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The Area of Freedom, Security and Justice
in the Treaty establishing a
Constitution for Europe

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ANALYSIS OF THE PROVISIONS GOVERNING EUROPE'S JUSTICE AND HOME AFFAIRS POLICY
IN THE FINAL VERSION OF THE TREATY ESTABLISHING A CONSTITUTION FOR EUROPE
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The Area of Freedom, Security and Justice in the Treaty establishing a Constitution for Europe

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I. Introduction

It had never been a realistic project when the Nice European Council called upon the debate on the future of Europe to consider “a simplification of the Treaties with a view to making them clearer and better understood *without changing their meaning*.”² As any lawyer knows every change of wording may entail a change of meaning. Thus, it is not surprising that Europe’s constitutional process soon transcended its original mandate and embarked upon a journey which reviewed the constitutional foundations of European integration. Issues such as the Presidency of the European Council or the infamous dispute on Nice-style or Convention-style majority vote in the Council attracted the attention of the wider public and the media. In the slipstream of this debate, the broader public did not focus on some rather “technical” changes to the European Treaties. They may nonetheless turn out to be at least as important as the questions of grand institutional design. In two policy areas, the reform packages proposed by the Convention and agreed upon by the Intergovernmental Conference are particularly important: Besides Europe’s Common Foreign and Security Policy, the reform of the Area of Freedom, Security and Justice deserves particular attention. The potential impact of the latter’s reorganisation shall be explored in this article.

The justice and home affairs regime laid down in the Treaty establishing a Constitution for Europe (hereafter: TCE) signed by Heads of State or Government on 29 October 2004³ is the result of a lively political debate in the European Convention and the Intergovernmental Conference (IGC) for more than two years: The discussion in the original Convention working group on the area of freedom, security and justice laid the groundwork for the draft articles proposed by the Presidium in March 2003.⁴ It was followed by a lively plenary debate and various amendments tabled by individual members and government representatives in the Convention which all led to a revised draft.⁵ Eventually, a consensus was reached in mid-July

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² Point 5, indent 3 of the Declaration on the Future of the Union attached to the Treaty of Nice (emphasis added) which was the starting-point of the post-Nice process and the establishment of the European Convention at the Laeken European Council in December 2001.

³ The article is based on the renumerated version of the TCE as laid down in Conference of the Representative of the Member States, Treaty establishing a Constitution for Europe, 6 August 2004, doc. IGC 87/04.

⁴ See the Final Report of Working Group X “Area of Freedom, Security and Justice”, 2 December 2002, doc. CONV 326/02 and the Presidium of the Convention, Area of Freedom, Security and Justice: Draft Article 31, Part I – Draft Articles Part Two, 14 March 2003, doc. CONV 614/03. All Conventions documents are accessible through the internet <<http://european-convention.eu.int>>.

⁵ See Summary Report on the Plenary Session—Brussels 3 and 4 April 2003, doc. CONV 677/03 and the Summary of Proposed Amendments Regarding the Area of Freedom, Security and Justice: Draft Article 31

on the Convention's Draft Treaty establishing a Constitution for Europe.⁶ But the politically sensitive area of justice and home affairs has always been likely to be subject to some changes during the IGC. Nonetheless, the final compromise embedded in the constitutional Treaty is surprisingly close to the Convention proposal. The numerous informal consultations between the Convention's Presidium and national governments played an important role in guaranteeing a basic compromise from which the governments did eventually not depart. The Convention's Presidium did, for example, "win" the full and unconditional support of Europe's biggest Member State by inserting a specific clause on the Member States' right "to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed."⁷

The reform of the constitutional foundations of justice and home affairs in the European Union touches upon traditional "core functions" of state sovereignty. It is therefore not surprising that some far-reaching reform steps in this areas do not receive overwhelming popular support. Whereas a clear majority of 80% of European citizens welcomes a common response to the trafficking in human beings, only a minority supports European decisions on the administration of justice and the police. Also, public opinion in a substantial number of Member States has a majority view in favour of preserving the national competences in immigration and asylum policy – despite an overall majority in favour of a common European approach.⁸ Against this background of popular doubts concerning Europe's future role in justice and home affairs, this article examines the implications of the reform steps enshrined in the constitutional Treaty. Since justice and home affairs cover many different policy areas ranging from immigration and asylum policy over border control management and the conflict of laws to third-pillar cooperation in criminal matters, this article is only a preliminary assessment. It adopts a special focus on the general constitutional foundations (II.), five aspects in relation to the decision-making procedure (III.) and five selected highlights concerning the substantive powers of the Union in the area of freedom, security and justice (IV.)

(Part I) and Draft Articles from Part Two, 7 May 2003, doc. CONV 644/03. For the revised draft see Presidium of the Convention, Draft Sections of Part Three with Comments, 27 May 2003, doc. CONV 727/03, at pp. 28 et seq. With various comments on the draft articles.

⁶ European Convention: Draft Treaty establishing a Constitution for Europe, 18 July 2003, doc. CONV 850/03.

⁷ Art. III-267(5) TCE was first proposed as Art. III-163(5) by the Presidium of the Convention, Draft Constitution Volume II, 8 July 2003, doc. CONV 847/03 before the last plenary debate on 9 July 2003 in Brussels after political lobbying by various German politicians. It should of course be noted that the specific wishes of other governments were also taken into account and that Art. III-267(5) TCE still constitutes a compromise which has been criticised in Germany; see for example the main opposition parties CDU/CSU, Gemeinsame Positionen von CDU und CSU zur Regierungskonferenz über den EU-Verfassungsvertrag, 29.9.2003 <www.cdu.de>. From a legal point of view, in particular the intra-Community migration of third country nationals within the Union is not covered by the provision.

⁸ In the field of immigration and asylum policy in particular, public opinion in the different Member States have almost opposed views with Austria, Finland and the United Kingdom being predominantly against European decision-making and Belgium, Greece, Spain and Italy being clearly in favour of a common European response. For more details see eurobarometer 59 of March/April 2003 <europa.eu.int/comm/public_opinion>, at p. 254.

11. Constitutional Foundations

The European Convention did not invent Europe's area of freedom, security and justice, but rather continues a reform process which began with Maastricht's third pillar on justice and home affairs which did not provide for the adoption of binding secondary law besides free-standing international agreements of classic international law. With the exception of the Europol Convention, these agreements remained a largely unsuccessful tool of integration due to long ratification processes.⁹ It is therefore not surprising that the Convention decided to abolish the specific reference to international agreements currently laid down in Art. 34(2)(d) TEU.¹⁰ Instead, Amsterdam's decision to "communitarise" important aspects of the area of freedom, security and justice comes full circle with the new Constitution.¹¹ The present pillar structure is abolished and the specific features characterising decision-making in criminal matters under the remaining third pillar are brought in line with the regular Community framework.¹² Only some minor specificities persist in relation to justice and home affairs under the umbrella of the future Constitution.¹³

Against this background, the reform steps proposed by the Convention are certainly important, but they are no revolution. The Convention's revision of the constitutional foundations of Europe's area of freedom, security and justice may facilitate its gradual realisation in the years to come, but it should also be born in mind that the Union can already build upon a considerable *acquis* in this respect. The integration of the Schengen agreements into the framework of the European Union by the Treaty of Amsterdam was a considerable dowry for the creation of the area of freedom, security and justice.¹⁴ In recent years, the Schengen law has

⁹ For Europol see Convention drawn up on the basis of Article K.3 of the Treaty on the European Union, on the establishment of a European Police Office (Europol Convention) (OJ 1995 C 316/2) which entered into force on 1 October 1998.

¹⁰ The attempt of the Treaty of Amsterdam to make international agreements a more attractive instrument of integration through the possible entry into force after the ratification by at least half of the Member States did not lead a reactivation of the instrument; see D. Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht* (Nomos 2004), pp. 182-7 for more details and B. de Witte, "'Old Flexibility': International Agreements Between Member States of the EU", in: G. de Búrca/J. Scott (eds.): *Constitutional Change in the EU* (2000), pp. 31-58 as well as Thym, *ibid.* pp. 297-319 for the general compatibility of international agreements among the Member States instead of secondary legislation.

¹¹ Under the Treaty of Amsterdam, former third pillar aspects concerning visas, immigration and other policies related to the free movement of persons were transferred to Title IV EC – although its integration into the EC Treaty remained imperfect with S. Peers, *EU Justice and Home Affairs Law* (2000), at p. 44 pointing at the "Title IV 'ghetto' of the EC Treaty".

¹² It should be noted that the Treaty of Amsterdam brought cooperation in criminal matters closer to EC law with a general, though limited jurisdiction of the Court under Art. 35 TEU and reformed legal instruments, though direct effect is expressly excluded by Art. 34(2) TEU; see H. Labayle, 'Un espace de liberté, de sécurité et de justice', RTD eur. 33 (1997), 813-881 for more details.

¹³ See section III *infra* for variations on the "regular" Community method in the area of freedom, security and justice.

¹⁴ See the Protocol integrating the Schengen *acquis* into the Framework of the European Union annexed to the Treaty of Amsterdam and D. Thym, 'The Schengen Law: A Challenge for Legal Accountability in the European Union', ELJ 8 (2002), 218-45 for more details.

been constantly updated within the single framework of the European Union and complemented with other important building blocks of justice and home affairs among which the European Arrest Warrant, the Regulation replacing the Brussels Convention of 1968 and the revised Dublin law deserve particular attention.¹⁵ But these selected examples are only illustrative of the ever growing *acquis* in the area of freedom, security and justice whose constitutional foundations are reformed, but not reinvented by the future Constitution.

The concept of the area of freedom, security and justice is modelled on the historic transitional periods of the common market, the single market programme and the introduction of economic and monetary union. A preliminary assessment of the secondary legislation adopted so far suggests that the original target of creating the area by May 2004 has not been missed as clearly as many observers would have thought when the Treaty of Amsterdam was drafted.¹⁶ The Constitution develops further the theoretical concept underlying the area of freedom, security and justice in Article I-41 TCE. Nonetheless, the experience of recent years suggests that the concept has so far not met the original goal to show to the wider public that the Union “places the individual at the heart of its activities”¹⁷ by constituting an area of freedom, security and justice. Arguably, already the rather inelegant reference to an “area of freedom, security and justice” is too complicated to grasp the imagination of European citizens and also individual reform project which directly affect their legal position in daily life are legally too complex to be easily understood.¹⁸ The abolition of internal border controls in the Schengen area as the single most tangible expression of “the area” are moreover still associated international law-style cooperation instead of secondary legislation – with its identity-building potential being further weakened by the continued asymmetry of the Schengen law stemming from the non-participation of the United Kingdom and Ireland which will be continued within the framework of the new Constitution.¹⁹

¹⁵ For the aforementioned examples see Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2001 L 12/1), Council Regulation 2001/44/EC of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2002 L 190/1) and Council Regulation 2003/343/EC of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50/1). For a comprehensive overview of the *acquis* of the area of freedom, security and justice see the summary on the Council’s webpage <ue.eu.int/jai/default.asp?lang=en>.

¹⁶ The 5-year-target for establishing the area of freedom, security and justice is laid down in Art. 61(a) EC. For the *acquis* adopted so far see the references above.

¹⁷ Recital 2 of the Preamble of the Charter of Fundamental Rights which will become the introduction to Part Two of the TCE.

¹⁸ The identity-building potential of integration projects depends at least partly on the possibility to be easily understood without the necessity of sophisticated rational reasoning, which is required to understand the impact of the harmonisation of the conflict of laws or minimum standards on access to justice. It is also doubtful whether European citizens will turn into fervent supporters of European justice and home affairs when fiscal penalties (e.g. on traffic infringements) may circulate as freely within Europe as they may travel in an area without internal frontiers.

¹⁹ See Thym, *supra* note 10, at pp. 79-130 for the asymmetry of the area – also on the non-participation of Denmark. The British-Irish-Danish opt-outs are maintained in Protocol (No. 20) on the Position of Denmark

Generally, the European constitutional Treaty does not pave the way for an overarching “federalisation” of justice and home affairs on the European level with an exclusive European competence for all or most issues. Instead, the area of freedom, security and justice as a whole is characterised as a “shared competence” in Art. I-14(2)(j) TCE. It is typical for “shared competences” that the degree of European harmonisation depends on the will and ability of the political actors to agree on specific legislative projects: “The Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence.”²⁰ But not any exercise of European competence in the area results in a respective exclusive competence of the Union: Instead, European competences are expressly limited to “minimum standards” in criminal matters²¹ and shall be guided by the principle of “mutual recognition”²², thereby preserving a high degree of autonomy for the Member States and their “different legal systems and traditions.”²³ The importance of the principle of mutual recognition has been underlined by the Court’s first judgement concerning cooperation in criminal matters under the present third pillar. With a view to the *ne bis in idem*-principle enshrined in Article 54 of the 1990 Convention implementing the Schengen Agreement the Court held that:

“... there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.”²⁴

From a theoretical point of view, one may insofar draw a direct line from the principle of mutual recognition underlying the area of freedom, security and justice to the Union’s new motto “united in diversity”²⁵ and the concept of multilevel constitutionalism developed by Ingolf Pernice. The mutual respect among the legal systems of the Member States postulated and reinforced by European law is an important building block of the non-hierarchical horizontal and vertical interaction of the different national and European levels of government in the ‘European constitutional federation’ (*Verfassungsverbund*) which is no federal constitution *sensu strictu*, but Europe’s framework of multilevel constitutionalism.²⁶ The horizontal re-

and Protocol (No. 19) on the Position of the United Kingdom and Ireland on Policies in Respect of Border Controls, Asylum and Immigration, Judicial Cooperation in Civil Matters and on Police Cooperation.

²⁰ See the general definition of shared competences in Art. I-11(2) TCE.

²¹ In particular as to criminal procedure and substantive criminal law under Art. III-270(2), 272(1) TCE. Whereas immigration and asylum issues are currently still limited to European minimum standards under Art. 63 EC, Art. III-266(2)(a) TCE now allow for a “uniform status” of asylum and subsidiary protection and “common procedures” for granting and withdrawing the former.

²² The principle of mutual recognition as a guideline for the realisation of the area of freedom, security and justice is expressly referred to in Art. I-42(1) and III-158(3) TCE and reinforced by explicit European competences concerning the mutual recognition of judgments in civil matters under Art. III-269(1) TCE and in criminal matters in accordance with Art. III-270(1) TCE.

²³ Art. III-257(1) TCE.

²⁴ Joint Cases C-187/01 & C-385/01, *Gözütok und Brügge*, [2003] ECR I-1345, at para 33.

²⁵ Recital 4 of the Constitution’s Preamble and Art. I-8 DCE.

²⁶ For details of the concept see I. Pernice, ‘Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-making Revisited?’, CML Rev. 36 (1999), 703-50, I. Pernice, ‘Europäisches und nation-

spect and cooperation of the Member States within the framework of the area of freedom, security and justice is further strengthened through European measures for police cooperation. Instead of creating a proper “European FBI”, the constitutional Treaty opts for further strengthening existing instruments of horizontal police cooperation within the European constitutional federation.²⁷ Also Europol will not gradually assume this function. The new Treaty now explicitly foresees that it continues to rely on Member States executive police power to exercise its functions.²⁸

III. Decision-Making Procedure

The area of freedom, security and justice is embedded into the general institutional framework of the European Union. In principle, the same procedures apply to justice and home affairs and other European policies alike. Thus, any reference to the adoption of “laws and framework laws” e.g. in Article III-269(2) TCE entails the application of the ordinary legislative procedure under Articles I-34(1), III-396 TCE according to which Council and Parliament are co-legislators with equal rights. Nonetheless, some specific features of decision-making persist in the area which differ from the general institutional rules. They are largely a remnant of the intergovernmental origin of the area of freedom, security and justice. Purists of the Community method may therefore criticise them as a compromise weakening the Community institutions. But the experience of recent years suggests that the modification of the Community method in justice and home affairs does not call into question the overall Europeanisation of the area and may even play a positive part in the progressive development of this new policy field. More specifically, five issues deserve closer attention in this respect:

1. Role of national parliaments: The future Constitution reserves a special role for national parliaments in the area of freedom, security and justice. They may participate in the evaluation mechanisms foreseen in Article III-260 TCE and shall be involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles III-273 and III-276 TCE. More important, the Protocol on the Role of Member States' National Parliaments in the European Union and the Protocol on the Application of the Principles of Subsidiarity and Proportionality generally enhance the role of national parliaments which they may use in justice and home affairs issues in particular.²⁹ Their experience and

ales Verfassungsrecht', *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 60 (2001), 148-93, I. Pernice, 'Multilevel Constitutionalism in the European Union', *EL Rev.* 27 (2002), 511-29 and D. Thym, 'European Constitutional Theory and the Post-Nice Process', in M. Andenas and J. Usher (eds.), *The Treaty Of Nice, Enlargement and Constitutional Reform* (Hart, 2003), at 179-210.

²⁷ See the explicit reference to and competence for horizontal police cooperation in Art. I-42(1)(c), III-124, III-275 and III-377 TCE.

²⁸ See Art. III-276(3) TCE: “Any operational action by Europol must be carried out in liaison and in agreement with the authorities of the Member State or States whose territory is concerned. The application of coercive measures shall be the exclusive responsibility of the competent national authorities.”

²⁹ Their role may prove to be particularly important in cooperation in criminal and police matters (Sections 4 and 5 the Draft Constitution's Chapter IV on the area of freedom, security and justice) in accordance with Art. III-259 TCE. Of course, their role may cover all other areas of EC policy in justice and home affairs; Art. III-259 TCE does not constitute the role of national parliaments legally, but underlines their importance

knowledge is an important input for European decision-making. But it should in particular be welcomed that the Convention did not juxtapose the democratic legitimacy guaranteed by the European Parliament and the control function exercised by national parliaments. The enhanced role of national parliaments under the said provisions does not replace but rather complement its European counterpart. Both levels of parliamentary accountability are no competitors but interlocking and mutually reinforcing channels of democratic legitimacy.

2. Right of Initiative: The Commission's right of initiative has always been an important instrument to focus the political debate and strategic orientations of European law on the general European interest. It is feared by many eurosceptic politicians as a proactive tool to speed the integration process, thereby limiting the autonomy of the Member States. For this reason, the Treaty of Maastricht had originally limited the Commission's right of initiative in justice and home affairs and conferred a complementary right of initiative on the Member States, which shall partly come to an end in Title IV EC by 2004 in accordance with the Treaty of Amsterdam.³⁰ The Constitution follows this path of gradually extending the Commission's right of initiative, but stops short of monopolising it altogether. According to Article III-264(b) TCE a quarter of the Member States may continue to bring forward initiatives in criminal matters including the operational cooperation between administrative and police bodies of the Member States. The experience with the Member States' present right of initiative under Title VI TEU suggests that they generally prefer supranational initiatives to national proposals.³¹ Moreover, police and judicial cooperation in criminal matters arguably requires a continued proactive role for national initiatives reflecting the specific knowledge, experiences and strategic planning capacities of national authorities.

3. Role of the European Council: The right of initiative is subject to another specificity in the area of freedom, security and justice. According to Article III-258 TCE the European Council "shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice." Again, the enhanced role of the European Council departs from the orthodoxy of the Community method, but need not necessarily have a negative impact. Simply as the provision codifies the existing practice since the famous Tampere European Council of October 1999 when the heads of state or government set the course for the progressive development of the area of freedom, security and justice under the Treaty of Amsterdam³² - an exercise which shall be repeated on 4/5 November 2004 just a few days

under the said protocols politically.

³⁰ Under Art. J.3(2) TEU (Maastricht) the Commission's right of initiative did not cover what is nowadays called cooperation in police and criminal matters. The Treaty of Amsterdam extended the Commission's right of initiative to the remaining third pillar under Art. 34 TEU (Amsterdam) and laid down that its right of initiative should be monopolised by 2004 in the first pillar; see Art. 67(2) EC.

³¹ Although the Member States and the Commissions share a right of initiative in the area of freedom, security and justice at present, the overwhelming majority of secondary law actually adopted originates in Commission proposals. By requiring a quarter of the Member States to support an initiative under Art. III-264 TCE the Constitution guarantees that national initiatives reflect a need for European cooperation (thereby giving teeth to the principle of subsidiarity) and are not based on specific national policy preferences of a single Member State.

³² See Presidency Conclusions, Tampere European Council, 15/16 October 1999 and the update of the roadmap by the respective Presidency Conclusions of the Seville European Council of 21/22 June 2002 and the Thessaloniki European Council of 19/20 June 2003; all available at <ue.eu.int/de/Info/eurocouncil/index.htm>.

after the signature of the constitutional Treaty when the Brussels European Council shall subscribe to the “Tampere II” agenda. Under their regime, the Commission (or the Member States in so far as they have a complementary right of initiative) retains the full legal control over the nitty-gritty details of individual legislative proposals, which are – as lawyers are well aware of – often more important than the grand political outline set by the European Council.³³ Peer pressure from the European Council may even have the positive side-effect of fastening decision-making in the Council, where the national interior and justice ministers would possibly not have agreed on a number of legal acts building the area of freedom, security and justice in recent years, if the heads of state or government had not “urged” its minister to adopt certain instruments and “speed-up” legislation.³⁴

4. **Qualified majority voting/Asymmetry:** It is well known to any European lawyer and politician that the extension of qualified majority voting is an important trigger for integrationist dynamics. But contrary to other policy areas, its extension in justice and home affairs did not feature prominently on the agenda of the European Convention and the IGC. This is largely due to general British support³⁵ and the political compromises reached at earlier Treaty revisions where the Member States had already agreed on a substantial, albeit gradual, extension of qualified-majority voting.³⁶ Against this background, the extension of qualified majority voting under the ordinary legislative procedure was not difficult to agree upon. Under the constitutional Treaty, only family law and politically sensitive areas of the present third pillar on police and judicial cooperation in criminal matters remain subject to national vetoes.³⁷ In other areas of substantive and procedural criminal law the IGC eventually main-

³³ Legally speaking, it seems as if the strategic guidelines set by the European Council under Art. III-258 TCE are not legally binding on the Commission in the sense that they are legally enforceable through the Court of Justice. Instead, their determinative impact is political and they are insofar comparable to Decisions of the European Council on the on the strategic interests and objectives of the Union in the field of external action under Art III-293(1) TCE.

³⁴ See in this respect in particular the Presidency Conclusions, Seville European Council, 21/22 June 2002, paras. 26-39 at 37: “Speeding-up of current legislative work...: The European Council urges the Council to adopt...”

³⁵ See the Secretary of State for Foreign and Commonwealth Affairs, A Constitutional Treaty for the EU: The British Approach, September 2003 <www.europe.gov.uk> at para 82: “QMV would be an important tool for speeding up decision-making in this area.” It should be remembered that the United Kingdom and Ireland have an unilateral opt-out concerning its participation in new legislative projects; see *supra* note 19.

³⁶ According to Art. 67(3)-(4) EC, the Protocol on Article 67 (Nice) and the Joint Declaration on Article 67 (Nice) the Community will gradually extend qualified majority voting in Title IV EC to visa issues (Art. 62(2)(b) EC), asylum and immigration policy (Art. 63(1), (2)(a) EC “from the date on which agreement is reached on the scope of the measures concerning the crossing by persons of the external borders of the Member States”), the conflicts of laws with the exception of family law (Art. 65 EC) and the horizontal cooperation of administrative bodies of the Member States (Art. 66 EC). The incoming justice and home affairs Commissioner Rocco Buttiglione strongly supported the extension of co-decision in the public hearings of the European Parliament LIBE-Committee in its hearing on 5 October 2004, see answer 3 at <http://www.europarl.eu.int/hearings/commission/2004_comm/default_fr.htm>.

³⁷ See Art. III-269(3) TCE for family law, Art. III-270(2)(d), 271(1) TCE for the extension of Union competences in substantive criminal law and criminal procedure, Art. III-274(1) TCE for establishing a European Public Prosecutor and Art. III-275(3), III-277 TCE for operational police cooperation.

tained the general rule of qualified majority voting despite initial British opposition.³⁸ Here, only a minor caveat applies: If a Member State invokes that a rule would “affect fundamental aspects of its criminal justice system” a “reflection period” of up to 12 months is initiated.³⁹ But at the end of the day it may not block the Union from moving ahead. Instead, it opts out of the decision-making procedure and the other Member States may proceed within the asymmetric framework of the enhanced cooperations regime.⁴⁰

5. Court of Justice: From a conceptual point of view, the legal supremacy of constitutional law is a constituent component of a European constitution which “is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.”⁴¹ Against this background, it should be welcomed that the European Convention has opted for a general extension of the Court’s jurisdiction to the whole area of freedom, security and justice, thereby eliminating remaining caveats of the present Treaty regime in this respect. Neither the specific provisions of Article 35 TEU nor Article 68(1) EC on the limitation of preliminary references will find their way in the European constitution. In justice and home affairs, the extension of the Court’s jurisdiction is particularly important, since the legal *acquis* in the area has potentially far-reaching consequences for the legal status of individuals and third country nationals. Only the specific clause of Article 35(5) TEU will continue to apply under Article III-377 TCE. Arguably, the clause protects the procedural autonomy of the Member States within the European constitutional federation by reassuring the role of the Court in Luxembourg as the supreme court for the interpretation of European law, while securing that national courts remain competent to “review the validity or proportionality of operations carried out by the police or other law-enforcement services.”⁴²

³⁸ This concerns all policy areas enumerated in Art. III-270(1), (2)(a)-(c) and III-271(1) TCE. In this area, the application of the regular legislative procedure under Art. I-34(1), III-396 TCE for the adoption of laws and framework laws entails qualified majority voting in the Council. Only the extension of Union competence requires a unanimous agreement under Art. III-270(2)(d), 271(1) TCE mentioned beforehand.

³⁹ Art. III-270(3), III-271(3) TCE.

⁴⁰ Under Art. III-270(3), III-271(4) TCE the regular rules governing enhanced cooperations under Art. III-416-423 TCE apply, which largely correspond to the present Art. 40, 43-45 EU already governing the present third pillar. It should be noted that Art. III-270(3), III-271(4) TCE only establish a specific procedure for the initiation of enhanced cooperations which do apply to all other policy areas alike. For more details on enhanced cooperations as a tool to facilitate decision-making see Thym, *supra* note 10, in chapter 2.

⁴¹ Art. I-2 TCE. For legal constitutionalism as an integral part of European constitutional theory see also Thym, *supra* note 26.

⁴² Of course, they have to take into account the European law dimension of the case – as interpreted by the Court of Justice – when applying national law and reviewing the validity of individual law-enforcement actions. This is underlined by the new appendix “where such action is a matter of national law”. Insofar, Art. III-377 TCE is in line with the general European court architecture, where national courts are in principle responsible for the adjudication of individual cases (possibly after a preliminary reference to the Court of Justice), while Luxembourg secures the uniform interpretation of European law. Against this background, only the exclusion of the review of proportionality from the Court’s jurisdiction (a principle which the Court has developed and applied *in extenso* in his case law on the fundamental freedoms) goes beyond the regular rules governing the Court’s jurisdiction; see Thym, *supra* note 14, at 233-4 on the similar provision in Art. 68(2) EC.

IV. Selected Substantial Highlights

1. **Border Controls:** The constitutional Treaty is a new step in the gradual extension of Union competences and measures concerning the “integrated management system for external borders”⁴³ which refers more or less directly to the “possible creation of a common European border guard unit as a longer-term issue.”⁴⁴ A common European responsibility for external border controls is gaining increasing support among old and new Member States in recent years – with the former trying to secure an influence of their own on the level of border controls after the application of the relevant Schengen law in the new Member States and the latter aiming at financial support for capacity-building.⁴⁵ In this respect, the constitutional Treaty will only further a development which is gathering increased momentum independent of its entry into force.⁴⁶ Indeed, the horizontal cooperation among the Member States may only be the first step towards a “federal” European border guard and does in so far not correspond to the non-federalising avenue followed by the future Constitution.⁴⁷ With a view to enlargement it should be stressed that the status quo of the Schengen law may of course be changed in accordance with the legislative procedure in the years to come in order to take account of the specific situation of the new Member States and in particular its Eastern regions.⁴⁸

2. **Immigration and asylum policy:** In this politically sensitive policy field, the future Constitution considerably extends the legal position of the Union by extending its competence beyond “minimum standards” and by introducing qualified majority voting as the general rule.⁴⁹ The Intergovernmental Conference remained these rules largely unchanged despite the wish voiced by several delegations to clarify the scope of the respective competences of the Union and the Member States in order to avoid disputes or a gradual erosion of national powers.⁵⁰ Arguably, a clarification might have been particularly important as to

⁴³ Art. III-266(2)(c) TCE.

⁴⁴ See Final Report of Working Group X, *supra* note 4, at p. 17.

⁴⁵ The Schengen Facility under Art. 35 of the Act of Accession (OJ 2003 L 236/33) is illustrative of recent aspirations to “Europeanise” not only the decision-making, but also the financing of actions at the new external borders of the Union to the East.

⁴⁶ On 11 November 2003 the Commission adopted a proposal on a Council Regulation establishing a European agency for the management of operational cooperation at the European Union's external borders; see COM-Doc. IP/03/1519 on the basis of Art. 62(2)(a) EC.

⁴⁷ See *supra* section II.

⁴⁸ The “Kalinigrad visum” established by Council Regulation 2003/693/EC of 14 April 2003 establishing a specific Facilitated Transit Document (FTD), a Facilitated Rail Transit Document (FRTD) and amending the Common Consular Instructions and the Common Manual (OJ 2003 L 99/8) indicates that the time of “unconditional” acceptance of the *acquis* in the pre-accession context will give way to an increased influence of the new Member States on the contents of new measures being adopted after enlargement. Polish regions neighbouring Ukraine and Belarus have certainly noticed the Commission's general willingness to take into account their specific economic situation when it adopted two proposals for Regulations on “local border traffic” on 1 September 2003; see COM-Doc. IP/03/1186.

⁴⁹ See Art. III-266-268 TCE.

⁵⁰ See Presidency, IGC 2003 : Issues to be dealt with by the Legal Expert Group (New Mandate), 4 November 2003, doc. CIG 43/03, at para 13.

Article III-268 TCE whose wording is broad enough to cover almost any issue of immigration law with the explicit exception of the access of third country nationals residing outside the Union the Member States' labour markets mentioned at the outset.⁵¹ Moreover, several non-governmental organisations have criticised the new Treaty for explicitly allowing the Union seeking to “sub-contract” the protection of asylum seekers to third countries on the basis of Article III-266(2)(g) TCE by establishing “reception centres” for the procession of asylum claims outside the Union as supported by an increasing number of European politicians.⁵² The increased role of European politics and law in the field of immigration and asylum policy underlines the potential importance of the Union's accession to the European Convention on Human Rights which will provide an additional legal and procedural safeguard for the necessary protection of human rights as on of the pillars upon which the area of freedom, security and *justice* is founded.⁵³

3. **Conflict of laws:** In this policy field, the Convention could built upon the substantial *acquis* which has been adopted in recent years. Nonetheless, the Convention had arguably foreseen a minor textual adaptation which may nonetheless have had the potential of considerably extending the Union competence: With a view to the present wording of Article 65 EC some commentators argue that the reference to the “proper functioning of the internal market” limits the Community competence to the internal conflict of laws among the Member States excluding the legal relationship with third countries, while others regard the integration of the internal market into a global system of conflict of laws as being covered by the same provision.⁵⁴ The Convention's original proposal to delete of the reference to the single market in the final Article III-270(2) TCE might have been an additional argument supporting the latter view.⁵⁵ But on the insistence of the British delegation the IGC did re-introduce the explicit reference to the “ proper functioning of the internal market” as the criterion governing the Union competence in civil law matters. Therefore, the Constitution will not change much and

⁵¹ Art. III-267(2) TCE covers all aspects of immigration policy ranging from the conditions of entry and residence to the rights of third-country nationals residing legally in the Member States and the combat of illegal immigration and residence; for the exception of Art. III-267(5) TCE see note 7 *supra* and accompanying text.

⁵² See the positive signals voiced by Rocco Buttiglione, Commissioner designate for justice and home affairs, at the European Parliament on 5 October, *supra* note 36, answer 15 and the critical comments Joint Comments of Non-Governmental Organisations for the IGC, Towards a Constitution for Europe: Justice and Home Affairs, 1 October 2003 <www.statewatch.org>, at p. 4. The organisations acknowledge at the same time that the provision may also be used for “desirable” cooperation projects such as resettlement schemes.

⁵³ On the Union's accession to the ECHR see Art. I-9(2) TCE. Art. III-365(4) TCE arguably stops short of granting individuals the right to challenge European secondary law (as opposed to regulatory tertiary law) directly in the Court of Justice. This does of course not preclude their right to challenge national implementation measures in national courts which may refer preliminary references to the Court of Justice in accordance with Art. III-369 TCE.

⁵⁴ For a restrictive interpretation see O. Remien, ‘European Private International Law, the European Community and Its Emerging Area of Freedom, Security and Justice’, CML Rev. 38 (2001), 53-86 at 76 and for a more “generous” view see J. Basedow, ‘The Communautarization of the Conflict of Laws under the Treaty of Amsterdam’, CML Rev. 37 (2000), 687-708 at 701 et seq.

⁵⁵ Of course, the additional reference to “cross-border implications” in the said provision might possibly have had the same meaning as the additional reference to the proper functioning of the internal market in Art. 65 EC.

it remains to be seen how the Court possibly decides the dispute in its advisory opinion 1/03 on the basis of the present Treaty regime.⁵⁶

4. **Criminal law:** In criminal law, the original idea of the German *Länder* to restrict the scope of European competencies by means of enumerative lists of EU powers has been implemented at least in criminal matters.⁵⁷ By enumerating the areas of Union competence in procedural and substantive criminal law, the constitutional Treaty opts for a cautious approach in Articles III-270-1 TCE. But at the same time, the future Constitution lay the basis for a later enhancement of Union action through review clauses allowing for the extension of Union competences in the years to come below the legal threshold of a Treaty amendment. This is a pragmatic compromise between calls for further integration and voices insisting on the protection of the status quo. According to Article III-271(1) TCE the Council may unanimously after the consent of the European Parliament adopt a decision identifying other areas of crime which may be subject to European harmonisation measures. Although national parliaments are not mentioned in the article, Member States are of course free to foresee their involvement on the basis of national constitutional law before the national representative expresses its consent in the Council. Moreover, it seems not to be excluded that some Member States agree upon the extension of Union competences under Article III-270, III-271 TCE in combination with the general mechanism of enhanced cooperations under Article III-416-423 TCE establishing a core group for a “criminal justice Schengen”.⁵⁸

5. **European Public Prosecutor:** Similarly, the establishment of a European Public Prosecutor in accordance with Article III-274 TCE requires a unanimous Council decision and the consent of the European Parliament and may again not comprise all Member States.⁵⁹ The article is a compromise between the Franco-German desire to establish the prosecutor as soon as possible and the position of the British government to refrain from any federalising tendency in this respect and to limit the cooperation of law-enforcement agencies to the horizontal cooperation and coordination through Europol and Eurojust.⁶⁰ Indeed, the establishment of a European Public Prosecutor, whose existence and processes could cut across the national criminal laws and procedures of the different Member States,

⁵⁶ The Council has asked the Court to give its advisory opinion on the “Lugano-II” agreement associating the EFTA countries with Council Regulation 2001/44/EC, *supra* note 15.

⁵⁷ This proposal was an important starting-point for the post-Nice debate as a whole and led to the adoption of the Declaration on the Future of the Union at the Nice European Council in December 2000.

⁵⁸ The asymmetric extension of Union competences has to be distinguished from the asymmetric adoption of specific legislative proposals mentioned above *supra* note 40 and accompanying text; on the asymmetric extension of Union competences generally Thym, *supra* note 10, at pp. 214-6.

⁵⁹ Again, the enhanced cooperation procedure may prove to be a viable compromise out of the deadlock of unanimous decision-making, if some Member States want to establish a European Public Prosecutor, while others prefer to postpone the decision.

⁶⁰ See the original Franco-German proposal by *D. de Villepin/J. Fischer*, Joint Franco-German proposals to the European Convention on an Area of Freedom, Security and Justice, 28 November 2002, doc. CONV 435/02 and for the British position House of Lords Select Committee on European Union, *The Future of Europe: Constitutional Treaty – Draft Articles on the Area of Freedom, Security and Justice*, 16th Report Session 2002/03, at p. 34-5. For Eurojust see Art. 31(2) TEU and Council Decision 2002/187/JHA of 28 February 2002 on its basis (OJ 2002 L 63/1).

would require the creation of European criminal procedure law and adequate legal supervision through European courts.⁶¹ Arguably, it is neither economically viable nor desirable from point of view of human rights protection to double national procedure with an additional European level.⁶² It might therefore not be the worst-case scenario, if the European Public Prosecutor was not established in the immediate aftermath of the entry into force of the Constitution. On the basis of the other provisions enhancing the constitutional foundation of the area of freedom, security and justice, Europe may nonetheless become more proactive and efficient in justice and home affairs in the years to come.

V. Conclusion

The Treaty establishing a Constitution for Europe signed by Heads of State or Government marks a new stage in the process of creating an ever closer area of freedom, security and justice. Against the background of the reform steps achieved in recent years, the new provisions are an important reform of the area's constitutional foundations, but no revolution reinventing the wheels of European integration. The decision-making procedures will eventually be brought largely in line with the regular Community procedure in other European policy areas. The remaining differences do not lead to a different conclusion and may even have a positive impact on the progressive realisation of the area of freedom, security and justice. It is illustrative of Europe's framework of multilevel constitutionalism that the new provisions do not pave the way for the overall federalisation of justice and home affairs on the European level, but rather focus on horizontal cooperation among the Member States and the coordination of their activities on the basis of the principle of mutual recognition. The extension of European competences in the fields of border controls, immigration, asylum and criminal justice is an atypical development which shows that the Member States acting individually have lost the ability to control international crime and migration flows. The underlying dichotomy between the requirements of freedom, security and justice needs to be addressed by the European institutions on the basis of the policy choices expressed by the European Parliament and the Council.

⁶¹ At present, national members of Eurojust are in principle subject to the respective national laws of the Member State they represent. Thereby, the gains of efficacy through cooperation are combined with the necessary safeguard for established procedural rules.

⁶² But see the detailed and balanced discussion of the EPP's possible role by Christine Van den Wyngaert, "Eurojust and the European Public Prosecutor in the *Corpus Juris* Model: Water and Fire", in: Neil Walker (ed.): *Europe's Area of Freedom, Security and Justice* (2004), pp. 201-239.