?

The key to understanding this apparent conundrum lies in the fact that one of the very reasons for adopting a constitution contained within it the seeds of its own failure, at least in the short term. In other words, the lack of social or popular legitimacy which had grown increasingly obvious over the decade following the near-failure to ratify the Maastricht Treaty, seemed to become a matter of increasing political concern as it threatened to undermine or halt some of the major EU initiatives to which Member States were committed. This apparent lack of social legitimacy – most obviously demonstrated in very marginal or negative referenda results – was diagnosed by several of Europe's political leaders as being a consequence of the complexity and incomprehensibility of the EU system and much of its legislation, and of the remoteness of its institutions and actors from ordinary people within the various Member States.¹¹ The inten-

tion to “bring Europe closer to its citizens” was cited as a key reason for enacting a constitutional settlement.¹² And yet it seems to be precisely the lack of citizen identification with the European Union as a political entity which helps to account for the lack of any broad public engagement with the constitutional process and the absence so far of evidence of popular enthusiasm for a European constitution. In other words, the “belonging” or solidarity factor whose absence appeared to prompt several European leaders to pursue a constitutional solution could be seen as a condition precedent for the success of the constitutional project.

The Constitutional Project in Pursuit of a European (Union) Identity

It would be highly implausible to assert that there was only one – or even one main – reason for enacting an EU Constitution.¹³ However, I want to emphasize the significance of this particular reason or aim – i.e. that of seeking to generate a sense of European identity and solidarity – and to argue that the dominance of externally-oriented novel provisions in the new constitutional text tends towards reinforcing that aim. It does so in the sense that, insofar as a European constitutional identity does gradually take shape over time, the “external dimension” is likely to play a significant part in its development. Hence the short-term failure of the constitution-drafting process and ultimately of the constitutional text to engage in a significant way with the lack of a “we-feeling” across the EU, does not necessarily consign the constitutional project to failure in the longer term, in part because of the potentially bootstrapping effect of the process itself. To put it in a different way, it is possible that the initiation of an explicit constitutional process could over time help to generate the kind of community-mobilizing¹⁴ and solidarity-generative effect to support the development of a sense of shared European identity – in Habermassian terms, the development of constitutional patriotism.¹⁵

On this view, the lack of a shared social imaginary among different EU states and populations to underpin a sense of European political allegiance could be countered by the ongoing process of public debate and contestation over the enactment of a European Constitution, and over its subsequent meaning, significance and values. Some of the counter-challenges to this vision mounted by communitarian, nationalist and republican theorists, among others, have argued that the existence of distinct and embedded social and cultural communities at national and regional level make unlikely or even impossible the emergence of a shared European constitutional allegiance based simply on political principles and values. Some of this scepticism about constitutional patriotism, however, has in turn been critiqued for its implicitly essentialist and static conception of culture and cultural identity. Thus if culture is understood

as activity rather than prior inheritance,¹⁶ and as a changing and contested category,¹⁷ some of the sting is taken out of the “cultural objection” to the idea of constitutional patriotism.

Yet even on a more conservative or non-dynamic understanding of culture, it is possible to imagine the emergence of a sense of European constitutional identity which does not come about through the internal transformation of national and other cultural identities, but rather from a collective sense of Europeaness forged by reference to what is perceived to be without or external to Europe. If the focus is placed not on the internal dynamics of the different nations, peoples and other social and cultural groupings within the European Union, but instead on the external relationship of the EU with the “international community” and with the rest of the world, the emergence of a sense of common cause built on a perception of distinctively shared interests and values seems more plausible. The central argument of this lecture is that the development of a sense of European identity, the absence of which was identified by several key political players as one of the reasons requiring the enactment of an EU constitution, is more likely to take place around what I broadly term the external rather than the internal dimension of the European Union's role and activities.

In the past, European elites and officials engaged in futile attempts to stimulate a sense of European identity by invoking the classic symbols of statehood and belonging – a common passport, an anthem, a flag (which appear now in elevated form in Article I-8 of the new constitution). The lack of social reality underpinning these symbols, and their nationalist pedigree rendered their claim to represent European identity both trivial and objectionable. More generally, however, despite a range of different strategies devised over the past decade or more on the part of the EU's institutions and leaders to address the perceived problem of popular alienation from the Union, including the introduction into the EC treaty of a concept of EU citizenship, an official endeavour to engage more with “civil society”, a regulatory and governance reform project, and the drafting of the Charter of Rights, there appears to be little evidence of a growth in civic engagement or identification with the EU.¹⁸ European Parliament elections remain as elections which are decided essentially on national rather than European issues, and only a number of specific constituencies such as transnational business actors, environmental activists and other social groups, see themselves as being directly engaged with the European level of governance. For many of those living in the Member States of the EU, the relevance of the European Union to their lives remains at best obscure and uncertain, at worst irrelevant or objectionable. The closely fought national referenda which have to date been held for the purposes of ratifying EU treaties (those of Maastricht and Nice in particular) do not seem to augur particularly well for the prospects of successful ratification of the treaty establishing a European Constitution.

Europe's International Position: Them and Us?

My argument, however, is that – for good or for bad – it will be the focus on Europe's international role which is most likely to capture the popular imagination during the public debates on ratification of the constitutional treaty, and which is most likely to contribute to the emergence of a European collective identity. The political interest in expanding and strengthening Europe's international role, and in promoting its capacity as a global actor, has increased in recent years. The consolidation of the dominance of the US as an economic and military power on the one hand, and the perception that a growing threat of terrorism constitutes a common external adversary on the other, have contributed to the conditions under which a thin sense of European solidarity premised on a distinctive international profile and position could be constructed. The darker dimension of the self/other dichotomy is a preoccupation of critical social theory, and a powerful example of this dimension was the radical Schmittian identification of the distinction between friend and enemy as the essence of the political. More recently, critical accounts of US foreign policy have argued that a close relationship exists between foreign policy and the construction of national identity, in particular through the identification of external threats.¹⁹ Psychological theories have also suggested a similar but less morally or ideologically loaded account of the way in which group identity is formed. Social identity theory in particular has argued over several decades that the social processes of categorization, identification and comparison lead to the formation of group membership and the creation of a distinction between “us” and “them”.²⁰ More specifically, for present purposes, the significance of identity has re-emerged as an issue in international relations theory.²¹

What these very different theories and theoretical accounts have in common is a belief that identity, including individual, national and group identity, is constructed or formed at least in part around a differentiation between self and other, between what is perceived as internal and belonging and what is perceived as external. Using this as a premise, the following section aims to assess the provisions of the recently signed Constitution and in particular to consider the balance between those provisions which could be described as internally focused and those which are externally focused. On the basis of that analysis, it can be argued that although the Convention and Intergovernmental Conference (IGC) processes may have begun as an exercise largely intended to bolster the internal legitimacy of the Union, with a view to “bringing the citizen closer to the Union” through the constitutional process, it became an exercise which focused much more on the external than the internal domain, and demonstrated a preoccupation with enhancing Europe's international role rather than grappling with the familiar legitimacy deficit or introducing significantly new internal institutional arrangements. Indeed, not only the constitutional text itself, but also the rhetoric of the political leaders when pronouncing agreement

on the text drew heavily on the external dimension in explaining and justifying the decision to proceed with the adoption of an EU constitution. In the declaration issued at the Rome European Council Summit in October 2003, at which the Intergovernmental Conference on the draft constitution was launched, no less than four of the five recitals made reference to the international role of the EU.²² Similarly, at the ceremony of signature of the Treaty establishing a European Constitution in Rome in October 2004, Romano Prodi in the second sentence of his speech declared that

“today, Europe is reaffirming the unique nature of its political organisation in order to respond to the challenges of globalisation, and to promote its values and play its rightful role on the international stage”.

The constitutional objective of strengthening the external unity, representation and capacity for action of the Union contains a number of different dimensions to this argument. A first is the idea of strengthening the EU's international identity, given the complexity and fragmented nature of the EC's current international representation and the lack of clarity for third states and other actors in this respect. Thus the fact that the European Community has always had express legal personality and could conclude agreements, but that the EU was not clearly accorded such legal personality (even though a number of agreements were concluded in the name of the Union)²³ is a matter of some confusion. A source of further complexity and confusion has been the range of different EU actors with apparently overlapping powers in the field of external representation in similar fields.²⁴ A second dimension is the objective of strengthening the Union's capacity for unified action, and the effectiveness of its international action and instruments, both in foreign policy and in other external fields.²⁵ A third and more specific dimension, less often articulated, is that the move to formally constitutionalize the EU in order to strengthen its international role is partly a response to the perception of increasing global “unipolarity”. The aim from this perspective is to seek to counterbalance the global strength and hegemonic position of the US,²⁶ and to counter its perceived attempts to “disaggregate” the EU.²⁷ Robert Kagan's controversial thesis in his “power and paradise” tract²⁸ stimulated responses from numerous Europeans,²⁹ including Jürgen Habermas and Jacques Derrida,³⁰ who argued for the EU to unite more effectively, to develop a real common foreign, security and defence policy, and to provide an alternative by way of global leadership to that of the US.³¹ This third dimension of the objective of strengthening Europe's international identity has remained relatively low-key, but it may well be one of the more compelling factors which explain various aspects of the constitutional text which ultimately emerged.

Below, the analysis of the constitutional text eventually adopted argues that the emphasis of the most innovative parts of the new constitution is on Europe's

external relations. This result, together with the accompanying political discourse emphasizing the EU's international role, is arguably aimed at – and may be partly successful in – generating a process of Europe identity-formation focused on how the EU distinguishes itself from and positions itself in relation to the “outside world”.

Analyzing the Constitutional Text

Below, the main innovations in the new Constitution are grouped, somewhat crudely, into two broad categories: those changes which are largely internally-focused, and those which are largely externally-focused.³²

(a) Internally-Focused Changes:

These reforms can be grouped into five main categories:

(i) Human Rights

A first, and perhaps the most symbolically significant, is the incorporation of the Charter of Fundamental Rights and Freedoms into Part II of the constitution, placing it centrally within the main body of the text, together with a provision in Article I-9 (2) declaring that the EU shall seek accession to the European Convention on Human Rights. Many criticisms have been made of the Charter, both of its substantive content and its “horizontal clauses”, but it is undoubtedly a major and significant change, with implications both for the EU internally and as far as external perceptions are concerned. Similarly, the provision mandating accession of the EU to the ECHR also heralds a notable change, even if it is true that there has been a gradual progress towards a kind of *de facto* accession in the rulings of the ECtHR in recent years,³³ but it is arguably a change which is also significantly connected with the international orientation of the EU and its apparent willingness to subject itself to external human rights scrutiny.

(ii) Competences / Powers

A second set of changes concerns the listing of categories of EU powers and competences. This, again, was a symbolically important issue since much of the early debate about the need for a constitutional text had focused on the fears of “creeping” EU powers, on the difficulties for states, regions and citizens to know exactly what the scope of the EU's powers of action were, and on the need for clarification in this respect.³⁴ Indeed one of the four items on the “post-Nice” agenda³⁵ which predated the decision to establish a Convention with a considerably broader mandate, was the question of clarification of the powers and competences of the Union. However, although the first part of the new Constitution contains a certain systematization in that it identifies and lists different

categories of competence in Articles I-12 to I-17, no real change is brought about by this act of classification, and it is part III of the constitution, which contains most of the detailed provisions currently contained in the EC treaty, which determines how and under which conditions the various powers can be exercised. Certainly the *Kompetenz-Katalog* which had been envisaged by some, or the clearly power-limiting constitution envisaged by others to set strong boundaries to what the EU could do and to return certain powers to the nation states, has not been realised. A number of associated changes made in relation to the EU's exercise of powers – in particular the provision for greater involvement of national parliaments in monitoring compliance by the EU institutions with the principle of subsidiarity – were obviously designed to address some of the internal legitimacy and parliamentary democracy concerns, but the new subsidiarity mechanism is ultimately a soft although interesting institutional addition to existing arrangements, rather than a radical new provision.³⁶

(iii) *Internal Decision-Making and Institutional Powers*

A third set of internally-focused changes relates to the extension of qualified majority voting and of the co-decision legislative procedure which gives the European Parliament a more equal say with the Council of Ministers in the general lawmaking process. These amendments were certainly presented as part of an attempt to address the concerns of effective and democratic government within the EU, in the sense that majority voting is seen as an obviously more efficient method than unanimity, and thus arguably also a more effective decision-making procedure; and also in the sense that the co-involvement of the directly elected European Parliament strengthens the parliamentary dimension of democratic legitimacy. Nonetheless, the scope of the extension is not dramatic, and is comparable to the series of previous and incremental treaty changes: beginning with the introduction of the procedure in the Maastricht Treaty, followed by its gradual extension under the Amsterdam and Nice Treaties. Where the extension of co-decision is perhaps most significant under the new Constitution – despite the addition by the IGC of “emergency-brake” provisions – is in relation to many of the formerly third-pillar issues of police and judicial cooperation in criminal matters,³⁷ and it is arguable that the introduction of this change was facilitated by the general change in the attitudes of Member States towards coordination and harmonization of aspects of criminal law, procedure and policing following the events of September 11 2001. In that sense, the most significant of the internally focused extensions of the co-decision procedure was linked to the perception that internal processes needed to be strengthened and unified in order to guard against external threats.

The other notable amendment connected to the change in decision-making procedures concerns the way in which qualified majority voting within the Council is to be determined, in accordance with a kind of double-majority rule which requires the support of 55% of the Member States, representing 65% of

the EU population overall.³⁸ This change was intended to simplify, to render more effective and also more proportionate to population size the way in which voting weight would be calculated, but it also gave rise to considerable political controversy, in part because it departed from the bargain agreed at the time the Nice Treaty was signed, weakening the voices of medium-sized Member States at the expense of the larger states. Similarly, the provision in Article 1-26 (6) on reducing the number of members of the Commission was a controversial one (though not as controversial as the initial proposal to have a class of non-voting Commissioners), and many smaller Member States were opposed to any move away from the one-Commissioner-per-Member-State rule. These various changes, on the co-decision procedure, the weighting of Council voting, and the size and composition of the Commission, were amongst the most controversial, and were amongst the main issues on the agenda of the Intergovernmental Conference which followed the Convention.

(iv) The Pillars

A fourth set of internal changes concerns the abolition of the so-called “pillar structure” originally introduced by the Maastricht Treaty, whereby foreign and security policy and policing and criminal cooperation respectively were governed by two treaty “pillars” of the European Union whose provisions differed from those of the first (supranational) pillar of the European Community. However, although this may be a symbolically significant change in that it seeks to emphasize the conceptual unity of the Union, the non-Community pillars will in practical terms continue their existence “underground”³⁹ in that what distinguished them from the first pillar – including the different lawmaking methods, legal effects and greater degree of intergovernmentalism – will continue to exist in various respects, even if there is a formal institutional unity brought about by the new constitutional treaty.

(v) Legislative Instruments

A fifth set of changes introduced by the new Constitution concerns the “simplification” of the EU’s legislative instruments. This is a mixed and rather technical set of changes which may be said to introduce a degree of simplification, in particular for lawyers from those Member States, such as France and Belgium, which use a similar classification, by reducing at least in formal terms the number of different types of instrument. However, it is difficult as yet to discern the significance and meaning of each of the new categories.⁴⁰

It is clear that several of these “internally oriented” innovations – the incorporation of the Charter of Rights and the extension of the co-decision procedure in particular – were introduced into the new constitution at least in part with a view to enhancing the popular legitimacy of the EU. However, it will be argued below that it are the externally-oriented changes, and the way in which the inter-

national dimensions of the new constitutional settlement have been highlighted by the political leaders since the agreement on and signature of the constitutional text, which are more specifically designed and sociologically speaking more likely to promote the emergence of a sense of European identity. And these elements, in turn, are likely to play a role in the shorter term process of attempting to generate the degree of popular support sufficient for the ratification of the constitutional text.

(b) Externally-Focused Changes

The new constitutional text contains three principal changes of significance affecting the external face of the Union, and a number of other notable yet less immediately striking provisions.

The key changes are the express conferral of single legal personality on the Union,⁴¹ the creation of a foreign minister of the Union – assisted by a diplomatic service⁴² – to amalgamate the role of several institutional actors currently responsible for aspects of external policy,⁴³ the creation of a more permanent, non-rotating president of the European Council,⁴⁴ and the more general and significant strengthening of the role of the European Council.⁴⁵ Other noteworthy changes also go clearly in the direction of enhancing the external role, dimension and capacity of the Union. These include first, a “solidarity clause” in Articles I-43 and III-329,⁴⁶ which although phrased in terms of solidarity in the event of a natural disaster as well as against the threat or occurrence of a terrorist attack, clearly carries with it the implication of internal cohesiveness against external threats; second, provisions for the establishment of a European Armament and a Research and Military Capabilities Agency in Article I-41(3) and III-311; third, a specific commitment in paragraph 4 of Article I-3⁴⁷ on the objectives of the Union to “strict observance and development of international law, including respect for the principles of the United Nations Charter”;⁴⁸ and a somewhat controversial provision for “permanent structured cooperation” in defence in Article I-41(6) and III-312.

The apparent boldness of these various externally-oriented changes could certainly be questioned on the basis that key features of the new provisions remain relatively undefined, or that they merely build a little on provisions or institutions which existed previously. The new foreign minister's role, for example, has been the subject of critical speculation on account of the complexities and compromises inevitably raised by its double-hatted feature: i.e. the curious combination of the post-holder being simultaneously vice-president of the Commission, with its collegiate nature, yet subject to the political mandate of the Council.⁴⁹ Secondly, it could be argued that the originally strong vision of the role of a long-term (5-year) president of the European Council was downgraded due to opposition from smaller Member States who would have preferred to see a strengthening of the leadership role of the Commission. Further,

the failure to introduce any really substantial reform of the decision-making processes – despite the move to a (nominally) single form of instrument and the limited provision for qualified majority voting – of the common foreign and security policy could be highlighted as a more general failure in the attempt to strengthen the unity and effectiveness of the EU’s international role. Finally, some of the externally-focused changes might be seen simply as consolidating trends which were already developing, such as in the emerging recognition of the legal personality of the European Union.

Such arguments however arguably underestimate the combined significance of the several changes as well as their potential future evolution. The innovations introduced in relation to the European Council in particular are quite clearly aimed at giving greater visibility and a coherent identity to the political leadership of the EU, and they undoubtedly aim to concentrate power in the hands of the heads of government and state. The fact that the European Council would, under the new constitution, be empowered to take decisions across *all* areas of EU external relations, and to identify and develop “common strategies” for any of these, rather than having a role mainly in specified fields such as the former second and third pillars or economic policy, reflects a very considerable reinforcement and strengthening of its overall role.⁵⁰ The fact that all of the existing provisions on external relations which were previously scattered across different parts of the EC and EU treaties have been gathered into one section is indicative of the intention to strengthen the legal coherence and unity of this field. As Marise Cremona noted, the new constitution aims not only at greater institutional unity and integration in the area of external action, but it also introduces for the first time⁵¹ “a set of overall principles, values and objectives guiding its external policy-making”, rather than there being different objectives for different specific parts of external relations as at present.⁵² Foreign, security and defence policy will now sit alongside commercial and development policy, amongst others, within the overall umbrella of EU external relations, suggesting a greater unity and coherence in all aspects of external action. Indeed, whatever their limits, all of the reforms introduced are aimed at giving greater definition, focus and unity to the external action, representation and identity of the Union in relation to the outside world, and each would bring about a distinctive, even if qualified, change to the existing situation. The very contested nature of several of these changes, with the exception of the relatively consensual move to single legal personality, is arguably indicative of their potential importance.

To Conclude

In sum, the boldest of the novel features of the new constitution, and the weight of significance of the changes which it has introduced lie, in my view, in the external domain. They lie in the conferral of legal personality

on the Union, in giving greater power and leadership to the European Council, and in creating a single post for foreign affairs, and more generally seeking to render the field of external relations more unified and integrated in both institutional and substantive terms. It could well be argued that there may be a tension between strengthening the external role and representation of the EU,⁵³ and the objective of enhancing its internal democratic legitimacy. For example, the effect of strengthening the role of the European Council, which of all the primary EU actors is the one which is least subject to the constraints of institutional accountability, to constitutional requirements of transparency or to judicial or parliamentary control, and the enhancement of whose role is quite likely to alter and even undermine the status and power of other European and national institutions. Yet a decline in the quality of democracy internally does not necessarily, as history has sometimes shown us, mean a lack of popular identification with the polity in particular in its pursuit of “foreign affairs”. On the contrary, as I have argued in this lecture, a range of diverse and influential bodies of scholarship – from social identity theory within psychology, to critical social theory, to international relations theory – have maintained that collective identity is formed through a process of differentiation between self and other, between what is within and what is without, between what is internal and what is external. One of the issues which ultimately appeared to contribute to galvanizing Europe’s political leaders into overcoming their initial disinterest and disagreement over the results of the constitutional Convention included the collective shock induced by the bombings in Madrid in March 2004. Further, the recurrent emphasis in the speeches and declarations of the political leaders and officials on Europe’s international role and global responsibilities suggest that the “external dimension” was a key factor in crystallizing political agreement over the desirability of enacting an EU constitution. And this observation is not simply a reflection on the uses of political rhetoric at key moments in the European constitutional process, since the actual provisions of the constitution itself, as I have argued, are weighted towards innovation and attempted strengthening in the field of external relations. The most interesting question remains to be answered in the future, however, and that is whether the emphasis on Europe’s “global role” and international identity is indeed the factor which will ultimately – if anything does – capture the public imagination in such a way as to generate sufficient support for ratification of the constitution in the short term, and to generate or construct a sense of European solidarity in the longer term.

Notes

Hyperlinks mentioned in the notes have also been reproduced at the website of Leuven CCLE in order to allow fast navigation (<http://www.law.kuleuven.ac.be/ccle>). All url's have been verified in January 2005.

- ¹ J.H.H. Weiler, "Federalism and Constitutionalism: Europe's Sonderweg", Jean Monnet Working Paper 10/00, <http://www.jeanmonnetprogram.org/papers/00/001001.html> (also published in: K. Nicolaidis and R. Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the US and the EU* (Oxford: Oxford University Press, 2001) and "A Constitution for Europe? Some Hard Choices" (2002) 40 *Journal of Common Market Studies*, pp. 563-580.
- ² S. Weatherill, "Is constitutional finality feasible or desirable? On the cases for European constitutionalism and a European Constitution", *Constitutionalism Webpapers*, No. 7/2002, <http://les1.man.ac.uk/conweb>.
- ³ A. Moravcsik, "The EU ain't broke", *Prospect Magazine*, No. 84, March 2003, <http://www.prospect-magazine.co.uk>.
- ⁴ See e.g. Judgement of the Court of 23 April 1986, 294/83, *Les Verts v. European Parliament*, ECR 1986, p. 1365, Order of the Court of 13 July 1990, C-2/88, *Zwartfeld*, ECR 1990, p. I-3365, Opinion of the Court on the European Economic Area Agreement of 14 December 1991, 1/91, ECR 1991, p. I-6079, and Judgment of the Court of 23 March 1993, C-314/91, *Weber v. European Parliament*, ECR 1993, p. I-1093.
- ⁵ A prominent example is J.-C. Piris, "Does the EU have a constitution? Does it need one?", Jean Monnet Working Paper 5/00, <http://www.jeanmonnetprogram.org/papers/00/000501.html>. For recent restatements of this view in light of the prospects of failure of the current constitutional text to be ratified, see F. Snyder, "Is the European Constitution dead?" (2004) 10 *European Law Journal*, p. 255 and G. Bermann, "The European Union as a Constitutional Experiment" (2004) 10 *European Law Journal*, p. 363.
- ⁶ D. Grimm, "Does Europe Need a Constitution?" (1995) 1 *European Law Journal*, p. 292.
- ⁷ For example Altiero Spinelli's Crocodile Club in the mid 1980s which led to the draft constitution of 1984.
- ⁸ N. Walker, "The EU as a constitutional project", <http://www.fedtrust.co.uk/uploads/constitution/walker.pdf>.
- ⁹ See the account provided by P. Norman, *The Accidental Constitution: The Story of the European Convention* (Brussels: EuroComment, 2003) section 4.4.
- ¹⁰ Flash Eurobarometer on the European Constitution (fieldwork: January 2004; published: February 2004), http://europa.eu.int/comm/public_opinion/flash/fl159_fut_const.pdf.
- ¹¹ For an analysis of the various speeches on the desirability of an EU Constitution made by European leaders in the year or so leading up to the Laeken Declaration, see B. Laffan, "The Future of Europe Debate" (Dublin: Institute for European Affairs, 2002), http://www.iiea.com/futeuro/bl_tfoed.pdf.
- ¹² R. Hirschl, in "Hegemonic Preservation in Action: Assessing The Political Origins of the EU Constitution" in: J.H.H.Weiler and C.L. Eisgruber (eds.), *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper 5/04, <http://www.jeanmonnetprogram.org/papers/04/040501-05.html>, is sceptical as to this "evolutionist" explanation for constitutionalization, finding it implausible that it took 13 years from the time of the Maastricht ratification crises for political agreement of this kind to crystallize. He prefers to isolate one kind of reason from a range of others as the main or the most convincing explanation for the political

decision to constitutionalise, which he labels as strategic and describes as a “‘hegemonic preservation’ measure undertaken by self-interested, risk-averse political power-holders who, given the uncertainty and potential threats posed by EU enlargement and other potentially destabilizing processes, may seek to entrench their privileges, worldviews and policy preferences through constitutionalization”.

- ¹³ See however R. Hirschl, *ibid.*, who chooses a “strategic” explanation over a range of other “evolutionist” and “functionalist” explanations.
- ¹⁴ See in particular N. Walker, “Europe’s Constitutional Momentum and the Search for Polity Legitimacy” in: J.H.H. Weiler and C.L. Eisgruber (eds.), *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper 5/04, <http://www.jeanmonnetprogram.org/papers/04/040501-01.pdf> on the present constitutional phase as a community-mobilising moment.
- ¹⁵ J. Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1996; also available in an edition of 1998) and *The Inclusion of the Other. Studies in Political Theory* (edited by C. Cronin and P. De Greiff; Cambridge: MIT Press, 2000).
- ¹⁶ See C. Calhoun, “Imagining Solidarity: Cosmopolitanism, Constitutional Patriotism and the Public Sphere” (2002) 14 *Public Culture*, p. 147 who argues that public life is not something separate from culture, but actually plays a role in constituting social solidarity and creating culture.
- ¹⁷ S. Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton: Princeton University Press, 2002).
- ¹⁸ U. Haltern, “Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination”, *Constitutionalism Webpapers*, No. 6/2002, <http://les1.man.ac.uk/conweb>.
- ¹⁹ D. Campbell, *Writing Security. United States Foreign Policy and Politics of Identity* (Manchester: Manchester University Press, 1992).
- ²⁰ The original theory was developed in the 1970s. See H. Tajfel and J. Turner, “An integrative theory of intergroup conflict” in: W.G. Austin and S. Worchel (eds.), *The Social Psychology of Intergroup Relations* (Monterey, California: Brooks, 1979).
- ²¹ Y. Lapid and F. Kratochwil, *The Return of Culture and Identity in IR Theory* (Boulder Colorado: Lynne Rienner, 1996). Also T. Checkel, “Norms Institutions and Identity in Contemporary Europe” (1999) 43 *International Studies Quarterly*, p. 83 and “The Constructivist Turn in International Relations Theory” (1998) 50 *World Politics*, p. 324.
- ²² This contrasts with the declaration made at the earlier Thessaloniki summit in June 2003, where the draft constitution was first presented by the Convention President to the European Council, in which the first two objectives listed were those of “bringing the Union closer to its citizens” and “strengthening our Union’s democratic character”, and only in third, fourth and fifth place came the references to the international role of the Union. In comparison, the relevant part of the Rome Declaration in October 2003 (my emphasis is italicised) reads that the heads of state and government and the presidents of the European Parliament and Commission:
- reaffirm that the process of European integration is our continent’s essential calling as *the instrument for a more efficacious international role for the Union* in supporting peace, democracy, prosperity and solidarity in all Member States;
- highlight the fact that the imminent enlargement constitutes a historical moment which renders the Union richer in terms of identity and culture and *extends the possibility of promoting shared values and of conferring weight and authority to Europe’s role in world*;

- confirm the importance of the commitment to endow the European Union with a constitutional text based on the equality of its States, people and citizens *that assures the efficacy, consistency and efficiency of Europe's role in the world* and take up the Convention's Draft Treaty as a good basis for starting in the Intergovernmental Conference;
 - renew the expectation of a conclusion of the constitutional negotiations in advance of the European Parliament elections in June 2004 in order to allow European citizens to cast their vote in full awareness of the future architecture of the Union;
 - stress that the adoption of a Constitutional Treaty represents a vital step in the process aimed at making Europe more cohesive, more transparent and democratic, more efficient and closer to its citizens, *inspired by the will to promote universal values above all through cooperation with international multilateral organisations and confirming a strong and balanced transatlantic relationship*".
- ²³ See Decisions 2001/352/CFSP *Official Journal* 2001 L 125 and 2001/682/CFSP *Official Journal* 2001 L 241 concluding Agreements between the EU and the Federal Republic of Yugoslavia (FRY) and between the EU and Macedonia (FYROM) respectively, and more recently the controversial EU-US extradition treaty of 25 June 2003. See more generally J.W. de Zwaan, "Legal personality of the European Communities and the European Union" (1999) 30 *Netherlands Yearbook of International Law*, p. 75, K. Lenaerts and E. de Smijter, "The European Union as an Actor under International Law" (1999/2000) 19 *Yearbook of European Law*, pp. 95-138.
- ²⁴ E.g. the Commissioner for external relations, the high representative for the common foreign and security policy, and the holder of the rotating Presidency of the European Council all have arguably overlapping functions.
- ²⁵ See e.g. the European Security Strategy presented by the high representative for the common foreign and security policy, Javier Solana, to the Thessaloniki European Council summit in June 2003, and approved by the European Council on 12 December 2003.
- ²⁶ See the exchange between F. Cameron and A. Moravcsik as to whether the EU should develop a fuller range of military capabilities independently of NATO: <http://www.nato.int/docu/review/2003/issue3/english/debate.html>.
- ²⁷ See the speech of J. Solana, high representative for the common foreign and security policy, "Atlantic Drift" in the *Guardian*, 10 July 2003, available online at <http://ue.eu.int/pressdata/EN/articles/76622.pdf>.
- ²⁸ R. Kagan, *Paradise and Power: America and Europe in the New World Order* (New York: Knopf, 2003). For critical commentary see S. Lukes, "The Question of Power: Europe versus America" (2003) 10 *Constellations*, p. 352.
- ²⁹ See the special issue of the *German Law Journal* (2003) Vol. 4, No. 9, <http://www.germanlawjournal.com> and the issue of *Constellations* (2003) Vol. 10, No. 3, <http://www.constellationsjournal.org>.
- ³⁰ J. Habermas and J. Derrida: "At the international level and in the framework of the UN, Europe has to throw its weight on the scale to counterbalance the hegemonic unilateralism of the US. At global economic summits and in the institutions of the WTO, the World Bank and the IMF, it should exert its influence in shaping the design for a coming global domestic policy", in "February 15, or What Binds Europeans Together: A Plea for a Common Foreign Policy, Beginning in the Core of Europe" (2003) 10 *Constellations*, p. 291, at p. 293.

- ³¹ Habermas in fact in his earlier essay, "Why Europe Needs a Constitution" (New Left Review 11, September-October 2001: <http://www.newleftreview.net/PDFarticles/NLR24501.pdf>), written before September 11 2001 and before the Iraq war had argued that: "we Europeans have a legitimate interest in getting our voice heard in an international context that is at present dominated by a vision quite different from ours".
- ³² This analysis of the constitutional provisions draws in part on that contained in G. de Búrca, "The Drafting of an EU Constitution: Europe's Madisonian Moment or a Moment of Madness" (2004) 61 *Washington and Lee Law Review*, p. 555.
- ³³ R. Harmsen, "National responsibility for EC acts under the European Convention on Human Rights: recasting the accession debate", (2001) 7 *European Public Law*, p. 625. And see the cases of Application no. 24833/94 ECtHR, *Matthews v. UK*, judgment of 18 February 1999; Application no. 6422/02 ECtHR, *SEGI v. 15 Member States of the EU*, 23 May 2002 and Application no. 56672/00 ECtHR, *Senator Lines GmbH v. 15 Member States of the EU*, 10 March 2004.
- ³⁴ F. Mayer, "Competences Reloaded: The vertical division of powers in the EU after the new European Constitution" in: J.H.H.Weiler and C.L. Eisgruber (eds.), *Altneland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper 5/04, http://www.jeanmonnetprogram.org/conference_JMC_Princeton/NYU_Princeton_Mayer.pdf.
- ³⁵ This was the agenda for reform of the EU which was set out in the Declaration on the Future of the Union which followed the conclusion of the fractious and unsatisfactory Intergovernmental Conference which took place in 2000. The four items on the post-Nice agenda were the need to delimit the competences of the EU more precisely, the future status of the Charter of Fundamental Rights, simplification of the Treaties and the role of national parliaments. See http://europa.eu.int/futurum/documents/offtext/declaration_en.pdf.
- ³⁶ Even the decision to grant national parliaments, which have objected to a particular Commission proposal on the ground of subsidiarity, an ex-post right to bring an action before the Court of Justice for annulment of the eventual measure adopted, was diluted in Article 8 of the new Protocol on the Application of the Principles of Subsidiarity and Proportionality, whose ambiguous language does not make entirely clear whether national parliaments may themselves lodge an action before the ECJ even without the consent or collaboration of their government: "The Court of Justice shall have jurisdiction to hear actions on grounds of infringement of the principle of subsidiarity by a European legislative act, brought in accordance with the rules laid down in Article III-365 of the Constitution by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it."
- ³⁷ See Sections 4 and 5 of Part III, Title III, Chapter IV of the new Constitution. The extension of co-decision to the fields of asylum, immigration, and judicial cooperation in civil matters which are also aspects of the "area of freedom, security and justice" in Sections 2 and 3 of the same Chapter was less dramatic in that it is largely in line with the expectation that this would have taken place after the expiry of the 5-year transition period introduced by the Amsterdam Treaty to Title IV of the EC Treaty.
- ³⁸ See Article I-25 of the new constitution.
- ³⁹ See e.g. J. Shaw, "What's in a Convention? Process and Substance in the Project of European Constitution-Building", Vienna Institute for Advanced Studies Policy Paper 89 (2003), http://www.ihs.ac.at/publications/pol/pw_89.pdf, citing K. Nicolaidis (in footnote 62).

- ⁴⁰ See e.g. the criticism of the UK House of Lords Select Committee on the European Union, 12th Report on the draft Constitutional Treaty, 13 March 2003, <http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/lduecom/71/71.pdf>.
- ⁴¹ See Article I-7 of the new constitution.
- ⁴² See Article III-296 (3), in which this new arrangement is called the European External Action service. On the importance of this innovation, see S. Everts and D. Keohane, "The European Convention and EU Foreign Policy: Learning from Failure" (2003) 45 *Survival*, p. 167, available online at http://www.cer.org.uk/pdf/everts_keohane_survival.pdf.
- ⁴³ Article I-28, and also Articles I-21 (2), I-22 (2), I-27 (2) etc. The intention is that the combined portfolios of the existing Commissioner for external relations and the High Representative for foreign and security policy will be combined in this one office.
- ⁴⁴ Article I-22.
- ⁴⁵ See in particular Articles III-258, III-293 and III-295, and also Articles I-35 and I-40. The breadth of the European Council's general role and decision-making power in the field of external relations as expressed in Article III-293 is particularly striking.
- ⁴⁶ Article I-43 provides "1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the victim of terrorist attack or natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:
- (a) – prevent the terrorist threat in the territory of the Member States;
 - protect democratic institutions and the civilian population from any terrorist attack;
 - assist a Member State in its territory at the request of its political authorities in the event of a terrorist attack;
 - (b) assist a Member State in its territory at the request of its political authorities in the event of a disaster."
- ⁴⁷ Article I-3 (4) reads: "In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and protection of human rights and in particular children's rights, as well as to strict observance and development of international law, including respect for the principles of the United Nations Charter."
- ⁴⁸ M. Cremona suggests that the external identity the EU promotes in clauses such as this one is that of a "stabilizing actor" in "The Union as a Global Actor: Roles, Models and identity" (2004) 41 *Common Market Law Review*, pp. 553-573.
- ⁴⁹ M. Cremona, *Ibid.*, J. Kokott and A. R  th, "The European Convention and its Draft Treaty Establishing a Constitution for Europe: An appropriate answer to the Laeken questions?" (2003) 40 *Common Market Law Review*, pp. 1315-1345 and B. de Witte, "The Constitutional Law of External Relations" in: I. Pernice and M. Poiares Maduro (eds.), *A Constitution for the European Union: First Comments on the 2003 Draft of the European Convention* (Baden Baden: Nomos, 2004), pp. 95-106.
- ⁵⁰ The strengthened references in Articles I-40, III-258, III-293 and III-295 of the new constitution referring to the European Council's role in defining the "strategic interests" of the EU in external relations in general and the common foreign and security policy, and the area of freedom, security and justice in particular, are also noteworthy.
- ⁵¹ In Article III-292.

⁵² M. Cremona, "The Draft Constitutional Treaty: External Relations and External Action" (2003) 40 *Common Market Law Review*, pp. 1347-1366.

⁵³ A comparable point has been made in a slightly different context by R.O. Keohane, in "Ironies of Sovereignty: The European Union and the United States" (2002) 40 *Journal of Common Market Studies*, p. 743, at 751-752 in which he discusses the changes in American and European approaches to sovereignty, emphasizing that the more the US became focused on the importance of its external sovereignty, the more the need for internal unity and control – which is certainly not always to the benefit of internal democratic processes – became apparent.

The Leuven Centre for a Common Law of Europe

Mission Statement

Extensive information on Leuven CCLE – including an overview of research projects and publications as well as of past and forthcoming conferences and lectures – is available at:

www.law.kuleuven.ac.be/ccle

(also available at www.commonlawofeurope.be)

Mission Statement

The objective of the Leuven Centre for a Common Law of Europe (Leuven CCLE) is to focus research efforts of the Faculty of Law of the Katholieke Universiteit Leuven (K.U.Leuven) on legal developments that are common to the whole of Europe. A tradition of forty years of research in the field of comparative and European Community law serves as an excellent starting point for the activities of Leuven CCLE.

The area's of interest are: (i) the law of the European Union and developments in European human rights and humanitarian law (ECHR law), (ii) the national legal systems of the European countries in a comparative context and in their interaction with European Union law and (iii) the interplay of European (Union) law with international law.

The Leuven CCLE research method consists in bridging the classical dividing lines between legal disciplines and in engaging in comparative and cross-disciplinary legal research, while at the same time embedding legal scholarship in broader social, economic, cultural and political contexts. Studies will not only focus on private law, but also on public law and areas of the law situated at the boundaries of its classical branches.

The first and foremost goal of Leuven CCLE is to promote fundamental legal research on the interaction between the aforementioned different fields and methods, thereby thoroughly analysing bottom-up as well as top-down movements. This approach is necessary in order to determine to what extent the building bricks of national, European and international law can be used to promote a common legal construction for Europe.

Leuven CCLE approaches the law not as a rule set in stone, but as a living and dynamic process. The core of the process is the interaction between different legal orders in Europe: between Community and national law, between separate national legal systems and between European and international law. As the composite of legal rules grows ever more complex, the question of legitimacy of legal rules is perceived as a major subject of research.

The Leuven CCLE approach to scholarship and research is rooted in the firm conviction, indicated by forty years of comparative analysis, that it will become more and more apparent that legal systems which *prima facie* may look very different are built around common principles that in Europe constitute a *ius commune* or a common law of Europe.

The Ius Commune Research School

Further information on the Ius Commune Research School (mission, participants, scientific programmes, etc.) is available at:

www.rechten.unimaas.nl/ozic

The Ius Commune Research School is a cooperation of the Law Faculties of the *Universiteit Maastricht*, the *Katholieke Universiteit Leuven*, the *Universiteit Utrecht* and the *Universiteit van Amsterdam*. The School was established in 1995 and was formally recognised by the Royal Dutch Academy of Sciences in 1998. The School accommodates about 200 (senior) researchers and 110 research fellows (PhD students). Apart from the researchers of the four founding Faculties, the School has admitted individual members of the Law Faculties of the *Vrije Universiteit Amsterdam* and the *Université de Liège* among its members. Close affiliations exist with the universities of Edinburgh and Stellenbosch.

The Research School facilitates the individual research of its members and promotes the co-operation among these members. In addition, the School takes care of the programme of studies of the School's research fellows.

The Ius Commune Research School aims at facilitating high-level legal research in the field of international and transnational legal processes. Three different sets of problems are addressed by the School's researchers:

- What is the role of the law in theory (policy) and practice of international processes of integration and to what extent is transnational integration of legal systems dependent of the commonalities among the national legal systems (ius commune)?
- What positive or negative effects may transnational integration have upon the commonalities among the national legal systems and the autonomy of national legal cultures?
- To what extent can the principles of democracy and *Rechtsstaat* (constitutional state) serve as a guide in the process of transnational integration? It is tried to answer this question from both a public law perspective (democracy and *Rechtsstaat* (constitutional state) as foundations of a ius commune) and a private law perspective (the impact of human rights on private law).

The van Gerven Lectures are organised by the Leuven Centre for a Common Law of Europe of the Katholieke Universiteit Leuven in honour of Walter van Gerven, emeritus professor at that university and former Advocate-General at the Court of Justice of the European Communities. Each year, the Centre invites a prominent European legal scholar to share perceptions and ideas about the existence or emergence of a common law of Europe. The lectures relate to the areas of interest of van Gerven, starting out from the idea that a *ius commune* is already present, but that one should continuously engage in uncovering it.

Professor de Búrca delivered the Fourth Walter van Gerven Lecture on 26 November 2004. She analysed how the Treaty establishing a Constitution for Europe adds to Europe's search for an international identity. She submits that the boldest of the novel features of the new Constitution, and the weight of significance of the changes which it has introduced, lie in the external domain. De Búrca launches the challenging question whether the emphasis on Europe's "global role" and its international identity will be the factor that ultimately will be capable of triggering the public imagination in such a way as to generate sufficient support for the ratification of the Constitution and – in the long term – to generate a sense of European solidarity, rather than the internally focussed changes brought about by the constitutional treaty.

Gráinne de Búrca has been professor of European Union Law at the European University Institute (EUI) in Florence, Italy as from 1998. Prior to that she was a lecturer in law at Oxford University and fellow of Somerville College. She has been a visiting professor at the Universities of Toronto, Michigan, Columbia and New York University. Her field of expertise is broadly in EU law, with a particular focus on constitutional issues of European integration, EU human rights policy and European and transnational governance. She is co-author with Paul Craig of the renowned textbook *EU Law*.

The fourth Van Gerven Lecture was organised in close cooperation with the *Ius Commune* Research School and has been delivered at the occasion of the closing session of the School's annual conference in Leuven on 25-26 November 2004. The Research School unites scholars from the law faculties of Leuven, Maastricht, Utrecht and Amsterdam.



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