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Joint submission to the Working Group No X of the European Convention on the Area of Freedom, Security and Justice

Our organisations represent Churches throughout Europe and Christian agencies particularly concerned with migrants and refugees. Since the entry into force of the Treaty of Amsterdam, we have closely accompanied the gradual development of a Common Asylum and Migration Policy of the European Union. We have issued a series of joint comments[1] on the European Commission's initiatives and closely monitored the Council of Minister's negotiations in these policy areas. On the basis of this experience, we should wish to submit our views relating to question 2 of the mandate of Working Group X.

The European Council of Tampere in October 1999 expressed a strong commitment of the European Union to establish a fair common European asylum system and a comprehensive immigration policy. The European Council of Laeken in December 2001 acknowledged that "despite some achievements such as the European Refugee Fund, the Eurodac Regulation and the Directive on temporary protection, progress has been slower and less substantial than expected. A new approach is therefore needed"[2]. We entirely share this evaluation, while we are concerned about the steps and decisions taken since the Laeken Council.

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[1] These joint statements included comments on the Proposal for a Directive on Family Reunification; on the European Commission's Communications on a Common Asylum Procedure and Status and on a Community Immigration Policy; on a proposed directive on Common Standards for Reception Conditions for Asylum Seekers; on a Common Refugee Definition; and on a Common Policy On Illegal Immigration.

[2] Presidency conclusions of the European Council of Laeken, N° 38.

There is an urgent need for a coherent and harmonised asylum and migration policy of the EU. In order to reach real “burden sharing” regarding the reception of refugees and asylum seekers as called for in Art. 63 N° 2 b), agreement on minimum standards will not suffice. Shared responsibility of the Member States will only be reached by true harmonisation of their policies.

- ***What improvements would have to be made to instruments and procedures?***

(a) Qualified majority voting to become rule rather than exception

According to our perception, the major obstacle to progress is a legislative dilemma. The same Member States who committed themselves to establishing an area of freedom, security and justice have created a political firewall, called the unanimity principle. This principle is a de-facto right to veto and allows a single Member State to prevent any compromise beyond its sole national interests. This has lead to blockage situations on several occasions and in the context of different legislative proposals.

We are increasingly concerned about the consequences of the right to veto. To name just one example, the Council negotiations on the directive on family reunification are a worrisome case in point. The current proposal, modified for the second time after two years of fruitless negotiations, falls far short of the goal of harmonising the mechanisms of family reunification for third country nationals in the European Union. In crucial areas the recent proposal would allow Member States to maintain very different approaches. Essentially this would mean loosing the opportunity of harmonising family reunification. Other instruments, like the directive on reception conditions for asylum seekers were agreed only as very minimal standards. We are profoundly concerned that this would set an example for other directives to be decided by the Council in the course of the next year.

We believe the only reasonable way out of this current dilemma in decision-making is the **abolition of the unanimity principle on asylum and migration policy**. The legislative commitment to reconsider unanimity in Article 67 (2) TEC as well as the slight step forward in the Treaty of Nice are a step into the right direction. It is clear, however, that the political will still has to undergo a ripening process. We feel that the time has come to recognise that a common European policy on asylum and migration can only be achieved by compromise for the good of the whole of Europe.

(b) Democratic control is essential

The time has come also for a more sincere democratic decision-making on European Union level. We are convinced that in any decision-making procedures democratic control is most crucial. This requires **transparency in all legislative procedures**, particularly when the Council is acting as legislative body. In an area as sensitive as this one, **National Parliaments** should have a greater role to play. Best practice – for example in the Netherlands – shows that it is possible, on national level, to hold the Home Minister responsible for his negotiating position in the Council. Furthermore, we consider it essential to fully involve the **European Parliament** into the decision-making process and apply the **co-decision procedure** to the entire policy area

(c) Effective judicial control

The arrangements in Articles 35 TEU and 68 TEC concerning the jurisdiction of the Court of Justice should be aligned on the general arrangements. Harmonisation requires effective judicial control by the European Court of Justice. This seems an

appropriate time to review the restrictions in Article 68 of the EC Treaty with regard to access to preliminary rulings on the interpretation of EC acts based on Title IV TEC. In our view, the general jurisdiction of the Court of Justice to give preliminary rulings laid down in Article 234 TEC should apply: Lower tribunals should have a discretion to submit an issue to the Court of Justice, whereas courts and tribunals of final appeal should be obliged to bring relevant matters before the Court of Justice. Otherwise, "[t]he fact that judicial control at the EC level is [...] contingent upon discretionary decisions at the level of national courts is likely to weaken the effective implementation of harmonisation measures under Title IV"[3].

(d) Third pillar legal instruments not suited for sustained legislative use

We share very much the opinion expressed by the Secretariat of the European Convention in its "Justice and Home Affairs – Progress Report and general problems" (CONV 69/02) that the 3rd pillar legal instruments are not suited for sustained legislative use. Although framework decisions and decisions – as the newly introduced instruments – seem to be more convenient than for example a convention between Member States, there is a long way of making it an operational tool – with a lot of hurdles on the way, be it the necessity of transporting the agreement authentically into national legislation or the lack of possibilities to make non-compliance an issue. While being aware of the limitations of the third pillar and of the fact that there is no political will towards harmonising the third pillar matters, we would wish to see – in the long run – the project of harmonisation enlarged into these areas as well, then meaning the power to enforce legislative acts and stronger judicial control by the Court of Justice.

(e) Pre-legislative consultation

The question of consultation and dialogue has been addressed in numerous other contributions, either to the Convention or in the debate on European Governance. It is in this context that we should like to mention the consultations of refugee agencies, migrants' organisations, Church groups and NGOs undertaken by the DG Justice and Home Affairs of the European Commission during the legislative drafting process since the entry into force of the Treaty of Amsterdam. In our view, these consultations were able to provide the Commission's proposals with expertise. At the same time, they have enhanced openness and participation.

We support the introduction of a formal procedure for the participation of Civil Society in the process of policy development. This should also apply to such sensitive areas as asylum and migration policy.

Sensitive terminology

We acknowledged the sensitive use of terminology by the Secretariat of the European Convention when speaking about "illegal immigration" but never about "illegal immigrants". However, we would very much prefer to see the term "irregular" used in this context as it is done at the level of the United Nations, where the agreed terminology is "migrants in irregular situations"[4]. We wish to encourage the

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[3] Alston, "The EU and Human Rights" (1999), OUP p. 373.

[4] We support the European Economic and Social Committee in its opinion that the term "illegal" should only be used to refer to smuggling, trafficking or exploitative activities. The EESC opinion SOC/095; CES 527/2002 ES/PM/ms continues: "In contrast, some clarification is needed when the term "illegal immigration" is used to refer to individual migrants. Although it is not lawful to enter a country without the required documents and authorisation, those

Convention to use its strong position to give leadership and orientation to other stakeholders in the use of correct and sensitive terminology.

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who do so are not criminals. Lumping together irregular immigration and crime, as the media frequently do, distorts the facts and breeds fear-driven and racist attitudes among the general public. Irregular immigrants are not criminals, even though their situation is not legal".