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Editor: Nicholas Busch, Blomstervägen 7, S-791 33 Falun, Sweden
tel/fax: +46/23 26777, Email: nbusch@nn.apc.org

`Fortress Europe?'- Circular Letter is the organ of **Platform `Fortress Europe?'** and of the **GENEVA GROUP - Violence and Asylum in Europe**.
The `Platform' is an informal international network concerned with European harmonisation in the fields of internal security, policing, justice, data protection, immigration and asylum and its effects on fundamental rights and liberties. It is associated with the European Civic Forum.
The **GENEVA GROUP - Violence and Asylum in Europe** came into being in 1993 at a conference organised by the University of Geneva. The Group wishes to contribute to international multidisciplinary discussion on the right to asylum and its interaction with other developments in society.
The objective of the Circular Letter is to offer a forum for mutual information, analysis and critical debate among experts and laypeople, scholars and practitioners. The Circular Letter is published 10 times a year. It offers a selection of news, comment and messages based essentially on the contributions of its readers.

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EUROPEAN UNION

BRITAIN'S MAD COWS BLOCKED JUSTICE AND HOME AFFAIRS COUNCIL

The controversy between Britain and the EU on the BSE disease virtually blocked formal decision-making at the JHA Council's meeting of 4-5 June in Luxembourg. The decisions of the Council require unanimity. British Home Affairs Minister Michael Howard refused to vote any of the A-points on the Council's agenda. Nonetheless, informally, the member states, including the UK, seem to have reached political agreement on a number of issues, among them the Draft Convention on Extradition.

Free movement of persons

The Ministers discussed three Commission proposals for Directives on the control of persons at external borders, free movement of workers and their families, and the right for third country nationals to travel freely within the territory of the EU. Several member states (i.e. not only the UK) stressed that the Commission proposals affect important questions of immigration and internal security. The JHA Ministers seem to agree that these aspects, as well as certain additional measures necessary for the abolition of internal border controls, must continue to be dealt with within Third Pillar (i.e. intergovernmental) cooperation. The British delegation reiterated its opposition, as a matter of principle, to the Commission's approach (which implies a transfer of the above issues to the First Pillar (Community law)), without, however excluding a "certain degree" of Third Pillar cooperation in this field between the member states.

For its part, the Commission, represented by Ms Anita Gradin, said it would maintain its proposals unchanged, as long as the European Parliament has not stated its opinion on the matter.

Illegal employment of third country nationals

No reservations were made by any member state delegation with respect to the content of a draft Recommendation regarding the fight against illegal employment of third country nationals. The draft Recommendation lists a number of penal and/or administrative sanctions not only against employers of illegal workforce, but also anybody "favouring, facilitating or promoting" illegal employment. Thus, illegal and organised trafficking in workers by individuals or networks should be punishable.

The draft Recommendation further calls on the member states to coordinate the action of their "competent services and authorities" in combating illegal employment, by, among other things, exchanging information and preparing joint operations covering particular economic sectors, geographical areas and periods of time associated with frequent illegal employment. The joint operations could consist of one member state supporting the "preventive action" of another member state, such as the inspection of workplaces or occasional assistance in "urgent situations".

Council decisions in the form of "Recommendations" do, however, not legally bind the member states.

Eurodac

Eurodac, the planned automated system for the exchange of fingerprints of asylum seekers, is necessary, according to the Minister, for the effective implementation of the Dublin Convention (which determines the member state responsible for examining an asylum application). A common fingerprint system would speed up asylum procedures by enabling a rapid identification of asylum seekers. As a result, multiple applications in several countries and new applications under false identities of persons expelled from the EU territory could be prevented more successfully.

The Dublin Convention was signed by all member states in 1990 and is expected to enter into force as soon as it has been ratified by the Irish and the Dutch parliaments.

The Eurodac Convention is currently being elaborated upon. It will provide the legal basis for the electronic register. As for the technical characteristics of the system, the Ministers are expected to take a final decision before the end of this year.

EDU-Europol

The Ministers agreed on the principle of increasing the 1997 budget of EDU-Europol by 12 per cent as against 1996. Thus, EDU-Europol, whose only legal basis is a "Joint Action" of the JHA Ministers, would have at its disposal the considerable sum of 5.6 Million ECU in 1997. The costs of Europol's Information System, which are not included in this sum, will amount to additional 5.5 Million ECU in 1997, 13 Million ECU in 1998 and 11 Million ECU in 1999.

The British delegation refused to vote on a formal decision because of the BSE controversy, but does not appear to object to the budget increase and the ensuing strengthening of EDU-Europol.

The Council also took note of a report defining the technical requirements for Europol's future electronic information system. Among other things, the report is believed to deal with questions such as the linking up of Europol's various data registers with other data registers

in the domain of policing, such as the Schengen Information System SIS (which will eventually become the European Information System, EIS), Interpol's registers and relevant data bases of third countries. Under the Europol Convention such links may be established on the basis of a unanimous decision of the JHA Ministers.

Directory on anti-terrorist expertise

The proposal to create a directory containing information on all agencies in the member states involved in the fight against terrorism, as well as their particular competencies and expertise, was originally presented by the UK. The objective of the directory is to facilitate cooperation between the member states in combatting of terrorism.

The Italian JHA Presidency noted that no delegation objected to the content of a draft Joint Action regarding the creation and regular up-dating of the directory. No formal decision was taken, due to the UK's position of non-cooperation.

EU participation in the US-sponsored International Law Enforcement Academy?

The Ministers exchanged views regarding the possibility of a EU participation in the International Law Enforcement Academy (ILEA) set up in Budapest in 1995 by the American FBI in cooperation with the Hungarian Government. The ILEA organises training courses for 150 police officers annually from the Central and Eastern European countries (CEEC).

While some delegations favoured a step by step approach, others advocated full EU participation on a level of equality with the USA. One delegation stated its opposition against any EU participation whatsoever in ILEA.

The Council refrained from taking any decision pending further consideration.

[It is characteristic of the EU's lack of action vis-à-vis the CEEC (which are all striving for EU membership), that the USA were first in setting up a police academy in Central Europe. So far, EU member states have preferred to develop their police cooperation with the CEEC outside EU structures and on an often quite informal basis. One example is the Central European Police Academy (CEPA), a joint Austro-Hungarian enterprise in which Germany, Poland, Slovakia, Slovenia and the Czech Republic are now also involved. According to the "Langdon Report" on JHA Cooperation with Associated Countries (October 1995), the aim is to "promote swift unbureaucratic cooperation between police officers engaged in investigations and operations". The courses are directed at specific policing issues such as drug-related crime and illegal immigration. Significantly, the courses are conducted in German only, which could be an explanation for the apparent lack of interest by the JHA Council in this project.]

Priorities of JHA cooperation until Summer 1998

There is agreement among the member states on a draft Resolution concerning the priorities of JHA cooperation for the next two years. A vote was postponed due to British non-cooperation.

The following items are among the priorities established by the Resolution:

1. Fight against terrorism: updating of the document on terrorist threats; directory on anti-terrorist agencies and expertise.
2. Fight against organised crime and drugs:
   implementation of the Europol Convention (implementing rules, Information System and control of the EDU); police training; strengthened technical cooperation, in particular concerning the interception of telecommunications, scientific police laboratories and national criminal intelligence services; project of a "Naples II" Convention on extended Customs cooperation; strategies for the control of external borders; fight against counterfeiting (trade-marked goods) and trafficking in works of art; examination of the effects a possible harmonisation of member states' legislation could have in reducing drug consumption and trafficking within the Union.
3. Judicial cooperation: Convention on Extradition; Convention on mutual legal assistance in criminal affairs; implementation of the Joint Action on liaison prosecutors and examination of the need for a network of "contact prosecutors".
4. Asylum and immigration: implementation of the Dublin Convention; mutual adaption of national asylum procedures and refugee law; mutual adaption of the conditions of reception of asylum seekers; development of the Eurodac system; examination of the legal situation of third country nationals legally residing on the territory of the member states; examination of problems regarding temporary protection and burden sharing; examination of forms of protection other than refugee status (de facto refugees, humanitarian grounds); fight against illegal immigration and employment; improved cooperation with countries of origin and with regard to the removal of illegal immigrants (readmission problem); document counterfeits (development of a common system for storing and transmitting pictures); examination of the problem of family reunion.
5. Reinforcement of checks of persons at external borders: draft Convention on the EIS (European Information System); improved operational cooperation between control authorities at external borders; mutual recognition of visa.
6. Fight against racism and xenophobia: Continuation of works on the judicial and police level.

A reason for establishing the priorities of cooperation by way of a Resolution is to achieve greater discipline by member states in implementing policy

decisions agreed by the JHA Council.

JHA Conventions and the European Court of Justice
Once again, no agreement was reached with regard to jurisdictional powers for the European Court of Justice (ECJ) within the framework of the Europol Convention and other JHA Conventions. In the light of persisting British opposition to any involvement of the Court in Third Pillar conventions, the Council decided to submit the issue to the EU summit (European Council) in Florence. At the Cannes summit of June 1995, the EU heads of state agreed that a solution must be found at the June 1996 summit at the latest.

Convention on Extradition
Significant progress seems to have been achieved with regard to the draft Convention on Extradition (see CL No.40, p.1).

Among the problems which remain to be solved is certain member states' reservation against a provision providing for the extradition of persons based on charges not punishable in the requested state. In several member states, to depart from the principle of double incrimination (the principle that extradition is possible only for offences punishable both in the requesting and the requested state) would breach the law. The French delegation now proposed a compromise formula under which these states would commit themselves to introduce in their legislation the catch-all offence of participation in a criminal organisation (*association de malfaiteurs*). This would enable the extradition of persons not accused of any more specific offence punishable in the requested state. Preliminary reactions of the member states indicate that agreement could be reached on this basis.

With regard to the problem concerning the extradition by member states of their own nationals, Denmark, Sweden and Finland presented a joint declaration, according to which they are prepared to extradite persons residing on their territory, provided they are not citizens of one of the five Nordic countries. This indicates that the governments of the Nordic EU-member states are willing to change their present legislation under which non-nationals legally residing on their territory may not be extradited. In an advance information on the JHA meeting in Luxembourg to the Danish Parliament's Committee on Legal Affairs, the Danish Minister of Justice, Bjoern Westh, contended that the other EU member states were "demanding" such a declaration from the Nordic countries. It remains to be seen whether the parliaments of Denmark, Sweden and Finland will agree to a change of legislation that would put an end to equal legal protection of Nordic and non-Nordic citizens residing on their territory.

Sources: 1993rd session of the JHA-Council, Luxembourg, 4.6.96, Communication à la Presse, 7813/96 (Presse 157); Projet de recommendation sur la lutte contre l'emploi illégal de ressortissants d'Etats (7813/96 Annexe I); Projet de résolution portant fixation des priorités de la coopération dans le domaine JAI (JHA) pour la période du 1.7.96 au 30.6.98 (Annexe II); Danish Ministry of Justice, Copenhagen, 23.5.96: Advance information to the Legal Affairs Committee of the Parliament on the agenda of the JHA-Council meeting on 4-5.6.96 (in Danish); our sources. All quotations are our translations from French and Danish.

SCHENGEN CHARTER FLIGHTS TO ZAIRE

Among the less known consequences of the entry into force of the Schengen Convention is the concerted organisation by France, Germany and the Netherlands of the return of unwanted Zairians to their country.

Since the entry into force of the Schengen Convention in March 1995, at least 11 joint charter flights to Zaire have taken place.
The flights, to Kinshasa-Ndjili airport, started alternately in The Netherlands and France. According to a survey made by *AK Asyl Bawü*, an asylum organisation in Baden-Wurttemberg, at least 290 Zairians were deported in such concerted operations by the three Schengen-member states.

In one case in 1995, *AK Asyl Bawü* was able to prove that a Zairian asylum seeker from Baden-Wurttemberg was arrested and tortured by the Zairian special forces, DSP (*Division Speciale Presidentielle*), upon arrival at Kinshasa-Ndjili airport. The DSP is in charge of security at the airport. This makes it difficult for Zairian human rights organisations to investigate what happens with deportees from Europe, when they arrive in Zaire.

Source: Note of AK Asyl Bawü, 26.3.96; see also CL No.42, p.4.

TRANSPARENCY IN THE EU: THEORY AND PRACTICE

Time and again the Council and the Commission of the EU, as well as member state governments, have solemnly emphasised the EU's commitment to open government and public access to information. In practice, however, secrecy prevails. After the *Guardian* and the *Journalisten* cases (see CL No.41, p.2, No.38, p.1, No.24, p.5), the most recent decision of EU bodies to refuse the disclosure of a number of JHA Council documents to the British journalist and editor of *Statewatch*, Tony Bunyan, does not indicate a policy change.

On 11 June, member states voted by eight votes to seven, both in COREPER (Permanent Committee of Representatives and the Council of Justice and Home Affairs (JHA) ministers, to refuse access to nine sets of minutes of the K4 Committee - the committee of senior officials which coordinates EU policy on policing, immigration/asylum and legal cooperation.

A "fair solution"

The (slim) majority of member states considered Mr Bunyan's request a "repeat application" allowing the Council to arbitrarily decide to disclose only five of a total of 14 documents.

Article 3.2 of the "Code of Conduct" on public access to information says: "The relevant departments of the General Secretariat shall endeavour to find a fair solution to deal with repeat applications and/or those which relate to very large documents". Apparently, a "fair solution" according to the Council is to decide arbitrarily what to send to an applicant. This is all the more true now that "repeat application" also means "similar". Indeed, Mr Bunyan never made repeat applications for the same document, but merely applied for access to different sets of documents at repeated occasions. This professional curiosity was too much for the Council.

The seven governments voting in favour of greater openness were: Denmark, Ireland, Greece, The Netherlands, Finland, Sweden and - somewhat unexpectedly - Great Britain. In addition, Denmark, Sweden and Finland issued declarations saying all the documents requested by Bunyan should have been disclosed.

"A democratic right that should not be used too often"

For their part, France and Belgium issued an astonishing declaration, attacking Mr Bunyan's right to request access to Council documents. It said they considered that "Mr Bunyan's applications ... are contrary to the spirit of the 1993 decision [the "Code of Conduct"] and that they abuse the good faith of the Council in its willingness to be transparent". Commenting on the declaration, Mr Bunyan said the right of access to Council documents was "apparently a democratic right which should not be used too often and certainly not regularly".

The champions of secrecy

The governments which have constantly voted against Mr Bunyan's requests for documents are Germany, France, Belgium, Luxembourg, Spain and Austria. The three Nordic EU-member states have taken the lead in calling for more openness.

Source: Statewatch, press release, 11.6.96. For more information contact: Statewatch, PO Box 1516, London N16 0EW; Tel: +44/181 8021882, Fax: +44/181/880 1727; e-mail: statewatch-off@geo2.poptel.org.uk

"MEMORANDUM OF UNDERSTANDING" ON THE INTERCEPTION OF TELECOMMUNICATIONS

Law enforcement agencies and secret services are showing growing concern about the prospect of interception becoming impossible as a result of new digital telecommunication techniques. In an attempt to get a grip on the situation, the EU member states and Norway have agreed on a Memorandum of Understanding concerning the "lawful surveillance" of telecommunications. The memorandum, quietly signed at the EU JHA Council's meeting on 23 November 1995, lists a number of legal and technical requirements that shall enable comprehensive surveillance of international telecommunications in the digital age. The document stresses the need for this form of global cooperation as a means of fighting

crime and maintaining national security.

The Memorandum expresses the common conviction of the signatory states that efforts at keeping telecommunications open to interception will be more successful if the participating states jointly set up a number of "international surveillance requirements" with a view to

- influence national policy concepts;
- provide guidelines for network operators, service providers and manufacturers on surveillance requirements they must take into consideration in developing telecommunication hardware and software;
- stimulate the development of norms for telecommunication industries regarding the execution of interception orders; and
- secure that new technical norms do not jeopardise interception.

In the English version of the Memorandum, the term used for authorities competent to carry out interceptions is "law enforcement agencies". Significantly, in the German version, this term is translated as *gesetzlich ermächtigte Behörden* ("agencies authorised by law"). The German wording would indicate that intercepting agencies include secret services.

Full access every where at any time

Among others, the following requirements are listed in an appendix to the Memorandum.

The "agencies authorised by law" must have access to all telecommunications transmitted to or from a user under surveillance by a telecommunication service. They also must have access to all call-associated data (e.g time of connection, call forwarding etc). Access must be possible even to telecommunication services used only temporarily by a customer under surveillance, as well as to the phone numbers of users called up by the person under surveillance, even if a connection was not made. Telecommunications not subject to an interception order may not be transmitted to the intercepting agency.

Tracking mobile phone users

Regarding users of mobile phones, service providers must be able to provide the competent authorities with information on the geographic position of a user under surveillance.

Permanent interception must be possible without any delay in time. For these purposes, network operators and service providers must prepare "one or several interfaces" from which the intercepted telecommunications can be transmitted to the surveillance facilities of the competent authority.

Cracking encoded telecommunications

Service providers who make use of compression or encoding programmes must provide the competent authorities with the intercepted telecommunications in their full, decoded form. Interception must be enabled in such a way that neither the person under surveillance nor other unauthorised persons becomes aware of the measure.

Prior to interception, network operators/service providers shall supply the intercepting agency with the following information:

1. Data regarding the identity of the person under surveillance, his phone number and/or other identification data;
2. Information on the services and characteristics of the telecommunication system used by the person under surveillance and provided by the network operator/service provider; and
3. Information on the technical parameters for transmission to the interception facilities of the competent authorities.

Service providers must enable for simultaneous interception by several agencies

It shall further be required that network operators/service providers provide for several simultaneous interception measures. This is necessary, in order to enable interception by several "agencies authorised by law". Network operators/service providers must implement interception "as fast as possible", and in urgent cases "within a few hours or minutes".

Cooperation with the FBI

Although an initiative of the EU member states, non-EU states have been invited to sign the Memorandum and signatory states are called upon to send information and recommendations pertaining to the constant examination and updating of interception requirements to two addresses: The General Secretariat of the Council of the EU in Brussels and... the Director of the FBI at 10, Pennsylvania Avenue, in Washington DC. However, despite this information input, generously and unilaterally offered by the Europeans to the FBI, the USA (as well as Canada, Australia and Hong Kong) have so far refrained from signing the Memorandum.

Memorandum a reaction to confidential K4 report

A confidential report of an expert sub-group of the K4-Committee from 5 May 1995 voices some of the fears of

law enforcement and intelligence agencies that led to the agreement on the Memorandum.

The report notes that lawful interception of terrestrial or wireless telecommunication networks (such as GSM) has up to now been carried out via national infrastructures, but that this will in many cases no longer be possible with the next generation of satellite supported systems that will be run by large international corporations and do not require exchanges in every country. This means that system providers could no longer be held responsible and interception no longer be carried out if exchanges are located in "non-cooperative" countries. "The problem is further complicated through the fact that an interception target, although it is operating within a certain national territory, can be registered in another country," the report emphasises.

Existing mechanisms of mutual legal assistance in police investigations no longer meet the requirements of the coming century, the report stresses and considers a number of operational and technical, as well as legal and political measures, much on the lines of a recent German draft Telecommunication Law (see article in this issue, p.7).

Privacy of telecommunications a "global problem"?

The report illustrates the concerns of the interception experts with the following example: A citizen of country A is a customer of a telecommunication service provider in country B, is temporarily working in country C, uses a telecommunication system whose exchange is located in country D, and wishes to ring up a number in country E. This person's telecommunications shall be intercepted in connection with a serious crime committed in country F.

The prime question is, which legal regulations apply and, consequently, in which country the interception order is issued and who is responsible to carry out the measure. Country A, whose citizen the suspect is, is not directly concerned, since neither the crime was committed there nor the phone conversations in question take place there. Country B, where the telecommunication service is located and where the customer pays his bills, is neither concerned with the crime, nor responsible for the transmission of the suspect's telecommunications. It must however authorise the "marking" (technical identification) of the customer, enabling interception. Country C, from which the suspect is communicating, probably has no idea of his presence in the country, is not concerned with the crime and has nothing to do with the authorization of the interception or the transmission of the intercepted conversations. Country D, the site of the telecommunication service's exchange, is not concerned with the crime, but responsible for the transmission of the suspect's telecommunications and in a position to intercept his conversations, on condition however, that the data of the suspect customer are "marked". Country E, to which the suspect is calling, has nothing to do with any of the above aspects, but may have regulations imposing certain operation restrictions on the service provider.

Need for international agreements

The report stresses that agreement must then be reached on how the content of the intercepted telecommunication and additional data in connection with a communication shall be processed on a transnational level. This requires prior treaties with respect to, inter alia, the site of the exchange used, forwarding information to the point where it is handed over, and questions pertaining to the confidentiality of the information.

By way of a conclusion, the report points out, that the new satellite supported telecommunication systems have a lot in common with existing terrestrial mobile phone (GSM) systems: the individual customer is mobile; the range of the system is not limited to one country; the customer can choose between a variety of competing systems. There is, however one crucial difference: the new systems must not necessarily be located in a particular country.

According to the expert subgroup, this situation will rapidly develop into a "global problem" which can be handled only through "global cooperation to a hitherto unknown extent".

Sources: Memorandum of Understanding betreffend die gesetzliche Überwachung des Telekommunikationsverkehrs (lawful interception of telecommunications), EU JHA-Council, Brussels, 25.10.95, 10037/95, Limite, Enfopol 112, 16 p., in German; Legales Abhören auf Telekommunikationssystemen ausserhalb der Landesgrenzen (Lawful interception on telecommunication systems outside the national frontiers), report of a subgroup of experts (Paris, 5.5.95), EU JHA-Council, Brussels, 2.6.95, 4118/2/95, 7 p., in German. Quotations from the above documents are our translations from German. On telecommunications interception see also CL No.13, p.6, and No.24, p.6.

GERMANY

INTERCEPTION OF TELECOMMUNICATIONS: THE GERMAN MODEL

Under a draft "Telecommunications Law" prepared by the German government, providers of on-line services and electronic mailboxes will have to allow police and security authorities full electronic access to their systems, including customer data registers, at any time.

The German project appears to be the forerunner of planned EU regulations (see article above).

Last year, the parties of the German coalition government and the opposition Social Democrat Party agreed on a draft Telecommunication Law. Negotiations took place within a small circle of initiates and, as yet, their is little awareness among the general public about the extent of the planned interception activities.

The draft's paragraph 87 is particularly problematic. It provides that law enforcement authorities and secret services shall have access at any time to the customers registers of telecommunication services. Today, they certainly no longer comprise German *Telekom* and the various providers of wireless communication networks only. In recent years, other service providers, such as on-line services, e-mailboxes and Internet providers have emerged in great number. Should the draft Bill become law, they would all have to see to it that "competent" authorities always have access to their data. They would even have to provide for interception to be carried out without their own or their users' knowledge. The system shall be "technically organised in such a way that retrievals [of data by the authorities] can not be recognised by the [system] provider", the provision says. Moreover, service providers must set up the necessary technical devices and computer software at their own expense.

The difficulties of criminal investigation in the digital era

The law enforcement and security authorities justify their claim with the particular difficulties of criminal search in the new era of computer networks and digital communication. At one time, it sufficed to obtain a court order and to find out the phone number of a suspect, in order to tap his phone conversations. Nowadays, a number of additional possibilities must be taken into account: A telephone connection at home, another one at the place of work, a separate number for the mobile phone and one for the fax machine, as well as one or several e-mail addresses. All these various means of telecommunication of one and the same user might be scattered among different service providers. All these providers offer far more than just telephone communications. They comprise electronic mail, on-line chats via computer keyboards and sending data files outside a particular network. In the digital age telecommunication means exchange of data of all kinds in every imaginable ways.

Interception everywhere at any time

Now, the authorities want to make sure that they have at their disposal all the connection data relating to every single user in the event of a need for interception. The various authorised authorities will not have the wearisome task of compiling the data themselves. This task is to be accomplished by a particular "regulation authority" (RA). Upon request, the RA shall search the data bases of all the providers which it is connected with. In doing so, it is merely an executive agency. The RA is not authorised to verify the lawfulness of a request. In fact, the draft bill contains no provision whatsoever restricting the retrieval of data for example to the mere purpose of surveillance of suspects.

Nonetheless, the concept seems complicated and fairly harmless at first sight: after all, the data in question are spread among a multitude of small and large user registers. However, since the RA would have on-line access at any time and within seconds to all registers at once, it would (just as all law enforcement an security agencies) have at its disposal a veritable super-data base.

The making of the transparent citizen

This database would be far more than a particularly up-to-date residents register with addresses and phone numbers. As a rule, telecommunication-service providers store not only the general data of their customers but also detailed information on the types of services they have used - simply for accountancy purposes. Thus, they keep records of which commercial data banks a user has accessed and which discussion groups he has subscribed to. Taken together, such data reveal much more about the interests and activities of a person than e.g. lending lists of libraries whose seizure requires a lengthy procedure. Authorities shall now have access to their electronic equivalents at any time. Nowhere in the draft does it say that retrieval will be limited to, for example, addresses and phone numbers.

Surveillance of non-suspects likely

With the multitude of services offered today, even non-suspects are likely to be registered in the course of a criminal investigation. All that is necessary is for a suspect to arrange to have his calls temporarily forwarded to the number of, for example, a completely unsuspecting business friend, who has invited him to a party. The police will merely have to retrieve the data of his telecommunication service providers and the number of the harmless business friend will end up in the list of phone numbers under surveillance.

Extensive cooperation between service providers and the authorities

Despite such problems the Federal Council of the *Länder*, which is dominated by the SPD, has called for

additional tough measures: service providers must supply the authorities not only with their current customers lists, but also with old lists, and while the draft bill regulates how long at most data may be stored, the *Länder* demand that only the minimum storing time be regulated. Moreover, the obligation for service providers to cooperate with the law enforcement and security agencies shall be extended from commercial service providers to "business-like network operators", i.e. firms using own electronic networks for their internal data exchange. Operators of short-range radio networks, as used for example at airports, are concerned too, and if the *Länder*-governments have their way, even mailbox operators are likely to be liable to enable the authorities' access to their data.

Law enforcement authorities' growing appetite for data

The authorities' growing appetite for data on the mere grounds that telephones must occasionally be tapped, is not just accidental. Indeed the rules regarding telecommunications surveillance were thoroughly toughened already a year ago with the entry into force of an Ordinance on Telecommunications Interception (*Fernmelde-Überwachungsverordnung: FÜV*; See CL No.36, p.4). The ordinance obliges service providers to have a so-called "interception interface" at disposal for the purpose of surveillance measures ordered by a court. Here too, the necessary additional
equipment and software is at the expense of the provider. Providers who failed to meet this requirement until 31 May are facing severe fines.

One line for the customers, two for interception

Together with the ordinance, the Telecommunications Law, if adopted, would imply that the technical equipment of every telecommunications service must consist of at least three lines: one for the customers, one for the unrestricted and unnoticed retrieval of customers' data by the regulation authority, and one to enable interception measures ordered by a court. Actually, the ordinance provides that "more than one surveillance measure per telephone connection" must be possible.

The extensive use of telephone tapping is nothing new in Germany. In proportion to population, surveillance measures are ten times more frequent than in the USA. Moreover, German legislation does not provide for courts to check the efficiency of an ordered interception measure. On the contrary, the draft Telecommunications Law prohibits the disclosure even of surveillance statistics. Thus the draft law is to definitively establish the rigid rules introduced by the ordinance.

The media under surveillance

The matter is no longer about conversations only. With computers and telecommunications networks steadily developing into a new medium, new forms of their use are constantly arising, e.g. telework, telebanking and telemedicine. Already today fundamental liberties, such as the constitutional freedom of press, are undermined to a large extent. Once connection data may be seized, from which it follows whom an editor has called and who has called him, there can no longer be question of any protection of sources.

The public German TV-channel ZDF made this experience during the search for a criminal real estate operator. From a mobile phone-service provider the prosecution authorities got the connection data of the ZDF journalists working on the case.

Towards a permanent criminal intelligence network

The Berlin Data Protection Commissioner, Hansjürgen Garstka, regards the draft law as a step towards drastically increased surveillance and claims that telecommunication networks are being made the "permanent criminal investigation network of the police and the office of public prosecution". Manuel Kiper, a Green Member of the Federal Parliament and his party's expert on post an telecommunication warns against "making the Telecommunication Law a tapping law".

Little protest

However, apart from the little band of professional data protection people, the draft bill has barely drawn criticism. There is no comparison with the storm of protest in the USA in 1995-96 when the American equivalent to the FÜV-ordinance, the Digital Telephony Bill was presented. Yet the US bill did not provide surveillance to the same extent as envisaged in Germany, nor were the service providers to bear the costs of the necessary technical adaptions. This last point has hitherto been the only aspect of the draft law that has upset some providers in Germany. Already when the ordinance was introduced, the wireless telecommunication providers Mannesmann and E-Plus feared that additional costs for new lines and technical modifications could amount to two digit figures in millions of D-Mark. In a letter to politicians in charge of post and telecommunications, the two companies protested at being burdened with criminal prosecution tasks and threatened with legal proceedings. Nothing has, however, happened so far.

General ban on encoding programmes?

A small service provider in Cologne wondered what benefit the police were expecting to draw from the data of network users, since increased surveillance would merely result in users encoding their data. Indeed the necessary software is widely available. One programme even allows for encoding telephone conversations. Such practices can not even be eliminated by a general ban on encoding programmes. There is actually already software making it possible to "hide" encoded messages before their transmission, e.g. in apparently innocent image files.

Supporters of generalised surveillance do not seem to be discouraged by such prospects.

Violation of constitutional rights?
The Federal Constitutional Court could, however, bring new movement to the debate. A Hamburg professor of criminal law and drug expert, Michael Köhler (see CL No.36, p.6) has filed a complaint with the Court against the systematic interception of foreign calls by the German Foreign Intelligence Service, the BND. To evaluate this mass of data the BND makes use of electronic "filters" that sift all conversations for suspect words such as "drugs" and "weapons". Köhler holds that he often talks about drugs on the phone for professional reasons and that he is therefore constantly running the risk of getting into the BND's search-by-screening system. This, he says, is a breach of the Constitution. A decision of the Federal Constitutional Court is expected before the end of this year. This is why the advocates of the new Telecommunication Law are showing particular haste: according to the Government's plans, the law is to be adopted before the summer vacation.

Information society without secrets
If the law actually enters into force, the confidentiality of telecommunications will be seriously weakened. "Without privacy of telecommunications there will no longer be any secrets in the information society", Ute Bernard of FIfF, a German organisation of critical computer scientists contends. That the authors of the draft Telecommunication Law are not particularly concerned with privacy can be deduced from the fact that they simply forgot to state a penalty for offences against the privacy of telecommunications. Thus, if the draft Law is adopted in its present form, anyone unlawfully infringing on privacy will commit an act prohibited by law, but will not be punishable ...

Ingo Ruhmann

The author is a computer scientist and an assistant of Manfred Kiper, MP in the German Bundestag. He is also member of the board of FIfF. Contact: Ingo Ruhmann, Büro Manuel Kiper MdB, Bundeshaus HT 404, D-53113 Bonn; Tel: +49/228 1681547; Fax: +49/228 1686515; E-mail: manuel@kiper.bn.eunet.de

LEGAL BLESSING FOR THE BURIAL OF ASYLUM RIGHTS

On 14 May, Germany's highest court, the Federal Constitutional Court in Karlsruhe, pronounced a judgement to the effect that the dismant-ling of the right to asylum in Germany, decided by the Federal Parliament in July 1993 is in compliance with the Constitution.

Three regulations of the new asylum law, all aiming to cordon off the country against asylum seekers were examined by the Court: the Third country rule, the "safe country" concept, and the so-called "airport procedure" - a fast-track procedure for dealing with "manifestly unfounded" asylum applications.

While the judgement of the Constitutional Court is celebrated as a triumph by the Government, human rights and refugee aid organisations are in a state of shock.

It should be recalled that it was the Social Democrat Party (SPD) that opened the way for the *de facto* abolition of the right to asylum - in Germany of all countries.

"Political persecutees enjoy the right to asylum", it simply and clearly said in the German Constitution until 1993. And that was a historically unique achievement. It was an answer of the young Federal Republic of Germany to the crimes of Nazi Germany and it consisted in giving a concrete form to the "inviolability of human dignity" in making the right to asylum a fundamental right of constitutional status that can be claimed before courts by individuals. The brilliantly unequivocal wording of the 1949 Constitution was strong enough to undermine to a certain extent the European "closed doors" policy of the early 90s. But when the number of asylum seekers in Germany rose from 100,000 to 400,000 between 1989 and 1992, after the fall of the Iron Curtain, the German state considered itself overstrained. Both the Government and conservative circles started a campaign against "asylum swindlers" and called for a change - or even the downright abolition - of the constitutional right to asylum.

Creating an atmosphere of pogrom
The campaign contributed to the rise of an atmosphere of pogrom throughout the country: the homes of asylum seekers burned, racist attacks multiplied. At many places, the life of anyone looking like a foreigner was at risk.

In this crucial situation the maintenance of the right to asylum depended on the steadfastness of the SPD. Without the Social Democrat votes the conservative majority in the *Bundestag* (Federal Parliament) would not obtain the two thirds majority, necessary in Germany for a change of the Constitution. Out of fear of a loss of popularity the SPD-leadership decided at a closed conference to bow to the atmosphere of pogrom. The SPD agreed upon an amendment of the Constitution with the governing conservative Christian Democrat parties, CDU and CSU.

De facto abolition of the right to asylum

The amendment amounted to actually dismantling the right to asylum by three drastic restrictions:

1. The Third Country rule: a refugee entering Germany via a country rated "safe" by the German government, is returned at once and without a procedure or access to legal remedy. Since the Government regards Germany's neighbours as "safe", refugees can no longer get to Germany by land.
2. Asylum applications of refugees from countries defined by (German!) law as free of persecution and humiliating treatment (at present: Bulgaria, Rumania, Hungary, Slovakia, the Czech Republic, Poland and Ghana) are turned down. Nationals of these so-called "safe countries of origin" may lodge a complaint against the automatic rejection of their asylum application to an Administrative Court, based on their claim that the country of origin in question is not safe with respect to their particular case. However, experience shows that only an infinitesimal number of such complaints result in asylum being granted.
3. These rules are complemented by an implementing provision in the asylum procedure law aimed at asylum seekers arriving by airplane (i.e. mostly at Frankfurt International Airport): they are not allowed to enter German territory but are detained in an "extra-territorial" building at the airport. Officials of the BAFI (Federal Office for the Recognition of Refugees) must interview them immediately upon arrival, allow them to call up a lawyer, and decide upon their asylum application within two (!) days. Statements of BAFI officials prove that the interviews actually rather resemble criminal interrogations. Asylum seekers are *a priori* suspected of lying. Decisions are often coloured, i.e. based on very subjective assessments of the interviewing officer, e.g. about whether an applicant appears "trustworthy" or not. If the BAFI turns down the application as "manifestly unfounded", the asylum seeker may apply for entry to the German territory before an Administrative Court on provisional legal protection grounds. The Court must decide upon this application within two weeks. Thus, the entire procedure does not take more than 19 days.

The impossibility of a fair procedure

The Federal Constitutional Court has now prolonged this period by four days. But a comprehensive examination of an asylum seeker's claim and a fair legal defence are still not possible under such circumstances. Since no opportunity for appeal is provided for by the law, the contradictory jurisdiction of Administrative Courts cannot even be standardised. The refugees are held in the extra-territorial zone so as to enable their immediate return to their airport of departure - even if they lack travel documents - in the event of their application being turned down as "manifestly unfounded". Indeed, once an insufficiently documented person has entered German territory, it is complicated and time-consuming to send him/her back.

Constitutional Court acted under political pressure

In its judgement, the Federal Constitutional Court quite boldly contends that the constitutional right to asylum is not restricted in an inadmissible way by these three regulations. Substantial parts of its decisions were passed with five votes against three, and dissenting opinions were published. However, as far as the only legally valid decision of the majority is concerned, there are reasons to suspect that it is a political decision. As a matter of fact, the Federal Constitutional Court recently incurred the wrath of conservative-religious circles with three judgements. One concerned the controversial issue of abortion. Another, the so-called "soldier decision", stated that it is lawful to quote the following words of Kurt Tucholsky (a renowned anti-Nazi writer and journalist of the 20s and 30s): "Soldiers are murderers". Finally, the so-called "crucifix judgement" prohibited the *Land* of Bavaria from prescribing by law the mounting of crucifixes in public schools.

The political courage of Germany's highest court seemed exhausted, especially since the Government increased political pressure on the judges. While the Federal Judges were deliberating, the Federal Interior Minister, Manfred Kanther, above all, repeatedly publicly warned against what he called the obstruction of the new asylum law and threatened with the "anger of the people". He also spectacularly complained about a TV broadcast that dealt critically with German asylum practice.

The last loopholes for humaneness tapped

With currently approximately nine per cent of asylum applications resulting in asylum, the recognition quota in Germany is still relatively high (as compared with other European countries). This is, however, mainly due to "old" cases, i.e. asylum seekers who made their applications before July 1993. The number of such cases is of course steadily diminishing.

Once the "dismantled" new asylum law is fully implemented, the number of recognised refugees will "drop down in the cellar", says Wolfgang Grenz, the asylum expert of Amnesty International's German section. The "asylum judgement" has, indeed, provided for exactly this to happen. Before, at least those refugees who arrived by land - i.e. via a "safe third country", but who did not know or concealed their itinerary - had a chance of obtaining asylum. The judgement of the Constitutional Court excludes any chance for these refugees to obtain asylum. Instead, they will have to make do with short-time, semi-legal "tolerance" permits allowing their immediate deportation as soon as a country willing to readmit them can be found.

Deportations executed before a final decision on their lawfulness

The judgement has tapped another loophole for humaneness. Hitherto, lawyers could sometimes prevent a deportation by filing an urgent appeal to the Constitutional Court. This possibility no longer exists. Petitions

against deportation measures may still be filed, the "asylum judgement" establishes, but they no longer have a suspensive effect. In other words, the complainant is deported and may wait for the decision of the German court "at home" - in many cases probably in prison or in a grave. This decision is particularly grotesque in view of the fact that, with regard to one of the five pilot cases considered in the "asylum judgement", the Constitutional Court ordered a review of the case by the subordinate court on the grounds that grave errors had been made. One of the lawyers of the successful Togolese applicant, Kouessi S., commented: "The Togolese who won here, would never have won, if this judgement had already been pronounced". And a colleague added:
"Henceforth it will be impossible to remedy a similar case via the Federal Constitutional Court". Indeed, in one and the same judgement the Constitutional Court admits the need for reviewing court decisions and *de facto* prevents the use of this legal remedy in future cases.

Consequences far beyond asylum
The judgement of the Federal Constitutional Court has consequences far beyond the domain of asylum law. Indeed, when the judiciary admits that immediate execution sets irreversible facts before the latter have been finally considered by the courts, jurisdiction will increasingly resemble an irrelevant scholastic exercise. What is the use of jurisdiction, when, for instance, an environmentally-damaging industrial project can be realised before a court finds that the building permit breached the law?

Felix Schneider (Frankfurt/Main)

RESPITE FOR BOSNIAN REFUGEES IN GERMANY

Refugees from Bosnia-Hercegovina (B&H) who found refuge in Germany will not be forced to leave Germany before October at the earliest. This statement was made on 6 June by the German Interior Minister, Manfred Kanther. Negotiations between Germany and B&H have not yet been concluded, the Interior Minister pointed out, but thanks to a number of transit and visa agreements, Bosnian refugees can visit their (former) home country and return to Germany afterwards.

The letter of Interior Minister Kanther means that the Government's previous plans for the swift forcible return of the Bosnian refugees have failed for the time being. Yet, the pressure on the refugees to leave the Germany "soon" remains.

According to earlier plans, singles and childless couples - with very few exceptions - were to be deported. This would have meant the forcible return of about 200,000 persons - about two thirds of all refugees from B&H, starting 1 July 1996 and completed by mid 1997. Starting May 1997, families with children were also to be sent back. This was decided by the Conference of German Interior Ministers (*Länder* and federal level) both on 15 December 1995 (just one day after the signing of the Dayton Agreement!) and on 26 January 1996.

Massive protest against overhasty repatriation
This overhasty decision, dictated only by the populist needs of German home affairs politicians, triggered a storm of protests inside and outside Germany: The Government of the Bosnian-Croatian Federation of B&H reacted with outrage. The UNHCR pointed out that, if realised, these plans were very likely to result in new camps being set up and would precipitate a humanitarian catastrophe.

In Germany, refugee assistants, churches, NGOs, charities and the Green Party mobilised public opinion. Even the conservative daily, *Frankfurter Allgemeine Zeitung*, which is known both for its influence on Government politicians and its very restrictive views on asylum, criticised the planned deportation of the Bosnian war refugees with unusual vehemence.

***Länder* Ministers fudge decisions**
The day before the German Interior Ministers met again on 3 May, the media had published pictures showing Bosnian Serbs attacking Bosnian refugees with batons. So the German Interior Ministers attempted the impossible: to take into account public opinion on the one hand, and to stick to their repatriation decisions on the other. As a result, they took a number of very muddled technical decisions, while leaving it to the Federal Interior Minister to decide upon the main and most controversial issue: whether or not to grant the Bosnian refugees in Germany a reprieve.

Forced repatriation in wintertime?
Mr Kanther has now decided: four months reprieve, until October. Apparently, one cannot expect a politician to consider the fact, that winter usually begins at that time of the year in Bosnia...

Now as before, many refugees, among them many survivors of torture camps, fear they will be sent back to places, where there persecutors, the assassins of their relatives, not only live unpunished, but also still hold the levers of local power. This is the situation facing in particular displaced people from today's Republica Srpska, but also for those from certain parts of the Bosnian-Croatian Federation.

Felix Schneider, Frankfurt/Main

HARDENING GERMAN ASYLUM PRACTICE

Information published by the German NGO *PRO ASYL* reveals a steady trend towards a super-restrictive asylum practice in Germany. German authorities cooperate with embassies of countries of persecution in preparing the return of asylum seekers, long before their applications for asylum have been decided upon. Refugees from civil war situations are systematically denied asylum status. Germany is breaching the 1951 Geneva Convention on Refugees and increasingly exporting its restrictive interpretation of the Convention on the rest of the EU, *PRO ASYL* contends.

PRO ASYL recently obtained documents proving that the German Border Protection force, BGS (*Bundesgrenzschutz*), communicated the identities of a group of Afghan asylum seekers to the Afghan embassy in order to obtain substitute travel documents enabling the deportation of the refugees. This happened five months before the Federal Office for the Recognition of Refugees (BAFI) decided upon their applications.

In its request to the Afghan embassy, the BGS wrote that the asylum seekers in question were "illegally" staying in Germany. A spokesman for PRO ASYL, Heiko Kaufmann, said this was an obviously incorrect statement, since asylum seekers have a right to stay in the country pending a decision on their application. Mr Kaufmann further made it clear that German asylum law prohibits the communication of personal data of asylum seekers to the authorities of potential countries of persecution while their applications are being examined.

For its part, the Federal Office for the Recognition of Refugees, BAFI, stated that the BGS may hand out documents of asylum seekers to their respective embassies only once a rejection of their application is "foreseeable". Mr Kaufmann said this was merely an attempt to put all the blame on the Border Protection, since the BAFI instructed the BGS to provide travel documents for the asylum seekers in question already 5 months before the BGS actually contacted the Afghan embassy.

PRO ASYL argues that these procedures are making refugees into potential targets of the secret services of their home country and amounts to a violation of a fundamental element of asylum law - the secrecy of the asylum procedure. Moreover, the practice of cooperation with foreign embassies endangers family members remaining in the country of origin. According to *PRO ASYL*, persecution on the mere ground of kinship is widespread in Afghanistan. The NGO also said there was evidence indicating that the case of the Afghan refugees was not an isolated incident but revealed a routine practice of the BGS.

As a consequence, *PRO ASYL* demands that the Home Affairs Committee of the Federal Parliament examine the proceedings of the BGS.

Source: PRO ASYL, press release, Frankfurt/M, 5.6.96.

No state authority = No political persecution

The Hessen Administrative Court ruled on 21 May that refugees from Somalia are not eligible for asylum in Germany. In a country lacking executive state organs, there can be no political persecution, the Court found. It argued that the local and regional clans ruling in Somalia could be characterised as "pre-state, but not state-like power holders".

Commenting on the judgement, *PRO ASYL* stressed that political persecution and human rights violations are characteristic precisely of civil war situations and that the jurisdiction of the Hessen Court amounts to an "attack against the Geneva Convention on Refugees". The Convention does not limit refugee status to merely victims of state sponsored prosecution.

The Hessen judgement confirms a growing trend in Germany to "define out" ever more refugees from the right to asylum. In earlier decisions by administrative courts, Afghan and Tamil asylum seekers were denied asylum on the same grounds as the Somalis in Hessen.

The German judiciary's restrictive interpretation of "persecution" according to the Convention is in line with the "Joint Position on a Common definition of the Term `Refugee'" adopted by the EU Justice and Home Affairs (JHA) Ministers in November 1995. Under the Joint Position, persecution by other parties than state authorities shall be considered only when it is "encouraged and authorised" by the public authorities. As a consequence, victims of persecution in countries where their are no public authorities according to the assessment of EU-member states, are not eligible for asylum.

France and Germany where among the strongest advocates of including this restrictive interpretation in the Joint Position which was adopted despite massive protests of the UNHCR.

The new jurisdiction results in ever more civil war refugees living in Germany only with short-time "tolerance" permits. The ensuing situation of constant uncertainty deprives them of any possibility to plan for their future, *PRO ASYL* holds.

Source: PRO ASYL, press release, Frankfurt/M, 22.5.96. On Joint Position, see also CL No.39, p.3.

OPINION

In the following piece, Christophe Tafelmacher analyses the striking similarities between Swiss policies with respect to asylum seekers, drug addicts and unemployed people. Denigration of the victims, emergency measures and increased policing are symptoms that highlight a trend towards an authoritarian system of government, the author suggests.

Christophe Tafelmacher is a lawyer and works as a legal counsellor in the refugee service of the Swiss Interchurch Aid.

He presented the following text at the occasion of a working meeting of the *Geneva Group - Violence and Asylum in Europe*, on 3 February 1996.

THE RISE OF THE 'AUTHORITARIAN WELFARE STATE'

Introduction

In dealing with the three distinct and specific categories of citizens - refugees, drug addicts and unemployed people - certain similarities are striking in the attitudes shown by the public state authorities and the prevailing political trends.

Since this convergence does not seem to be accidental, my hypothesis is that we are dealing with a deliberate strategy.

I will try here to briefly describe these similarities. In my conclusion, I wish to present some of my reflections based on these findings.

Rise in numbers and denigration

The first thing that strikes me is the way in which the state and politicians have tried to cope with the steadily spreading three societal phenomena (drug addiction, refugee influx and unemployment) - and with the increasing number of people directly or indirectly demanding assistance or some other form of action from the public authorities.

Indeed, since the beginning of the 80s, Switzerland has experienced the arrival of a steadily increasing number of asylum seekers, from 7,000 in 1984 to more than 40,000 in 1991. Very soon, the authorities adopted an aggressive language in the face of what they termed a "massive influx". At that time, the term "bogus refugee" was created - a term to which all societal actors were to refer to ever since. The term was widely used by Government officials in charge of asylum policies. The distinction made between "genuine" and "bogus" refugees was quickly accepted by a wide public and is now a natural part of popular discourse.

In the beginning of the 1990s, the same phenomenon reproduced itself, this time with respect to the unemployed. The economic crisis which hit Switzerland led to an explosion of unemployment statistics. Before, unemployment was virtually non-existent in Switzerland. Today, about 150,000 people are dependent of unemployment benefits (six per cent of the working population). This extraordinary development very soon resulted in the denigration of the victims by the Head of the Federal Labour Board. This senior official claimed that many among those receiving unemployment benefits were actually "bogus unemployed". This term hit home with the public and has been frequently used in subsequent debates ever since.

Finally, one can observe that the emergence of "open scenes" of illicit drugs sales and consumption which made the problems of drug addicts visible to everybody on the streets entailed increasing mass-media coverage which in its turn triggered a polemic political debate. The drug addicts were stigmatised as "mentally sick persons" or "criminal abusers". In public perception, the problem was often linked to immigration, due to the presence of Lebanese, Nigerian or Kosovo-Albanian dealers.

The consequences of denigration: state of emergency policies and restricted rights

The large press coverage of all the above phenomena was linked to a veritable campaign of denigration. The ensuing widespread indignation manifestly provided the public justification for adopting "restrictive policies". It is striking how this key term appears time and again in the three domains considered. The bogus unemployed, the bogus refugee and the criminal or mentally sick drug addict are to become the objects of repressive measures and increased social control within the scope of a restrictive general policy that has become legitimate in the eyes of a large part of the population.

The use of a denigrating language made it possible to create an atmosphere of extreme suspicion. By using the label "bogus" or "delinquent", one induces the perception that we are dealing with profiteers and parasites, in short, people who do not deserve any

sympathy. This legitimises the adoption not only of restrictive but also of veritable state of emergency measures.

Indeed, this is another similarity between the three domains considered: When the situation appears to be dramatic enough, due to increasing statistical figures and denigration, one can easily get the Parliament, or even the people, to vote federal emergency decrees. The choice of this particular legal instrument seems significant to me. To begin with, its adoption procedure is characterised by the extreme rapidity of the elaboration of the regulation and of the parliamentary debate, as well as by its immediate entry into force. Even the launching of a referendum procedure does not delay the entry into force of an emergency decree. Thus, public and democratic debate is short-circuited in order to enable the rapid implementation of emergency measures. The latter are subsequently integrated into ordinary legislation, once they have become normal practice.

As regards asylum, the Government got a federal emergency decree pertaining to the asylum examination procedure voted in 1990. In 1993, the Parliament adopted a similar decree pertaining to the unemployed. A package of measures for coping with the problem of drug addicts dependent of assistance, was decided by the Government in 1991. Finally, in 1995, a committee on drug policies of the three largest governing political parties recommended the introduction of emergency legislation even in this domain.

In the two first cases mentioned above, the federal decrees adopted in accelerated procedures contained direct and serious infringements of the rights of asylum seekers and also unemployed people, such as, for example, the possibility of refusing a substantive examination of an asylum application, the reduction of unemployment-insurance allocations and the obligation for unemployed persons to accept any work deemed "suitable".

In all three cases, an alleged emergency situation is used as a justification of political proceedings in which an often strong dissenting opinion does not have to be taken into account. As for the Swiss people, the outcome of all referendum votes in the three domains from 1993 to 1995 shows that they tend to side with the Government.

Scornful treatment of the people concerned

The scornful and sometimes brutal treatment of asylum seekers, unemployed people and drug addicts in need of assistance is another consequence of the campaign of denigration.

Asylum seekers get the words "uncertain identity" stamped in their documents and are discriminated against by federal and local authorities. In the town of Thune, for instance, asylum seekers received social benefits in the form of special "asylum seeker-coins" accepted only at certain shops. The local authorities idea, was to prevent asylum seekers from unnecessary and expensive shopping. In the town of Bauma, asylum seekers were denied entry to the municipal swimming pool. A disquieting number of cases of ill-treatment of asylum seekers during their interrogation by the police has also been reported.

Unemployed people are complaining about the attitude of unemployment insurance personnel and have launched a petition demanding "respectful and dignified" treatment.

As regards the drug addicts, the homeless are most exposed to humiliating treatment. In Berne, a group of high-school students set up structures in support of homeless addicts. The group has documented the numerous forms of violence these people are regularly subjected to: police hunts, ill-treatment, attempts to prevent them from eating the free meals distributed by a "street kitchen" ...

Unfortunately, many politicians, as well as a large part of the Swiss population consider this type of abuse as almost natural or acceptable, since the victims of such practices are widely considered as spongers and criminals...

Measures of constraint, privation of liberty

The concept of constraint was introduced in the field of aliens law by the adoption of a law on "compulsory measures" allowing, inter alia, to *constrain* a foreigner to stay inside or outside a particular area on public order grounds (see CL No.30, p.9). This regulation enables authorities to sanction innocent aliens for alleged anti-social or restive behaviour. Non-compliance with such a measure of confinement can entail imprisonment. The new measure is aimed particularly against asylum seekers.

The latest amendment of the law on the unemployment insurance provides for the authorities to *constrain* an unemployed person to accept any work deemed "suitable". Any refusal to accept such work or the fact of not being hired for an assigned job can entail the suspension of unemployment benefits.

As regards drug addicts, the Federal Law on Narcotics introduced in 1975 allows for the hospitalisation by constraint of addicts. In the 1990s, certain circles advocating particularly harsh "War on drugs" policies publicly demanded that drug addicts be subjected to confinement for therapy purposes. In my opinion, this amounts to medical treatment by constraint.

In all three cases we can note that public authorities are expected to impose a behaviour on certain categories of citizens in an authoritarian manner, or even to punish those who fail to comply. According to this logic, these persons are denied the capacity of subjects of right, while the authority is entrusted with extensive powers of decision-making.

In the same way it is interesting to see that, in 1993, the Canton of Zurich created a "returnee centre" for drug addicts. Any drug addict not residing in Zurich can be confined to this centre and deprived of drugs for 24 hours before being sent back to his/her home town. Beyond the fact that these "internments" and "forcible returns" violate the freedom of residence on the entire territory of the country, guaranteed by the Swiss Federal Constitution, the resemblance of this practice with the forcible return of foreigners and asylum seekers is striking. Indeed, the language and the measures resorted to with respect to drug addicts and asylum seekers are tending to get confounded.

The army against drug addicts and asylum seekers

In 1991, Switzerland experienced a particularly massive arrival of asylum seekers and the Government adopted the "Programme 1991/1992 regarding asylum". It consisted of implementing all measures provided for by the federal emergency decree of 1990 with regard to asylum procedures, and, beyond this, it contained a set of new proposals for action. Two ideas, in particular, drew a lot of attention: the setting up of internment camps for 200-500 persons each, that could be guarded by the army; and, the use of the army for border surveillance in order to fight against illegal entries. An inter-ministerial working group was charged with drafting a plan for the deployment of army units. A number of army units even took part in a military exercise with the code-name LIMES, i.e the Latin word used by the Romans for the borders of their empire with the barbarians.

The proposal was denounced as totally unrealistic and inept not only by the Church, but even by right-wing politicians and senior police officers. However, only in April 1992 did the Federal Government renounce to resorting to the emergency provision allowing for the use of the army at the border.

In 1994, the then Federal Minister of Defence, Kaspar Villiger, proposed army assistance to the authorities of Zurich, confronted with the problem of the open drug scene in the city. Three options were considered: "background" presence of the army; use of army material and infrastructures; Know-how supply by the general staff of the army to the city authorities. The Defence Minister's proposal, however, met little enthusiasm in the public and was finally dropped.

Fortunately, nobody has yet dared to suggest that the labour authorities resort to the army for checking in door-knocking operations, whether unemployed people are sleeping too long.

The mere idea of resorting to a militia-army of conscripts, as is the Swiss army, to tackle social problems of this type is so absurd, that it is difficult to say whether all these proposals were actually meant seriously or not. Be it as it may, on the political level, they did not remain without effect. Undoubtedly, the mere reference to the army strongly contributed to the rise of a collective feeling of a "threat against the nation", as if the country was in war.

It is disquieting to see the extent to which public authorities have adopted stands that were initially taken by the extreme right only. Thus, some years ago, the then chief of the Federal Office for Foreigners publicly deplored the fact that "the Swiss territory is already over-populated" and contended that "the arrival of the Tamils is a plot by Moscow to destabilise Switzerland".

In a country that gives credit to fears of an invasion of foreigners and considers drug addicts as a prime public threat, it is maybe not so very astonishing that the commanders of the army point out these marginalised categories of people as the new enemy justifying the continuing need for an army after the fall of the Berlin wall and the Soviet Union.

Towards "democrature"

For several years, Switzerland has been facing a profound economic, social and political crisis. This crisis affects the citizens through the deregulation of work conditions, as well as statutes and contracts, through the fall of salaries, the calling into question of social insurance schemes, and growing unemployment.

More and more people are rejected. Those to whom a social status or even the means of existence are denied, when they are no longer able to compete on the market; those who can no longer find a job or earn to little to make a living; those who are not efficient enough in terms of market competition; the retired, the handicapped, the sick or otherwise in need of assistance, the victims of solitude. As we have seen, we are excluding from our country the asylum seekers and immigrants by way of deportations and expulsions, but we are also creating veritable ghettos of poverty, neglect and marginalisation. In other words, the emergency policies in the domains of asylum are connected with strategies of exclusion extended to the society as a whole.

Government needs to control and quell the excluded and the marginalised. It also needs to arouse anguish, the fear of disorder, in order to appear as the great supplier of security. And, lastly, it needs to bring discredit on the legitimate demands of people. As soon as the latter claim some rights whose symbolic, political or economic cost is viewed as excessive, they are suspected of abuse and fraud. Then, one resorts to the following method: dramatisation of a situation, largely created and spread by mass media that are always homing

in on sensational news; maintaining public ignorance of the fundamental mechanisms that govern the development of societal phenomena; and, finally, adoption of a spate of repressive measures.

Thus, the question is whether we are not slipping towards a new system of government that could be described as "*democrature*" - a term used by political activists in Uruguay to describe the situation in that country after the end of military dictatorship.

Christophe Tafelmacher

This is our abridged and edited translation of: Assignation, armée, arrêtés fédéraux urgents: émérgence d'un Etat social autoritaire; Contact: Ch. Tafelmacher, Fraisse 4, CH-1006 Lausanne; Tel: +41/21 6160705.

DOCUMENTS AND PUBLICATIONS

Spotlight report No 21 & 22, Humanitarian law Center, Belgrade. Report No. 21 is about the denial of entry to FRY citizens by the authorities of this country. Entry is most frequently denied to Kosovo-Albanians, the report says. This amounts to discriminatory law enforcement prohibited by the Constitution of the FRY. Moreover, in barring entry to the country to its citizens, the FRY is acting in violation of general rules of international law.

Report No. 22 deals with group disappearances during the armed conflict in Bosnia-Herzegovina.

Available at: Humanitarian Law Center, Terazije 14, Belgrade, FRY; Tel/Fax: +381/11 657355; e-mail: hlc@opennet.org

FOCUS, Vol.1, No.1, March-April 1996. First issue of the newsletter of the Human Rights Project (HRP). Since 1992, HRP monitors the human rights situation of the Roma community in Bulgaria and publishes case reports. HRP advocates legislative and policy changes in favour of the Roma people. Among other things, the first issue of FOCUS contains a number of reports on police racketeering and brutality against Roma.

Available at: Human Rights Project, 23 Solunska street, 6th fl, Sofia 1000, Bulgaria; Tel: +359/2 806145 or 808092, Fax: +359/2 808092; e-mail: hrproject@sf.cit.bg

L'avant-projet de la loi Debré - Analyse et commentaires, GISTI, Paris, April 1996, 12 p., in French.

Comprehensive analysis of the ultra-restrictive preliminary draft of Interior Minister Debré for the amendment of French foreigners legislation.

Available at: GISTI, 30, rue des Petites Ecuries, F-75010 Paris; Tel: +33/1 42470709, Fax: +33/1 42470747.

Contributors to CL No.44: Ingo Ruhmann, Christian Busold (Bonn), Felix Schneider, Karl Kopp (Frankfurt/Main), Michael Williams (Hedemora, S), Mads Bruun Pedersen (Copenhagen), Christophe Tafelmacher (Lausanne), Jolyon Jenkins (Brighton, UK), Nicholas Busch (Falun, S).

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