



Statewatch analysis

Cover-up!

Proposed Regulation on European Border Guard hides unaccountable, operational bodies

When people are subjected to routine fingerprinting, when they are locked up, when they are restrained by body belts and leg shackles and thirteen feet of tape, or forcibly injected with sedatives to keep them quiet as they are bundled onto an aircraft, it seems reasonable to ask what have they done? The answer is that they have tried to come to western Europe, to seek asylum, or to live here with their families, or to work here. And the whole panoply of modern policing, with its associated rhetoric, is applied against them. (Frances Webber, "Crimes of Arrival", Statewatch, 1995)

On 11 November 2003 the European Commission produced its draft Regulation on the establishment of "a European Agency for the Management of Operational Co-operation at the External Borders" [COM(2003) 687, 11.11.03. Ref 1]. This long-awaited proposal is presented by the Commission as the basis for the long-term development of an EU Border Police. In this respect, however, the Regulation is little more than a window dressing exercise, giving a "legal basis" to the *ad hoc* development of a whole host of operational bodies and measures that are already in place. A number of documents obtained by *Statewatch* show the extent to which this structure has already developed.

What is new in the proposed Regulation is the *de facto* creation of an "EU Expulsions Agency". This "clearing house" will coordinate and organise joint deportation operations of the Member States.

As to the development of the "EU Border Police", the proposed Regulation will see the "new" agency take over the work of the "Common Unit" of external border practitioners created in June 2002. Under the supervision of this group, the EU has already set-up "operational-coordination centres" on land borders", sea borders and "airports"; a Risk Analysis Centre and a number of joint operations. This structure is not even mentioned in the Commission proposal and will continue to develop outside any meaningful democratic control.

The point of the draft Regulation is to secure EU funding, enable cooperation agreements with third states, and provide legal and political “legitimacy” for pre-existing initiatives. This legitimacy rests on “consultation” of the European and national parliaments on the legal personality of an agency that has already been *de facto* established, while excluding them from any role in its further development.

This analysis looks at the development of the EU border police structure and then the proposed regulation.

Preventing illegal immigration by sea: the new armada?

The EU has already conducted a “Feasibility study on the control of the European Union’s maritime borders” (“CIVIPOL”) [11490/1/03, 19.9.03. Ref 2], created an EU “Sea Borders Centre” and drafted a “Programme of measures to combat illegal immigration across the maritime borders of the European Union” (hereafter, “the action plan”) [13791/03, 21.10.03. Ref 3].

CIVIPOL represents a law enforcement blueprint rather than any kind of objective or broad-based “feasibility study” and the subsequent action plan proposes police, military and naval operations against people trying to reach the EU by sea. Under the proposals, the EU is planning extensive police and naval operations in foreign waters and ports. This depends upon the conclusion of agreements with “countries of origin”. These are not specified but can be expected to include Morocco, Algeria, Tunisia, Libya, Egypt, Lebanon, Turkey, Syria, Malta, Cyprus and Albania. The levers of aid and trade are to be used explicitly in this process.

The underlying principle is that the EU’s “sea border” extends to any country with which it shares an ocean, basically giving it the right to police the entire sea:

The principal means of ensuring the success of any measures taken is enhanced international relations with the third countries from which illegal migration flows originate or through which they pass. The [EU] programme adopts the concept of the virtual maritime border in order to reinforce the legal borders of Member States by means of joint operations and specific measures in the places where illegal migratory flows originate or transit

The programme cites the Australian and UK navies’ worthy role in a “myriad of rescue operations in the South China Sea in 1979 and 1980” as many Vietnamese fled their country in ill-equipped boats. The picture today is of course rather different, with the Australians attracting international condemnation for their handling of the Tampa refugees and an inquiry into the death of twenty-one migrants, trying to cross from the North African coast to the Canary Islands, that includes the role of the RAF in the multinational joint operation “Ulysses”. [See IRR News Service, *Canary*

Islands tragedy: did the RAF put border security before human safety?
October 2003. Ref 4]

The drafters of the action plan concede that the

use of makeshift craft (rubber dinghies and small or unseaworthy boats) gives rise to particular public concern, as they often sink with the loss of many lives

but there is no further concern for the safety of would be immigrants. On the contrary, any existing rights are viewed as “legal loopholes” that need to be “plugged” (see below).

EU “coastline controls”

Joint “coastline controls” will see the increasing deployment of police, military and naval forces. The proposals include:

- *using the most sophisticated technical tools and the most effective operating methods, based on one another's experience and on information available among Member States;*
- *providing non-member countries with technical and organisational assistance in stepping up surveillance of coasts from which illegal migrants leave;*
- *joint sea patrols carried out by the navies of Member States and of non-member countries concerned by illegal migration flows;*
- *conducting naval operations to intercept and restrain vessels carrying illegal immigrants;*
- *ordering intercepted vessels into safe ports;*
- *arranging for immigrants found on board vessels to be processed and for traffickers to be brought to justice;*
- *organising holding centres for illegal immigrants at vessels' places of departure;*
- *carrying out the identification and repatriation of immigrants held;*
- *exchanging information for the purposes of combating criminal organisations and identifying methods of unlawful transport of illegal immigrants by sea.*

EU Port controls and internal policing

Under the heading “Checks on regular shipping services between a port in a non-member country and a port in a Member State”, the programme

proposes “prior agreements with the authorities in non-member countries” on:

the presence on board, at sea, of police officers from both countries, to carry out advance border checks and observe passengers.

EU member states will also “provide technical assistance and any necessary equipment for more effective checking of vessels”, “help in improving the security and quality of travel documents and in recognising forgeries” and exchange “intelligence on criminal groups suspected of facilitating illegal immigration by sea”.

The programme of measures then goes on to suggest that the EU border police should be equally concerned with:

existing illegal immigrants, since passengers carried on vessels operating regular shipping services between Schengen States are exempt from border checks.

In any event, given the increasing use of such services by foreign nationals already unlawfully present within Member States, special operations should be organised to locate them and expel them from Member States. [emphasis added]

To this end the programme calls for “joint surveillance at vessels’ ports of departure and destination” and the deployment of “police on board vessels, for observation and supervision purposes”.

Rewriting the Law of the Sea?

The programme of measures to combat illegal immigration by sea sets out the legal basis for EU interception of boats in territorial *and foreign* waters. Its argument is as follows:

1. The EU asserts that the presumption of innocence principle in the Law of the Sea (the “right of innocent passage” under the 1982 Montego Bay Convention) cannot apply to potential illegal immigrants (or, since the EU makes no distinction, potential refugees). On the contrary, the Montego Bay Convention is seen to provide “full criminal jurisdiction for the purpose of preventing or punishing illegal immigration” [article 27(a)], both within EU territorial waters and a “contiguous zone” just outside [art. 33].

2. On the “High Seas” [outside EU territory] the action plan recognises that the

Montego Bay Convention does not expressly allow for the shipping authorities of a State other than the flag State to intercept a ship and inspect it on illegal immigration grounds. However, it does make this possible where the vessel has no nationality or its nationality is in doubt [Art. 110].

It seems that the EU envisages a *carte blanche* application of this exception, giving it the right to “intercept” boats whose “nationality is in doubt”.

3. The document suggests that with the consent of third states its joint patrols could operate in the coastal territories of “countries of origin” of migrants. This would be with their “consent” (i.e. tied in to aid and agreements, see below), either under bilateral agreements, the Protocol on smuggling of migrants to the UN Convention on Transnational Organised Crime, or even under a (non-binding) International Maritime Circular. In the longer term the EU might try to introduce a multilateral Convention on immigration controls covering all the Mediterranean countries.

Human rights and other “legal loopholes”

The action plan suggests that:

Member States should endeavour to apply all existing international instruments for the prevention and punishment of illegal immigration by sea, while ensuring the safety of individuals and compliance with human rights provisions.

However, it then goes on to suggest that human rights provisions are in fact “legal loopholes”:

Legal loopholes, as revealed by the CIVIPOL feasibility study, will have to be plugged by means of careful, coordinated action, with the fullest participation by Member States and the undertaking of specific initiatives by the Commission. Efforts to improve the current potential of international practice in this area, though, should not stand in the way of achieving as much as possible through the use of existing instruments.

The first of these “loopholes” is the SOLAS Convention (International Convention for the Safety of Life at Sea), under which the master of any ship has a duty to respond to distress calls and take passengers aboard unseaworthy ships to a place a safety. This, suggests the CIVIPOL study, can be used “to the advantage of the European Union, in order to legitimise emergency intervention” by the:

meticulous application of the law of the sea for the immediate rescue of ships whose seaworthiness is in doubt.

So, while arguing that the Law of the Sea provides for “full criminal jurisdiction for the purpose of preventing or punishing illegal immigration” in coastal territories, the EU is also adamant that migrants intercepted in EU waters can not claim to be in the territory of the member states:

A shipwrecked person who is picked up on the high seas or in the territorial waters of the country of departure or destination cannot claim to have crossed the frontier into the territory of the country.

The CIVIPOL study refers to the “dry foot, wet foot” principle:

while a person is on board a ship flying the flag of the country, he or she is not on the territory of that country.

This has two significant implications. Firstly, it means that member states can operate on each other’s behalf within EU waters and secondly:

stowaways can be kept on board the ship that brought them into a European port so that the same ship can return them to their country of origin under the responsibility of its master. This provision should also apply to those who voluntarily place themselves in a state of distress and are picked up at sea.

CIVIPOL also suggests that an EC Directive should lay down the conditions for including the principle of the extraterritoriality of ships in the national laws of the Member States that do not apply it. A second proposal is to amend the law of the sea to “explicitly spell out the responsibility of the flag state”.

cases must be brought and damages sought by States that are victims of illegal immigration against States whose civilian vessels use their territorial sea for non-peaceful purposes...

The law of the sea should therefore formally spell out the responsibility of the State that agrees to register sub-standard ships or allows them to sail from its coast and does not carry out any checks. What is needed are additional collective sanctions that are sufficiently deterrent when a direct causal link has been established between the vessel's sub-standard condition and the lack of effective control by the flag State. [emphasis added]

In short, the action plan proposed that countries of origin of boats containing “illegal immigrants” should be punished for failing to prevent their departure. It is hard to see how any reasoned reading of the Law on the Sea could envisage such a principle.

Identification, processing and deportation

On the question of what to do with the people “intercepted” at sea, the action plan is equally clear - identify them, process them, then deport them.

It is also essential to consolidate Community rules on identifying illegal immigrants in EURODAC, by making it into a more permanent

database in the interests of measuring and pinpointing migratory movements, carrying out risk analyses, improving controls and the allocation of resources for such controls and closing off the routes. Visa applicants should also be identified in an equally rigorous way (VIS proposal confirmed in Thessaloniki). Biometric identification procedures exist, provided uniform legal bases are available in all the Member States.

This confirms the belief by civil society groups that once established the scope of EU databases would be widened as new justifications emerged.

“Illegal immigrants” who give false nationalities, or even try to claim asylum, are seen as a further “problem”. Here CIVIPOL builds on the “camps” proposals in the UK government’s “safe haven” proposals, calling for “a two-tier system”:

using reception areas in third countries. In an initial stage the case of illegal immigrants without any stated nationality or giving a false nationality will be examined on land in Europe, to assess possible refugee status. In a second stage, those who are not granted asylum will be issued with a residence permit for a host country.

It suggests that agreements should be negotiated with volunteer host countries along the lines of that between the US and Jamaica for the readmission of illegal immigrants who declare no nationality or a false nationality:

*These agreements would be accompanied by a sizeable financial contribution, both to help these countries to cater for the migrants with the help of the UNHCR and national NGOs providing assistance to foreigners, and to finance the ultimate repatriation of the migrants to their country of origin **once they remember what their nationality is.** (emphasis added)*

This condescending approach would be laughable did it not have such serious implications for the rights of refugees and migrants.

Soliciting the cooperation of third states

The preamble to the action plan notes that agreements on “management of migration flows” could be included in cooperation agreements (EU aid and trade) with third countries. In fact, such plans are already well developed. Last year’s Seville European Council Conclusions stated that each future EU association or cooperation agreement should include a clause on “joint management of migration flows and compulsory readmission in the event of illegal immigration”. Sanctions for non-cooperating countries were also envisaged. A recent treaty between the EU and Central American states is the first to contain the “new generation” migration management clause in an agreement. In May of this year the EU Council adopted Conclusions on

“migration and development” in which “migration management” is the primary “strategic policy priority” for the EU [8927/03, 5.5.03.Ref 5].

To this end the EU calls for the “coordination of development and migration related policies, and cooperation with regional processes and international organisations operating in the field”. The May Conclusions propose that “the opportunity of the mid-term review of Country Strategy Papers [EC relations with third states]... allow for a case-by-case reassessment of migration issues in concerned countries”. Then in June the Commission proposed an EU Regulation to create a budget providing “financial and technical assistance” for the development of developing countries legislation in the field of legal immigration and asylum; the establishment “of an effective and preventive policy in the fight against illegal migration” and the readmission of third country nationals. [See, *Statewatch* evidence to the International Development Committee; forthcoming]

EU Sea Borders Centres

The Spanish and Greek delegations have proposed the creation of two operational EU centres on maritime border controls, one in Pireaus (Greece) and the other in Madrid (Spain). Greece will focus on the Eastern Mediterranean and Spain the Southern Mediterranean and Atlantic [13918/03, 24.10.03. Ref 6]. These bodies will oversee and coordinate the port and coastline controls outlined above.

The Sea Borders Centres are among a number of ad hoc, operational groups that are developing outside the EU legal framework.

EU Land Borders Centre

Participants in the EU “Centre for Land Borders” (CLB) have now met on six occasions. Only one report on their activities is listed in the public register of Council documents and this is not publicly available. According to the text [12799/03, 17.10.03. Ref 7], the CLB is dealing with:

- “joint operations” (including the creation of a pool of border guards “to serve abroad”);
- “risk analysis” (exchange of intelligence and information in conjunction with the Risk Analysis Centre, see below);
- the “prevention of illegal entry in border-crossing railways” (in conjunction with another ad hoc body, “COLPOFER” (Cooperation of European railway police and security services));
- the creation of a dedicated “information system” or the coordinated use of “existing channels” (“CIREFI Early Warning System, ICONet, bilateral exchange measures etc.”)

The CIREFI early warning system on routes used by refugees and migrants has been developed in conjunction with Europol over the past five years.

The Risk Analysis Centre

The EU Risk Analysis Centre on illegal immigration (RAC) is another ad hoc body set-up under the auspices of the Common Unit. It is charged with developing “resources for gathering, analysing and disseminating the information and data obtained” from other ad hoc bodies. It also recommends specific joint actions to be undertaken by the member states and other ad hoc centres. The joint operations it proposes will see EU countries assisting a lead state and/or EU bodies [11477/03, 16.7.03. Ref 8]:

1. “Italian Southern Coastline” [Italy], focusing on Northern African countries, particularly Libya and Tunisia;
2. “Spanish Coastline” [Spain], focusing on the Canary Islands and Ceuta and Melilla;
3. “Visa under false pretences” [Europol, Land Borders Centre, Air Borders Centre] intelligence gathering followed by operation to “intensify checks at external borders”;
4. “Austrian External Green Borders” [Austria, Land Borders Centre], focusing on the Austrian borders with Hungary, Slovakia and the Czech Republic;
5. “Illegal immigration from China” [Europol, Air Borders Centre, national authorities], to complement existing international initiatives within the G8 (Lyon Group) and IGC (Intergovernmental Consultations on Migration)
6. “Aegean Sea, Greece” [Europol, Greece], focusing on Turkey (Kurds), Iraq, Iran, Pakistan, “and other Asian nationalities”.

Air Borders Airports plan

The Italian delegation, which is the lead state in the development of the EU “Air Borders” Centres, claims that its “International Airports plan” is the “direct result of the Feasibility study for the setting-up of a European border police force”. Though since the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) “approved” the airports plan on 16 September 2002 and the feasibility study was not completed until more than a year later it is hard to see how.

There have been six phases to this project to date, involving five meetings in Rome attended by the delegations of the eleven participating Member States (Austria, Denmark, France, Germany, Greece, Italy, the Netherlands, Portugal, the United Kingdom, Spain and Sweden) and countries with “observer status” (Latvia, Poland, the Czech Republic and Hungary).

Agreement has already been reached on the organisational model for air borders centres, staffing, operational principles and a special communications system [8645/03, 5.5.03. Ref 9]. The central EU Air Borders Centre (ABC/IAP) will be located at Rome's Fumicino Airport and will be comprised of a Chief (Head of Border Police), a permanent secretariat, a number of computer technicians and a group of up to six experts from the Member States. Its premises will have an "electronic information clearing house (the communications/data centre), a meeting room, and offices for the experts, the secretariat/translation unit and the Head of the Centre." [13524/03, 13.10.03. Ref 10]

Centre for Border Police Training

The proposed Training Centre for the European Border Guard (ACT) also dates back to the mid-2002 and is being overseen by Austria and Sweden. Initial stages are focusing on the development of a common training "curriculum" and organisational and administrative structure of the ACT [12570/03, 16.9.03. Ref 11].

The proposed Regulation: an EU Expulsions agency in disguise?

The draft Regulation on the establishment of "a European Agency for the Management of Operational Co-operation at the External Borders" covers all the activities already being undertaken by the *ad hoc* bodies described above. The proposal, however, makes no mention of any of these groups, except for the possibility of setting-up "specialised branches" (Article 13). It seems the Commission is in either "in the dark" or being selective in its "explanatory memorandum".

The new Agency, which will be a *de facto* continuation of the "common unit" of external border practitioners created in June 2002, has the following tasks:

- a) co-ordinate the operational co-operation between Member States in the field of control and surveillance of the external borders.*
- b) assist Member States on training of national border guards.*
- c) carry out risk assessments.*
- d) follow up on the development of research relevant for the control and surveillance of the external borders.*
- e) assist Member States in circumstances requiring increased technical and operational assistance at the external borders.*

f) co-ordinate operational co-operation between Member States in the field of removal of third-country nationals illegally residing in the Member States. [Article 2, proposed Regulation]

It is quite clear that the only thing that this “proposed” agency will do that unaccountable EU groups are not doing already is organise joint expulsions. It is no coincidence that that the EU has just politically agreed Decisions on joint expulsions [14205/03, 31.10.03. Ref 12] and financing them from EC funds [13714/1/03, 29.10.03. Ref 13]. These provide a legal basis for the simultaneous deportation of people from to the same country by a number of member states despite European Court rulings that group deportations are illegal. Given the ambitious expulsion targets of most member states, the new agency can expect to be very busy. All the draft Regulation has to say is that:

1. The Agency shall subject to the Community return policy co-ordinate or organise joint return operations of Member States. The Agency may use Community financial means available in the field of return.

2. The Agency shall identify best practices on the acquisition of travel documents and the removal of illegally residing third-country nationals from the territories of the Member States. (Article 9)

There is no reference to the safety or rights of people being deported.

Other hidden agendas

The failure of the Commission to mention the pre-existing and extensive *ad hoc* structure outlined above begs further questions. In its Communication of May 2002, entitled “towards integrated management of the external borders” [COM (2002) 233, 7.5.02. Ref 14], the Commission proposed the introduction of a “security procedure” called “PROSECUR” based on “direct links and exchanges” of “data and information between authorities concerned with security at external borders”. PROSECUR would have access to the Schengen Information System (SIS), “privileged links with Europol”, access to the new database being created on visas and its own communications system. [See *Statewatch* analysis on: <http://www.statewatch.org/news/2002/may/06border.htm> Ref 15]

Again, there is no mention of this system in the draft Regulation, yet all of the “specialised branches” envisage access to EU databases and creation of their own information systems. It seems the PROSECUR system will be developed outside the formal EU structure.

The only mention of “information exchange” is in Article 10, where the agency may take “all necessary measures” and Article 11, which envisages a cooperation agreement with Europol on “strategic non-personal

information”. Like the communication before it, the Commission proposal makes no mention of “data protection”.

Regulation and accountability

Democratic control is via a Management Board - Home/Interior Ministry officials from each member states. Public accountability is via an annual public report (which usually lack detail), to which the specialised branches are expected to contribute. The Agency will be bound by the Regulation on public access to documents (as are all EU bodies).

The choice of the “legal” basis is also significant. The Regulation is based on Article 66 of the TEC which has the broad objective of “ensur[ing] cooperation between the relevant departments of the administrations of the Member States” in the field of Justice and Home Affairs. This requires “consultation” of the European Parliament. The obvious legal basis, “measures on the crossing of the external borders of the Member States” (Article 62(a)) would have given the EP a meaningful vote on the proposal (co-decision).

The Commission also asserts that the new Agency will:

not be given a policy making role, nor would it make legislative proposals or exercise implementing powers within the meaning of Article 202 of the Treaty.

Given that the new agency is “overseeing” an ad hoc structure which is clearly developing and implementing policy this claim is another that does not stand-up to scrutiny. The paucity in judicial and political accountability is surpassed only by the disregard for international human rights and asylum rules which are not mentioned in either the proposed Regulation or the wider *ad hoc* framework.

Financial aspects

It is had to avoid the cynical conclusion that the proposed Regulation is all about securing EC funds for existing initiatives. The revenues of the Agency, at least six million euros in the first year (rising to nine in the second), “shall consist, without prejudice to other types of income, of”:

- *a subsidy from the Community entered in the general budget of the European Union (Commission section);*
- *a contribution from the third countries, which have become associated with the implementation, application and development of the Schengen acquis;*
- *fees for services provided;*
- *any voluntary contribution from the Member States.*

Again, the Commission neglects to mention the funding of the *ad hoc* groups and joint operations from the ARGO budget line on “facilitating adoption

and implementation of EC migration, asylum and borders legislation". Perhaps because this would amount to tacit admission that the "Agency" is responsible for implementing EU policy?

The International Airports Plan was financed by the ARGO programme, the training centre has made another application and the action plan on illegal immigration by sea outlines the "need for ad hoc Community financing". Here it refers specifically to:

the possibility of using the Community funds set aside for the period 2004-2006, by using the ARGO funds or budget heading B7-667, given the anticipated direct involvement of third countries in the cooperation process, which must aim not only to combat migratory flows through those States, but also to curb and manage them.

Conclusion

If adopted, the proposed Regulation would enter into force in January 2005. Given the rapid development the current ad hoc framework over the past year it can be expected that the operational structure will be well advanced by then. In any case, the Regulation promises no real accountability whatsoever - the operational "specialised branches" will operate under the "supervision" of a "management agency" that is only thinly accountable to the EU Member States and less so to parliaments and civil society.

This will mean that information regarding practise, joint operations and the evaluation of policy will be hidden from view. It will be impossible to tell whether the safety, integrity and rights of migrants and refugees are being respected or even considered.

The Council and the Commission argue that this ad hoc framework is necessary in order to respect "national sovereignty". Member states, they suggest, need the "space" to plan and undertake operations. The Commission is supposed to be the "neutral arbiter" of European integration. The Objectives set out in the Commission proposal begin with the view that:

a high and uniform level of control and surveillance, [are] an essential prerequisite for an area of freedom, security and justice.

With its compliant proposal, the Justice and Home Affairs Directorate has shown just how close it is to the "securitarians" in the member states and the Council - and how far it is from the values of humanity and democracy.

Earlier this year, a coalition partner in the Italian government advocated shooting "illegal" immigrants out of the water. That its Presidency of the EU has championed an European Border Police, and it is taking a lead role in setting-up the operational and administrative structure, only adds to the serious misgivings about the current form of the entire project.

Ben Hayes, November 2003

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NOTE

Direct access to the full-text of all these references is available on the html version on:

<http://www.statewatch.org/news/2003/nov/10euborders.htm>