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monitoring the state and civil liberties in the European Union

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Towards a Constitution for Europe:

Justice and Home Affairs

Joint Comments from Non-Governmental Organisations for the IGC

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As non-governmental organisations concerned with human rights and with issues relating to justice and home affairs we recognise the importance of the adoption of a Constitution for Europe in ensuring respect for human rights in and by the European Union.

Through this submission we seek to highlight areas of common concern that remain in the text of the draft Constitution which we hope will be taken into consideration during the Intergovernmental Conference (IGC). We will comment firstly on fundamental rights in general in the draft constitution and will then raise our concerns in relation to policies on immigration, asylum, judicial cooperation in criminal matters and policing as currently presented in Part III, Chapter IV of the draft constitution. We urge the IGC to give substantive consideration to these shortcomings given that Part III is essentially designed to ‘translate’ the principles and objectives of Parts I and II into concrete policies and programmes of implementation. As the Convention was given limited time and competence to consider these policy areas we press the IGC to revisit specific areas of concern in Part III, Chapter IV on an area of freedom, security and justice.

Fundamental Provisions of the Constitution

Fundamental rights

We welcome Part II of the constitution which contains the Charter of Fundamental Rights of the Union. The EU's constitution must include this Charter if it is to be legitimate in the eyes of civil society and those whom it will govern. The legal effect of the Charter cannot be compromised in any way without threatening the legitimacy of the project. We are concerned, therefore, that the requirement to implement principles before they can be justiciable combined with the optional nature of implementation set down in Article II-52(5) constitutes a serious impediment to the full implementation of the Charter and is, as such, regrettable. In order for the Charter to be implemented in full, the policies contained in Part III must be of a type to guarantee the rights contained in the Charter.

There is a need to ensure that the rights contained in the Charter are observed in practice as well as on paper. Implementation, independent monitoring and peer review of the respect for fundamental rights in the Member States and accession countries are crucial if human rights are genuinely to be an integral part of the EU. While Article I-58 takes up the possibility to suspend Union membership rights for Member States in breach of fundamental rights which is currently present in Article 7 TEU, we note, however, that this mechanism has never even been initiated to date despite ongoing breaches of fundamental rights in many Member States.

The commitment to EU accession to the 1950 European Convention on Human Rights (ECHR) is also welcome. We regret that this essential step to ensure EU accountability under international law has not however been extended to accession to the European Social Charter and other international human rights instruments and we urge the IGC to consider this extension.

Accession to the ECHR will also have a positive impact on human rights considerations in EU relations with third countries and other organisations and common foreign and security policy. The inherent responsibility in Article 1 ECHR to respect fundamental rights should ensure that the EU takes seriously its responsibility for human rights abuses that occur in third countries as a result of agreements concluded with the EU.

Judicial supervision

The full jurisdiction of the European Court of Justice (ECJ) to supervise respect for fundamental rights is of central importance to the viability of the constitution. In particular, the relegation of immigrants, asylum seekers and refugees to an inferior level of judicial protection in the Amsterdam Treaty was unacceptable. The proposed uniform competence of the European Court of Justice in this field is highly commended.

Democratic accountability

The constitution proposes the full extension of the powers of the European Parliament in the fields of immigration and asylum, and judicial cooperation in criminal matters and policing. This will greatly enhance the legitimacy of the constitutional project. The European Parliament must have the powers necessary to fulfil its function as the elected voice of civil society in Europe. In the same vein, we welcome the enhanced accountability of EU decision makers to national parliaments.

We welcome the increased levels of accountability and transparency which will apply to the organs and institutions of the Union under the draft constitution. We also recognise and welcome the steps that have been taken thus far to enshrine public access to documents under the Treaty of Amsterdam but are concerned that the mechanisms designed to achieve wider access have not been developed sufficiently. We urge the IGC to consider the transition from a regulatory framework on public access toward a fuller ‘freedom of information’ framework.

Issues requiring clarification in Part III

Standing committee

We believe that clarification is required as to the nature of the standing committee which is to be set up under Article III- 162 to ensure that operational cooperation on internal security is promoted and strengthened. We are concerned that the term ‘operational’ may be erroneously applied to exclude the committee from normal mechanisms for democratic and judicial control and rules on access to documents. The European Parliament should be fully informed of and engaged in the proceedings of the committee to ensure application of the principles of accountability and transparency. The citizen of the Union is also entitled to be informed through the publication of all notes of deliberation and reports of the committee.

Asylum

We note with satisfaction that the preamble of the draft constitution recognises that the inhabitants of Europe “arriving in successive waves from earliest times...” have developed the common values which are given expression in the document. In this way, the centrality and positive contribution of immigration and asylum - past, present and future - to the development of Europe is acknowledged at the very start of the constitutional project.

We do, however, have some concerns about particular provisions in Chapter IV of the constitution. The Chapter moves from the position under the Amsterdam Treaty of seeking to establish minimum standards in the field of asylum to a common asylum policy. While in principle we are not opposed to this move we are concerned about the risk of a drop in standards in some Member States as regards the protection of asylum seekers and refugees which this could entail. Further, the failure to incorporate the principles contained in the Tampere Milestones exacerbates this concern. Thus we consider it essential that the constitution be considered to include a standstill provision whereby more favourable provisions in national law regarding asylum seekers and refugees cannot be abolished on the grounds of the common policy.

We also consider it essential to clarify the meaning of Article III-167(2)(g). This provision provides for “partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection”. While cooperation with third countries in this field is desirable, in particular regarding the development of resettlement schemes and appropriate burden sharing measures, we are concerned that this provision is open to misuse if Member States seek to “sub-contract” their protection duties to third countries. The discussion which has taken place in the first half of 2003 culminating in the Thessaloniki Summit of June 2003 regarding the processing of asylum applications outside the territory of the EU is of grave concern. We are firmly opposed to any such attempt to move outside the territory of the Member States responsibility for asylum seekers who have applied for protection within the Union. In our opinion such measures are inconsistent with the meaning of the 1951 Geneva Convention relating to the status of refugees and its 1967 Protocol. In addition, it conflicts with the Union’s commitment to coherence in external action including human rights protection as an objective for the relations of the EU with the rest of the world.

The EU Member States are both legally and morally committed to the international system of protection of persons fleeing persecution and torture. Member States are obliged to accept their responsibility within that international system to provide protection on their territory and not to seek to off-load the costs, both financial and political, onto weaker or poorer states either neighbouring on the EU or elsewhere in the world. Such efforts undermine the international system of human rights protection and the Union’s commitments to itself, to the Member States and to the international community.

Article III-167(2)(g) contains the possibility that the EU could seek to coerce third countries into admitting those seeking protection in the EU. This would not be acceptable. It must be dependent on and subject to Article II-18, the right to asylum. The meaning and interpretation of the right to asylum in the 1951 UN Convention relating to the status of refugees and its 1967 protocol are the responsibility of the United Nations High Commissioner for Refugees whose interpretation of the protection duties of the Member States must be observed within all aspects of the law of the European Union. In no circumstances can Article III-167(2)(g) be construed as permitting the negotiation or settlement of agreements or understandings with third countries which would have the effect of moving or requiring the physical displacement of protection seekers to third countries before a full examination of their protection claims on their merits including an independent review of any refusal of the claim. Any person whose protection claim is accepted shall be permitted to reside within the Union.

Immigration

While we welcome the move towards a common immigration policy in Article III-168, we consider that the reference to fair treatment of third country nationals residing legally in Member States needs to be clarified and amplified in accordance with the Council’s Milestones set out at its meeting in Tampere, October 1999. The standard referred to must be treatment for third country nationals equal to the treatment of nationals of the Member States. Any variation from equal treatment must be justified on precise grounds in the light of Article II-21. Further, the last minute addition of Article III-168(5) regarding the determination of volumes of third country nationals entering Member States to seek work requires clarification as well. This provision should only apply to third country nationals who have no other claim of entry, economic activity and residence in the Member States.

Judicial cooperation in criminal matters

We welcome the inclusion in Article III-171.2 of a legal base to establish minimum rules concerning the rights of individuals in criminal procedure and the rights of victims of crime as a step towards acknowledging the central importance of rights in a genuine system of mutual recognition based on mutual trust.

Evaluation of compliance is an essential component of mutual trust. We are concerned at the absence of an independent monitoring mechanism to ensure that minimum rules designed to protect the rights of the individual involved in criminal proceedings or confronted with law enforcement activity are implemented and respected in the Member States. A clarification that the evaluation mechanism outlined in Article III-161 will consist of some type of peer review between Member States as opposed to self-evaluation only by Member States would go some way to allaying our concerns. We regret, however, that the opportunity has not been taken to include independent experts in such evaluation and to insist on transparency in any monitoring exercise. We also regret the missed opportunity to consider suspension of instruments based on mutual recognition where implementation of minimum standards is found lacking until the Member State demonstrates that the right(s) is (are) consistently observed.

We seek clarification that the creation of a European Public Prosecutor within Eurojust, as suggested by Article III-175, would necessarily also imply the establishment of a coherent set of European criminal procedural rules with adequate safeguards for the rights of the defence, including, in particular, adequate legal representation. In order to ensure legal certainty and avoid the possibility of forum shopping between national courts, the actions of such a European Public Prosecutor must be subject to judicial review by a European Court, possibly one of a specialised nature set up according to Article III-264.

Police cooperation

In relation to police cooperation, we seek clarification of the nature of the competent authorities referred to in Article III-176(1). We believe the most appropriate form of such clarification would be a European law annexed to the constitution containing an exhaustive list of competent authorities in each Member State, capable of amendment only through parliamentary debate. This would ensure greater transparency and accountability in the field of international police cooperation.

We have concerns regarding data protection in relation to the activities of Europol as set out in Article III-177. In particular, we ask for clarification as to the role of the intelligence services of Member States and the potential of third countries and organisations with whom Europol cooperates to access information held by Europol. Clarification through an annexe in the form of a European law containing an exhaustive list of those bodies considered by Member States to be ‘police authorities and other law enforcement services’ which may cooperate with Europol would also be welcome. Crucial to the standard of protection of data held by Europol is a guarantee that private companies will not be used in the collection and/or exchange of data.

Reflecting the importance of the right to the protection of personal data in Article II-8 of the Constitution, we urge the Council to affirm that increases in Europol’s remit and capability will be met with corresponding increases in the scope and capacity of an independent supervisory mechanism to monitor data protection .

Judicial accountability

We welcome the extension of the ECJ's jurisdiction to cover justice and home affairs. We would, however, ask for clarification that the limitation of the competence of the ECJ contained in Article III-283 (which excludes jurisdiction to review the validity or proportionality of law-enforcement operations or the exercise of Member States' responsibilities in the maintenance of law and order and the safeguarding of internal security, where such action is a matter of national law) will not apply to responsibilities which arise from European laws or framework laws. This limitation could certainly not apply to laws and framework laws affecting the rights of individuals in criminal procedure without undermining their effective implementation.

Conclusions

As representatives of non-governmental organisations across Europe engaged in issues of human rights and justice and home affairs, the legitimacy of the project of a constitution for Europe depends on the actual and perceived clarity and enforceability of the rights of individuals both within and coming to the Union. These, our concerns, are central to the achievement of a Europe that genuinely incorporates international human rights obligations at the heart of its constitution and that is, indeed, an area of freedom, security and justice.

Signed

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* signatory to this statement only insofar as it applies to issues relating to asylum and immigration.