JOINT SUBMISSIONS

BY

THE STANDING COMMITTEE OF EXPERTS ON INTERNATIONAL IMMIGRATION, REFUGEE AND CRIMINAL LAW,

THE IMMIGRATION LAW PRACTITIONERS ASSOCIATION,

STATEWATCH,

AND

THE EUROPEAN COUNCIL OF REFUGEES AND EXILES

TO

WORKING GROUP X ("FREEDOM, SECURITY AND JUSTICE") OF THE CONVENTION ON THE FUTURE OF EUROPE

Prof. Deirdre Curtin and Prof. Steve Peers (eds.)

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STANDING COMMITTEE OF EXPERTS ON INTERNATIONAL IMMIGRATION, REFUGEE AND CRIMINAL LAW.

Secretariat
P.O. Box 201, 3500
AE Utrecht/ The Netherlands

Tel: +31 (30) 297 42 14/43 28
Fax: +31 (30) 296 00 50
email: cie.meijers@forum.nl

Statewatch

monitoring the state and civil liberties in the European Union

PO Box 1516,
London N16 0EW, UK.

Tel: +44 (0)20 8802 1882
Fax: +44 (0)20 8880 1727
email: office@statewatch.org

ILPA secretariat:
Lindsey House,40-42,
Charterhouse St.,
London EC1M 6JN. UK

Tel: +44(0)20 7251 383
Fax: +44(0)20 72518384
email: info@ilpa.org.uk

ECRE Secretariat
Clifton Centre
Unit 22, 3rd Floor
110 Clifton Street
London EC2A 4HT, UK.

Tel: +44-(0)20-7729 5152
Fax: +44-(0)20-7729 5141
email: ecre@ecre.org

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The need for change

Given their huge impact on human rights and civil liberties and their great importance for the public, policies on immigration, asylum, crime and policing should only be adopted following adequate and effective judicial, parliamentary and public accountability and must be in full compliance with human rights obligations. The current rules applying to EU Justice and Home Affairs (JHA) policies fall well short of these standards. In order to ensure that these basic accountability and human rights standards are met, a number of changes to the current EU rules on JHA issues are essential.

Working group X on 'freedom, security and justice', meeting as part of the 'Convention' on the future of the EU, is ideally placed to consider and recommend these changes.

Recommended changes

1) Abolishing the 'third pillar'

- the 'first pillar' and 'third pillar' of the EU should be fully merged, while keeping crime and policing matters in a separate title from immigration and asylum matters

- decision-making over 'third-pillar' matters should be replaced by the 'Community method' of decision-making in order to ensure coherent proposals and adequate democratic scrutiny, while reserving the possibility of unanimous voting and control by national parliaments for matters concerning the exercise of coercive powers

- EC instruments (directives, regulations) should be used for 'third pillar' matters in order to simplify the decision-making system and ensure that individuals can enforce their rights in national courts

- the 'third pillar' external relations rules of the EU should be replaced by the 'first pillar' rules, in order to ensure effective judicial and parliamentary control and public scrutiny of EU treaties on criminal law and policing

- the existing complex EU 'acquis' on policing and criminal law dating from three different periods as well as the Schengen process should be consolidated within a fixed period

- if a European Public Prosecutor is established, there must be a coherent and fair accompanying framework a European Police Force and European Criminal Court and of rules on criminal law and policing

2) Fair and effective rules on immigration and asylum

- the EU should have full competence to adopt immigration and asylum laws, subject to the human rights obligations in the EU Charter of Fundamental Rights and the European Convention of Human Rights (ECHR)

- the normal EC decision-making procedure (co-decision and qualified majority voting) should apply to all immigration and asylum matters, except the creation of a European Border Guard

- if a European Border Guard is created, it should be subject to effective judicial, parliamentary and public accountability and should be considered a civil body, not a police or military force

3) Normalising rules on all Justice and Home Affairs matters

- the regular jurisdiction of the EU Court of Justice should be fully extended to all JHA matters

- the idea of a 'High Representative' for JHA matters should be rejected

4) Ensuring effective protection for human rights and judicial, parliamentary and public accountability

- a legally binding effect of the EU Charter of Rights and EU accession to the European Convention on Human Rights and other international human rights treaties is essential to protect human rights related to immigration, asylum, criminal law and policing

- all EU institutions, bodies and entities should be subject to effective rules concerning accountability and control of their external relations powers, including effective judicial control and access to their documents

- the ability of the EU ombudsman to follow up citizens' complaints and ensure protection of human rights should be enhanced

- the Council should be obliged to meet in public when making all legislative decisions and as many non-legislative decisions as possible

- the status of national parliaments' scrutiny reserves and their ability to exercise effective scrutiny, including over implementation of EU measures, must be significantly enhanced

- equality rights should not be limited to EU citizens but extended to lawfully resident third country nationals

- the rules on direct access to the EU courts need to be broadened significantly

1. Introduction

The *Standing Committee of Experts on International Immigration, Refugee and Criminal law*, was established in 1990 by five NGO's: the Dutch Bar Association, the Refugee Council, the Dutch section of the International Commission of Jurists, the Netherlands Centre for Immigrants/FORUM and the National Bureau against Racism (LBR). The Committee is independent. Most of its members are lawyers, working at Law Faculties in the Netherlands or in Belgium. They are experts in one of the three fields mentioned in the Committee's name. The Standing Committee monitors developments in the area of Justice and Home Affairs and presents its opinion to the Dutch Parliament, the European Parliament, or parliaments in other Member States (e.g. the House of Lords), to the Dutch government, the European Commission and to other public authorities and NGO's.

Statewatch monitors justice and home affairs and civil liberties in the EU. It was founded in 1991. Its contributor group of lawyers, researchers, journalists and academics is drawn from 12 European countries. It has two websites: www.statewatch.org and www.statewatch.org/semdoc (this is specialist site devoted to documentation on justice and home affairs in the EU and carries a "Legislative Observatory" on all measures since May 1999)

ILPA (the Immigration Law Practitioners' Association) is the professional association which represents the interests of some 1100 immigration lawyers in the United Kingdom. Since the remit of ILPA is limited to immigration and asylum matters, ILPA has participated only in the parts of the current submissions, which deal with immigration and asylum matters and their future institutional and substantive development. The same applies to ECRE, which has participated only in the parts of the current submissions concerning asylum matters.

The *European Council on Refugees and Exiles* (ECRE) is a network of some 70 non-governmental refugee-assisting organisations in 30 European countries. ECRE supports the proposals made in this document in the framework of its mandate and positions, in particular those seeking to recommend changes that would guarantee the improvement of refugee protection in the European Union, the effective application of the principles of transparency and accountability, and the fulfilment of the Tampere commitments.

As four organisations with a specific remit to cover developments in the field of justice and home affairs it was deemed desirable to join forces in attempting to make a focussed contribution in the field of justice and home affairs. It was considered necessary to look at these issues in a non-national context but rather having regard to the truly international context in which decisions are being taken.

At the same time it was considered necessary to relate important horizontal themes which have been considered elsewhere in the Convention (i.e. legal personality, protection of fundamental rights, external relations, role of national parliaments) and where work has been concluded by the specific Working Group in question to the issues are of justice and home affairs. At the same time these non-profit organisations wished to underline the fact that certain important horizontal themes risk being if not over-looked then certainly underdeveloped by virtue of the fact that no Working Group has been specifically assigned to look in detail at them. In this regard we wish to mention in particular the topics of access to information, the role of the Court of Justice of the European Communities (the ECJ) and the role of the Ombudsman. These topics have a particular pertinence in the field of justice and home affairs and our observations develop certain perspectives in that regard.

Our submissions were finalised on 14. November 2002 and take into account developments up to that date. This means that we were able to comment where appropriate on the preliminary draft Constitutional Treaty submitted by President Giscard d'Estaing on 28 October 2002 to the Convention (CONV 369/02), in addition to the final reports of the first six Working Groups of the Convention.

2. Legal Personality of the European Union and Justice and Home Affairs

2.1 General issues

From the perspective of citizens of the Member states but also from that of third states and international organisations conducting relations with the EU as such the explicit conferral of express legal personality on the EU must be welcomed. These submissions fully endorse the conclusions of the WG on Legal Personality that the Union's legal personality should be explicitly recognised and moreover that the legal personality of the EC should be subsumed into that of the Union.

In such circumstances it would indeed be considered anachronistic to retain the current "pillar" structure of the European Union especially since the manner in which the pillar structure has evolved in practice over the course of the past ten years has added considerably to the complexity and non-transparency of the relevant legal provisions. There are however four points in particular that these submissions will develop which are of relevance to the issue area Justice and Home Affairs.

2.2 EU agencies and other bodies

One point that has received inadequate attention to date in the context of the discussion within the Constitutional Convention is the manner in which the legal personality of several of the independent organs set up by the Council and or Member States must co-exist with the legal personality of the EU as such. For example, should Europol continue to conduct its own external relations (agreements with third states and with other international organisations once the EU as such acquires its own legal personality)? We feel that it should not as it exists outside the judicial and political framework of accountability developed in the Treaties as such and that at the very least the external relations of Europol and other similar independent organs and agencies should be subject to full control of the EU' s political organs. It may in addition be considered desirable to specifically state that the legal personality of the European Union covers that of all organs and agencies set up by the EU, or one of its institutions to assist in the carrying out of the tasks of the EU. At the very least it must be made clear that the consequence of having one Union is that the underlying fundamental principles of transparency, judicial control and parliamentary accountability applies right across the spectrum of the EU in all its various manifestations. In this context too, account must be taken of the special position which the European Council has enjoyed to date and its status as an institution of the EU should be specifically clarified (as indeed is proposed in the Praesidum's Preliminary Draft Constitutional Treaty). The European Council must therefore also be subject to effective judicial control and accountability rules.

2.3 Full abolition of the 'third pillar'

The second point we would like to emphasise that the proposed disappearance of the pillar structure must constitute more than a window-dressing exercise. Leaving aside the issue-area of CFSP that is outside the remit of the organisations co-operating in the context of the current submissions, we would propose that a new title on policing and criminal law should be included in the body of the new Constitutional Treaty.

At the same time with the disappearance of the different pillars the many illogical and unnecessarily complex distinctions between the first and third pillars should be dropped. For example, one mechanism for national courts to make preliminary references should apply across the entire spectrum of the first and third pillars. In other words a distinction should no longer be drawn between the jurisdiction of national courts to refer questions to the European Court in Luxembourg depending on whether the facts concern free movement, immigration or criminal law (see further part 6).

2.4 Distinction between crime and immigration

We do not recommend amalgamating the issue area of policing and criminal law with that of immigration and asylum but rather favour the maintenance of two separate titles within the EU as a whole, as already suggested in the Praesidum's Preliminary Draft Constitutional Treaty. The reason for this is that criminal law is relevant to many other issues besides immigration law and that it is desirable to avoid giving the impression that immigration and asylum matters concern essentially security issues by mixing the two issue areas up.

2.5 External Relations and JHA

Specific external relations rules (Article 38 TEU, which currently governs the rules for adopting policing and criminal law treaties), should be entirely absorbed into the rules for negotiating and concluding EC Treaties (the current Article 300 EC). Given the importance of these treaties, the EP should have assent over all treaties in the future criminal law and policing title. This follows the logic of applying the EC method to the adoption of EC legislation on these issues. Furthermore, the EC method for adopting treaties has greater democratic legitimacy and allows for more transparency than the secretive negotiations under Article 38 TEU (for example, the current talks with the US on extradition and mutual assistance). In order to ensure full scrutiny of external relations activities, there should be a Treaty provision on the external relations of all EU agencies and bodies, requiring information to be provided to the public, national parliaments, and the EP in all cases and the assent of EP to all treaties concluded by Europol and Eurojust (or any new body with comparable or additional powers). This should include the requirement of publication in the Official Journal for all external EU treaties (including those of agencies and other bodies) and measures implementing them.

3. Human Rights, Citizenship and Democracy as related to Justice and Home Affairs

3.1 Human rights issues

It is essential in the light of the development of the EU' s Justice and Home Affairs (JHA) powers that the EU Charter of Rights must be part of the EU' s 'constitution', or at the very least legally binding as part of the EU Treaties or general principles of EU law, with priority over EU secondary law. This will increase protection of many basic rights as regards immigration, asylum and criminal law. It would be preferable to include the Charter in the Treaties so that its Articles will likely create 'directly effective' rights which individuals can rely on in national courts.

It is also essential in view of the development of the EU' s JHA powers to provide that the merged Union can (or must) accede to the ECHR. Accession by the full Union is important because the internal security aspects of the Union's current third pillar (police and criminal law) raise obvious human rights issues. Accession to the ECHR would provide vital external supervision of Union activity.

As regards other international human rights treaties, the Opinion of the Court of Justice concerning EC power to accede to the ECHR (Opinion 2/94 of 1996) does not make clear whether or not the EC (or in future, the EU) could accede to such treaties. It is arguable that this issue was left open by that Opinion, and that in light of EC competence over immigration and refugee law in particular, the EC has competence to accede to the 1951 Geneva Convention on refugee status (following the adoption of the proposed directive on the definition of 'refugee'). EU ratification of the International Covenant for Civil and Political Rights (ICCPR) would ensure EU observance of a number of important rights relating immigration and criminal law, which do not appear expressly in the ECHR. For the avoidance of any doubt, the EU' s competence to accede to such treaties should be specifically set out in the future EU treaty. Alternatively, it should in any event be recognised that insofar as the EU enjoys competence, these international human rights treaties form an integral part of the EU legal order.

It is also necessary to fill a particular lacuna in the protection of human rights when states are co-operating in criminal matters. Whereas combating crime has gradually been organised on a trans-national (European) level, e.g. Europol, co-operation in criminal matters, the protection of the rights of individual and the accountability of law enforcement agencies has remained national. This leads to a situation in which rights cannot effectively be invoked when two or more countries have co-operated. When it comes to securing the rights of the ECHR, the Human Rights Court has decided that when co-operating in criminal matters states are individually responsible, not collectively. In an area of freedom, security and justice, it should be provided that if states violate human rights by acting together they are also responsible together.

3.2 Access to Information and all EU Institutions, Organs and Bodies.

Access to information is an essential aspect of democracy, for only with the fullest possible access to information in the hands of public authorities are citizens able to play a full role in casting their vote and interacting with public authorities, whether as voters or as part of civil society, or as persons affected by administrative decisions of the public authorities. At present there is a provision in the EC Treaty requiring

the adoption of rules on access to documents held by the Council, Commission and European Parliament. However, there is a large number of EU institutions and bodies that hold documents relevant to citizens. Most of these bodies have internal rules on access to documents, but these rules are often weak or inconsistent with each other. One body (the European Court of Justice) has even refused to adopt such rules, but its justification for this is not convincing. The European Council is not clearly governed by access to documents rules either. Therefore there should be a revised Treaty provision (in the citizenship section of the Treaty, although the right of access should be extended to all resident third-country nationals) on access to documents created or held by all EU institutions, bodies, or agencies created by the Treaty or the EU legislator, in accordance with the principle of openness in the current Treaty on European Union.

A single set of rules concerning access to information should apply to all these entities, to be further specified in more detail in the entities' rules of procedure.

These rules should go beyond 'access to documents' to include 'access to information'. As a result, they must require an active information policy-ensuring interaction with the public on the development and application of policy, taking account of the Internet. All instances subject to the access to information requirement should be obliged to publish and keep up to date a register of its documents on Internet. It may be considered desirable in the interests of democracy in general and the citizen in particular to require that a horizontal one-stop-digital portal be created providing digital access to information by all the institutions, organs and bodies created by the EU or carrying out tasks on its behalf and in addition providing access to information on activities by national parliaments and comments by NGO's on EU related matters.

3.3 An expanded role for the EU Ombudsman

The ultimate power of the Ombudsman is currently to present a special report to the Petitions Committee of the European Parliament – there have only been six such reports. This should be replaced by giving the Ombudsman the ultimate power of referring a case to the ECJ. Such a power would, we believe, lead to the resolution of most issues without the need to resort to using this new power much in practice. Existing cases have proven yet again that it is virtually impossible for a normal individual supported by a non-profit organisation to support the costs involved in bringing a direct claim to the European courts in Luxembourg. The costs of legal representation, of paying copies of the relevant Council documents (in access to documents cases) and the risk of being ordered to pay the Council's costs are simply insurmountable for such stakeholders. The Standing Committee of Experts was only able to pursue the two Kuijer cases for example because the Dutch Refugee Council promised to pay the costs in case of need.

The power of the European Ombudsman to bring cases on his own should supplement his power to intervene in other cases concerning issues within his special competence. The Commission also has both powers, acting as amicus before the ECJ and bringing its own cases.

3.4 Scope of Scrutiny by National Parliaments and the European Parliament

3.4.1 Open Council Meetings

It is clearly desirable that the Council should make its decisions in public. However, this has to be backed by full access to documents prior to the adoption of measures and a more meaningful role for national parliaments and civil society. It would be useful to underpin such a development with further openness requirements in the Treaties, which would compel the Council to move toward public debates as the norm. This is in fact what the WG on National Parliaments has suggested and we fully support putting in the new Treaty an obligation for the Council to deliberate in public when adopting measures of a legislative or rule-making nature.

3.4.2 Role of National Parliaments and the European Parliament in Exercising Scrutiny

Scrutiny in our view concerns both parliaments and civil society because both have a role to play in democratic decision-making. Parliaments should be the point of contact between national governments, the European Commission and the Council on the one hand and civil society on the other.

Citizens and civil society can directly relate to elected parliaments. It is our view that the parliamentary scrutiny timetable for all new measures should include a public deadline for the submission of the views of citizens and civil society. The same should hold for the European Parliament as well. Such timetables should assume that proposals and background documents are available to civil society in sufficient time for them to consult and reach a view.

Reports by national parliaments and the European Parliament should list evidence submitted and make it available. This would ensure that the views of citizens and civil society are taken into account - and if they are not, or not even addressed, then this will be clear too.

We favour placing an explicit provision in the EU Treaty that national parliaments must be enabled to exercise effective scrutiny at the national level. The mechanics of that scrutiny must of course remain a matter for national constitutional law. The scope of scrutiny should be wider than EU legislation as narrowly defined at present in the Council's rules of procedure, and could embrace scrutinising the new Council work programmes as well as the Commission's work programme and the actions of the European Council.

3.4.3 SCRUTINY OF IMPLEMENTING MEASURES

The role of national scrutiny committees should in addition be extended to require the scrutiny of the implementation of EU policies/measures. Whether this would be the responsibility of the same committees or new ones should be left to national constitutional arrangements.

The European Parliament should similarly scrutinise and report back on the implementation of measures. In this instance a separate committee with substantial overlapping membership (i.e. at least 50%) is probably required taking into consideration the substantial demands already made on the Committee for Citizens Freedoms and Rights – demands which are likely to increase if co-decision is introduced for existing Title IV EC and Title VI EU matters.

These powers for reviewing the implementation of measures should include the powers to initiate inquiries on specific issues drawn to the attention of the Committee. In a recent confirmatory application for example, the Council turned down access to a Schengen evaluation on the grounds of an exception contained in Article 4(2) (inspections, investigations and audits) of the Council Regulation on Access to Documents! This more than suggests that access to all evaluations of practice/implementation are to be refused under current rules.

3.4.4 SCRUTINY RESERVES

The status of a scrutiny reserve is also an important topic for consideration. First, there have been a number of occasions, in the field of justice and home affairs, where measures have not been sent over to national parliaments for scrutiny. For example, it appears that the UK Home Office has discretion to decide which proposals are sent for scrutiny. In our view all national parliaments should automatically be informed of all new measures and should be formally consulted on all unless it indicates otherwise. Further the submission of a measure for scrutiny should include a list of all relevant background documents (that is, all documents from Council working parties and all documents at each stage of the Commission's considerations). Copies of these documents must be made available on request to parliaments.

We believe that scrutiny reserves should have more force and leave less discretion to a national government to override them. At the very least: i) where a parliamentary report has indicated a strong reservation on a particular point or issues this should be formally communicated to the Council, the Commission and the European Parliament;
ii) in its consideration the European Parliament should be obliged to record general and specific reserves from all national parliaments in its reports formally.

3.5 Equality rights and citizenship

The Praesidum's Preliminary Draft Constitutional Treaty suggests (Article 33) that there will be equality rights for EU citizens but (implicitly) not for anyone else. This would be a retrograde step from the current rule in Article 12 of the EC Treaty, which sets out the right of non-discrimination on grounds of nationality but does not expressly restrict the application of this right to EU citizens. This rewording would also restrict the interpretation of the identical right in the EU Charter of Rights, and would mean that EU law would fall short of the protection accorded by the European Convention of Human Rights and the ICCPR, which protect all persons against discrimination on grounds of nationality (although in different ways). To ensure that EU law is consistent with human rights obligations, Article 12 of the EC Treaty should not be amended. Under the present EC Treaty the right to petition the European Parliament and to file a complaint with the European Ombudsman is not restricted to Union citizens, but is extended to all resident third-country nationals (Articles 194 and 195 EC). Article 5 of the Praesidums Draft guarantees these rights for Union citizens only. There is no reason to narrow the scope of access to the Ombudsman to EU citizens only, since all residents of the EU may encounter maladminstration by the EU institutions and should have the right to complain to the Ombudsman about it.

4. The Specific Context of Law Enforcement and Criminal Law

4.1 The Europeanisation of Law Enforcement in General

The problem with the gradual process of europeanisation of criminal law to date has been its step by step development, from compromise to compromise and detail to detail. It has developed in practice like a building without solid foundations. It is therefore necessary to address the issue under what conditions a European criminal justice system could be established as a preliminary matter of fundamental importance. It does not, for instance, make sense to establish a European Public Prosecutor if such an institution is not embedded in a European framework: a European Criminal Court, a European Penal Code, a European Code of Criminal Procedure and a European Police Force.

In this sense it cannot be denied that the European Union omits to logically structure the regulatory and legislative steps it takes. It has created a European Police Office but without first constructing the European legal context in which it can and should operate. The collection, storage and analysis of data related to criminal activity now takes place on a supranational level. However, the data comes from the national police services and will be returned to it. This constitutes an incomplete structure, which necessitates the creation of additional lines of communication between national police services and the new European Police. This seriously hampers the efficiency of combating crime. In a situation where the police do not have the capacity to respond to all crime, it is important to appreciate the fact that the establishment of more agencies with competences in criminal law, as well as an additional layer of legislation, may also have negative effects in the sense that it complicates co-operation and may make it even more time consuming.

Starting from the point of view that it is neither necessary nor appropriate to europeanise all criminal law, we are immediately faced with the question: What will be European and what can be left to the Member States? We could envisage a European Criminal Code dealing with a limited number of crimes. Criteria for the selection of such crimes could be:

1. the crime is by nature of a trans-national character;
2. the crime is related to European policy/ legislation (or otherwise common to all Member States) in other fields of law;
3. the prevention, investigation and adjudication of such a crime on a national level would encounter more difficulties than prosecution on an European level.

In this respect one could think (among others) of crimes related to the European Customs Union, to EC fraud, to the illegal smuggling of immigrants, as well as to the Euro. A fundamental choice must be made between direct enforcement by the EU of certain crimes and enforcement by the Member states of most other crimes which are local by nature.

Any categorisation of a crime as ‘European’ must be dependent upon a detailed and objective prior analysis of the relative effectiveness of European and national approaches to enforcement. There should be no move to European enforcement unless it is clear that national approaches are not currently dealing with the issue effectively, and moreover could not deal with the issue effectively (even after potential reform).

4.2 Legal Instruments and Decision-Making in Policing and Criminal law

There should be a move to EC instruments (currently directives and regulations) in all policing and criminal law areas as these instruments compared to third pillar instruments are relatively simple, well-established, clear, and create rights that individuals can enforce in national courts. This change would also simplify the legal system of the Union, and permit the adoption of measures dealing with matters in both the 'first pillar' and 'third pillar' in a single instrument. This is also the logical consequence of doing away with the pillars flowing from the decision to give the Union a single legal personality (see section 2, *infra.)*.

Under no circumstances should the planned constitutional treaty permit the adoption of EC instruments in these areas unless those instruments confer direct effect on individuals. In other words it should not be provided in the new Constitutional Treaty that the instrument of a directive for example can be used but that it cannot be considered as conferring directly effective rights on individuals (in that specific policy area). It is essential in the area of policing and criminal law that suspects, defendants or victims should be able to rely directly in court on any rules which were developed to protect their legal position.

It would be necessary and desirable to consider as part of this process consolidation of the existing large acquis of criminal law and policing measures, including pre-Maastricht, 'Maastricht era', and post-Amsterdam measures, along with the 'Schengen acquis' on policing and criminal law.

Likewise, 'third pillar' issues should immediately move fully to the 'Community method' of adopting measures. This means that only the Commission can make proposals, with a right for Member States to request a Commission proposal (as in the current 'Title IV' EC on immigration and asylum, following the expiry of the transitional system applying to that Title in May 2004). This will ensure coherent proposals, and will also make this area fully subject to the EU' s obligations under the current protocol on national parliaments (including provision of information to national parliaments, a waiting period before adoption of legislation, and wide prior consultations before proposals are made.

There should be three types of Council and EP voting used as regards criminal and police law, conforming to the three main types of voting rules that characterise the EC Treaty: the normal rule of qualified majority vote with co-decision; unanimity in Council with assent of the EP, for issues which are especially important for Member States or fundamental to the EU legal order; unanimity in Council with assent of the EP and ratification by national parliaments, for issues which are essential to national sovereignty or significantly alter the balance of power between Member States. Therefore QMV with co-decision will be the normal rule, with certain, issue-related, exceptions. The issues that would remain subject to the unanimous vote of the Council, but with assent of the EP, are those closely related to the exercise of coercive authority central to state sovereignty, while the assent of national parliaments should be necessary for decisions transferring coercive power to an EU institution or body.

The idea of a 'High Representative' for JHA matters has been discussed within Working Group X. However, this idea is singularly unsuited for JHA issues in our view, where (unlike the case of foreign policy) the need to present a single face continuously to the outside world is not pressing. Also, traditionally prosecution agencies, police authorities and courts are under an obligation to operate independently of a single unified control (although of course they are all accountable) in order to avoid a concentration of coercive power. The creation of a High Representative would breach this principle. Instead, the answer to the problem of the complexity of JHA rules and institutions is to simplify the rules for adopting measures and to consolidate legislation, as described above.

5 The Specific Context of Immigration and Asylum

5.1 The Europeanisation of the Law on Immigration and Asylum

The Community should have general competence to enact rules on immigration and asylum. This will end disputes over whether the EC has the power to adopt rules on a particular aspect of the subject and would ensure that the Community rules on this subject can established a 'balanced' policy with due regard paid to rules on human rights and international protection requirements. Furthermore, as pointed out in section 3.1 above, it is essential for the further development of EC immigration and asylum law that the EU Charter of Rights gains the status of Treaty law and that the EU accedes to the ECHR (so that each both the Charter and the ECHR have higher priority than EC secondary law and can confer direct effect). This will ensure, inter alia, better protection for the right to family reunion, asylum and non-refoulement.

We do not take a view on whether or not a 'European Border Guard' should be established, but if a European Border Guard is established there should be adequate judicial and parliamentary control as set out in sections 3 and 6. This will best be assured if the European Border Guard is brought fully within what is presently the 'first pillar' of EC law. This is because the border is a place where persons crossing it exercise rights to do so under Community law relating to persons and services and where only a tiny percentage are eligible for refusal. It is this model which corresponds most closely to the reality of EU borders. The administrative body established to carry out the control should therefore be commensurate with this function – civilian in nature and with only such powers as are strictly necessary for the function to be performed.

This perspective, border crossing as the exercise of rights, as nationals of a state re-entering the territory, as Community nationals entering the territory of another Member State as third country nationals entering the Union for service provision and receipt, for instance as tourists is the only option consistent with the objective of the Union regarding completion of the internal market. It is only against this framework of rights that a control may be carried out where there are reasonable grounds to suspect that a criminal activity is taking place or intended. Should a common European Border Guard be established this must be in the context of the internal market and the powers of such a guard limited to those appropriate to verifying the documents for entry into the common area. The idea of the possible involvement of Europol in the management of the external border is the wrong approach. The crossing of the EU' s external frontier is not a criminal activity but

an exercise of rights and should be subject to civil control consistent with that applied to the movement of goods.

In contrast, a European Border Guard should not be addressed as part of the Treaty provisions on policing and criminal law, whether or not those rules are still different from the current 'first pillar' rules. This is because the logic of a 'third pillar' approach to this issue is that the border is a place where crime takes place and persons seeking to cross it are potentially seeking to carry out criminal acts. This perspective associates border crossing with combating illegal immigration and trafficking in human beings, with the underlying thesis that the act of seeking to cross an EU external border places an individual in the same category as a suspect in a criminal investigation. While the person may not in fact be guilty of a criminal act, he or she is ipso facto included in a highly suspect group against which policing type measures to identify criminals are justified. Because of the perspective that border crossing is by definition a potential crime rather than the exercise of a right, persons at the border are by definition liable to questioning and detention. The burden of proof on this reasoning passes from the administrative authority to show cause to believe that a criminal act is being perpetrated to the individual to show that he or she is not carrying out a criminal act.

Nor should these matters be addressed as part of the 'second pillar', again regardless of whether or not distinct rules on EU foreign policy are maintained. According to this view, the border is a place where the external security of the Union must be secured. This is a military vision of the border as the place of defence of the realm against invasion and international threat to sovereignty. This vision of the border as the place of international conflict, danger to sovereignty and beyond the scope of national law is reflected in references to combating terrorism which occur at a time when the EU is associated with the US war on terrorism and its Member States are participating in international military action resulting from this war on terrorism. According to this perspective on border crossing, it is always a potentially hostile act in respect of which the administrative authority responsible for the control of the border is entitled to use all means of war permitted under the Geneva Conventions. There is no longer a relationship of rights between the individual seeking to cross the border and the administrative authority carrying out the control as is pre-supposed in the first two perspectives. Here the individual is a potential enemy against whom the authority is entitled to act in order to defend those to whom the authority owes a duty – the persons inside the border.

5.2 Legal Instruments and Decision-Making in Immigration and Asylum

There should be a move to co-decision and qualified majority voting (QMV) for all matters currently subject to EC competence and for the general EC competence over immigration and asylum advocated elsewhere in these contributions (see part 5.1), with the exception of the creation of a European border guard. This development is subject to a strengthening of human rights protections in Title IV and the strengthening of legal protection in the Treaty for certain essential immigration and asylum rights (see further part 5.1).

This move is necessary to ensure the effectiveness of decision-making, democratic accountability of decisions, and possible European Parliament (EP) vetoes of bad measures (for example, the EP has voted overwhelmingly against a number of illegal immigration measures in the last two years; all these votes were simply ignored by the Council). We suggest an exception from these rules for the creation of a European border guard, if the revised Treaty makes provision for such a body, for the shift of coercive powers to an EU-level body would alter a central aspect of state sovereignty. Therefore such a move should be subject to unanimity in the Council and ratification by national parliaments, along with the assent of the European Parliament.

6 Role of the Court of Justice and the System of Remedies

6.1 Full Jurisdiction of the Court in Justice and Home Affairs

The jurisdiction of the Court relating to justice and home affairs should be aligned with the regular jurisdiction of the Court. As regards references for a preliminary ruling, all national courts should be able to make references relating to immigration, asylum and international private law and the complex opt-in procedure under Article 35 TEU (relating to policing and criminal law) should be replaced by the general rule of Article 234 EC. This would entail permitting all national courts (instead of final courts only as under the present Article 68 EC) to send questions relating to immigration and asylum law, and permitting the national courts of all Member States to send questions to the Court of Justice on policing and criminal law. At present, under Article 35 TEU, the UK, Ireland and Denmark have an opt-out and Spain permits only final courts to refer. The unsatisfactory consequence is that courts of first instance in Belgium and Germany have referred a question on the interpretation ne-bis-in-idem clause in the Schengen Implementing Agreement to the Court

of Justice, but no British and most Spanish courts are unable to make a reference on third pillar policing or criminal law.

We further propose to allow individuals and the European Parliament to bring direct challenges and allow the Commission to sue Member States as regards faulty implementation of the current third pillar 'decisions', 'framework decisions" and 'common positions' (if these instruments are retained) or their replacements (if they are not). Finally, the public order restrictions on the Courts' jurisdiction in these areas (see Article 68 EC and Article 35 TEU) should be abolished.

Permitting all national courts to send *immigration and asylum* questions to the Court of Justice would enable the conclusion of such cases earlier and prevent divergences in implementation of Community law on these subjects, which is desirable from the perspective of human rights and the fair and efficient functioning of asylum and migration law. It particularly would enable a more effective indirect challenge to Community legislation on this area (given that, according to the Court of Justice, national courts cannot rule that EC acts are invalid without first obtaining the opinion of the Court of Justice). In fact, the current limits on such indirect challenges to immigration and asylum law is questionable from the perspective of Article 13 ECHR and the EC law general principle of effective remedies and access to a court.

Permitting all national courts to send references on *criminal and policing* matters would again prevent divergences in implementation of the legislation and enhance the protection of human rights, in particular to ensure that there is a possibility to challenge EU rules indirectly (the absence of such a possibility is highly questionable from the perspective of Articles 6 and 13 ECHR and the EC law general principle of effective remedies and access to a court). The UK's opt-out from the possibility of sending references does not prevent Court of Justice rulings from having an effect on the UK.

The ability for individuals to bring direct challenges would further ensure the application of Articles 6 and 13 ECHR and the EC law general principle of effective remedies and access to a court, particularly if individual access to the Court is widened more generally. As for the European Parliament, it is anomalous that it cannot defend its legislative prerogatives in this area by judicial action. Giving the Commission the ability to sue Member States regarding implementation of all instruments (rather than just Conventions) would ensure greater uniformity of implementation of measures, and in particular would be useful as regards existing or planned EU measures concerning the rights of suspects, defendants or victims of crime. Finally, the 'public order' restrictions on the Court's jurisdiction prevent effective and uniform scrutiny of national decisions when human rights are often at stake.

6.2 Right of Intervention to provide Expertise in JHA

The UNHCR, the Council of Europe's High Commissioner on Human Rights and the UN High Commissioner on Human Rights should have the right to intervene in relevant proceedings before the Court of Justice acting as amicus curiae on themes relevant to their special expertise in the issues before the Court. The UNHCR has performed that role before the European Court of Human Rights. Similarly, the European Ombudsman should be entitled to act as amicus curiae before the ECJ in cases on data protection and access to information. Both proposals can be realised by amending the Court's Statute at the forthcoming IGC.

6.3 Broadening the Locus Standi for Individuals

Extension of access to the Court for individuals bringing challenges directly against the EU institutions will ensure that there is a greater possibility to test the validity of EC acts on human rights (and other) grounds. This is particularly important in regard to JHA matters, for it is in these areas that conflict with human rights principles is most likely.
The importance of extending access is explained in working document 20 of the human rights working group of the Convention (submission by Advocate-General Jacobs).

6.4 Judicial Control of Acts of EU Agencies and Organs

It is necessary to consider specific provisions on judicial control of EU agencies in this field: Europol, Eurojust, and the EU border control co-ordinators (SCIFA+), along with any future bodies to be set up. Allowing direct challenges to actions of these bodies is vital to ensure effective judicial protection for human rights and to ensure that such bodies are acting legally. It may be necessary to provide for remedies against the decisions of such bodies in addition to the remedies for annulment, damages and failure to act. There is a precedent for this already in Article 229 EC (jurisdiction for the Court of Justice to vary the amount of fines).

This point has also been fully examined in working document 20 of the human rights working group of the Convention (submission by Advocate-General Jacobs).

7 Concluding Remark

Effective judicial, parliamentary and public scrutiny and human rights protection is not an optional extra within the
EU' s area of 'freedom, security and justice'. It is essential to public confidence in and the continued legitimacy of these developments. Working group X must therefore take full account of these issues alongside the issues of the operational effectiveness of JHA matters, in order to assure the public that neither human rights protection nor the effective public scrutiny and judicial control of these issues will be jeopardized by addressing them at EU level.