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COVER NOTE

from Secretariat

to The Convention

Subject : Contribution by Professor Jürgen Meyer, member of the Convention
- “An area of freedom, security and justice”

The Secretary General of the Convention has received the attached contribution by
Professor Jürgen Meyer, member of the Convention.

“An area of freedom, security and justice”

Paper by Professor Jürgen Meyer

Enlargement of the area of freedom, security and justice is one of the **key missions of the EU**. Challenges such as the protection of the common external borders or the fight against organized crime and terrorism have long been beyond the capacity of individual Member States. The people of Europe therefore rightly expect the EU to show greater commitment in matters of justice and home-affairs policy which directly affect their daily lives.

The task of the Convention is to ensure that the area of freedom, security and justice can become a reality, even in a Union of 27 or more Member States, and that its further development can be accelerated on the basis of the decisions adopted by the European Council in Tampere. The yardsticks for the performance of this task must be respect for human rights and fundamental freedoms, democracy, transparency and the rule of law, all of which are part of our common European constitutional tradition.

A. Visa, asylum, immigration and other policies related to free movement of persons (Part Three, Title IV, of the EC Treaty)

The precepts of freedom, security and justice do not only apply to citizens of the Union. It is part of Europe's humanitarian responsibility to afford persecuted people protection and refuge. For this reason the EU must continue to develop its common asylum and refugee policy, guided by the aim of unrestricted application of the Geneva Convention relating to the Status of Refugees.

If rapid implementation of the European Council's Tampere decisions on the establishment of a common European asylum system is to be guaranteed, the following action must be taken:

- The unanimity requirement that still exists in this domain must be replaced, at least by a gradual **transition to qualified majority voting and codecision procedure.**
- The restriction of European legislative powers in the domain of asylum policy must be superseded by a **revised Article 63 of the EC Treaty establishing a general legal basis for a common European asylum system and a common asylum policy.** Article 18 of the Charter of Fundamental Rights of the European Union, which guarantees the right of asylum with due regard to the rules of the Geneva Convention relating to the Status of Refugees and in accordance with the Treaty Establishing the European Community, represents a first step towards the development of a future Community law of asylum.
- The **principle of solidarity and balance of effort between Member States** in receiving and bearing the consequences for receiving refugees and displaced persons, a principle that has already been enshrined in Article 63(2)(b) of the EC Treaty, must be **established as a general principle for Community action in the domain of asylum, immigration and border checks.**

The EU also needs a **comprehensive immigration strategy** that takes account of the political dimension, of human rights and of developments in the immigrants' countries of origin. As part of this strategy, rights and obligations comparable to those of EU citizens must be assigned to nationals of non-EU countries ('third-country nationals') who are legally resident in the territory of the European Union. Article 63 of the EC Treaty provides for the possibility of harmonizing the rights and integration of third-country nationals by means of common standards governing matters such as migrant labour, family reunion and the suppression of trafficking in human beings. With regard to these areas and to the creation of a common visa policy based on a simplified Article 62(2)(b) of the EC Treaty, the European constitution should provide for a transition to majority voting and codecision.

The **protection of Europe's external frontiers** is a common concern of all Member States. After the forthcoming enlargement, the Member States' common responsibility must not be delegated to the new EU members in Eastern Europe. In the **development of a new system of border checks** in accordance with the decisions taken by the European Council in Seville and in the **establishment in the medium term of a European border guard**, solidarity must be a guiding principle. A sustainable legal basis built on this principle must be included in the European constitution.

B. Cooperation in civil matters

As far as substantive civil law is concerned, the provisions of Article 95 of the EC Treaty relating to the approximation of laws should be supplemented by means of a catalogue enumerating the areas of civil law in which approximation is required and eliminating any doubts as to the reliability of the present Article 95. This catalogue should comprise the following subject matter:

- the law of contracts, particularly with regard to rights and obligations arising from a contract;
- selected areas of substantive family law, particularly married couples' choice of surname, European rules permitting a choice of marital property regime, the right of access to children and cross-border custody rights;
- certain matters relating to the law of succession, particularly European provisions on testamentary freedom.

C. Police and judicial cooperation in criminal matters (Title VI of the EU Treaty)

In order to make the area of freedom, security and justice a reality in an enlarged Union, the EU must be able to act efficiently in the realm of justice and home affairs. To this end, the following measures are essential:

- **Reform of the existing legal instruments and simplification of legislative procedures in the domain of justice and home affairs.** Framework decisions, decisions, common positions and conventions have proved inefficient and must be replaced by the Community legislative instruments, as recommended by Working Group IX. At the same time, legislative decisions should be taken in the Council by qualified majority voting, and the European Parliament should have the right of codecision. As far as the **right to initiate legislation** is concerned, this very prospect of future majority voting and parliamentary codecision largely obviates any need for special rules in the field of justice and home affairs.
- The **revision of the legal bases, particularly Articles 30 and 31 of the EU Treaty**, with a view to permitting a minimum level of harmonization of substantive and procedural criminal law and the adoption of rules governing police and judicial cooperation between the authorities of the Member States. A list of crimes of a supranational character for which the provisions of substantive criminal law are to be harmonized should not be included in the European constitution, since this would limit the degree of flexibility for future adaptations, the scope for which should be maximized.

Minimum standards in the realm of criminal procedural law, which are essential to meet the urgent need for a European arrest warrant, for example, should cover areas such as the taking and admissibility of evidence as well as fundamental judicial rights arising from the Charter of Fundamental Rights and the European Human Rights Convention.

D. Closer operational cooperation

Open borders are intended to benefit people, not to facilitate organized crime. Hearings at which the views of numerous experts were taken and discussions within the group have both highlighted the fact that current cooperation between Member States leaves much to be desired in terms of efficiency and transparency. Improved cooperation and coordination between the Member States' police and judicial authorities and further development of Europol, Eurojust and the Anti-Fraud Office OLAF as well as the creation of a European public prosecutor and a European border guard are key reform issues. The idea of creating a 'justice and home-affairs supremo' or entrusting a senior official in the Council Secretariat with the task of coordinating operational activities has rightly been rejected by a large majority of the members of Working Group X.

The Convention must create a strong transparent basis for the **development of coherence between Europol, Eurojust and OLAF**. This basis includes:

- the **revision of Article 30 of the EU Treaty into a general legal basis for Europol**; the new provision should clearly emphasize the key role of Europol in the framework of European police cooperation, give the European legislature greater flexibility to develop the future remit of Europol and make it possible to equip Europol with operational and executive powers in collaboration with the authorities of the Member States or with joint investigation teams;
- the **incorporation of the Europol Convention into a Regulation**, with a view to providing enough flexibility, which the Convention cannot offer, to guarantee the adaptation of the legal basis of Europol in future; the immunity of Europol employees must also cease to apply in view of its new operational and executive tasks;

- ensuring full **legal control of Europol by the European Court of Justice and political control by the European Parliament**; this control should be supplemented by national parliamentary scrutiny of the authorities in the Member States;
- the **development of judicial cooperation in the framework of Eurojust** and the creation of a legal basis for **the European public prosecutor** to protect the financial interests of the Community.

Damage to the financial interests of the Union caused by fraud has increased alarmingly in recent years and now accounts for about one billion euros every year. The victims of such fraud are the European taxpayers. In view of the forthcoming enlargement of the Union, it would be irresponsible to perpetuate a legal situation in which the protection of the financial interests of the European Union against every type of fraud and corruption cannot be properly guaranteed. At the present time there is no criminal-prosecution authority with the power to conduct investigations within the Community institutions and bodies in order to protect the financial interests of the European Union. As an investigating agency in the domain of administrative law, OLAF can only offer assistance to the judicial authorities. Moreover, legal and practical difficulties can impede the flow of information between Member States and from OLAF to the Member States. In cases where the investigation of a particular offence is a matter for the public prosecutor's office in some Member States and for an administrative authority in others, direct contacts between the two are often impossible in practice or inadmissible in law.

The office of the European public prosecutor can serve as an interface between the Community level and the national judicial authorities, thereby plugging the sensitive gaps in the protection of the Union's financial interests. This certainly does not imply the creation of a separate comprehensive Community system of criminal law. Nor will the establishment of a European public prosecutor result in any extension whatsoever of the powers of the EU in the domain of substantive law. The national systems of criminal justice are indispensable and will remain the cornerstones of the penal defences against international crime. What is necessary, however, is the development of greater coherence between the existing structures of Europol, Eurojust and OLAF on the basis of the Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, which the Commission presented on 11 December 2001. The Commission's proposals provide only for case-by-case empowerment of the European public prosecutor, limited by the principles of subsidiarity

and proportionality to the absolute minimum required for the effective prosecution of frauds and other fiscal offences affecting the financial interests of the Community.

The establishment of a European public prosecutor should proceed on the basis of Eurojust and OLAF; special emphasis must be laid on OLAF's wealth of experience and on the professional and personal independence of the public prosecutor, who must have the right to bring charges before national criminal courts in order to protect the financial interests of the European Community.

E. Judicial control

A significant defect in the area of freedom, security and justice today is the fact that the jurisdiction of the European Court of Justice is restricted by the special provisions of Article 35 of the EU Treaty and Article 68 of the EC Treaty. In the realm of asylum law, for instance, the fact that the courts of first instance in the Member States with regular jurisdiction in asylum matters have no entitlement to request a ruling under Article 68(1) of the EC Treaty means that the redress function of referrals for preliminary rulings is considerably curtailed. Until all the national stages of appeal have been exhausted, national courts are bound to apply legal norms that they regard as infringements of fundamental rights as well as being barred from issuing provisional injunctions; this is incompatible with the principle of effective rights of redress and appears to be more than questionable in the light of Article 6 of the European Human Rights Convention. Another serious restriction derives from Article 68(2) of the EC Treaty, whereby the Court of Justice has no jurisdiction to rule on any measure or decision taken by a body of the Union pursuant to Article 62(1) relating to the maintenance of law and order and the safeguarding of internal security; this includes measures and decisions taken in connection with the abolition of border checks at the internal frontiers of the countries bound by the Schengen Agreement. Regulations, directives or decisions adopted unanimously by the Council in this domain are thus entirely immune to judicial review.

The current restrictions on the jurisdiction of the European Court of Justice in matters of justice and home affairs and the continued existence of European legal instruments that are not subject to judicial control cannot be tolerated any longer in the context of plans to create an area of freedom, security and justice that will directly and immediately affect the rights of every single citizen of the EU. **In the future European constitution, the jurisdiction of the European Court of Justice must cover the entire domain of justice and home affairs**, including the activities of EU bodies such as Europol and

Eurojust that operate in the domain of police and judicial cooperation in criminal matters. At the same time, the rules governing **access by individuals to the European Court of Justice** must be revised in order to guarantee an effective right of redress, as Working Group II has already proposed in connection with **Article 230(4) of the EC Treaty** (see CONV 354/02 and my proposed formulation for the extension of the revocation action in WD 17 - WG II).