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COVER NOTE

from The Secretariat

to The Convention

Subject : Contribution from Mr Andrew Duff, member of the Convention

The Secretary-General of the Convention has received the attached contribution from Mr Andrew Duff, member of the Convention.

**Contribution by Mr Andrew Duff,
representative of the European Parliament
at the Convention on the future of the European Union**

INSTRUMENTS IN A FEDERAL UNION

CONV 22/02 proposes certain draft articles of a comprehensive constitution for a Federal Union of Europe's states and peoples.¹ They comprise a *Preamble*, Article 1 *Objectives*, Article 4 *Governance*, and Article 5 *Competencies*.

I submit here three further articles concerning the main instruments of a Federal Union.

As is suggested in the Praesidium's contribution CONV 50/02, the current, three-pillar Union suffers from a plethora of instruments subject to a very large number of decision-making procedures, leading to great opacity and a certain ineffectiveness.

A constitution should offer the legislature a range of precise instruments from which to choose. A reduction from the present number of available options would help to combat political obfuscation and legal confusion. The Union's methods need to be both more clear and more forceful. We need a single hierarchy of acts appropriate for all policy sectors. The effects of an act should follow systematically from the form of the act. The consequences flowing from the political choice made between the different types of secondary legislation and implementing measures should be made explicit.

ARTICLE 3 — CITIZENSHIP

- 1. Nationals of the member states are also citizens of the European Union.**
- 2. The Charter of Fundamental Rights of the European Union is established as a Protocol to this Constitution. It is binding upon the institutions and agencies of the Union in its entirety. It is binding upon member states and political authorities within them when and in so far as they implement Union law and policy.**
- 3. A citizen directly affected by an act of the Union may institute proceedings before the Court of Justice.**
- 4. An Ombudsman shall be appointed by the European Parliament.**

¹ The existing Treaties will have to be rationalised, simplified and reduced in order to conform with the provisions of this 'chapeau' constitution of Federal Union.

Justification

European Union citizenship is, along with the member states, one of the two bases of post-national federal society. As an instrument of the Union, the assertion of a common citizenship ensures a direct political and judicial relationship between the individual natural or legal personality on the one hand and the supranational authorities on the other. The concept is consonant with and reinforces the application of the principle of subsidiarity (Article 1 TEU).

1. Drawn from Article 17 TEC.

2. The solemn proclamation of the Charter in December 2000 is an insufficient guarantee of the fundamental rights of the individual. Ironically, the current non-binding nature of the Charter has led to that very legal uncertainty (evident in several cases heard both in the Court of Justice and the European Court of Human Rights) that those who opposed its entrenchment in the draft Treaty of Nice professed to wish to avoid.

Naturally, a Federal Union needs a Bill of Rights in order to guarantee that the interests of the citizen will not be abused by the central institutions. To this end, the Charter can probably be enshrined as part of the basic law of the Union more or less as it stands, with certain modifications only to its Preamble and to the horizontal Articles 51 - 54.

The Charter also requires more legal force because of the emphasis placed in Article 49 TEU on the salience of fundamental rights in the process of enlarging membership of the Union. Amendment will therefore be required to Articles 6 & 7 TEU.

The differentiated scope of the Charter between the EU institutions and member state governments, as provided for here, respects the delimitation of competencies under this Constitution.

3. As a consequence of the Charter's incorporation the citizen needs improved, direct access to the European Court of Justice. The present Article 230 TEC is already too restrictive in that it leaves the citizen a distinctly under-privileged litigant. The entrenchment of a fundamental rights regime at the heart of the integration process can be assured only if the Court of Justice develops its role in the field of constitutional complaint in respect of both the individual and, by implication, all those enjoying legal personality.¹

4. Since his establishment in 1995 the Ombudsman has proved to be an important instrument in the good governance of the Union (Article 195 TEC).

ARTICLE 6 —ACTS

1. The European Union shall have legal personality in international law.

2. The Union shall act by way of:

Organic Law, for certain measures as stipulated in this Constitution;

¹ I concur in this respect with Mr Farnleitner (CONV 45/02), and note the recent ruling of the Court of First Instance in the Jégo-Quéré Case.

Regulation, which shall be binding in entirety and directly applicable throughout the Union;

Directive, which shall be binding as to the results to be achieved but shall leave to member states the choice of method;

Joint Action, which shall establish the mandate for a specific operation;

Decision, of an executive nature, which shall be binding on those to whom it is addressed;

Opinion, of an advisory nature;

Code of Conduct, which may be either mandatory or advisory;

Interinstitutional Agreement, which shall bind its contracting parties.

3. All acts shall be decided jointly by the Parliament and Council on a proposal of the Commission according to the provisions of Article 9.¹

Justification

1. As an important addition to its portfolio of instruments the Union needs to attain full international legal personality. This move is consistent with the demolition of the three pillar system and will have beneficial effects not only for internal coherence but also for external action and recognition.

A Union that formed a single entity in international law could make do no longer with the mere coordination of its position in international negotiations, but would have to adopt a common policy (Article 19 TEU). An early practical result of this reform would be to enable the EU to become a high contracting party to the ECHR, thereby to bolster the entrenchment of the Charter.

2. This is a fairly minimalist hierarchy of norms to which all institutions, not excluding the European Council, would have to conform.

To a modified catalogue of the existing instruments (Articles 12, 16, 17 & 34 TEU, Article 249 TEC) is added an Organic Law for quasi-constitutional matters that might serve to shift the balance of power between the institutions. Examples of where an Organic Law might apply - which would all have to be specified in the Constitution - are the statutes of the institutions, the electoral procedure of the Parliament and the 'own resources' decision.

The current classical method of intergovernmental diplomacy among member states, the convention (Article 34(2)(d) TEU), is redundant in a Federal Union and is therefore suppressed.

¹ To follow.

The case for including in the hierarchy of norms the supposed methods of self-regulation, co-regulation and open coordination has not been made. They are not excluded by the terms of this Constitution as working methods of the Council, but they are not in the formal sense 'acts'.

As far as the implementing measures are concerned, the powers of both the Council (Article 202 TEC) and the Commission (Article 211 TEC) are modified and will be set out at a later stage in the proposed clauses concerning the functions of the institutions.

3. It is worth establishing here, however, that all decisions as to the choice of instrument must be taken jointly by the Council and Parliament (the legislature) on a proposal of the Commission.

ARTICLE 7 — FINANCE

1. The Union shall establish its own financial regime within expenditure limits expressed as a defined percentage of the Union's gross domestic product.

2. It shall establish a system of own revenue resources which may include the levying of taxes and duties.

3. It shall lay down provisions for a system of financial control.

4. The financial regime as provided for in paragraphs 1, 2 and 3 will take the form of Organic Law.

Justification

As the Union enlarges and takes on more competence in a wider variety of fields, it needs and deserves more financial autonomy from that of its member states.

Paragraph 1 caps the size of the Union's budget.

Paragraph 2 is permissive as to the sources of revenue.
