Fortress Europe?

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`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.
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EUROPEAN UNION

EU PLANS EXTRA-TERRITORIAL POLICE AND CUSTOMS OPERATION

The European Union is to lead a "strategic operation" to combat drug smuggling via the Balkans. The operation has been planned by the international Customs Cooperation Council and will take place this year. It appears that Customs and Police officers of EU member states (alongside the law enforcement authorities of "certain Central and Eastern European countries") will be operating on foreign soil.

The unique customs and police operation is summarised in a confidential Draft Joint Action, drawn up by the Customs Cooperation Working Party, a K.4 subgroup. According to our sources, the Draft was put on the preliminary agenda of the Justice and Home Affairs (JHA) Council meeting of 28 November 1996 as an A-point (item to be adopted without discussion by the ministers), but removed shortly before the meeting, apparently because of a last-minute disagreement on the financing of the operation. But after some editing by the COREPER, the Joint Action was finally adopted in

December - without ever having been discussed by the responsible JHA ministers - at a meeting of the EU ministers responsible for ... fisheries.

Advanced control of EU external borders?

According to the Draft, the "general objective" of the "strategic operation" is to combat drug smuggling with a view to "ensuring an effective control along the external borders of the European Union". More specifically, the operation shall contribute to uncovering smuggling networks "by making possible the identification of suspect loads being carried by road, while they still are on the territory of certain Central and Eastern European countries, that is, before they enter the European Union".

Moreover, the operation aims to "improve cooperation between law enforcement authorities in the EU (including customs and police) and with the law enforcement authorities in the relevant countries of Central and Eastern Europe".

100,000 Ecu from the EU for "operational expenses"

The operation will last two weeks. It will be financed with a maximum of 100,000 ECU from the European Communities' 1997 budget, "within the framework and under the conditions laid down in the programme for the exchange and training of and cooperation between law enforcement authorities (OISIN)". The contribution is granted to the Customs Cooperation Council (CCC). The EU's contribution shall be used to finance "operational expenses" (inter alia the travel and living expenses of participating customs and police officers), including those of participating Central and Eastern European countries, and "the communication costs arising during the operation".

The CCC is not an EU institution, but an international body with 131 member states. It was established in 1953 to promote cooperation between governments and, among other things, to exchange operational intelligence on the trafficking of illegal goods.

Operational tasks for EU customs and police

That the "strategic operation" implies clearly operational action of EU customs and police officers on foreign soil, can be deduced from the summary description of its "specific purpose" in the Joint Action, including the following:

- surveillance of road traffic along the different variants of the Balkan drug route;
- collection of "information and intelligence" on drug consignments;
- deepened cooperation between "law enforcement authorities" on a regional and international level.
- establishment of a suitable communication system for the exchange of information between the law enforcement authorities concerned;
- more frequent search operations aiming at uncovering drug smuggling organisations - for example by the increased use of "controlled deliveries" (deliveries under police observation) of drugs.

A role for the EU Commission's SCENT computer

The EU Council and the Commission will be fully incorporated into the project. The Joint Action obliges the CCC to submit a full report on the operation to the General Secretariat of the Council and to the Commission.

The Commission will make available its computerised information system, SCENT, for the communication of information during the operation. SCENT (System Customs Enforcement Network) is a system for the exchange of encrypted information between the member states and the Commission about the import and export of goods. SCENT was set up in 1987. Its central computer is placed at the Commission in Brussels. The SCENT system is better known under the name of what is actually its extension, the CIS (Customs Information System). The CIS was established in 1992. It enables customs officers at external EU borders to exchange information on cases of fraud and trafficking in prohibited goods. The Draft CIS Convention provides for a dedicated database on persons and items to be incorporated in the system.

German Balkan expertise

According to the draft, the Joint Action was prepared by the Irish Presidency "with help from Germany". Incidentally, the German authorities operate a "Balkan Route Information System" in Cologne. The system involves the exchange of intelligence about drugs trafficking through the Balkans.

Sources: Joint Action concerning the participation of the Member States of the EU in a strategic operation planned by the Customs Cooperation Council (CCC) to combat drug smuggling on the Balkan route, Customs Cooperation Working Party, Brussels, 5.9.96, 9099/2/96, Rev 2, Limite, ENFOCUSTOM 20, and corrigendum 3, 17.12.96 (quotations: our translations from Danish); The information on CCC, SCENT and the German Balkan Route Information System is drawn from: Police Co-operation in Europe: An Investigation, J. Benyon and others, CSPO, University of Leicester, 1993, ISBN 1 874493 30 8.

Comment

The planned “strategic operation” is a novelty. For the first time in the history of the EU, customs and police officers of EU member states will participate in a joint operational action outside the territory of the Union. Considering the obvious legal and political implications of the operation, it is all the more remarkable that the Joint Action seems to have been neither discussed nor decided by the politically accountable Justice and Home Affairs ministers. Instead it was adopted without discussion by the Fisheries ministers (Perhaps because the Council regards these ministers as experts in the field of extra-territorial operations?).

Given the sparse information concerning the practical execution and the scale of the “strategic operation”, many questions remain unanswered. Should the operation be seen rather as joint manoeuvres aimed at setting up and testing practical cooperation structures between the law enforcement authorities of the EU member states and those of certain Central and Eastern European countries - a sort of equivalent in the domain of policing to the joint military manoeuvres in the framework of “Partnership for Peace”? Or is the operation actually focused on genuine operational action, including, for example, the seizure of drugs, checks of road traffic, and arrests of drug smugglers? Will EU police and customs officers play an active role in such operations or will they assist their Central and Eastern European colleagues as a sort of military advisers in a European "War on Drugs"?

The wording of the Joint Action seems to suggest that the operation will contain all the elements named above.

In any case, the legal and political basis for *any* participation of EU police and customs officers in an extra-territorial operation of this scale is the secret which the K.4 Committee and the fisheries ministers are keeping to themselves.

There are reasons to believe that the planned operation is just another example of a process by now well-established among ministers and civil servants responsible for Justice and Home Affairs. It consists of achieving European harmonisation in the field of law enforcement by creating structures of practical cooperation through *faits accomplis*, rather than by choosing the way of legal harmonisation, which requires public debate, parliamentary approval and judicial control and is therefore considered all too cumbersome by the executive branches of government of the EU member states.

Given the declared “general objective” of the operation - ensuring an effective control of the Union’s external borders, one also wonders whether future joint “strategic operations” will still be limited to drug smugglers. In fact, the Balkan route is much used also by other people, such as, for example, asylum seekers on their way to Europe. Shall they too be stopped, “while they are still on the territory of certain Central and Eastern European countries, that is, before they enter the European Union”?

Finally, in view of the strong German role in the planned “strategic operation”, could there be interests other than simply internal security and law enforcement behind the EU’s apparent attempt to control movements of persons and goods through the Balkans? Will joint intelligence gathering on drug smugglers not produce plenty of other “useful” intelligence? The European Parliament, as well as the national parliaments, would be well advised to demand some explanations - perhaps from their Fisheries Ministers.

N.B.

DUBLIN SUMMIT: NO ASYLUM IN THE EU FOR CITIZENS OF EU MEMBER STATES

At its Dublin Summit of 13-14 December 1996 the European Council agreed on the principle that no citizen of a member state of the EU shall be allowed to apply for asylum in another member state. An amendment to that effect of the Maastricht Treaty would constitute a violation of the Universal Declaration of Human Rights and the 1951 Geneva Convention on Refugees, Amnesty International warns.

One of the Dublin Summit Presidency Conclusions states: “The European Council asks the Conference [IGC] to develop the important proposal to amend the Treaties to establish it as a clear principle that no citizen of a Member State of the Union may apply for asylum in another Member State, taking into account international treaties.”

In a statement of January 1997, Amnesty International (AI) strongly objects to the proposed amendment.

Firstly, AI questions the words “taking into account international treaties” in the Conclusion. “Does this mean that the proposal would only be applicable if it was not contrary to prior international agreements subscribed to by the Member States? This would seem logical, but in this case, Amnesty International considers that it immediately negates the effects of the proposal”.

Indeed, as is pointed out in the AI statement, Article 14 of the Universal Declaration of Human Rights establishes the right of everyone “to seek and to enjoy in other countries asylum from persecution”. Under the 1951 Geneva Convention on Refugees all signatory states are obligated to respect its provisions, including the fundamental principle of *non-refoulement*: Article 33 of the Convention forbids signatory states to expel or return (*“refouler”)* a refugee to frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. AI notes that this prohibition of return requires that each asylum seeker must have access to a fair and satisfactory asylum determination procedure, capable of identifying all those at risk of persecution if returned.

Violation of the principle of *non-refoulement*

The AI statement goes on: “Affiliation to a supranational body such as the European Union cannot be used by Member States to evade their obligations under international law”. Therefore, it says, the exemption of Member States from examining individual asylum applications of nationals of another Member State is a clear violation of the principle of *non-refoulement*.

Moreover, AI expresses concern that such a proposal could "constitute a precedent that could be implemented in other regions of the world".

"Furthermore, the present proposal could have serious consequences where a EU Member State (present or future) would be culpable of persecuting a certain category of persons or an ethnic minority, or would be unable to protect such persons from persecution".

Nobody knows what will happen in the future

"Nobody can attest to what will happen in the future in the current or enlarged European Union", AI argues. European governments therefore should envisage "all possible future scenarios".

The AI statement further refers to the Conclusions adopted by the EU immigration ministers in December 1992 on "countries in which there is generally no serious risk of persecution" (see CL No. 11, pp. 1-2). These Conclusions state that the absence of serious risks should be established "in an objective and verifiable way" and that the general assessment of a country as safe "should not automatically result in the refusal of all asylum applications from its nationals or their exclusion from individualised determination procedures".

Breach of Universal Declaration on Human Rights and of Geneva Convention

Finally, the AI statement recalls that, less than two years ago (in June 1995), the EU Council Resolution on minimum guarantees for asylum procedures explicitly stipulated that the Member States continue to be obliged to examine individually every application for asylum made by a citizen of another Member State.

The statement concludes: "The present proposal (...) would constitute a clear violation of the international obligation of European States under the Universal Declaration on Human Rights and the 1951 Geneva Convention. Amnesty International accordingly strongly urge European Union Member States not to retain the present proposal."

Source: 'Concerns of Amnesty International concerning the proposal of the European Council to suppress the right to asylum for nationals of a member State in the other Member States of the European Union', Statement of AI-European Union Association, Brussels, January 1997.

DROP IN ASYLUM APPLICATIONS IN EUROPE

The number of asylum applications in Western Europe is falling, according to the EU Office of Statistics, Eurostat.

In the first half of 1996 a total of 107,144 persons applied for asylum in the EU member states, Norway and Switzerland. This is 12 per cent less than in the same period in 1995.

The number of asylum applications in Western Europe has been declining since 1993. The most significant decreases were reported in Italy (-63 per cent), Sweden (-43 per cent) and the UK (-25 cent).

More than half of all applications (57,500) were filed in Germany. With an approximate 15,000 applications in the first six months of 1996, Great Britain was the second country of destination. France ranked fifth, behind Switzerland.

Refugees from the former Yugoslavia formed the largest group of asylum seekers in Europe.

Source: *Neue Zürcher Zeitung*, 21.1.96.

SCHENGEN

SECRETIVE "SIRENES": MAINTAINING PUBLIC ORDER AND STATE SECURITY

The Schengen Information System (SIS), the Schengen countries' powerful police and security computer is little more than an index system, compared with its "extension", the secretive SIRENE structure for the exchange of "supplementary" information. This is the conclusion one is inclined to draw after reading a confidential Schengen document, the "SIRENE Manual". Among other things, the Manual establishes special procedures for the exchange of information between secret services.

Free movement under police surveillance

Government politicians and officials like to present Schengen membership as a means to abolish border controls and promote free movement of persons within Europe. Schengen citizens shall be allowed to travel "without passport" from Finland to Portugal. However, most of Schengen cooperation has little to do with promoting free movement of persons, and much more with increased policing and control of people.

The Schengen Implementing Convention of 1990 (SIC) provides for extensive police cooperation not only for the purpose of prosecuting crimes committed, but also for pro-active surveillance in the alleged interest of "public order and security" as well as "State security". This includes intelligence gathering and comprehensive automated data exchange on persons not suspected of any offence under criminal law.

The pro-active character and the remarkably wide scope of police action and cooperation allowed under the SIC is made particularly clear by four provisions of the treaty.

Article 39.1 SIC says that the police authorities of the Contracting Parties (CP) "shall, in compliance with national legislation and within the limits of their responsibilities, assist each other for the purposes of *preventing* and detecting criminal offences, insofar as national law does not stipulate that the request is to be made to the judicial authorities and provided the request or the implementation thereof does not involve the application of coercive measures by the requested Contracting Party" (our italics). This amounts to all but a blank cheque for the "police authorities". Instead of unequivocally prohibiting any form of cooperation and information exchange which is not explicitly authorised by the law of a CP concerned, the "police authorities" are generally empowered and invited to do anything they want, provided this is not explicitly prohibited by law. The wording of the provision also indicates a shift of power from

the judiciary to the police. It suggests that, whenever possible, the judicial authorities of the CPs shall be kept out of mutual contacts aiming at crime prevention and detection.

According to Article 46 SIC, each CP may "*without being asked*, send the Contracting Party concerned any information which *may* be of interest to it in helping prevent *future* crime and to *prevent* offences against or *threats* to public order and security" (our italics).

Both articles stipulate that assistance requests and information exchange shall, in principle, run via one "central body responsible for international police cooperation" in each Schengen country, which shall see to it that requests for assistance and ensuing communication of information swiftly reach the responsible authority in the Schengen countries concerned.

SIS: the tip of an iceberg

The joint computerised database, Schengen Information System (SIS), is the best known - but, as will be shown below, far from the only tool enabling swift information exchange between the Schengen countries' police authorities.

The SIS is clearly not just a criminal search database. Instead, according to article 93, its purpose is to "maintain public order and security, including state security" and to apply the rules of the SIC relating to the control of foreigners and the movement of persons on the Schengen territory. Though secret services and intelligence services are not mentioned in the SIC among the authorities with direct access to the SIS, the wording of article 93 clearly suggests a strong role for these services.

"Discreet surveillance" on State security grounds

Finally, article 99.3 SIC says that "at the request of the authorities responsible for State security", reports on persons may be stored in the SIS for the purposes of "discreet surveillance" or "specific checks", where "concrete evidence gives reason to suppose" that the information thereby gained is "necessary for the prevention of a serious threat by the person concerned *or other threats to internal or external State security*" (our italics). The provision is particularly questionable since it authorises secret registration in the SIS not only where a supposed threat is considered to originate from the reported person, but also in the alleged presence of "other threats" - i.e. threats *not* originating from the person reported in the SIS. Thereby, the Schengen Convention provides for an all but unrestricted registration and surveillance of innocent citizens on political grounds.

No rules on secret service cooperation in the Convention

However, the SIC does not establish any rules and procedures for secret service and state security cooperation. Direct access to the SIS (or parts of it) is explicitly reserved for the authorities responsible for border checks, police and customs checks carried out within a Schengen country and to aliens administration authorities. State security or intelligence services are not mentioned.

Moreover, a planned chapter on "mutual assistance between the State security services" was actually removed from the text of the SIC shortly before its signing in 1990, in an apparent effort to diffuse mounting concern in some countries that Schengen could lead to extensive political policing beyond any democratic accountability.

However, the removal of the controversial provision was no more than a purely "cosmetic" measure aimed at deceiving the public.

This is the only conclusion to be drawn from the so-called SIRENE Manual, a classified Schengen document now available to CL.

The SIRENE Manual

SIRENE stands for "Supplementary Information Request at the National Entry". SIRENE could best be described as a complex, network-like structure for bilateral and multilateral police and security cooperation between the Schengen countries, including central national offices and a sophisticated computerised information system, enabling the exchange of "supplementary" data on persons and items prior to the entry of a report in the SIS, or following a hit (positive search) in the SIS.

SIS little more than an index system for the SIRENEs

Compared with the amount and sensitivity of information that can be stored and exchanged by the SIRENE offices, the SIS is actually little more than an Index system. Nonetheless, while the Schengen Implementing Convention establishes comprehensive rules concerning the SIS, it does not even mention the SIRENE network.

SIRENE activity lacks legitimacy

This remarkable lack of a legal basis in the Convention for the SIRENE organisation was actually addressed by the Schengen countries' own Joint Supervisory Authority (ACC). In February 1995, the ACC asked the Schengen Central Group (the powerful body of senior officials preparing all decisions of the Schengen ministers) to "indicate the measures envisaged by the Contracting Parties as a whole or by each of them for giving a satisfactory legal basis to the competencies of these [SIRENE] offices". The ACC considered that failing an amendment of the SIC, the Schengen countries should establish "on a central level" the appropriate rules for basing the competencies of the SIRENE offices on the national law of each CP in a harmonised way. To our knowledge, the ACC recommendations have as yet not entailed any action from the Central Group and the Executive Committee (the Schengen ministers).

An "indispensable structure" hard to define

Since the SIC does not even mention SIRENE, one has to resort to the confidential Manual to get to the truth.

In the Manual the SIRENEs are defined by turns as an "indispensable *structure* (the French version uses the term "organisation") for the functioning of the Schengen Information System", as a "summary description of *proceedings*" which shall enable the authorities of a CP to send supplementary information which the receiving CP needs in order to decide further action following a hit (positive search) in the SIS, and as an "operational organisation". An official Belgian

report of 1994, first describes SIRENE as “the authority which constitutes the ‘human intermediary’ in the computer structure of the SIS for the treatment of reports”, and later on as an “additional structure for the support of the computerised application”.

Be that as it may, in substance, the SIRENE network consists of one central SIRENE office for each CP, and a computerised information system making it possible for the SIRENE offices to exchange information between each other, on a bilateral or multilateral basis.

The national SIRENE offices are the only points of contact between the member states as regards exchange of supplementary information relevant to reports in the SIS.

Crucial difference between the national SIS-units and the SIRENEs

The Manual refers to article 108 SIC as the legal basis of SIRENE. However, this provision merely requires the CPs to designate a national central authority responsible for the national units of the SIS (N-SIS), provided for by the Convention. Schengen officials have tried to justify the legitimacy of the SIRENE system by presenting it as a part of the SIS. This interpretation fails to convince. The SIRENEs clearly differ from the N-SIS both as regards their technical features and their purpose. As far as the first point is concerned, the data stored in each N-SIS are identical with the relatively restricted and standardised data in the central SIS support in Strasbourg (C-SIS). On the second point, a direct data exchange between the various N-SIS is not permitted by the Convention and technically not possible. By contrast, the SIRENE system enables the direct and computerised exchange round the clock of far more comprehensive information between two or more CPs, including free texts of unlimited length (i.e. non-standardised information) and comprehensive personal data that may not be stored in the SIS.

Any other “useful information”...

What is more, the use of the SIRENE system is not limited to information connected with reports in the SIS. The Manual actually stipulates that “the SIRENEs of the Contracting Parties may exchange any useful information within the limit of national arrangements made for the application of articles 39 and 46 [of the SIC]” (Manual, Chapter 3.2.1). “The cooperation between the Contracting Parties and police experts cannot be reduced to only the use of information stored in the SIS (...) The discovery of a report [in the SIS] can entail the discovery of an offence or a serious threat to public order or security. Consequently, it may prove necessary to identify with precision a person or an object”.

Photographs and fingerprints sent by E-mail...

For this purpose, the swift exchange of photographs or fingerprints must be possible, it says in the Manual. “Article 39 and 46 [SIC] provide for these means of action”.

Modes of communication between the SIRENEs comprise oral and written messages, as well as images. Two categories of written messages can be sent: free texts and standard forms. Texts and images (e.g. photographs and fingerprints) shall, whenever possible, be sent via the SIRENEs’ own electronic mail link rather than by other means of telecommunication. However, messages shall mainly be communicated orally by telephone. The SIRENEs shall be able to reply to a request for supplementary information within a maximum 12 hours. Therefore the SIRENE of each CP shall hold at the disposal of the other CPs all supplementary information concerning the persons and items it has reported to the SIS (Manual, Chapter. 2.1.3a). This seems to imply either that the national SIRENEs run their own register containing all supplementary information on persons or items they have reported to the SIS, or that they have electronic access to the respective registers of the various national authorities (e.g. judicial authorities, aliens authorities, police).

"Supplementary information" stored in SIRENE databases?

The receiving SIRENE shall store the files and other messages sent by the other SIRENEs according to its national data protection legislation. This supplementary information "should, *whenever possible*, no longer be stored on the SIRENE level once the corresponding SIS report has been deleted" (our italics).

The Manual lists the national authorities in charge of the SIRENE offices for 6 Schengen member states. While, for example, Belgium has set up a particular body, the Belgian SIRENE Bureau, in Germany the SIRENE office is part of the BKA (Federal Office of Criminal Investigation). In several member states, the responsibility for the SIRENE is placed within the national police board. Portugal has designated the Department for Aliens and Frontiers (at the Ministry for Internal Administration), and in Greece the Ministry of Public Order is in charge of SIRENE.

In all member states the SIRENEs operate on the mere basis of what the Manual calls "national arrangements" - i.e. not legislation adopted by parliament but mere government ordinances or ministerial directives.

1994: 63 authorities allowed access to SIS and SIRENE

In 1994, the total number of national authorities and services (police, customs, judiciary, foreigners administration and State security authorities) allowed access to the SIS was 63(!) for 9 member states (Belgium: 13; Germany: 8; Greece: 5; Spain: 6; France: 7; Italy: 5; Luxembourg: 5; The Netherlands: 7; Portugal: 7). Consequently, in several member states the SIRENE staff is composed of officials representing different authorities (e.g. police, Customs, Ministry of Justice, Interior Ministry).

Technical intermediaries or operational organisations?

On the one hand, the Manual stresses that, "in most cases", the SIRENE offices are no more than technical and formal points of contact, whose task is limited basically to forward information to the responsible authorities concerned. On the other hand the same Manual stipulates that "in other cases, the competencies exerted by the SIRENEs must be defined on the national level". This is specified later under the chapter "Specific competencies as regards police and security" (Manual, Chapter. 3.2.2), where its says: "Title III of the Schengen Implementing Convention lays down numerous innovatory provisions in the field of police and justice cooperation. The SIRENEs provide an *operational organisation* that can prove very useful in certain cases while at the same time reducing the need for certain Contracting Parties to set up various additional structures".

This conception of the SIRENEs as "operational organisations" strikingly conflicts with their definition earlier in the same Manual as little more than post offices. Besides this, the very number and variety of authorities (63 services in 1994) with access to the SIS - and thereby involved in the exchange of supplementary information via the SIRENEs - suggests that the SIRENE offices are in an excellent position to gradually develop into powerful national inter-service information and co-ordination task forces in the broad field of public order and security.

SIRENE and the State security services

The Manual also lays down a special procedure for State security and secret service cooperation in connection with reports on persons in the SIS for the purpose of "discreet surveillance" and "specific checks" (Article 99.3 SIC).

Chapter 4.1.2 of the Manual says: "This very sensitive domain requires a special procedure in order to preserve the confidentiality of certain information. To this effect it is advisable to separate contacts between services responsible for State security from contacts between the SIRENEs". In cases concerning State security, the SIRENEs shall merely see to it that the consultation procedure runs lawfully and shall record its results, while the actual exchange of supplementary information runs directly between the specialised authorities of the CPs concerned. Prior to entering a report in the SIS, the security authority concerned directly contacts the security authorities of the other CPs. The services concerned exchange information, whereupon the security authority which intends to enter a report in the SIS informs its national SIRENE office of the results of this preliminary consultation - for example objections of other CPs against the inclusion of the planned report in the SIS. After this preliminary "internal" consultation between the State security authorities of the CPs, the SIRENE office of the national security authority demanding the inclusion of a report in the SIS informs the other SIRENE offices of this demand. Thus, the other CPs can claim their rights. As soon as the SIRENE of the reporting CP has recorded the satisfactory conclusion of the consultation procedure it authorises the integration of the report in the SIS.

In conclusion, by setting up the SIRENE network, the Schengen countries have provided themselves with organisational and technical structures allowing swift information exchange and consultation between their secret services concerning "State security" matters. The very elastic wording of Articles 46 and 99.3 SIC implies that this activity will comprise the exchange between the "competent authorities" of the CPs of comprehensive data on persons who are neither guilty nor suspected of any criminal behaviour. This secret service cooperation makes use of both the SIS and its "extension", the SIRENEs. The fact that the secret services have no direct access to the SIS and are not represented in the SIRENE offices has little practical significance, since the secret services of the CPs can have reports entered in the SIS and will be informed of hits in the SIS via the intermediary SIRENE structure.

Protection of personal data an illusion

The secretive SIRENE structure reduces any talk about data protection and legal control in the field of Schengen police cooperation to wishful thinking. Which data protection authority - national or international - will have the budget, the personnel and the technical means to control the legitimacy of the constant flow of information - from informal phone calls to electronic image files? How can there be any legal security, when the rules

concerning the processing, storing and communication of data are not the same in every Schengen member country? It is true that a CP may communicate data to another CP's authorities only if this is authorised by its national law. However, once transmitted, the data will be stored and processed according to the law of the receiving CP. The receiving CP, it is true, shall in principle not use the data for any other than the initial purpose of their collection. Exceptions to this rule can be made only upon authorisation by the sending CP. But how can the authorities of the sending CP check what really happens with their data in the receiving CP? And are they really interested in knowing? The question is all the more pertinent since both the wording of the relevant provisions in the SIC and the composition and operation of the national SIRENE offices suggest that it will not be the judiciary, but police and security authorities who will produce and control most of the information exchanged in the framework of Schengen cooperation.

Schengen, Interpol, Europol: a common desire for "supplementary information"

Finally, the history of the genesis of the SIRENE structure suggests, that whenever a computerised information system permitting access to *some* information is created, this almost automatically leads to demands for "supplementary information" - i.e. *more* information, which can be found in other information systems and databases. Thus, it is not at all surprising that the SIRENE Manual emphasises the need for "rules of cooperation between the SIRENE offices and the Contracting Parties' central Interpol offices (NCB)" and that the exchange of information between the national SIRENEs and the NCBs shall be regulated by national law. A K.4 report of February 1996 says the Europol computer system, "or rather ensemble of systems" will have to be defined in a way that will allow it to "link" up with "the systems of national units". It further recommends "taking into account other national and international systems, such as the Schengen Information System and that of Interpol".

Indeed, once information is released, it generates a desire for "supplementary information". And, as both the example of Europol and the SIS-SIRENE show, information systems tend to develop into "ensembles of systems" which in their turn are likely to eventually link up with other ensembles of systems - on a national, a European and an intercontinental level...

Sources: SIRENE Manual, Brussels, 28.3.94, SCH/OR.SIS-SIRENE (92) 26, 9 rev, 7 corr, confidential (all quotations from the Manual are our translations from Danish and French); 'The Schengen Information System and its implementation in Belgium, report by the Belgian SIRENE office, December 1994; Schengen Implementing Convention, 19.6.90; List of competent authorities with direct access to the data in the Schengen Information System, Comité d'orientation SIS, Brussels, 17.6.94, SCH/OR.SIS (94) 18, 3 rev (in French); Décision de l'Autorité de Contrôle Commune Provisoire: Fondement juridique des bureaux SIRENE et du Manuel SIRENE, Brussels, 22.2.95, SCH/Aut-contr (94) déc. 3 rev.; The Europol Computer System and Draft of the additional budget for 1996 for the post-Convention phase of Europol, report to the JHA Council, 12869/95, agreed on 26-27.2.96.

INCORPORATION OF "SCHENGEN" INTO EU DISCUSSED AT INFORMAL MEETING

"Schengen" shall be incorporated into the European Union, according to a three phase strategy outlined and discussed at the informal part of a meeting of the Schengen Executive Committee on 27 June 1996.

The basic idea of the plan is to create a fait accompli through practical cooperation at secretariat level, co-ordination of the decision-making institutions work and, if necessary, with the help of a "flexibility clause" leaving out the EU countries which are not willing to follow the plan.

For Norway and Iceland, which are not members of the EU, but have signed a treaty of full association with Schengen, the question is whether this plan will not gradually lead them into de facto EU-membership.

In a note to the IGC (the EU's Intergovernmental Conference), written by Michiel Patijn from the Dutch delegation at the IGC, it says:

"We have at an earlier meeting under the IGC discussed Schengen's possible integration into the EU. (...) This unofficial document focuses on a strategy in three phases according to the following pattern:

Phase 1: practical cooperation, whereby the Schengen secretariat is placed together and incorporated into the EU Council's secretariat and meetings of Schengen fora and corresponding EU fora are held directly after each other.

Phase 2: transfer of the Schengen institutions' planning and decision authority to the EU institutions, whereby effective Schengen regulations are still maintained separately from effective EU legislation. This phase presupposes that the work of the IGC results in a streamlining of the structure of the Third Pillar.

Phase 3: full incorporation of effective Schengen regulations into effective EU law".

The original unofficial document referred to by Mr Patijn, stresses that the above strategy presupposes a change of the British position at the IGC with respect to Third Pillar cooperation in general and free movement of persons in particular. If the British government accepts the Schengen agreements' objectives and effective Schengen regulations, this will open the way for full incorporation into the EU, the document says. If not, the third phase will have to be limited to a solution based on a "flexibility clause", which is also being discussed at the IGC.

According to the Dutch note to the IGC, "almost everybody" at the 27 June 1996 meeting of the Schengen Executive Committee accepted the first phase of the Dutch strategy paper and wanted it to start as quickly as possible. Some delegates, however, expressed some scepticism regarding the chances for the second and third phase to be realised as long as the IGC does not come closer to an agreement on the future functioning of the Third Pillar. Nonetheless, according to Mr Patijn, there was "broad agreement" at the meeting that a "pragmatic approach" to the whole process of the incorporation of Schengen into the EU was necessary.

Mads Bruun Pedersen (Copenhagen)

Sources: Note from the Dutch delegation to the IGC: 'Third

Pillar: Schengen and the European Union', Brussels, 15.7.96, CONF/3872/96 Limite, with annexe: 'Unofficial document: Schengen and the European Union' (Quotations from these documents are our translations from Danish).

NORWAY

MINISTER STEPS BACK AFTER NEW SNOOPING SCANDAL

While an independent commission inquiring into extensive illegal surveillance activities of the Norwegian Secret Police, one of its members was himself being investigated by the same Secret Police.

This most recent revelation in the Norwegian snooping scandal has led to the resignation of the responsible minister and the Head of the Secret Police. But at the same time the Government is eagerly preparing Norway's association with the Schengen countries and their sweeping police and secret service cooperation.

As reported in CL No. 43 (p. 7), an independent commission appointed by the Storting (the Norwegian Parliament), the so-called Lund Commission, recently revealed extensive illegal registration and surveillance by the Secret Police (*Politiets overvåkningstjeneste*) of a large number of individuals and left-oriented political parties and organisations in Norway. The illegal activities were reported to have taken place from the end of World War II until the late 1980s. The report also revealed extensive secretive and illegal cooperation between the Secret Police and the Social Democratic Party. The Lund Commission's report created great consternation and alarm in almost all political parties represented in parliament, as well as in the mass media.

Secret Police checks East German Stasi files: attempt to discredit the Lund Commission?

In the autumn of 1996, the Control and Constitutional Committee of the parliament held open hearings based on the Lund report, which were also widely reported in the media. In December, the Control Commission of the Secret Services, a new supervisory body appointed by the parliament to control the secret services (earlier, the Control Commission was appointed by the Government) revealed that while the Lund Commission was scrutinising the work and activities of the Secret Police, one of the Commission members, historian and professor Berge Furre, had been the subject of a secret investigation of the Secret Police.

The investigation had been authorised by the prosecution authorities. The Secret Police had been seeking information about Mr Furre in the Stasi archives of former East Germany, and also information about what documents the Lund Commission had been given access to in the archives. Professor Furre, who is known as an outstanding historian of high integrity, was at one time a member of parliament for the Socialist Left Party. After 1966, he had no contact with official East German representatives, only with groups opposed to the regime. In 1983 he participated in a seminar against nuclear weapons in West Berlin. The seminar included a demonstration in East Berlin, which Professor Furre attended. The demonstration was infiltrated by the Stasi, and thus the Stasi obtained information about Furre.

Alarm from right to left

The discovery that Professor Furre was being investigated by the Secret Police while a working member of the very commission appointed to scrutinise the Secret Police, gave rise to renewed great consternation and alarm across the political spectrum in the Storting, and was given wide press coverage. In January 1997, it emerged that several other people had been similarly investigated, including the vice-chairman of the Storting's Control and Constitutional Committee, and the earlier chairman of the Storting's Justice Committee. Experienced politicians stated that this was the most serious case of conflict they had experienced between a government agency and basic Norwegian state and democratic traditions.

Head of the Police Division steps back, becomes Schengen co-ordinator instead

At the time of writing the story has not come to an end, but the Head of the Secret Police, as well as the responsible minister (Ms Grete Faremo, who was minister of Justice at the time, and later minister of Petrol and Energy), quickly had to resign. Officials in the Ministry of Justice had been informed of the investigation, but - allegedly - Professor Furre's name had been filtered out on its way to the minister. Be that as it may, she was held constitutionally responsible. A high-ranking official in the Ministry of Justice, the Head of the Police Division (the closest Norwegian parallel to the general director of police), also left her office, allegedly of her own free will. Her reason for doing so was that she "had not understood the seriousness and extent of the case in question". Interestingly, she was instead given the task of co-ordinating and leading the development of Norwegian association with Schengen - which plainly requires a less delicate appreciation of such matters. The Social Democratic government, which recently took office under a new Prime Minister (Torbjørn Jagland, who followed Gro Harlem Brundtland) is weakened by the affair. The Government is vulnerable because another newly appointed minister recently had to leave his post due to allegations of shady economic dealings.

Thomas Mathiesen, professor of sociology of law (Oslo)

MOUNTING RESISTANCE AGAINST SCHENGEN IN NORWAY: RATIFICATION UNCERTAIN

In the light of the Lund Commission's report and its aftermath (see article above), one might have expected media coverage and debate over Norway's participation in Schengen. But it seems as if both the Government and the leading media organisations preferred silence.

Nonetheless, resistance against Schengen is mounting and the ratification of the Convention is uncertain. If Norway refrains from joining the Schengen group this could put into question Nordic Schengen participation as a whole.

The Nordic EU member states (Finland, Sweden and Denmark) have applied for full membership, and the non-EU members (Norway and Iceland) for an associated status. All countries, including Norway and Iceland, have accepted the Convention as well as the full Schengen *acquis*, and all five countries signed the treaty on 19 December 1996. In all five countries parliamentary ratification debates will probably take place in 1997.

Ambiguous status of Norway and Iceland

Norway and Iceland's status will be ambiguous: While having agreed to all Schengen obligations, the two countries have - due to their non-EU status - neither a vote nor a veto in the Schengen Executive Committee. If disagreements occur, the two countries are free to leave Schengen, but in the light of the extensive police cooperation and integration which Schengen represents, such an option will only be theoretical. In reality, the two countries will be fully-fledged participants in terms of duties, but unlike the other states, they will not have the power to stop developments they disagree with.

Concern about political surveillance

With the automated database, the Schengen Information System (SIS), the supplementary SIRENE system and police exchange of information in general, Schengen involves extensive registration and surveillance activities, also of people who are not suspected of any criminal activities. Several important articles in the Convention (notably articles 93 and 46.1) open for the possibility of registration on political grounds, which is illegal in Norway. Recently, it has also been reported that the secret SIRENE handbook contains procedures (based on article 99.3 of the Convention) according to which the agencies of the member states responsible for state security (in most instances the secret police) may register in the SIS individuals presumed to be threatening the state.

Substantial parliamentary minority opposed to ratification

Despite the great alarm and extensive media coverage brought about by the Lund Commission's findings and the secret investigation of one of its central members, Norwegian media have largely been silent about Schengen. But a substantial minority of the Storting (the Christian Democrats, the Centre Party, the Socialist Left Party, the Communist member and the Liberal member) are concerned and are expected to vote against ratification. Moreover, according to an opinion poll, there appears to be widespread resistance in the population against a Norwegian association with Schengen. This is no doubt related to opposition to the European Union as such, which is mounting in Norway as well as in other Scandinavian countries. Nonetheless, there is little public debate about Schengen.

Media coverage of Schengen issue: his master's voice?

The Government has argued that Schengen participation makes it possible to maintain the Nordic passport union together with the freedom to travel throughout the rest of Europe. Furthermore, the Government has maintained that the SIS, the supplementary SIRENE system and other measures of policing are exclusively oriented towards combating serious, organised crime. This version, has, with a few exceptions, been uncritically accepted and supported by the media. Norway has four fairly large television channels. Nonetheless, during all of 1995 and 1996 only a single full scale television debate with different views represented was organised by one of them. The Norwegian Broadcasting Television, Norway's oldest and largest channel, has almost consistently reported the views of the Government. Researchers and other academics, as well as the members of the "No to the Union" organisation, have had their critical articles relegated to the insignificant status of "letters to the editor", and have often simply been denied space for larger articles. The Government's version has had a widespread "rhetorical hegemony", and has permeated through the media as something to be taken for granted and beyond doubt. It seems as if investigative and critical journalism in Norway presupposes scandals, like the aftermath of the Lund report.

Petition demands a ratification procedure in respect of the Constitution

Recently, however, a shift may have taken place. In early December 1996, 38 persons representing a cross-section of professional and political life delivered a petition to the presidency of the parliament, demanding that the Storting follow the Constitution when voting over ratification of the Schengen Agreement. The 38 included two earlier prime ministers and several other people active in political life, a former judge at the International Court in The Hague, and several well-known lawyers, authors and professors from a variety of relevant fields. The petition argued that Norwegian association with Schengen will imply a gradual integration into the EU, thus negating the people's vote against membership of the EU in the referendum in 1994. Furthermore, it argued that in absence of voting rights and a veto, Norwegian Schengen association will necessarily imply a transfer of national decision-making authority and sovereignty to international organs. Such a transfer presupposes - to put it briefly - either that three quarters of the Storting agrees (§ 93 of the Constitution), or that the Storting modifies the Constitution, which requires a proposal to that effect in one Storting period and a final vote in a second, with an election in between and a 2/3 vote (§ 112).

Public debate on Schengen, at last

The petition as well as a press conference held by the "No to the Union" organisation on 19 December, the day of the signing of the Schengen Agreement, were covered by a number of newspapers, as well as several television channels and the main Norwegian radio. In addition, during December the minister of Justice had to appear three times in the Storting to answer questions related to article 99.3 of the Schengen Convention and the SIRENE handbook. Further public debate is likely to follow.

Norwegian No could terminate Nordic Schengen membership.

The case for a decision concerning Norwegian Schengen association being taken under the procedure provided for by § 93 or 112 of the Constitution is quite strong. If the Storting decides that the question must be given such a treatment, the Schengen Agreement will most likely fall in the Storting and not be ratified. A decision not to ratify the agreement would have major consequences for Nordic Schengen participation in general. In fact, Nordic participation as a whole in Schengen may collapse, because with Norway outside Schengen, the Nordic passport union cannot be maintained.

A lot at stake for the Social Democratic Government

With all of the Nordic countries outside Schengen, and the Nordic passport Union intact, Nordic citizens will - contrary to statements made by the Government - have easy access to the rest of Europe: due to their membership of the EU or (in case of Norway and Iceland) in the EES, they will simply have to show their passports when entering and leaving Schengen territory - like today.

But the issue is by no means decided. A lot is at stake for the Social Democratic minority government in Norway, which follows a "EU-friendly" policy despite the referendum of 1994, and which sees Schengen participation as a step towards EU integration. With the support of the Conservatives, they have a simple majority in the Storting. The two parties argue that Schengen represents a conventional inter-state agreement, and are expected to argue strongly for a simple majority decision.

Thomas Mathiesen

DENMARK

DENMARK JOINS 'SCHENGEN'

On 19 December 1996 the Danish Minister of Justice, Bjoern Westh, on behalf of the Danish Government, signed the Schengen Implementing Convention of 1990, thereby ending a seven month period in which Denmark had observer status. The ratification process will begin shortly and is expected to be concluded by the end of this year.

Danish membership of Schengen is supported by the Social Democratic Party, the Social Liberals, the Liberal Party, the Conservative People's Party and the Centre Democrats. This is a majority of the parties represented in the Folketing (Danish parliament).

The opposition, which is deeply divided in its arguments, consists of both parties to the left - Enhedslisten (the Red-Green Alliance) and Socialistisk Folkeparti (The Socialist People's Party) - and to the right - Dansk Folkeparti (Danish People's Party) and Fremskridtspartiet (Progress Party).

The Danish way into Schengen

The idea of joining the Schengen Group was first taken up in the beginning of 1991, and the first meeting between the Schengen presidency and Denmark took place in May of that year. At that time, Denmark had a Conservative-led right wing government. But in January 1993 that government fell and was replaced by a Social Democratic-led centrist government. The previous political reservations against joining Schengen, which until then had found some resonance also inside the Social Democratic Party, gradually disintegrated, leaving only the left and the extreme right in the opposition. In May 1994 Denmark applied for observer status in Schengen. This was accorded in May 1996, after the Danish Government answered a comprehensive Schengen questionnaire on Denmark's immigration, police and border control policies to the satisfaction of the Schengen Group.

The act of accession consists of an agreement, a so-called final act, a protocol, and a statement, which all define the conditions and responsibilities of the Danish government and its institutions. These documents and the Schengen *acquis*[1] constitute the basis of the Danish membership.

Pressure from major EU countries

There is no question that one of the reasons why the Danish government decided to work towards Schengen membership was pressure from the major EU countries. As long ago as 1991, a representative of the then German Schengen presidency, Dr Glatzel, said in an interview about the reasons why the presidency had approached the Danish government: "We would very much like Denmark to join Schengen, and since Spain and Portugal are now joining, you are among the last in the chain to have your borders closed"[2].

At that time, Greece was on its way to membership. With Denmark inside Schengen, all continental EU countries would be part of Schengen. Such a situation would make it possible to put pressure on the negotiations on the External Borders Convention, which had started in 1989 but were and still are blocked because of a Spanish-British dispute over Gibraltar. In this situation, the Schengen process was considered a powerful engine to speed up the process and reach the same goal as the European Union, but faster. This was however never mentioned openly as a reason by the pro-Schengen lobby.

The political scene

The two main arguments of the proponents of membership was that Schengen would make it easier to fight international organised crime and that it would become easier to travel. Furthermore they argued that an "open Europe" would attract illegal immigrants and that therefore strong external border controls and internal control measures were necessary.

The critics among politicians are divided into two categories: a nationalist wing and a civil libertarian wing.

The criticism from the nationalist wing concentrates particularly on the lifting of internal border controls, which is perceived as opening of the country to a mass influx of "undesirable" foreigners - i.e. asylum seekers and illegal immigrants. But the nationalists are also worried about the protection of the Danish nation as such. This viewpoint is held by the Danish People's Party and the Progress Party.

Part of the broad anti-EU movement (which covers the whole political spectrum from right to left) also subscribed to this point of view, but from a distinctly nationalist point of view. They argue that by joining Schengen another step is taken towards the elimination of Denmark as an independent nation.

The civil libertarian wing which mainly consists of the Left wing and concerned lawyers, researchers, parts of the anti-EU movement and human rights organisations, argues that Schengen will lead in direction of a more police-controlled society with clear racist tendencies. Their criticism has focused around the powers which the police and intelligence services will get. Also the creation of computerised registers and information systems (SIS and SIRENE) is viewed as a threat to the rights of the individual and as an expression of a generalised suspicion of, not least, "foreigners".

Opposition inside the police

The Danish police are also divided on the issue. The chiefs are very pro-Schengen, but the Police Union warns against lifting border controls, stressing that border checks make it possible to catch criminals in a way that cannot be replaced by stepping up general control inside the country.

The deputy chairman of the Danish Police Union, Peter Ibsen, said: "Open borders means that we deprive ourselves of some of the means of control we have today. It does not entail any saving of resources, but control will be less effective. No doubt about that".[3]

Ibsen is also worried about the consequences of the Schengen Information System (SIS) which,

he fears, will end up containing highly sensitive information based on "hearsay about people who are assumed to be doing something illegal".[4]

The police leadership does not appear to have the same concerns. The Chief of *Rikspolitiet* (the National Police) says: "It is absolutely necessary that we get some of the more advanced investigation methods, in order to be able to hit organised crime. For this purpose SIS is a good tool".[5]

A less frequently admitted reason for the Police Union's opposition is there fear that the net result of Schengen membership will be a cut in the number of police officers. The government has, however, promised that there will not be any major reductions of the police force in areas close to the internal borders.

The irony of the pro-Schengen wing's arguments is the strange contradiction between, on the one hand, the promise that it will become easier to cross the borders, and on the other hand their plans for more police control just behind the borders. In a note to the parliament the government explains the consequence of the abolition of checks at internal border crossing points as follows: "There ought to be a not insignificant police reserve in the areas near the internal borders (...) with the purpose of direct control, and patrolling and observation activities".[6]

According to a bilateral German-Danish agreement on cross-border police observation and hot pursuit under the Schengen Implementing Convention, the right of the German police to operate on Danish territory is limited to a 25 kilometre deep zone behind the Danish border, and German police are not allowed to make arrests on Danish territory. No such restrictions are made by the German side: Danish police are authorised to operate freely on the whole territory of Germany.

Mads Bruun Pedersen (Copenhagen)

Notes:
1) The Schengen "acquis" consists of the 1985 Schengen Agreement, the 1990 Implementing Convention, four confidential manuals, the readmission agreement with Poland, the accession agreements with Italy, Spain, Portugal, Greece and Austria, plus 59 decisions taken by the Executive Committee between 1993 and 1996. 2) Ugeavisen Klassekampen, no.24, vol.22, 28.6.91. 3) Berlingske Tidende, 20.12.96. 4) ibid. 5) Berlingske Tidende, 19.12.96. 6) Note on the Schengen Convention and the legal, financial and administrative consequences of Danish Schengen membership, 21.11.96, p.8.

OPINION

The following text is a contribution to the conference "Revising the Maastricht Treaty and the concerns of the NGOs", held in Amsterdam, on 22 to 26 January 1997. The author, Professor Herman Meijers, is the Chairman of the Utrecht based "Standing Committee of Experts on International Immigration, Refugee and Criminal Law".

EUROPEAN COOPERATION: AN AUTHORITARIAN TEMPTATION?

At this moment, in and around Amsterdam, the delegations of the fifteen member states of the European Union - are trying to amend the Maastricht Treaty on European Union of 1992. In so doing they are applying Article N, second paragraph, of the Maastricht Treaty. In their speculations and comments, journalists attracted by the Intergovernmental Conference (IGC), to a large extent concentrate on two particular issues before this Conference.

The first issue is the power politics between the existing fifteen member states, in particular when these politics are about the relations with the world outside the Union - relations that are incorporated under Title V of the present Maastricht Treaty. The second set of issues that interest newspapers and television comments are about money, in particular about the prospects of the so-called Monetary Union and its future common currency, the Euro.

However, the most important common value all the member states adhere to, democracy, is on the whole not part of the picture.

Democracy a recent phenomenon in some member states

Power politics and money are the central issues of the previous century. But democracy, as we now know it, is a comparatively recent phenomenon both in some of the large and some of the small member states that constitute the Union at present.

I take the liberty to mention in passing the following: the rise of the nation-state and of national democracies in the past two centuries, the values and divisions of power on which national democracies were or are based until recently, the recent internationalisation of society - particularly in Europe - and the threat this internationalisation of Europe may possibly pose to the values of democracy adhered to by the citizens of this part of the world.

No definition of "democracy" in the Maastricht Treaty

I also wish to remind of the fact that the words "democracy" and "democratic" figure prominently in the text of the Maastricht Treaty, for instance in the preamble, in Article F.1 and in Article J.2. The word "democracy" also figures prominently in the so-called second Dublin Draft of 1996, styled as: "A general outline for a draft revision of the treaties". The word appears in Chapter 1 of that

draft and in particular in its Article F.1 in which "the general principles underlying the Union" are reformulated.

However, neither the text presently in force, nor the said Dublin Draft define these basic terms: "democracy" and "democratic".

The phenomenon of national democracies

The idea and phenomenon of national democracies arose during the French revolution and the Napoleonic wars, and the names of Tom Paine and Jean Jacques Rousseau are linked with it. Between 1815 and 1945 the concepts of the nation-state, of nationality and of national sovereignty developed. In and for the Western world the idea became accepted (and in fact vigorously promoted) that "the people", that is the citizens of the national entity to which one belonged, had to be protected in their rights by the sovereign state.

Lyrical songs were composed stating that God should save the king of one particular country, or that nothing in life was superior to one's own state: "Deutschland, Deutschland über alles", or comparable silly songs sung in the Netherlands or in any other country of Europe. Nationalism became more than an accepted value. And, within the nation state, in the period mentioned, democracy developed to high levels and also came to its lowest ebb.

European Union and Schengen: a take-over of national powers

However, at present we are witnessing, particularly in this same European area, the internationalisation of society. National powers of the state are slowly but steadily taken over by international constructions of private law conglomerates constructed by civil law enterprises. But also public international law constructions take over powers from the State. We in Europe often discuss two examples - among many others - the constructions of "Schengen" and the "European Union". These two examples of new subjects of international law are taking over the power to decide on critical questions of migration law and of criminal law from the national states co-operating in Europe. These two fields of law are of course the *touchstones par excellence* for this most important question: does democracy exist or not in the society concerned?

Three criteria for defining "democracy"

Now what is meant by the word "democracy"? The Standing Committee of Experts on International Immigration, Refugee and Criminal Law uses three criteria for an international organisation or a state to qualify as "democratic". These criteria are probably acceptable to all EU member states as *conditiones sine qua non*. They are:

1. Openness of decision-making in preparing and formulating rules of law;
2. No making of binding rules of law without the clear assent of a parliament chosen by all citizens to whom the law will apply;
3. Control by an independent Court, of the application and interpretation of the rules just mentioned.

Transfer of powers to the executive branch of government undermines democracy

Any authoritarian institution, international or national, rejects these three criteria. Such an authoritarian institution will argue that all real and effective power has always been exercised in secret, by so-called "Privy Councils", by - as the Germans put it - *Geheimräte* (literally: "Secret councils"), who are the most important persons in the country. From an authoritarian point of view, parliamentary debates take too much time. And a truly independent Court, and in particular an international - and thus superior - Court, spoils the unity of decision-making and brakes the speed of executive action.

In anti-democratic environments it is always the executive branch of government, and not the parliament or a Court, that takes the final decisions. In newly born, or newly reborn national or international societies - societies that cannot count on long established democratic traditions, the transfer of powers and competencies to the executive branch, to the detriment of the powers of parliaments and of independent Courts, always threatens to undermine democracy. Democracy is based on a division of powers, as Montesquieu pointed out back in 1748.

The hidden temptation of quick and efficient solutions

That is the threat which the European Union is presently facing: now that central fields of law, central competencies of national democracies, of which I already mentioned immigration law and criminal law, are being transferred to international institutions embodying an international European society, this transfer may well be realised by the ministers and civil servants belonging to the executive branch - leaving aside parliaments like the European Parliament and Judges exercising their competencies within the European Court of Justice. If so, the competencies of the national parliaments and the national courts have in fact disappeared, without the compensations so much needed for the maintenance and enforcement of democracy in Europe: that is, the transfer of as much powers as possible to the European Parliament and to the European Court of Justice. Hannah Ahrendt writing about authoritarian regimes in general after World War II described - within the national context - the hidden temptations of quick and effective solutions, particularly for unstable and new societies. "*La tentation autoritaire*" was a French expression used in discussions around Ahrendt's publications.

Within the slowly arising constructions of very diverse and very recent European cooperations the temptation for quick and effective solutions of intricate international problems cannot be ignored. Such solutions, perhaps valuable during unavoidable transitional periods, threaten the three bases of democracy within the existing national societies that transfer national competencies to European Councils of Ministers and to their civil servants, as long as such international Councils are not under control of parliaments and Courts exercising their competencies on the same - that is the international - level. That is "*la tentation autoritaire européen*".

Proposals of the Standing Committee
For that reason, our Standing Committee has directed proposals for amendments of the Treaty on European Union mainly towards reinforcing the possibility to preserve the most distinguishing features of democratic decision-making for Europe *). The proposed amendments focus on the decisive criteria for democracy I mentioned before. As far as European law is concerned, these criteria are:
- openness in the making of European law;
- more powers for the European Parliament; and
- decisively larger competencies for the European Court of Justice.

May the Intergovernmental Conference, presently trying to amend the Treaty on European Union, avoid "*la tentation autoritaire*" mentioned above.

Professor Herman Meijers,
Chairman of the Standing Committee of Experts on International Migration, Refugee and Criminal Law (Utrecht)

*) The document 'Proposals for the amendment of the Maastricht Treaty on European Union at the IGC in 1996' (Utrecht, March 1995), is available from: FORUM - Commissie Meijers, Postbus 201, NL-3500 AE Utrecht; Tel: +31/30 2974321, Fax: +31/30 2960050. See also: Dutch experts make proposals to amend Maastricht Treaty, in CL No.33, p.5.

APPEAL TO THE CITIZENS OF EUROPE FOR A NEW IMMIGRATION POLICY

The following is our translation from French of an appeal published by the French *Collège des médiateurs* in spring 1996, in support of the *sans-papiers*, immigrants without residence papers in France.

For 20 years, the problem of immigration has been a major political issue in various Western European countries and a challenge for the rule of democracy.

Short-sighted policy objectives have for too long delayed a solution to the immigration problem. Yet, faced with a confused public opinion, easily manipulated by extremist rhetoric, a just solution is now a civic priority.

All citizens of Europe - above all those with public responsibilities or moral authority - must unite their efforts to lead the way to a new forward-looking policy.

First of all, people must be made aware of the impasse into which the ever more widespread use of restrictive and repressive policies has led. Such policies are both unjust and ineffective. They have no lasting effect and, in the long run, worsen the difficulties they pretend to deal with.

Europe is not a beleaguered fortress
Europe is not a beleaguered fortress. It is not obliged to pull up the drawbridge behind its illusory frontiers.

On the contrary, such a policy of self-confinement is compatible neither with universality, the best of European traditions, nor with the interests of Europe as a leading power in the field of world exports.

Both dignity and realism demand a completely different approach.

Three urgent actions are essential:

- The first concerns the situation of the *"sans-papiers"*, i.e immigrants lacking residence permits.

The implementation of increasingly harsh anti-immigration policies has resulted in a rapid increase in the number of migrants and their families, deprived of any legal existence and reduced to a life of constant fear.

We cannot afford to wait for time-consuming amendments to the law. We must put an end without delay to inhuman living conditions which are unacceptable in a state governed by the rule of law.

A halt to expulsions, the formulation of fair criteria for the regularisation of stay, and the use of mediation are the most appropriate transitional measures.

- The second action relates to the right of asylum. Here too a climate of systematic suspicion against certain foreigners has had unacceptable consequences.

Asylum should be granted to all persons forced to flee their home countries due to a threat of persecution, whether this threat originates from the state authorities themselves or results from their shortcomings. In general, humanitarian asylum should be extended beyond the present excessively restricted definition of "persecution" to other cases of extreme distress.

In all cases, the risks run by an asylum seeker must be assessed with both realism and humaneness, without juridical hair-splitting and with due regard to the difficulty in providing evidence, which is often inherent in the situation of asylum seekers.

- The third and most crucial action should focus on the foundation of European policies regarding migration and development. As a matter of priority, the very concepts at the origin of immigration law rather than just some one or other effect of this legislation, must be called into question.

The spirit of today's legal texts has remained largely discretionary. While asylum seekers are placed under ever more constraints and administrative obligations, their rights have become increasingly restricted and disputed. This balance must be radically redressed.

Regardless of his or her origin and identity, every person has fundamental rights which every constitutional state has a duty to respect and protect.

The freedom of movement, the freedom to seek a decent existence and the freedom to live a normal private and family life are most genuine fundamental rights.

Any restrictions of these freedoms is inherently discriminatory or arbitrary and must be limited to

what the necessities of a democratic society require.

It is in this spirit that a just reconciliation between the rights of migrants and those of the citizens of the host country must and can be found.

Here, we may not separate the struggle for the legitimate rights of migrants from the global action for the protection and promotion of all peoples' rights in all areas where these rights are principally at stake.

In particular this implies:

- in the social domain, the fight against the dramatic spreading of exclusion;
- in the economic domain, the fight against the various forms of illegal labour and the increasing insecurity of employment;
- in the cultural domain, the defence of an open and democratic conception of culture, opposed to ghettoisation and all forms of fundamentalism and in full respect of the rights of women and children.

Moreover, it must be ensured by appropriate guarantees and access to legal remedy that migrants actually are granted their legal rights. These measures should include:

- the right to clear information on the grounds for decisions concerning them;
- the right to appeal to an impartial and independent Court, which will arrive at its decision within a reasonable time;
- the right to legal assistance under conditions enabling a genuine defence.

As regards development, there is a need for new forms of solidarity between civil societies of the North and the South, in particular by ensuring increased mobility between urban and rural communities in the countries of emigration and migrants' associations in the host countries.

Citizens of Europe!

In the age of globalisation, the temptation to withdraw into oneself can only lead to isolation and decline.

By setting an example, both with respect to the protection and promotion of human rights for all people living on its soil and in the search for a genuine co-development between the various continents Europe will best ensure its future.

It falls to all those who believe in mankind to meet the challenge with clearheadedness and generosity!

This appeal was written upon the initiative of the 26 members of the "Collège des médiateurs". This body was created in April 1996 in support of the of the "sans-papiers" (immigrants without residence papers) in France (see CL No.46, p.4).

The appeal was published on 18 November 1996 on the occasion The "Convention for a new migration policy" in Paris.

All persons who wish to support the appeal are invited to send their signature to: Collège des médiateurs - 14, rue d'Assa, F-75006 Paris, Tel/Fax: +33/1 42 031956.

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APOLOGIES

Due to a computer-system crash this issue of CL is greatly delayed. We apologise to our readers.

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