

**JOINT SUGGESTED AMENDMENTS TO DRAFT CONSTITUTIONAL ARTICLES ON JUSTICE  
AND HOME AFFAIRS**

*BY*

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

**AND**

**STATEWATCH,**

*TO*

***THE CONVENTION ON THE FUTURE OF EUROPE***

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## 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](http://www.statewatch.org) and [www.statewatch.org/semDOC](http://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)

We would first take this opportunity to welcome the proposed draft articles of the Constitution relating to the "area of freedom, security and justice", proposed by the Praesidium (Document CONV 614/03) which will incorporate essential principles of human rights into the Convention. In our view the incorporation of the Charter of Fundamental Rights is essential to the legitimacy of the Convention. It is an extremely important counter balance to some of the other measures in the proposed Treaty articles for Chapter X, which, without the assurance of binding and judiciable fundamental rights protection at EU level would be unacceptable. Secondly we welcome the proposal to extend the jurisdiction of the European Court of Justice in the field of Justice and Home Affairs so that there is a single system of judicial review in the Union, not one which varies depending on the subject matter. Rule of law is an essential element in this field and one which has been too easily sacrificed in the past. This rectification is warmly welcomed.

There are however a number of points in the draft chapter, which raise serious concerns. We set out here in the following pages the main lines of our common concerns by immediately suggesting (underlined) amendments to the text. These concerns are inspired by the wish to ensure that executive power when exercised by the Council and its committees, agencies or independent bodies is subject to independent scrutiny and overall accountability to parliaments, the judicial system and ultimately to the citizen. Many of our proposed amendments attempt to ensure that such concerns are expressed in concrete form in the Treaty amendments itself and are self-explanatory for the most part. Where additional comment was required we have supplied it in the form of a brief explanatory note. For further detail on many of our common concerns we would refer the reader back to the joint submissions we already submitted to Working Group X and the Convention as a whole (together with our sister organisations, ILPA and ECRE) dated 4 November 2002.

While the formal date for submission of amendments by members to the Convention has expired, we note that members continue to submit such amendments in the run-up to the plenary debate on the subject of these articles (4-5 april next). As non-members of the Convention but representing a concerned and constructive strand of civil society we would appeal to the members of the Convention to consider the context and concerns expressed in our suggested amendments when debating the specific texts and to the members of the Praesidium when drawing up their revised text on this crucial chapter in the weeks and months ahead.

## 2. Suggested amendments

**GENERAL NOTE:** ALL SUGGESTED AMENDMENTS TO SPECIFIC TREATY ARTICLES ARE UNDERLINED

### Part One

#### Article 31: [Implementation of the area of freedom, security and justice]

1. The Union shall ensure an area of freedom, security and justice:

- by adopting laws and framework laws intended in particular to approximate national laws in the areas listed in Part Two of the Constitution;
- by promoting mutual confidence between the competent authorities of the Member States, in particular on the basis of mutual recognition of judicial and extrajudicial decisions.
- by democratically controlled operational cooperation between all competent authorities of the Member States for internal security.

2. Within the area of freedom, security and justice, national parliaments shall have the right to participate in the evaluation mechanisms foreseen in Article [4, Part Two] of the Constitution, and shall be involved in the political monitoring of Europol's activities in accordance with Article [Article 22, Part Two] of the Constitution.

3. In the field of police and judicial cooperation in criminal matters, Member States shall have a right of initiative under the arrangements set out in Article [8, Part Two] of the Constitution.

## Part Two

### Article 1: [Definition of the area]

The Union shall constitute an area of freedom, security and justice for everyone within its jurisdiction with respect for fundamental rights and taking into account the common European legal traditions and systems. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control based on solidarity between Member States and fairness towards third-country nationals.

The Union shall ensure a high level of safety by measures to prevent and combat particularly serious crime with cross-border dimensions or of a special need to prosecute jointly and promote coordination and cooperation between criminal police and judicial authorities and other competent authorities, as well as by the mutual recognition of judgements in criminal matters and the approximation of criminal laws.

The Union shall facilitate access to justice in particular by the free movement of documents and judgements in civil matters based on the principle of mutual recognition.

*[Explanatory Note: It is important that the principles of freedom, security and justice apply for everyone, irrespective of nationality, legal status and the place they are, as long as it is clear that the ECJ has jurisdiction. The terminology is inspired by art. 1 ECHR.*

*The replacement of "different" by "common" is designed to avoid the situation where the differences between Member States would determine the level of freedom, security and justice.*

*The limited definition of crime has been taken from art. 17, taking into account our suggested amendments in that regard ]*

### Article 2: [Role of the European Council]

The European Council shall define the multi-annual guidelines for legislative and operational action within the area of freedom, security and justice and shall forward it to the European Parliament and the national parliaments for debate.

### Article 3: [Role of national parliaments]

1. National parliaments shall have the right to participate in the evaluation mechanisms contained in Article 4 of the Constitution and shall be involved in the political monitoring of Europol's activities in accordance with Article 22 of the Constitution.

2. All proposals concerning operational co-operation in accordance with Article 31 of Part I of this Constitution are immediately communicated to the national parliaments.

3. (Etc)...(previous second paragraph)

### Article 4: [Evaluation mechanisms]

Without prejudice to Articles [226 to 228] of this Treaty, the Council may adopt arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities. The European Parliament, as well as national parliaments, shall have the right to participate in this evaluation and shall be informed of the content and the result of the evaluation.

**Article 5: [Operational co-operation]**

In order to ensure that operational co-operation on internal security is promoted and strengthened within the Union, a standing committee may be set up within the Council. Without prejudice to Article [207 TEC], it shall be responsible for co-ordinating the action of Member States' competent authorities, concerned with the prevention, detection and investigation of serious criminal offences. The Commission, Europol, Eurojust and, if established the European Public Prosecutor's Office, shall be represented in this Committee. The European Parliament shall be kept informed of the work of the committee and has the right to require the committee to give full information on its activities. The Standing Committee has no legislative power nor power to take binding decisions.

**Article 7: [Administrative co-operation]**

The Council shall with the European Parliament adopt by a qualified majority laws and framework laws to ensure co-operation between the relevant departments of the administrations of the Members States...(etc)

**Article 9: [Judicial control]**

DELETE ARTICLE

OR

"In exercising its competences...the safeguarding of internal security, where such action is solely a matter of national law".

**Article 10: [Checks on persons at borders]**

1. The Union shall adopt laws and framework laws with a view to:

- (etc)
- (etc)
- the gradual introduction of a common integrated management system for external borders based on European law.

2. For this purpose, the European Parliament and the Council, in accordance with the legislative procedure, shall adopt laws or framework laws concerning:

- (etc)
- (etc)
- the conditions under which nationals of third countries shall have the freedom to travel and to stay within the Union for a short period;
- any measure necessary for the gradual establishment of a common integrated management system for external borders with due regard to the necessary safeguards for democratic control and the rights of individuals.

**Article 12: [Immigration]**

The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient and fair management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

To this end, the European Parliament and the Council, in accordance with the legislative procedure, shall adopt laws and framework laws in the following areas:

- conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion;
- definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing the freedom of movement and of residence in other Member States and equal treatment for long term residents;
- illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;
- combating trafficking in persons, in particular women and children.

3. The Union may, in conformity with Article 11, paragraph 1, conclude readmission agreements with third countries for the readmission of third-country nationals residing without authorisation to their countries of origin or provenance.

*[EXPLANATORY NOTE: The main reason for adding 'and fair' is to make sure that the rights of individuals must be taken into account. The reason for adding the equal treatment clause is to make sure that this aim, formulated in Tampere, will not fade away. The reason for referral to Article 11 (1) is to guarantee that the prohibitions of refoulement must be taken into account whenever readmission agreements are concluded. This is very important given the fact that readmission agreements are and tend to be a major instrument in asylum policies]*

**Article 13: [Principle of solidarity]**

The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility (including its financial implications) between the Member States. The European Parliament and the Council, in accordance with the legislative procedure, may adopt laws and framework laws to give effect to this principle.

**Article 14: [Judicial co-operation in civil matters]**

1. (etc)

2. To this end,...

- (etc)
- (etc)
- (etc)
- (etc.)
- (etc.)
- a high level of access to justice , including legal aid
- (etc)
- (etc.)

**Article 16: [Criminal procedure]**

In order to strengthen mutual trust between the competent authorities of Member States and to guarantee the effectiveness of common tools for police and judicial co-operation, the European Parliament and the Council, in accordance with the legislative procedure, may adopt laws and framework laws containing minimum rules to the extent that such rules relate to procedures with cross-border implications and are needed to ensure the full application of mutual recognition of judicial decisions or to guarantee the effectiveness of common tools for police and judicial co-operation. These laws and framework laws may relate to:

- (etc)

*[EXPLANATORY NOTE: The added text is from the recommendation of the Working Group cited in the Comments]*

**Article 17 : [Substantive criminal law]**

The European Parliament and the Council, in accordance with the legislative procedure, may adopt framework laws containing minimum rules concerning the definition of incriminations and sanctions:

in the areas of particularly serious crime with cross-border dimensions (deleted) or of a special need to prosecute them jointly. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. The Council, on the basis of developments in crime and acting unanimously after obtaining the assent of the European Parliament, may identify other areas of crime that meet the criteria specified in this indent;  
in areas of crime affecting a common interest which is the subject of a Union policy, if criminal sanctions prove essential to ensure the effective implementation of that policy.

**Article 20: [European Public Prosecutors Office]**

1. With a view to combating (deleted) illegal activities affecting the interests of the Union, (etc). ...It shall exercise the functions of prosecutor through the national public prosecutor's office in the competent courts of the Member States in relation to such offences.

*[EXPLANATORY NOTE: The phrase "serious crimes having a cross-border dimension" belongs to the mandate of Eurojust. The role for the national prosecutor's office has been added for practical reasons. It is important that the prosecutor knows the legal system of the member state concerned]*

**Article 21: [Co-operation with regard to internal security]**

1. The Union shall establish co-operation involving all the Member States' authorities with responsibility for the prevention, detection and investigation of criminal offences, including police, customs and other specialised services . [Deleted]

2. To this end, the European Parliament and the Council, in accordance with the legislative procedure, shall adopt laws and framework laws concerning:



- the collection, storage, processing, analysis and exchange of relevant information;
- the training and exchange of staff, equipment and research;
- any other measure not referred to in the following paragraph, that encourages co-operation between the authorities referred to in this Article;
- a joint supervisory authority that supervises the actual implementation of the data protection rules concerning exchange of data on individuals;
- operational co-operation between the authorities referred to in this article.

### 3. [DELETE]

#### **Article 22: [Europol]**

1. (Etc.)

2. The European Parliament and the Council, in accordance with the legislative procedure, shall determine Europol's structure, operation, field of action and tasks. These tasks may include:

- the collection, storage, processing, analysis and exchange of information forwarded by the authorities of the Member States or third countries or bodies;
- the co-ordination (deleted) of investigative and operational actions carried out jointly with the Member States' services or in the context of joint investigative teams

The law referred to in the previous paragraph also lays down the procedures for scrutiny of Europol's activities by the European Parliament, together with the national parliaments.

3. Any operational action co-ordinated by Europol must be carried out in liaison with and in agreement with the services of the Member State(s) whose territory is concerned. The application of coercive measures is the exclusive responsibility of the competent national authorities.

#### **Article 23: [Operations on the territory of another Member State]**

The European Parliament and the Council acting unanimously, in accordance with the legislative procedure, shall adopt laws and framework laws laying down the conditions and limitations under which the competent authorities of the Member States referred to in Articles 13 and 15 may operate in the territory of another Member State in liaison and in agreement with the authorities of that State. (Last sentence deleted)