



Statewatch

Submission to the Network of Independent Experts on fundamental rights in the EU

Introduction

Our submission is comprised of short summaries of our concerns followed by links to coverage on the internet - which carries the detailed argument and the full-text background documents.

We would wish to raise the following general issues:

i) It is our view that the effects of the "war on terrorism" is having a detrimental effect on peoples' rights and liberties and democratic standards both at the national and European levels.

Your report last year which carried a special section on the "war on terrorism" was a welcome initiative. Perhaps you could consider continuing this on an annual basis.

ii) It is our view too that this phenomena extends to increasing secrecy, the removal of judicial controls over police and security agencies' actions, the creation of unaccountable bodies (such as the PCOTF, the Security and Intelligence Chiefs Working Party and multinational investigation teams).

iii) Two years on from 11 September it is clear that two groups have been targeted and viewed as "suspect communities".

First, are resident migrants and their communities, refugees and asylum-seekers. It is demonstrable that selected migrant communities have been subjected to institutionalised racist practices such as surveillance and police raids. Third world peoples, whether resident, visiting or claiming asylum are the subject of stereotyping - in addition to being the target of racist and fascist groups.

Across the EU we are witnessing a shift from multiculturalism to monoculturalism. This is exemplified by the shift from pluralism, tolerance and multiculturalism to "forced integration" under which the values and norms of the host European society are enforced through "citizenship tests" - in effect migrants are expected

to replace their own histories and culture with that of the host "European" state:
<http://www.statewatch.org/news/2003/jul/29cele.htm>

The second group are political activists and protestors. Specific plans have been put in place to subject any group whose members may attend an EU-wide demonstration under surveillance at the national level and to share and collate "intelligence".

iv) In addition to the targeting of specific groups we are also seeing the introduction of wholesale (global) surveillance of telecommunications and of movement directed at the whole population of the EU.

v) It is our view that there has been a "sea change" since 11 September 2001 which is not temporary but permanent. The "war on terrorism" has replaced the "Cold War" as a legitimating ideology in the EU and the USA which requires the surveillance and control of those entering and the wholesale surveillance and control of their own populations.

There is no longer a balance between freedoms and liberties on the one hand and the demands of security on the other. The demands of security, the law enforcement and internal security agencies are dominant and "emergency powers" are becoming the norm.

Left unchecked basic freedoms and democratic standards - freedom of movement, freedom of expression and the right to protest, freedom from surveillance in everyday life, accountability, scrutiny and data protection - will be whittled away one by one threatening the very democracy being defended by the "war on terrorism".

Your Network, together with many others in civil society, can play an important role in attempting to halt and reverse the present direction.

We would draw attention to the following specific issues:

A. Surveillance and data exchange

1. The use of biometrics in identity documents

(Articles 7 and 8 of the Charter)

At the Informal Justice and Home Affairs Council in Veria, Greece in March the Ministers agreed that visas and residence permits should include biometric data held on a contactless-chip on the documents. The data will be stored on national databases and copied to SIS II.

On 25 September 2003 the Commission produced a Communication and a

legislative proposal on the issue. They cover visas and residence permits are to be followed by one introducing biometrics on EU passports for EU citizens. The Council has already agreed to adopt it by the end of the year, before any parliamentary scrutiny has taken place.

The use of biometrics throws up substantive questions for data protection, privacy, civil liberties, exchange of data, "function-creep" and surveillance.

See:

<http://www.statewatch.org/news/2003/sep/19eubiometric.htm>

2. Data protection and the exchange of data outside the EU

(Articles 7 and 8 of the Charter)

The 1995 Data Protection Directive, and the subsequent 1997 Directive on privacy and telecommunications, are widely seen as positive contributions by the EU to citizens' rights. Both have come under major attack in the last two years.

The latter was substantially undermined by changes introduced in 2002. The principles established by the former have been undermined by the Europol-USA agreement, the EU-USA agreements on extradition and judicial cooperation, and the substance of the 1995 Directive by access to Passenger Name Record (PNR) data by the USA and proposals that similar data should be accessed on "foreign nationals" entering and travelling within the EU (Spanish proposal).

In addition there must be concerned over the use of the multitude of agreements under which Europol can exchange data with third states and agencies. These cover not just the supply of data and "intelligence" on individuals to third states but the supply of data on individuals from third states. The adoption of the agreements was based on very general theoretical descriptions of the law in each third state with no evaluation at all of how it works in practice. Moreover, there are no review procedures in place to evaluate the accuracy or legality (whether evidence or intelligence was obtained by threat or force) of the information received or use of the information sent.

There are 11 such agreements in place (with Interpol, Norway, Poland, Estonia, Hungary, Slovenia, European Central Bank, Czech Republic, the World Customs Organisation and the USA) and as many as 20 more are being negotiated. It is astonishing that only one these international treaties has been officially published.

3. Passenger data: recording and use of by USA and EU

(Articles 7 and 8 of the Charter)

Since the beginning of this year a demand by the USA for access to data on all airline passengers leaving the EU for that country has been on the table. The question of the "adequacy" of the US assurances on data protection have not been

met (see Bolkestein letter and speech to European Parliament).

Despite the possibility of legal challenges under the 1995 Directive a number of airlines have been giving direct access to their reservation databases to US agencies.

In addition the Commission has failed to use its powers under the 1989 Regulation on computerised reservations (2299/89) systems which specifically precludes the exchange of such data with third parties.

see:

1. This page contains the latest and all the background documentation:

<http://www.statewatch.org/news/2003/oct/12pnrspain.htm>

2. Spain proposes data on all airline passengers to be sent to law enforcement agencies and for extra checks on all foreign nationals entering the EU:

<http://www.statewatch.org/news/2003/mar/24spain.htm>

4. The surveillance of telecommunications

(Articles 7 and 8 of the Charter)

An issue which your report for 2002 dealt with, namely the retention of data by service providers for use by the law enforcement agencies, is still being pursued at national level in the majority of EU states.

The lack of coverage and media attention in 2003 simply reflects the fact that the chosen strategy is for national laws to be adopted and then for a "harmonised" approach to be raised. It can be expected that this issue will re-surface in 2004.

see:

Majority of governments introducing data retention of communications:

<http://www.statewatch.org/news/2003/jan/12eudatret.htm>

5. The development of the SIS and SIS II

(Articles 7, 8 and 47 of the Charter)

Up to three million individuals have now been registered on the Schengen Information System. Plans for 'SIS II' which will incorporate new EU member countries and introduce a range of new functions for the SIS are well advanced. The expansion of the SIS has not been accompanied by the provision of sufficient resources for the Joint Supervisory Authority on data protection to fulfil its mandate.

As the JSA noted in its annual report for 1998-9:

“For there to be true democratic checks, it is not sufficient for there to be an independent authority, it is essential that that authority be given the necessary means and instruments to function”.

Unfortunately, the now common data protection authority for the various EU databases lacks human, technical and financial resources. Moreover, the remit of the JSA does not include powers to remedy individual complaints. We have seen more and more people denied access to the Schengen area on the basis of their inclusion on the SIS. It is highly questionable whether the level of member state discretion in handling individual complaints under Article 108 of the Schengen Implementing Convention offers them adequate judicial redress. Moreover, as more states participate in the SIS, so the number of access points has increased dramatically - to such an extent that officials can only estimate that there now “approximately 125,000!”

For the SIS, like a number of other databases on which personal data is held, a system of national authorities needs to be created which are accessible, have effective powers and providing a response which allows people to identify which authority they need to refer their complaints to.

Documents published on the *Statewatch* website in March 2002 outlined a host of far-reaching proposals for SIS II, some on which there was “general agreement”, and others requiring “further discussion”. A number of these proposals have been incorporated into a draft EC Regulation and EU Decision on the extension of the capabilities of the existing SIS [see 10055/03, 24 June 2003 and 9408/02, 11 June 2002 respectively]. We share the concern of the Commission that “some of the proposals currently under discussion would fundamentally change the functions of the SIS, transforming it from a reporting system to a reporting and investigation system” [COM (2001) 720, 18.12.01].

The Council has decided to deal with the legal and political issues arising from an extended scope and function for SIS II *after* the contracts have been awarded and technical development of the new system is underway, allowing for what it calls the “latent” development of SIS II (“meaning that the technical pre-conditions for such functions should be available in SIS II from the start, but those functions would only be activated once the political and legal arrangements were in place”) [6387/02, 25.2.03 and later revisions of this document]. This is already shielding the development of SIS II from the view of civil society and can only have a negative effect on debate and scrutiny over the protection of fundamental rights.

See:

1. March 2002: <http://www.statewatch.org/news/2002/apr/01sis.htm>

B. The rights of migrants and refugees

6. The removal of migrants by land and air

(Articles 2, 4 and 19 of the Charter)

The removal from the EU of rejected refugees and asylum-seekers has moved from voluntary repatriation to a combination of voluntary repatriation (viewed as "induced" in an unquantifiable number of instances) and forced repatriation (including the use of force and restraints).

Most "voluntary" repatriations are carried out by the IOM (International Organisation on Migration) or by regular passenger flights. The IOM is a non-EU intergovernmental body which is not accountable to EU institutions.

No reports have ever been produced in the EU on what happens to the people who are repatriated.

There are two proposals currently on the table, one on repatriation by air, the other repatriation by land. Both are of concern. However, the latter raises a series of new questions and dangers (see story below).

See:

1. Italian Presidency proposes that officers in plainclothes drive unmarked police cars across the EU to deport migrants:

"As we going to see people shackled to their seats on public trains and coaches or perhaps trains with "cattle trucks" chugging east, reminiscent of another time? How safe are migrants being transported in unmarked police cars or vans driven by plainclothes police officers going to be if they resist at any point? Will we ever know what happened to them if they do not arrive at their destination?"

<http://www.statewatch.org/news/2003/aug/01cattle.htm>

2. EU: Mass deportations by charter flight - enforcement and resistance:

<http://www.statewatch.org/news/2003/aug/03deport.htm>

7. Deaths and injury during deportations

(Articles 2, 4 and 19 of the Charter)

There are unfortunately a number of recorded instances of deaths and injuries during forced repatriations - which are likely to increase as more forced removals are undertaken.

See:

1. France: Outrage over deaths of migrants being deported:

<http://www.statewatch.org/news/2003/jan/10fran2.htm>

2. France: Argentine migrant dies during deportation:

<http://www.statewatch.org/news/2003/jan/04fran.htm>

3. Deaths during forced deportation: Case details of nine deaths during forced deportations in Switzerland, Germany, Belgium, Hungary, France, Austria and the UK (IRR News Service): <http://www.irr.org.uk/2003/january/ak000003.html>

8. Deaths at borders

(Articles 2 and 18 of the Charter)

There are many chilling accounts of migrants dying and being seriously injured when trying to enter the EU. We would draw your attention to three of these, one by UNITED which records those reported as dying, one by the IRR's European Race Audit's "Death at the border, who is to blame?", and finally a moving essay on dead migrants washing up on Spain's beaches:

"would it have been better if more of them had drowned, so that only half of them would arrive?"

See:

1. "Nothing is true, nor is it a lie?" by Nieves Garcia Benito. A powerful and moving essay on the indifference of Europe to dead migrants whose lives end on Spain's beaches: <http://www.statewatch.org/news/2003/jul/21spain.htm>

2. Weekly deaths at European borders - fatal realities of Fortress Europe:

<http://www.statewatch.org/news/2003/jun/20deaths.htm>

3. EU: The other asylum statistics - Governments count the numbers coming in. But who counts the numbers that do not make it? Report from the European Race Audit (IRR) : <http://www.statewatch.org/news/2003/jul/30irr.htm>

9. The targeting of migrant communities

(Articles 2 and 18 of the Charter)

There have been consistent reports from across the EU since 11 September 2001 that migrant communities, especially Muslim communities, have been targeted by police and internal security services. This has involved raids on homes and businesses, surveillance and the recruitment of informers.

The stereotyping of migrant communities by both governments and the media is ongoing. Resident migrant communities, refugees and asylum-seekers are all perceived as potential "terrorists" or terrorist sympathisers, and if not terrorists then criminals.

See:

Terror policing brings many arrests but few charges - survey by the Institute of Race Relations: <http://www.irr.org.uk/2003/march/ak000002.html>

10. UK government AND UNHCR plans for camps

(Articles 18, 19, 47 of the Charter)

We are very concerned that the UK government proposals for external asylum processing centres are now being taken forward within the EU framework. In principle in the Blair government's "new vision for refugees" is the automatic removal from the EU for the processing of all applicants for asylum - the Ukraine and Albania have been suggested as possible locations. The fraction granted asylum would receive temporary protection in an EU country (though they will not be able to choose which one), while the majority would be sent back to UN administered refugee camps in North or West Africa (likely N. Somalia for S. Somalians; Morocco for Algerians), Turkey (and potentially Iran and N. Iraq for Iraqis and Kurds) and Europe (again, possibly the Ukraine or Albania). Non-EU countries will be offered economic incentives to participate in the scheme (see also point 13 below).

Documents from the UNHCR in April show that the organization broadly supports the UK proposals (with the reservation that the processing centres should be inside the EU).

The issue was first discussed at the EU level at an informal meeting of justice and home affairs (JHA) ministers in Greece at the end of March. At the JHA Council on 5-6 June, only the Swedish government expressed firm opposition while the Netherlands, Denmark and Austria backed the UK strongly. The November JHA Council is scheduled to discuss the issue again and the Commission is said to be considering proposals.

There can be no doubt that removing asylum-seekers to holding and processing centres outside the EU before substantive consideration of their applications would breach the Geneva Convention and ECHR. We are therefore concerned about the ambiguous wording of Article III-167(2)(g) of the draft constitution which calls for "partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection".

See:

1. <http://www.statewatch.org/news/2003/mar/25asylum.htm>
2. <http://www.statewatch.org/news/2003/jun/07eubuffer.htm>
3. <http://www.statewatch.org/news/2003/jun/25asylopinion.html>

11. Readmission agreements

(Articles 18, 19 of the Charter)

Re-admission agreements are intended to ensure the swift repatriation of refugees and asylum-seekers that EU member states have decided do not qualify for protection and the right to remain.

Some re-admission agreements have been concluded between the EU and third states (eg: Sri Lanka and Macao) and a number are in the pipeline. The negotiating tactics used by the EU to conclude such agreements is based on using political and economic "leverage" (trade) to get agreement. These agreements are not freely negotiated by equal partners but rather imposed on third world countries by the EU.

Re-admission agreements form part of the EU's new policies - others are a common asylum policy, funds and policies to be followed by the source countries to impose border controls which end "illegal" migration, the possible creation of mass "camps" in the third world and in or on the borders of the EU and the setting of "quotas" for "legal" entry (ie: skilled professionals to meet the EU's labour needs).

The perspective of EU governments was expressed in a Note to the Informal Meeting of Justice and Home Affairs Ministers in Rome on 12-13 September. This laid the blame on third world governments who:

"often promote emigration, even illegal immigration, in order to: first, alleviate the problem of internal unemployment and underemployment; secondly, ensure the influx of money remitted by expatriate workers, which is nowadays a great resource for the economic growth of less developed countries"

The logic of this statement beggars belief and moreover assumes that these governments can control people who are fleeing from poverty and persecution.

See:

1. Readmission agreements and EC external migration law: Statewatch analysis:

"The EU's approach to readmission agreements involves insisting that more and more non-EU countries sign up to broad readmission obligations to the EU with little or nothing in return. EU policy has been backed up by harsher and harsher rhetoric and threats against third countries as the EU becomes more and more unilateralist and focused solely on migration control. These policies are unbalanced, inhumane, and internally contradictory"

<http://www.statewatch.org/news/2003/may/12readmission.htm>

12. Development of an EU border police

(Articles 18, 19 of the Charter)

The *ad hoc* development of an EU border police under the framework set out in

the Commission's communication of May last year raises further concern [COM(2002)233, 7.5.02]. This included only marginal reference to the protection of asylum-seekers, no mention at all of data protection or other human rights considerations, and no suggested rules for the legal or political accountability or control of the common unit and the information system of the Border Corps. In fact the Commission explicitly suggests setting up the new information exchange system without any legal rules whatsoever governing its operation and envisions that it will only be placed on a legal footing in the 'long term'. The draft EU Constitution is ambiguous on this point. Unless the operation of "PROSECUR" is confined merely to non-personal data in the meantime, and/or making use of the existing rules of access governing existing databases which include personal data (which seems unlikely from the tenor of the Communication), then the legality of this approach is extremely doubtful. It is clear from the case law of the European Court of Human Rights that any measures interfering with the right to private and family life must be 'prescribed by law'; a purely informal decision to exchange personal data would therefore breach the European Convention on Human Rights. In fact the words 'data protection' do not even appear anywhere in the communication

There has been no evident discussion of the rules that would have to govern such a Corps as regards data protection, protection of human rights and asylum rules or judicial and political accountability. The main route of accountability envisioned seems to be control by the 'common unit', but this would further beg the question in turn as to the adequacy of judicial and legal controls on the common unit.

The protection of fundamental rights must extend to people at the EU's borders. We urge the Committee to monitor closely the development of the EU border guard and draw its attention to the invitation from the JHA Council of 2-3 October 2003 to present further proposals in early November.

See:

1. <http://www.statewatch.org/news/2002/may/06Aborder.htm>

13. Contamination of EU development agenda

(Article 6 of the Charter)

Our concerns here are related to those over the development of "external processing" for asylum-seekers (see point 10 above) and the control of immigration in countries of origin and transit. The UK government argues that "at every level of governance (domestic, EU, international) in development, trade, conflict resolution and promotion of human rights, the factor of reducing forced migration should be explicit and played into the wider agendas of these objectives". In June 2002, the Seville European Council agreed upon the establishment of a single body for General Affairs and External Relations. Article 3 of the TEU gave development policy an independent role in foreign

policy. Within the new body it will instead be considered alongside security and defence and external trade. We share the concerns raised in a report commissioned by the European Parliament that this “creates a risk of development considerations being seen as less important, even ignored”.

Post-11 September it is not only migration concerns that are contaminating the development agenda with recourse to the powers of persuasion assured by aid and trade. Financial Intelligence Units from the USA and EU member states in the pursuit of terrorist funds and assets have designated non-cooperating countries to face sanctions, potentially as part of wider anti-terrorism clauses to be imposed on the developing world in the same way as readmission clauses. The European Commission has also suggested that there will be a greater allocation of resources to developing countries to combat “crime and terrorism” in its 2003-04 review of Country and Regional Strategy Papers.

There are also institutional and political links between development considerations and the EU Common Foreign and Security Policy. The EU’s creation of a Rapid Reaction Force will (eventually) be used against “growing violence destabilising law and order, breaches of the peace, outbreaks of fighting, armed conflicts, *massive population movements...*”. Together with the EU’s “non-military crisis management” capability, it marks a radical departure from the earlier frameworks which were “politically neutral and ... aimed exclusively at alleviating human suffering”.

While the Committee is concerned with adherence to the Charter in the member states we believe that in the long term fundamental rights in the EU can only be preserved if the EU puts the reduction of global inequalities, peaceful conflict resolution and the promotion of human rights ahead of self-interested and potentially counter-productive security and migration concerns.

See:

1. <http://www.statewatch.org/news/2003/sep/17bhtb.htm>

C. Policing and security

14. The policing of protests and the gathering of intelligence on protestors

(Articles 7, 8, 12, 45, 48 of the Charter)

The issue of controlling protests came to the fore before 11 September 2001 as a result of Gothenburg and Genoa in June and July 2001. In the wake of 11 September public order at EU Summits and other international fora public order became incorporated in internal security plans in the EU.

The Police Chiefs Operational Task Force has been assigned a role, meetings have

been held of para-military public order units from member states, a Handbook has been prepared and new proposals have been put forward by the Italian Presidency.

Our concerns are three-fold:

a. That the operational plans laid out in the Handbook, the new proposal and others require the on-going surveillance in member states of any group which might take part in an EU-wide demonstration (eg: on globalisation, racism etc).

In our view the effect of the operational plans is to legitimise the surveillance of groups exercising their basic democratic rights to organise themselves around issues of concern to them. This is an unwarranted intrusion in a democratic society.

This view is confirmed by the terms of the Handbook etc where it is the surveillance of potential "trouble-makers" which is the benchmark, not those who may have a criminal record related to public order (and many of these may anyway result from non-violent protest).

b. Over the past two years hundreds of protestors have been refused entry to member states, not on the basis of a relevant criminal record but usually on grounds that the police or immigration officials believe them to be potential "trouble-makers" - such subjective discrimination has no place in a lawful society. Moreover, a number of these people (plus a number of those arrested but never charged) have been placed on the Schengen Information System (SIS).

Use of Article 2(2) in the Schengen Convention to counter protests:

We are concerned at the apparently arbitrary use of Article 2(2) of the 1990 Schengen Convention. This allows Schengen states to reintroduce border checks "Where public policy or national security so require... for a limited period". The Belgian government was the first to invoke this 'exception', during an immigrant 'regularisation' programme in early 2000; it was first used to prevent protestors attending a demonstration during the French presidency of the EU, where both France and Spain reintroduced border controls for the Biarritz summit in December 2000. Since then, Article 2(2) has been used on at least 26 occasions and at least 14 times to counter demonstrations taking place at international summits [see *Statewatch European Monitor*, vol 3 no 4, February 2003].

This policy does not just mean that identity checks take place during the limited periods, but that hundreds (and in some cases thousands) of people are refused entry to the member states to which they are traveling. By way of example, some 2,093 people were turned away at the Italian border in the run-up to the G8 meeting in Genoa [see: *Statewatch bulletin*, vol 11 no 3/4, May-July 2001]. More recently, at the G8 summit in Evian, France, (1-3 June 2003) border controls were reintroduced among six countries, for a two week period

commencing ten days before the meeting! [9537/03, 23 May 2003]

It is thoroughly unacceptable that Article 2 of the Schengen Convention, which provides for the abolition of internal borders, is being used arbitrarily to deny people their right to free movement, assembly and protest.

c. The way EU-wide protests are policed is another issue.

In our view the carrying of firearms by those policing protests and demonstration should be banned.

The use of para-military police units (like the Tactical Support Group in the UK, the CRS in France and the carabinieri in Italy) should be strictly limited to life-threatening situations - they not normally be employed to police protests.

The arrest and holding of protestors without any intention of charging them with an offence - that is, to simply take them off the streets and hold them as a way of quasi-legal punishment - should be outlawed.

No ones' personal details should be held on any database unless they have been convicted of an offence.

See:

1. Italian EU Council Presidency: Plan to put protestors under surveillance and deny entry to suspected troublemakers:

"if implemented this proposal will legitimate the ongoing surveillance by the political police of any person or group who they think might go to a protest in another European country on a whole range of issues from racism to the environment, from globalisation to peace.

Most people in Europe do not take part in protests, but those that do express a wider, and historic, concern over democracy and its future. Politicians may choose to ignore them but, in between elections, protests are one of the few ways that people can collectively express themselves" Tony Bunyan, Statewatch editor

<http://www.statewatch.org/news/2003/aug/15protest.htm>

2. Expulsion from Belgium and Schengen bans for anti-war protestors:

<http://www.statewatch.org/news/2003/feb/15green.htm>

15. Police Chiefs Operational Task Force

(Article 42 of the Charter)

The Police Chiefs Operational Task Force (PCOTF), comprising representatives from each member state, was set up in 2000 following the Tampere Summit. It is an ad hoc body with no legal basis for its activities and yet it has emerged as a coordinating group outwith any accountability [see: Statewatch European Monitor,

vol 2 no 1].

Lacking a legal base it even drew up its own terms of reference and submitted them to the Article 36 Committee for approval.

It must be expected that it will play a key role if the Standing Committee on operational cooperation on internal security is set up under the new Constitution.

This is just one of a growing number of ad hoc groups created post 11 September 2001.

see:

1. <http://www.statewatch.org/news/2001/oct/12atrm.htm>

16. The development of Europol

(Articles 7, 8, 42, 47 of the Charter)

We are concerned about supplementary legislation and ongoing development of proposals to replace the Europol Convention with an EU Council Decision. Taken together these measures amount to a fundamental transformation of Europol's constitution from a "reactive", analytical agency to a "proactive", operational unit. It should be remembered that Europol's competence has been extended to all the forms of crime listed in Annex 2 of the Convention (the fourth such extension by the Council from the five original forms of crime in Europol's mandate under Article 2 to 25 specific offences). The *de facto* extension of Europol's remit from "organized" to "serious" crime must also be considered in the context of the Protocol to the Europol Convention on Europol's participation in joint investigation teams operating the member states [OJ 2002 C 312/1] and the framework decision applying the relevant provisions in the Mutual Legal Assistance Convention [OJ 2002 L 162/1].

This has not been accompanied by matching efforts to increase the regulation and scrutiny of Europol's activities running the risk that negligence or breaches of data protection or human rights protections by Europol staff will be shielded from judicial scrutiny. This is part of a wider problem of democratic control and accountability, exemplified recently by the Europol Management Board's letter to the Article 36 Committee expressing "growing concern" that the "legislative framework applied to Europol and its work was not always applied" and noting that "on several occasions Council working groups have asked Europol to carry out task originally not foreseen by its yearly work programmes and budgets"

There are further proposals to extend access to the Europol database and analysis files, weaken the supervision of data retrievals and allow Europol to process "background information". At the same time we have also seen the rules on the transmission of personal data by Europol to third parties weakened by the Council Decision amending the Act setting out the procedural rules (OJ

2002 C 58/12; see also OJ 2002 C 76/1), not to mention the first unregulated and now dubiously regulated exchange of information with the United States. Here we would reiterate the concerns raised above in relation to powers and resources for the Joint Supervisory Authority on data protection (see point 5 above).

In a Note to the Informal Meeting of Justice and Home Affairs Ministers in Rome on 12-13 September on the "Relaunching of Europol" the Italian Presidency said that it become the "body in charge of implementing the EU public security policies" which should be achieved by:

"The overcoming, by the competent authorities of the Member States, of any technical, legal or organisational obstacle hampering the complete and rapid feeding of the Europol data banks... on the investigation and operational level".

See:

1. <http://www.statewatch.org/news/2003/oct/03europol.htm>
2. <http://www.statewatch.org/docbin/evidence/europolOct2002.htm>

D. Judicial cooperation, criminal law and constitutional issues

17. EU-US agreements

(Articles 7, 8, 42, 47 of the Charter)

Drafts of the agreements were leaked by Statewatch in August 2002 and in April 2003 - the drafts were de-classified in May and submitted to national parliaments and the European Parliament.

The agreements raised substantial questions which remains unanswered, for example, over extradition, data protection, surveillance of telecommunications, control of joint investigative teams, and the monitoring and scrutiny of "mutual assistance" (agency to agency exchange of data on individuals or groups).

See:

1. JHA Council to authorise signing of EU-USA agreements on extradition and mutual legal assistance - European Parliament adopts highly critical report and Amnesty International say extradition agreement flawed:
<http://www.statewatch.org/news/2003/jun/01useu.htm>
2. EU-USA agreements - the drafts on the table:
<http://www.statewatch.org/news/2003/apr/01Auseuag.htm>
3. UK parliament Committee refuses to scrutinise agreements in secret:

<http://www.statewatch.org/news/2003/apr/07euusauk.htm>

4. Secret EU-US agreement being negotiated (August 2002):

<http://www.statewatch.org/news/2002/jul/11Auseu.htm>

18. Terrorist lists 18. Terrorist lists

(Articles 42, 47, 48, 49 of the Charter)

In a process that began in October 2001 with the unquestioning transposition into EC/EU law of the UN Taliban Sanctions Committee's proscribed list of "terrorists", an arbitrary mechanism allowing for the freezing of assets and banning of support for groups and individuals is now in place.

Although this issue was covered in the thematic report of the Network we suggest that the ongoing monitoring of this mechanism (and the dozen cases lodged at the European Court of Human Rights) is essential.

We also note that updates to the EU's terrorist list contravene an earlier declaration - never published in the *Official Journal* - that liberation struggles in occupied third countries would be respected. Many listed would consider them to be liberation movements, for example, the Kurdistan Workers' Party (PKK), the Popular Front for the Liberation of Palestine (PLFP) and Professor Jose Maria Sison from the Philippines. The PKK was apparently added to please Turkey, despite holding true to a 2000 ceasefire and being replaced in April 2002 by the Kurdistan Freedom and Democracy Congress (Kadek) - which is not on the list.

The list has now been updated seven times. It is unacceptable that these lists are agreed by "written procedure" and on occasions without debate (they have simply been faxed round to the fifteen foreign ministries and adopted if there are no objections). There is thus a complete lack of political accountability over how the list is drafted, the grounds for inclusion, which officials in which member states are proposing amendments and why and the extent of consultations, if any. It hardly needs stating here that the failure to require as much as a preliminary investigation demonstrating a connection to terrorism before individuals or organisations can be included on the list or have their assets frozen and the failure to provide any mechanism for appeal or judicial review is a spectacular breach of fundamental rights of those affected.

See:

1. <http://www.statewatch.org/news/2001/oct/03finance.htm>

2. <http://www.statewatch.org/news/2002/may/04pkk.htm>

and case lodged by the PKK contesting its inclusion and the legality of the EC Regulation (OJ 2002 C 233/32)]

3. Lists: <http://www.statewatch.org/news/2003/sep/08terrlists.htm>

19. The proposed committee on operational control of activities concerning internal security (Article 42 of the Charter)

We have grave concerns over the proposal in the draft Constitution to create a Standing Committee on operational cooperation on internal security:

“Article III-162

A standing committee shall be set up within the Council of Ministers in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union. Without prejudice to Article III-247, it shall facilitate coordination of the action of Member States' competent authorities. Representatives of the Union bodies and agencies concerned may be involved in the proceedings of this committee. The European Parliament and Member States' national parliaments shall be kept informed of the proceedings.”

The concept of “internal security” is well developed in the fields of counter-insurgency, military and intelligence fora, and academic discourses. It can embrace, without limits, any aspect of EU competence if considered relevant. At the most obvious level it could cover immigration, external border management, databases, telecommunications surveillance, public order and customs.

The European Parliament and national parliaments are only to be “kept informed” which on the evidence of the past ten years means sporadic, vague statements with little detail.

To empower such a committee with such wide ranging powers covering key aspects of peoples’ rights and liberties without at the same time ensuring the highest level of accountability, scrutiny and openness has no place in a democratic society.

See:

1. Statewatch’s in-depth analysis: Creation of an EU Interior Ministry?
<http://www.statewatch.org/news/2003/apr/TBART.pdf>

20. The mutual recognition of decisions in criminal matters (Articles 42, 47, 48, 49 of the Charter)

We believe that dual criminality should not be abolished within the European Union as a matter of principle. While some form of mutual recognition regarding criminal law is acceptable, it requires sufficient harmonisation or comparability of the substantive law in the member states before the decisions of other member states can be accepted. The same is true of rules on protection of suspects and defendants.

We are therefore concerned that a number of EU Framework Decisions (particularly those on the European Arrest Warrant, the freezing of assets and evidence and confiscation) abolish dual criminality for a list of thirty two crimes in the absence of harmonised laws relating to a number of these offences. We are also concerned that thirteen Framework Decisions criminalising offences or providing for mutual recognition and enforcement have been adopted (and a further ten are on the table) while the essential proposals to follow-up the Commission green paper on minimum guarantees for criminal defendants are behind schedule. The failure on the part of the Commission to produce a proposal on guarantees for data protection in policing and criminal cases (mentioned in its May 2002 'JHA scoreboard') is also regrettable.

E. Access to EU documents, accountability and scrutiny

21. The failure of the EU institutions to implement the Regulation on access to documents (1049/2001) (Article 42 of the Charter)

The new Regulation on access to EU documents (1049/2001) came into effect in December 2001. The provision in the Regulation concerning the establishment of public registers of documents came into effect in June 2002.

The European Commission has failed to implement Article 11 on registers - it has a register but only a tiny proportion of documents are listed. This says that each institution shall "provide public access to a register of documents". It goes on to say that: "References to documents shall be recorded in the register without delay". Over a year after this became a legal obligation the Commission's register patently fails to implement it.

The European Parliament has not produced and adopted an annual report on its own activities as it is required to do under Article 17 (it has produced what it calls a "combined report" covering all three institutions which contains references to its work).

The Council of the European Union has had a public register of documents since 1999 but this only gives direct access to around 50% of the documents listed.

There are in addition a number of other unsatisfactory aspects to the implementation of the Regulation including effective "third party" vetoes over access, the regular use by the Commission to refuse access to "internal documents" or those under discussion (ie: citizens may get documents after the decision has been made), the failure of the Commission to make publicly available on its register confirmatory applications (appeals against refusal of access) and the response to them, failure to give direct access to documents "partially released" (ie: with passages blanked out - usually the names of governments).

See:

1. EU annual reports on access to documents - still a very long way to go:

"It is ten years since the Code on access to Council and Commission documents was introduced in 1993 and it is six years since Article 255 in the Amsterdam Treaty allegedly "enshrined" the citizens' right of access. Yet even now less than 50% of the contents of documents on the Council's public register have been released and the Commission's public register is absolutely useless. How much longer are we going to have to wait for freedom of information in the EU?"

<http://www.statewatch.org/news/2003/jun/24open.htm>

22. The failure to produce an annual report on activities carried out under the Schengen acquis (Article 42 of the Charter)

The 1990 Schengen Convention was fully implemented from March 1995. Subsequently three annual reports were produced on the full range of activities undertaken - in 1996, 1997 and 1998. These reports then ceased when the Amsterdam Treaty came into force in May 1999. The official rationale, informally communicated, was that Schengen activities were then divided between the TEC and TEU and it was therefore not possible.

II. Suggestions for your second question

The most useful development would be to move towards a system for non-judicial complaints to be made by NGOs or individuals to a body at EU or national level competent to deal with the complaint and to issue recommendations on general matters or specific cases.

There would have to be rules allocating responsibilities as between the EU body and national bodies, depending on whether the EU bodies or the Member States are mainly responsible for the alleged breach. This would parallel the possibility for complaints to be brought to the courts.

III. Suggestions for your third question

It is very important to ensure adequate funding for non-governmental organisations, voluntary and community groups in relation to various human rights issues so that an effective civil society continues to flourish. To this end the experts should recommend that EU funding programmes be set up and should examine the role that they could play relating to funding.

Statewatch
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(prepared by Tony Bunyan, Ben Hayes and Steve Peers)