

Working Group X

Working document 12

Working group X « Freedom, Security and Justice »

Subject : “Cooperation not centralisation”

- Paper by Mr. Timothy Kirkhope, member of the Convention

Members of Working Group X “Freedom, Security and Justice” will find attached a paper by Mr. Timothy Kirkhope, member of the Convention.

SUBMISSION TO WORKING GROUP X: “FREEDOM, SECURITY AND JUSTICE”

COOPERATION NOT CENTRALISATION - *TIMOTHY KIRKHOPE MEP, SPOKESMAN ON JUSTICE AND HOME AFFAIRS, CONSERVATIVE DELEGATION TO THE EPP-ED, AND UK HOME OFFICE MINISTER 1995-1997*

In the very useful *Justice and Home Affairs Progress Report* which the Praesidium prepared for European Convention members ahead of our debate in June, they correctly noted, “the Eurobarometer statistics of April 2002 confirm and clarify European citizens’ expectations in this area.”

The fight against organised crime and drugs trafficking ranks third (after peace and security and the reduction of unemployment) in priority and has the support of almost 9 out of 10 Europeans. Although a very large majority of those canvassed were in favour of decisions being taken within the EU on the fight against terrorism (85%), trafficking in human beings (80%), the fight against organised crime (72%) and the fight against drugs (71%), the findings vary when it comes to immigration and asylum policy. A minority of those surveyed were in favour of European-level decisions being taken on justice (58% against) and police matters (63% against).¹

What these statistics suggest to me is that justice and home affairs issues are important to the people in the European Union but they do not want centralisation; rather they want co-operation. This paper outlines how the ‘cooperation not centralisation’ mandate applies to issues such as Europol, Eurojust, a European Border Guard, a common asylum and immigration policy and the Charter of Fundamental Rights.

1. EUROPOL

Europol is the organisation through which national police forces in the European Union cooperate to tackle international crime. This cooperation has been a success, but there is scope for improvement. As the Praesidium acknowledge in their report on *Justice and Home Affairs*, experts have given a “qualified verdict” on the success of Europol and direct cooperation between national police forces “only seems to be operating satisfactorily.”² What are the impediments to more effective police cooperation?

- The Director of the Belgium Federal Police, Patrick Zanders, argues that an *insufficient supply of information* from the member state authorities makes it difficult for Europol to respond to requests for information.³

¹ Praesidium (31 May 2002) *Justice and Home Affairs – Progress report and general problems*, CONV 69/02, page 2.

² Praesidium, *op.cit.*, page 7.

³ Patrick Zanders (2 October 2002) *Summary of the meeting on 25 September 2002*, CONV 313/02, page 2.

- The President of Eurojust, Michael Kennedy, refers to practical difficulties resulting from *different investigative procedures* in the member states, such as different surveillance mechanisms and rules for evidence gathering.⁴
- The Director of the British National Crime Intelligence Service, John Abbott, mentions the *diverging judicial rules* on the taking and admissibility of evidence, the use of informants and cooperative witnesses, disclosure rules and data protection.⁵
- The Director of Europol, Jürgen Storbeck, argues that his agency is hindered by not having the *legal and material means for an operational role* in the fight against international crime, including the right to interrogate witnesses,⁶ a position backed by Antonio Vitorino, the Portuguese Commissioner responsible for Justice and Home Affairs.⁷

Some of these problems could be overcome through improved coordination. For example, member state authorities could be encouraged to provide Europol with the information it requests (or an explanation why it will not release the information) within a certain time period. However, a number of the solutions proposed appear to be motivated by a desire for greater centralisation rather than as a practical response to the fight against crime.

Storbeck argues that for crimes such as fraud against the Union's financial interests or counterfeiting the Euro, Europol should act as the "European police".⁸ Zanders sees the long-term evolution of Europol into a "European FBI" as "the right solution" and argues for the creation of "a genuine [European] Police Academy".⁹

I believe that we should focus on improving cooperation between national police forces rather than greater centralisation for integration's sake. Many Convention members supported this view when we discussed justice and home affairs in June.¹⁰ Representing the Irish Government, Ray MacSharry said: "As regards police cooperation: most objectives can be achieved through close cooperation between the police authorities of the Member States. The role of Europol is to support such police cooperation."¹¹

The European Union has improved police cooperation this year by reaching agreement on the formation of Joint Investigation Teams to tackle international crimes such as terrorism, drug trafficking and the trafficking of human beings. The JIT report, which I steered through the European Parliament, authorises much closer cooperation between police forces, customs authorities and intelligence services than has previously been allowed. The measures will allow,

⁴ Michael Kennedy (2 October 2002) *Summary of the meeting on 25 September 2002*, CONV 313/02, page 7.

⁵ John Abbott (2 October 2002) *Summary of the meeting on 25 September 2002*, CONV 313/02, page 2.

⁶ Jürgen Storbeck (2 October 2002) *Summary of the meeting on 25 September 2002*, CONV 313/02, page 5.

⁷ European Convention (6 June 2002) *Verbatim Report of the plenary session on 6 June 2002*, page 7, available at http://www.europarl.eu.int/europe2004/textes/verbatim_020606.htm.

⁸ Jürgen Storbeck, *op.cit.*, page 6.

⁹ Patrick Zanders, *op.cit.*, pages 3 and 4.

¹⁰ Secretariat (19 June 2002) *Note on the plenary meeting – Brussels 6 and 7 June 2002*, CONV97/02, page 6.

¹¹ European Convention, *op.cit.*, page 12.

for instance, two police forces from separate Member States to set up a JIT for a specific purpose, for a limited time period, functioning under the law of the Member State in which it operates. This means that any member of the JIT, whether a national of the Member State in which the operation takes place or not, will be seen as an official of the Member State for the duration of the operation. The Kirkhope report provides a practical example of how the EU can improve police cooperation without needless harmonisation.

2. EUROJUST

Eurojust (an abbreviation for the European Judicial Cooperation Unit) was established under article 1.8 of the Nice Treaty to facilitate extradition requests and to support criminal investigations into cases of international crime such as terrorism, trafficking in human beings, computer crime, forgery and money laundering. The unit is composed of 15 prosecutors, one from each member state, along with a number of police officers and judges.

Although the unit is still in its infancy, there are already calls for it to be expanded and strengthened.¹² Indeed, the mandate for Working Group X states that “ways of reinforcing Eurojust should be explored in the light of experience gained during its first weeks of operation.”¹³ In my view, it is too early to tell whether it has been a success, let alone whether it should be strengthened. However, a number of proposals have been made:

- The Vice-President of Eurojust, Olivier de Baynast, wants a “a stronger definition of Europe as a common judicial area to which all magistrates in Europe would have to be committed.”¹⁴
- The Director of the General Secretariat of the Council, Gilles de Kerchove, suggests that a preliminary criminal chamber in the European Court of Justice should be set up to prevent “forum shop”,¹⁵ a proposal backed by Chritine van den Wyngaert, a Professor at the University of Antwerp.¹⁶
- The most common proposal for Eurojust at the Convention is for it to become a European Public Prosecutor, whose jurisdiction and orders would be recognised within the member states for crimes against the EU itself and for certain international crimes.¹⁷

¹² Praesidium, *op.cit.*, page 6, says in candour: “a new institution, Eurojust, was set up on 6 March 2002 without waiting for the Nice Treaty, which provided for its creation, to enter into force.”

¹³ Secretariat (12 September 2002) *Mandate of Working Group X “Freedom, Security and Justice”*, CONV 258/02, page 3.

¹⁴ Olivier de Baynast (2 October 2002) *Summary of the meeting on 25 September 2002*, CONV 313/02, page 8.

¹⁵ Gilles de Kerchove (16 October 2002) *Summary of meeting held on 8 October 2002*, CONV 346/02, page 11.

¹⁶ Christine van den Wyngaert (16 October 2002) *Summary of meeting held on 8 October 2002*, CONV 346/02, page 6.

¹⁷ The creation of a European Public Prosecutor was supported at the plenary meeting on justice and home affairs in June by, among others: Elio Di Rupo, representing the Belgium Parliament; Peter Glotz, representing the German Government; Jürgen Meyer, representing the German Bundestag; Louis Michel, representing the Belgium government; and Antonio Vitorino, the Portuguese Commissioner responsible for Justice and Home Affairs.

The establishment of a European Public Prosecutor, based on the Continental ‘Napoleonic’ judicial system, would introduce changes which are alien to the Anglo-Saxon ‘common law’ tradition. The most notable change would be trial by appointed judge (the European Public Prosecutor) rather than trial by jury. Another notable change under the ‘Corpus Juris’ project is the concept of pre-trial (or prevention) detention, under which suspects may be locked up for up to nine months. This concept runs contrary to the ‘habeas corpus’ tradition of Common Law. Judicial cooperation is one thing, judicial centralization is quite another.

3. EUROPEAN BORDER GUARD

Earlier this year, the European Commission produced proposals for a European Border Guard. Beginning with a common basis for the training of border guards and a European College of Border Guards, they hope to create a European Corps of Border Guards in the medium term.¹⁸

Unsurprisingly, this proposal received enthusiastic support from the applicant countries who emphasised the need for burden-sharing with those responsible for large sections of the common external borders.¹⁹ Representatives from Bulgaria, the Czech Republic, Hungary, Lithuania, Poland, and the Slovak Republic all supported the project.²⁰

The proposal has, however, received a less enthusiastic reception from the existing fifteen member states. Göran Lenmarker, representing the Swedish Parliament, said: “I am very doubtful about the Union setting up some sort of a border control. The strength of the Union is that it has never had anything but a central administration; local and national administrations have been dealt with nationally. I do not see why that sound principle should now be broken. We have national border guards who can do the job based on a common policy. I think building some sort of a European local or national administration would be a step in the wrong direction.”²¹

I see the proposals for a European Border Guard as part of the European Union’s objective to create a European Police Force and a common asylum and immigration policy. These powers are as integral to a country’s independence as the right to set taxes or wage war. They should be non-negotiable.

4. COMMON ASYLUM AND IMMIGRATION POLICY

The current creation of a common asylum and immigration policy is perhaps the most controversial aspect of the justice and home affairs agenda. The case for a common policy has been made by Sören Lekberg, a Swedish Parliament representative on the Convention,²² and by the British Government’s substitute representative, Baroness Scotland, who said:

¹⁸ Praesidium, *op.cit.*, page 8.

¹⁹ Secretariat, *op.cit.*, page 7.

²⁰ Neli Koutsova, an alternate member representing the Bulgarian government; Jan Kavan, representing the Czech Republic; Pál Vastagh, representing the Hungarian parliament; Rytis Martikonis, representing the Lithuanian government; Danuta Hübner, representing the Polish government; and Jan Figel, representing the Slovak Republic.

²¹ European Convention, *op.cit.*, pages 31 and 32.

²² Sören Lekberg (29 October 2002) *Freedom, security and justice: How to increase the decision-*

The Union needs a common asylum policy, common standards for how we treat our asylum-seekers and a common understanding of what constitutes a refugee. Going beyond the minimum standards that we are currently seeking to agree, we need a common approach to immigration, working together to strengthen the EU's borders, to fight the human traffickers and to manage limited economic immigration to fill the gaps in our labour markets. ... Those who say that unanimity has held up progress on asylum and immigration are right, experience demonstrates that we should now move to majority voting in relation to this area.²³

I would like to present the case against a common asylum and immigration policy based on my own experience as a former UK Immigration Minister (1995-1997).

The basis of the European Union's current asylum system is the Dublin Convention, which was agreed in 1990 and came into force in September 1997. The aim of the Convention is to solve the problem of 'asylum shopping' – asylum seekers travelling to the member states with the most generous asylum systems. The Convention is based on the principle that applications for asylum should be made in the member state where the asylum seeker entered the EU. Although appealing, this principle has not worked at all in practice.

The main problem with the Dublin Convention is the difficulty in proving where the applicant for asylum entered the EU due to a lack of documentation and/or the asylum seekers inability or unwillingness to provide that information. If, for example, an asylum seeker is caught entering Britain clinging to a Eurostar train, it is clear that they came into Britain from France but it is not obvious whether France was their point of entry into the EU. If they entered through Italy, for example, then under the Dublin Convention the French authorities have no responsibility for the asylum seeker. The difficulty for the UK authorities, to pursue this example, is proving that Italy was their point of entry. The bilateral agreement I oversaw when I was a UK Minister in the was allowed to lapse shortly after Tony Blair came to power. Recent panic attempts to restore it have so far been rejected by the French and it is unlikely to be resurrected.

The absurdity of the EU's current asylum system is shown in Figure 1. According to figures compiled by the United Nations High Commission for Refugees, the United Kingdom has 278,3000 applications for asylum between 1999 and 2001 whilst Italy had 58,319. The top five nationalities of asylum applicants in the EU during this period were from the former Yugoslavia, Iraq, Afghanistan, Turkey and Iran,²⁴ so it is beyond belief that more asylum seekers entered the EU through the UK than through Italy. The Dublin Convention clearly isn't working.

making capability of the European Union in order to combat crime, CONV 376/02.

²³ European Convention, *op.cit.*, page 24.

²⁴ Population Data Unit, *Trends in Asylum Applications Lodged in Europe, North America, Australia and New Zealand, 2001*, UNHCR, 1 March 2002, table 5.

Figure 1: Asylum applications lodged in EU member states, 1999-2001 ²⁵

Member State	No. of applications
Austria	68,549
Belgium	103,017
Denmark	36,934
Finland	7,928
France	116,684
Germany	262,458
Greece	10,031
Ireland	28,968
Italy	58,319
Luxembourg	4,186
Netherlands	115,771
Portugal	701
Spain	24,661
Sweden	51,047
United Kingdom	278,300

The EU's response to the failure of the Dublin Convention—like its response to most problems—is simply more harmonisation. In a working paper entitled *Revisiting the Dublin Convention* published in March 2000, the European Commission claimed: “There do not appear to be many viable alternatives to the present system.”²⁶ The Commission's answer to ‘asylum shopping’ was “harmonisation in other areas such as asylum procedures, reception conditions, interpretation of the refugee definition and subsidiary protection to reduce any perceived incentives for asylum applicants to choose between Member States when lodging their application.” In essence, ‘Dublin II’ would end ‘asylum shopping’ by regulating the application process and standardising the treatment of asylum seekers.

Asylum is undoubtedly an issue that requires some international cooperation. If an asylum seeker enters the EU in Italy, travels to France and crosses the Channel to the United Kingdom, the issue clearly requires international liaison. Cooperation does not, however, require harmonisation. The principle of the Dublin Convention can and has been successfully enforced through bilateral treaties rather than greater harmonisation.

Are bilateral treaties really possible? Yes. As I have stated, in 1995, I implemented a bilateral treaty with France (which is sometimes misleadingly referred to as the ‘Gentleman's Agreement’) to facilitate the return of asylum seekers who had travelled from one country to the other, within 24 hours. Soon after the treaty came into force, applications for asylum fell by no less than 33 per cent. After it was abandoned by Tony Blair and superseded by the Dublin Convention, applications then increased by over 40 per cent (see Figure 2 for long term trend).²⁷

²⁵ Population Data Unit, *op.cit.*, table 1.

²⁶ *Revisiting the Dublin Convention*, Brussels: European Commission, SEC (2000) 522.

²⁷ Kate Sladen (4 February 2002) *Failure of HMG to negotiate a bilateral agreement with France on asylum seekers*, London: Parliamentary Resources Unit, page 5.

Bilateral treaties do not in any event contravene the Dublin Convention. For instance, both the Danish and German Governments are signatories to the Convention yet they have a not dissimilar bilateral which enables Denmark to return 18 per cent of asylum seekers to Germany. Furthermore, illegal entrants into Germany and Spain from the Czech Republic and Morocco, respectively, are returned without the issue of asylum being raised because they are deemed to have come from a 'safe third country' and so the need for asylum does not arise.

Figure 2: Asylum cases in the UK, 1994-2001 ²⁸

Year	UK
1994	32,830
1995	43,965
1996	29,645
1997	32,505
1998	46,015
1999	71,160
2000	80,315
2001	71,700

Asylum policy should remain a national competence with international cooperation on a bilateral basis.

5. CHARTER OF FUNDAMENTAL RIGHTS

Although the incorporation of the Charter of Fundamental Rights has already been considered by Working Group II and debated by the Convention, many aspects are pertinent to the future of justice and home affairs.²⁹ Former Commission President and representative of the Luxembourg government at the Convention, Jacques Santer, has described the inclusion of the Charter in a fundamental text as an issue of "primordial importance" to the creation of a European area of Justice.³⁰

My "bottom line" is that I am against incorporating the Charter into European Union law because it deals with matters of social, employment and cultural policy, which must always remain the responsibility of the member states. It also contains a number of provisions detrimental to law and order in my view.

Article 19.1 on "Protection in the event of removal, expulsion or extradition," states that "Collective expulsions are prohibited".³¹ Would this clause prevent the removal of illegal asylum seekers from member states? For example, at the end of September, the British Government

²⁸ Kate Sladen (24 April 2002) *Nationality, Immigration and Asylum Bill*, London: Parliamentary Resources Unit, pages 6-7. UK figures refer to *cases* rather than *applications*. On average, there are 1.3 applicants per case.

²⁹ See Working Group II (22 October 2002) *Incorporation of the Charter/Accession to the ECHR*, CONV 354/02.

³⁰ European Convention, *op.cit.*, page 14.

³¹ See <http://www.europarl.eu.int/charter/> for the text of the Charter

deported a group of 48 illegal immigrants from the United Kingdom to the Czech Republic on a chartered plane.³²

Article 19.2 states that “No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.” Would this prevent member states from extraditing terrorists such as Osama Bin Laden to the United States? Would the EU become a haven for criminals facing the death penalty?

These questions need to be considered with others before we consider the future for the Charter.

6. KEEP THE THIRD PILLAR

The question of whether we should abolish the third pillar is central to the future of justice and home affairs. Do we want cooperation in the third pillar or centralisation in the first pillar? The justice and home affairs plenary session in June suggested there were three bodies of opinion at the Convention.³³

- Some argue in favour of the full application of the Community method to justice and home affairs.
- Some see full communitarisation as unfeasible and argue for a step-by-step pragmatic approach to the issue.
- Others, like myself, believe that both full and partial communitarisation of justice and home affairs are a step too far and believe in much greater cooperation instead.

Although I recognise that my view is at present a minority one, I see the pillared structure as the guarantor that Justice and Home Affairs (and the Common Foreign and Security Policy) remain matters for intergovernmental negotiation rather than supranational governance. It is on the basis of this guarantee that the British people accepted European Union involvement in this issue and it is a guarantee on which future British involvement in these areas stands. There is great scope for further cooperation in this matter without the need to press divisive harmonisation. Let cooperation—not centralisation—be our watchword.

³² BBC News (20 September 2002) *Czech asylum seekers deported*, <http://news.bbc.co.uk/1/hi/england/2270575.stm>.

³³ Secretariat, *op.cit.*, page 4.